COMMENT

NOT ALL PRACTICE MAKES PERFECT: HOW THE TREASURY'S REVISED ANTI-TERRORIST FINANCING GUIDELINES STILL FAIL TO ADEQUATELY ADDRESS CHARITABLE CONCERNS

INTRODUCTION

In December 2004, a massive tsunami struck Southeast Asia, killing more than 200,000 people.[1] Fortunately, the world community responded generously to the victims of this tragedy, donating more than $10.5 billion as part of a combined relief effort.[2] Reports since that time, however, suggest that a portion of those donations did not reach tsunami victims, but were instead diverted as part of a complex terrorist scheme.[3]

In light of these despicable events, it is surprising that the U.S. government identified the abuse of nonprofit organizations as a potential source of terrorist financing over a year before the terrorist diversions.[4] And while it is morally repugnant to think that terrorists have obtained nonprofit funds, terrorist abuse of the charitable structure is practical (from their perspective) because nonprofits offer access to vast resources[5] with minimal government oversight, particularly outside the United States.[6] To help prevent

1. Somini Sengupta & David Rohde, *When One Tragedy Gets More Sympathy Than Another*, N.Y. TIMES, Nov. 14, 2005, at F30.

2. *See* Editorial, *One Year After the Tsunami*, N.Y. TIMES, Dec. 28, 2005, at A18 ("According to the United Nations Office of the Special Envoy for Tsunami Recovery . . . the amount pledged [to tsunami victims] was $10.51 billion.").

3. Cameron Stewart, *Tigers Perfect Money Moving Skills*, AUSTRALIAN, May 5, 2007, at 3 (describing the complexity of a terrorist financing scheme used to divert funds intended for tsunami relief to LTTE, a terrorist group based in Sri Lanka).

4. *See* U.S. GENERAL ACCOUNTING OFFICE, TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS' USE OF ALTERNATIVE FINANCING MECHANISMS 9–10 (2003), http://www.gao.gov/new.items/d04163.pdf.

5. Joel G. MacMull, *Removing the Charitable Veil: An Examination of U.S. Policy to Combat Terrorist Funding Charities Post 9/11*, 10 NEW ENG. J. INT'L & COMP. L. 121, 123–24 (2004).

6. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2003-2004 13 (2004), http://www.fatf-gafi.org/dataoecd/19/11/33624379.pdf [hereinafter FATF TYPOLOGIES].

such abuse, the Department of the Treasury ("Treasury") published its original version of Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities ("Guidelines"), which detailed a range of steps that domestic grantors could take to limit terrorist access to charitable funds.[7] In short, the Guidelines encouraged domestic grantors to conduct extensive due diligence about their international grantees before making a donation, in a system analogous to the "know your customer" provisions required of domestic financial institutions.[8]

While the Treasury's guidance on this topic should have been useful, in practice the Guidelines were difficult, if not impossible, to follow. For example, the Treasury suggested that grantors acquire information that was unavailable from some grantees. In response to this problem (and a number of others), the Treasury issued a revised version of the Guidelines ("Revised Guidelines") under the same title in September 2006.[9] Unfortunately, even the Revised Guidelines do not adequately respond to many legitimate charitable concerns. That is not to say, however, that the Revised Guidelines are without merit; rather, with a few revisions, the Treasury could alleviate many of the practical problems facing charities while retaining the vast majority of its ability to ensure charities do not intentionally, knowingly, or even unwittingly donate resources to international terrorists.

This Comment will focus on the Revised Guidelines and their effect on charitable grantmaking. Part I of the Comment will discuss the state of federal anti-terrorism law prior to the publication of the Revised Guidelines, including a detailed synopsis of Executive Order 13,224 and 18 U.S.C. §§ 1956–57 & §§ 2339A–39C. Part II will detail the provisions of the Revised Guidelines, noting the areas that were changed from the original version. Part III will summarize the major criticisms leveled at the Revised Guidelines and show how this version still fails to address a number of charitable concerns. Finally, Part IV of the Comment will provide specific suggestions regarding how the Revised Guidelines could be modified to deal with the problems facing the charitable sector.

I. MAJOR ANTI-TERRORISM PROVISIONS APPLICABLE TO CHARITABLE GIVING

In the wake of the events of September 11th, Congress and

7. Christine Holland Anthony, *The Responsible Role for International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks*, 39 VAND. J. TRANSNAT'L L. 911, 928–29 (2006).

8. *Id.* at 929–30.

9. *See* Press Release, U.S. Dep't of the Treasury, Treasury Updates Anti-Terrorist Financing Guidelines for Charitable Sector (Sept. 29, 2006), http://www.ustreas.gov/press/releases/hp122.htm [hereinafter Press Release].

President Bush were under considerable pressure to prevent additional terrorist attacks.[10] Unsurprisingly, there were already a number of anti-terrorism statutes on the books prior to 9/11; however, a feeling remained that there were gaps in the then-existing scheme that needed to be addressed.[11] Consequently, the federal government enacted a number of measures (such as the PATRIOT Act[12]) to strengthen the penalties for violations of existing statutes and to add provisions designed to criminalize additional behavior not reached by the then-existing scheme.[13] Five such anti-terrorism provisions now potentially apply to domestic grantors: (1) Executive Order 13,224; (2) 18 U.S.C. § 2339A; (3) 18 U.S.C. § 2339B; (4) 18 U.S.C. § 2339C; and (5) 18 U.S.C. § 1956–57. Each provision is discussed below.

A. *Executive Order 13,224*

Just twelve days after the September 11th attacks, President Bush signed Executive Order 13,224 into effect pursuant to his authority under the International Emergency Economic Powers Act ("IEEPA").[14] After issuing a finding that the "pervasiveness and expansiveness of the financial foundation of foreign terrorists [might require] financial sanctions" against persons and organizations that support terrorism, the Order specifies two methods that the federal government could use to cut off terrorists from funding.[15] First, the Order blocks all transactions involving entities that support or

10. *See* James Risen, *Bush Tells the Military to "Get Ready"; Broader Spy Powers Gaining Support: Lawmakers See Need to Loosen Rules on C.I.A.*, N.Y. TIMES, Sept. 16, 2001, at 1 (quoting a member of the Senate intelligence committee as saying that the country needs to be "more aggressive" in gathering intelligence regarding terrorists).

11. *See* Neil A. Lewis & Robert Pear, *Terror Laws Near Votes in House and Senate*, N.Y. TIMES, Oct. 5, 2001, at B8 ("Attorney General John Ashcroft has argued that without new legislation, law enforcement authorities lack all the tools they need to thwart terrorists.").

12. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

13. Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 654 (2005) ("[The USA PATRIOT Act] greatly expanded the government's powers both by amending existing anti-terrorism legislation and by creating new means for the government to prevent acts of terrorism.").

14. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). The IEEPA allows the President to "investigate, regulate, or prohibit" various monetary transactions if he finds that the economy, foreign policy, or national security of the United States is faced with an "unusual and extraordinary threat." *See* 50 U.S.C. §§ 1701–02 (Supp. 2008).

15. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

otherwise associate with terrorists.[16] In addition, the Order also gives the government the power to freeze the property of terrorists and supporting entities.[17]

All entities that "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of . . . terrorism" are subject to these sanctions.[18] Additionally, to aid in the identification of terrorists and terrorist organizations, the Order allows the Secretary of the Treasury to place suspected entities on its Specially Designated Nationals ("SDN") list.[19] As of September 7, 2008, this list included hundreds of names and was 393 pages long.[20]

Executive Order 13,224 clearly applies to charitable organizations, particularly in light of the Treasury's inclusion of several nonprofits on the original "blocked" list that accompanied the text of the Order.[21] Unfortunately, being included within the Order's scope is problematic, as it does not specify any mens rea requirement to incur sanctions nor does it require any prior legal proceeding before the government can block a transaction or freeze an entity's assets.[22] Therefore, it is possible that a grantor's assets could be frozen despite its best efforts to ensure that funds are not misused.[23]

B. 18 U.S.C. §2339A: The Violent Crime Control and Enforcement Act

Enacted as part of the 1994 Violent Crime Control and Enforcement Act, § 2339A prohibits entities from providing "material support or resources" to terrorists with the intent or knowledge that those resources be used to commit an act of terrorism.[24] For purposes of the statute, material support is defined

16. *Id.* at 49,080.

17. *Id.* at 49,079–80.

18. *Id.* at 49,080.

19. Philip K. Ankel & Glenn H. Kaminsky, *Exporting to Special Destinations and Persons: Terrorist-Supporting and Embargoed Countries, Designated Terrorists and Sanctioned Persons*, 883 PLI/COMM 271, 301 (2005).

20. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS 1–393 (2008), http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf. (last visited Sept. 7, 2008).

21. Nicole Nice-Petersen, *Justice for the "Designated": The Process that Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1396 (2005).

22. *See id.* at 1393–95.

23. *See* Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625, 632–33 (2002) ("[T]he Executive Order mandates imposing sanctions for even unintentional involvement with terrorist-related funds . . . .").

24. 18 U.S.C. § 2339A(a) (Supp. 2008).

as:

> Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[25]

Individuals found guilty of violating this statute can be imprisoned for up to fifteen years; if the death of a person results from the supported activity, however, the maximum sentence is raised to any term of years or life.[26]

This provision is potentially relevant to charities for two reasons. First, the statute's sweeping definition of "material support" includes virtually any type of aid that a charity could conceivably grant, including currency and other financial aid.[27] Second, Congress appears to have targeted at least one of its amendments to the statute at charities, as when in 1996, it replaced a provision exempting "humanitarian aid to persons not directly involved in such violations" with a more limited exemption for "medicine or religious materials."[28]

C. 18 U.S.C. § 2339B: The Antiterrorism and Effective Death Penalty Act

In 1996, Congress enacted another major anti-terrorism statute when it passed the Antiterrorism and Effective Death Penalty Act ("AEDPA").[29] In pertinent part, this statute prohibits entities from knowingly providing material support to a foreign terrorist organization.[30] Section 2339B explicitly adopts the broad definition of "material support" from § 2339A, and imposes the same sentencing maximums as well.[31] In order to meet the statute's mens rea requirement, an individual must only have knowledge[32] that the

25. *Id.* § 2339A(b)(1).

26. *Id.* § 2339A(a).

27. Nina J. Crimm, *Post-September 11 Fortified Anti-Terrorism Measures Compel Heightened Due Diligence*, 25 PACE L. REV. 203, 208 (2005) [hereinafter Crimm 2005].

28. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (1996).

29. H.R. REP. NO. 104–518, at 114 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 944, 947.

30. 18 U.S.C. § 2339B(a)(1) (Supp. 2008).

31. *Id.* § 2339B(a)(1), (g)(4).

32. The legislative history for the original version of the AEDPA indicates

organization is a designated terrorist group or that the organization has engaged or engages in terrorist activity or terrorism.[33] For this reason, courts have interpreted this statute to be much broader than § 2339A because § 2339B does not require the defendant to have any specific intent to further illegal activities.[34]

Section 2339B also contains a provision that requires financial institutions to "retain . . . control" over a terrorist's or terrorist organization's funds, as well as report the existence of those funds to the government.[35] Institutions that fail to comply with this requirement can be assessed a civil penalty that is the greater of $50,000 per violation or twice the amount that the institution should have retained possession of.[36]

This statute is relevant to charities for at least three reasons. First, the statute's legislative history indicates that it was passed to prevent terrorist organizations from raising funds "under the cloak of a humanitarian or charitable exercise" and, therefore, sought to encompass those donors "who acted without the intent to further federal crimes."[37] Thus, charities appear to be one of the major targets of the statute. Second, because the statute does not require the defendant to knowingly or intentionally further violent acts, prosecutors could potentially charge charities with an unwitting violation of the statute.[38] Lastly, while the section of the statute

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that Congress considered including the terms "should have known" in the mens rea requirement specifying knowledge in the original statute, which would have greatly expanded the statutory scope.

> Earlier drafts of the legislation that became § 2339B in the House contained a second knowledge requirement, punishing the "knowing provision" of material support only where the support goes to an organization "which the person knows or should have known is a terrorist organization" or, in another variation, "which the person knows or has reasonable cause to believe is a terrorist organization." Neither formulation survived the conference process that produced the final text of § 2339B, however, and there are no statements from the conferees explaining why they were dropped.

See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 62 (2005). However, no parties in any reported case have attempted to argue that this standard requires actual knowledge, so the potential remains that a charity could be charged for unwittingly donating.

33. 18 U.S.C. § 2339B(a)(1).

34. *See* Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005).

35. 18 U.S.C. § 2339B(a)(2).

36. *Id.* § 2339B(b).

37. *Humanitarian Law Project*, 380 F. Supp. 2d at 1146.

38. *See* Crimm 2005, *supra* note 27, at 209–10 (opining that the statute has been given a "broad reach" after Congress refused to specify a mens rea with respect to the furtherance of illegal activities in its 2004 amendments to the statute).

dealing with financial institutions appears to be aimed at traditional ones like banks, it is not unreasonable to assume that the definition of "financial institution" could be stretched to include charities as well.[39] Therefore, in addition to the criminal penalties available for individuals, charitable organizations could potentially be assessed huge civil penalties for a violation of the statute.

D. 18 U.S.C. § 2339C: The Terrorist Bombings Convention Implementation Act of 2002

In January 2000, the Senate ratified the United Nations' International Convention for the Suppression of the Financing of Terrorism, which required all signatory countries to adopt laws criminalizing the financing of terrorism.[40] However, despite the horrific events of September 11th, as well as a spate of terrorist bombings worldwide, U.S. law was not in compliance with this treaty until it enacted § 2339C in 2002.[41] In short, this Section prohibits entities from knowingly or intentionally collecting funds in order to carry out acts of terrorism.[42] For the purposes of § 2339C, a terrorist act is an act that violates any one of nine specified treaties or that is intended to injure or kill civilians for the purpose of intimidating a population or coercing the government to act in a particular way.[43] Violators of this provision can be imprisoned for a maximum of twenty years[44] or civilly fined at least $10,000[45] or both.

Since its enactment, commentators have described § 2339C as a "powerful governmental weapon [in] the financial war on terrorism."[46] Theoretically, this provision could ensnare charitable organizations due to its broad reach; however, its effectiveness has been limited so far, as no nonprofits have been charged with an

39. *Id.* at 210.

40. 148 CONG. REC. S5569-01, S5569 (daily ed. June 14, 2002) (statement of Sen. Leahy).

41. *See id.* at S5570:

> Articles 2 and 4 of the Financing Convention require signatory countires to criminalize willfully 'providing or collecting' funds, directly or indirectly, with knowledge that they are to be used to carry out acts which either (1) violate nine enumerated existing treaties, or (2) are aimed at killing or injuring civilians with the purpose of intimidating a population or compelling a government to do any act. The Financing Convention also requires that signatories criminalize aiding and abetting, attempting, or conspiring to commit such crimes. Signatories must criminalize such acts under Article 2 whether or not 'the funds were actually used to carry out' such an offense.

Id.

42. 18 U.S.C. § 2339C(a) (Supp. 2008).

43. *Id.* § 2339C(a)(1).

44. *Id.* § 2339C(d)(1).

45. *Id.* § 2339C(f).

46. *See* Crimm 2005, *supra* note 27, at 213.

offense of this provision in any reported case to date.[47]

E. 18 U.S.C. §§ 1956 & 1957: The Money Laundering Control Act

Enacted in 1986, the Money Laundering Control Act was passed as part of Congress's efforts to stop international drug trafficking.[48] Since that time, however, the federal government has stated that it also will rely on §§ 1956 and 1957 of the Act in its fight against terrorism.[49]

In pertinent part, § 1956(a)(1) prohibits an entity from intentionally promoting an unlawful act by consummating a financial transaction with funds known to have been derived from illegal activity.[50] Therefore, a violation of this section requires the government to meet two separate mens rea requirements: intentionally and knowingly. Although a high standard, an intentional violation can be proven through the use of circumstantial evidence indicating just one purposeful violation of the law.[51] Unlike many related criminal statutes, however, Congress intended for the term "knowingly" to be narrowly construed; in other words, the defendant must have actual knowledge that the funds were raised illegally, as this provision was not intended to ensnare unwitting violators.[52] For this reason, the directors of very few charities have been charged under this Section.[53]

In addition, the Act also prohibits the international transfer of funds "with the intent to promote the carrying on of specified unlawful activity."[54] Again, the statute's mens rea requirement of intent is extremely high, and does not allow for unwitting violations; for this reason, it is highly unlikely that any well-run charity will ever be found guilty of violating this provision.

Unlike § 1956, which criminalizes only pure money laundering

47. As of June 10, 2008, a Westlaw search revealed that only sixteen cases have cited this provision since its enactment.

48. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207, 3218–21 (1986).

49. U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 3–4 n.2 (2006), http://www.ustreas.gov/press/releases/reports/0929%20finalrevised.pdf [hereinafter REVISED GUIDELINES].

50. 18 U.S.C. § 1956(a)(1)(A)(i) (Supp. 2008).

51. United States v. Cruz, 993 F.2d 164, 167 (8th Cir. 1993).

52. 132 CONG. REC. E3821-03 (daily ed. Oct. 18, 1986) (statement of Rep. McCollum).

53. For an example of a case where a person was charged, see United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002) (upholding the convictions of the operators of a Ponzi scheme that had induced investors by falsely claiming they gave all of their profits to charity).

54. 18 U.S.C. § 1956(a)(2)(A) (Supp. 2008).

offenses, Congress intended for § 1957 to apply to a broader range of activities.[55] This statute prohibits an entity from knowingly engaging or attempting to engage in a financial transaction using more than $10,000 in funds derived from illegal activity.[56] As with § 1956(a)(2), however, this statute is unlikely to impact competent nonprofit organizations, as many nonprofit organizations are unwilling to accept funds known to have been obtained illegally.[57]

II. THE ANTI-TERRORISM FINANCING GUIDELINES

After the issuance of Executive Order 13,224 and the enactment of the anti-terrorism statutes detailed above, the federal government began to develop plans to prevent terrorists from receiving funds and other types of support.[58] During its investigation, the government determined that terrorists had used nonprofit grantees to "raise and move funds, provide logistical support, encourage terrorist recruitment [and] otherwise cultivate support for terrorist organizations and operations."[59] And although some commentators believe that the link between nonprofits and terrorism is tenuous at best,[60] the Treasury chose to publish its original version of the Guidelines to help charities prevent these abuses.[61]

While the original version of the Guidelines was not binding, many charities considered them to be extremely important because they offered insight into the government's interpretation of anti-terrorism statutes with respect to charities.[62] In the Guidelines, the Treasury made several recommendations, including that charities maintain a sound governing structure, ensure transparency in their

55. 132 CONG. REC. E3821-03 (daily ed. Oct. 18, 1986) (statement of Rep. McCollum).

56. 18 U.S.C. § 1957(a) (2007).

57. *See* Suzanne E. Coffman, *Reflections on "Dirty Money": March Question of the Month Results*, GUIDESTAR, Apr. 2006, http://www.guidestar.org/DisplayArticle.do?articleId=731 (detailing results of survey finding that only 29% of charities believed they should accept funds from "controversial sources").

58. REVISED GUIDELINES, *supra* note 49, at 2.

59. *Id.*

60. *See* U.S. DEP'T OF THE TREASURY, RESPONSE TO COMMENTS SUBMITTED ON THE U.S. DEPARTMENT OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 3 (2006), http://www.ustreas.gov/press/releases/reports/0929%20responsetocomments.pdf [hereinafter COMMENTS].

61. *See generally* U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002), http://www.treas.gov/press/releases/docs/tocc.pdf [hereinafter ORIGINAL GUIDELINES].

62. EDGARDO RAMOS ET AL., DAY, BERRY & HOWARD FOUNDATION, HANDBOOK ON COUNTER-TERRORISM MEASURES: WHAT U.S. NONPROFITS AND GRANTMAKERS NEED TO KNOW 20 (2004), www.cof.org/files/Documents/Publications/2004/CounterTerrorismHandbook.pdf.

governance and finances, require accountability and the use of sound financial judgment, and that grantors investigate their international grantees prior to distributing funds.[63]

Over the next three years, the original Guidelines were criticized for three major reasons. First, many commentators believed that, despite the use of the term "voluntary" in the title, the Treasury intended to require all charities to undertake at least some of the enumerated steps.[64] Second, commentators lamented that the Treasury had not stated whether all charities should undertake all of the new counter-measures, or if the level of due diligence required was variable and dependant on the specifics of a particular grantee.[65] Lastly, many grantors complained that compliance with the extensive due diligence procedures would force charities to take on a quasi-governmental role, which in turn would compromise their relationships with the communities in which they served.[66]

In response to these and a number of other criticisms, the Treasury proposed to revise the Guidelines in December 2005.[67] After allowing the opportunity for public comment on its revisions, the Treasury issued its final revisions in September 2006.[68] The final version of the Revised Guidelines changed the original in a number of ways. First, it clarified that charitable practices did not have to conform to all of the Revised Guidelines to be in compliance with the law; however, it also stated that even if a charity were to comply with every provision contained in the Revised Guidelines, the charity would not always be immune from prosecution.[69] Second, the Revised Guidelines explicitly state that compliance with federal anti-terrorism laws is not "one size fits all;" rather, the guidelines maintain that charities should assess each potential grantee individually, using a risk-based approach that would require the utilization of "all prudent and reasonable measures . . . feasible under the circumstances."[70] Lastly, the Revised Guidelines replaced the original four sections with five sections of its own: fundamental principles of good charitable practice, governance accountability and transparency, financial accountability and transparency, programmatic verification, and anti-terrorist financing best practices.[71]

The first section, which is a new addition in the Revised Guidelines, makes a series of general statements regarding

63. ORIGINAL GUIDELINES, *supra* note 61, at 2–7.
64. *See* Press Release, *supra* note 9.
65. Anthony, *supra* note 7, at 931–32.
66. *See* COMMENTS, *supra* note 60, at 3.
67. REVISED GUIDELINES, *supra* note 49, at 2.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1.

charitable practice. First, in a reference to one of the criticisms leveled at the original Guidelines, this section reiterates that charities are private (not governmental) entities, but that they still must comply with the laws of the United States.[72] Second, this section encourages charities to adopt additional practices beyond those suggested by the Revised Guidelines to provide further safeguards against the misuse of charitable funds.[73] Lastly, this section reminds charitable officials to fulfill their responsibilities to the organization, including compliance with all fiduciary duties.[74]

The second and third sections, which are taken almost verbatim from the original Guidelines, address the mechanics of charitable decision-making and financial oversight. For most respectable charities, these sections do little but reaffirm existing management principles, as most of the suggestions are already required of nonprofits under the laws of their states of organization.[75]

The fourth section, like the first section, is a new addition in the Revised Guidelines. In pertinent part, this section suggests that grantors take a number of precautions to ensure their donations are used for legitimate purposes. For example, when a domestic charity donates resources to an international group, grantors should determine whether the grantee is capable of accomplishing its charitable goals; if it is, then the grantor should reduce the grant agreement to writing.[76] Furthermore, the grantor is encouraged to monitor the grantee to ensure that donated funds are being used appropriately so that the grantor can correct any misuses that are detected.[77] Unsurprisingly, this section also suggests that grantors use a similar monitoring system when they provide services (instead of funds).[78] Lastly, this section suggests that grantors require periodic reports from grantees that detail the use of donated funds or that grantors should perform on-site audits (if reasonably possible) to ensure those reports are accurate or both.[79]

72. *Id.* at 3.

73. *Id.* at 4.

74. *Id.*

75. *See* RAMOS ET AL., *supra* note 62, at 22 (noting that analogous sections of the original Guidelines that "outline principles of good governance which are largely already observed by well-run foundations and nonprofits . . . are included in various statements of standards recommended to nonprofits and are frequently the subject of state law governing the structure and operation of nonprofit organizations [and] [t]hus . . . do not present substantial new challenges"). Although this document talks specifically about the Original Guidelines, these specific sections of the Revised Guidelines are almost identical.

76. REVISED GUIDELINES, *supra* note 49, at 8.

77. *Id.*

78. *Id.* at 8–9.

79. *Id.* at 9.

The vast majority of the Treasury's suggestions come in the fifth section, which details financing best practices. First, the Guidelines state that a grantor should obtain basic information about a potential grantee, including:

> The grantee's name in English, in the language of origin, and any acronym or other names used to identify the grantee; [t]he jurisdictions in which a grantee maintains a physical presence; [a]ny reasonably available historical information about the grantee that assures the charity of the grantee's identity and integrity . . . ; [t]he available postal, email and URL addresses and phone number of each place of business of a grantee; [a] statement of the principal purpose of the grantee, including a detailed report of the grantee's projects and goals; the names and available postal, email and URL addresses of individuals, entities or organizations to which the grantee currently provides or proposes to provide [support] . . . ; [t]he names and available postal, email and URL addresses of any subcontracting organizations utilized by the grantee; copies of any public filings or releases made by the grantee . . . ; [and] [t]he grantee's sources of income . . . .[80]

After obtaining this basic information, the Treasury suggests that the grantor conduct a "reasonable search of publicly available information," including an examination of government-sponsored terrorist watch lists (such as OFAC's SDN list) to determine if the grantee or any of its key employees are associated with terrorism.[81] The grantor is also urged to require the grantee to certify that it is in compliance with all laws and that the donation will not be used to fund terrorism.[82]

In addition to suggesting that grantors acquire information about the grantee, the Revised Guidelines also encourage the grantor to research its own key employees to ensure they are not linked to terrorism either.[83]

Finally, the Guidelines conclude by stating that if the grantor's search turns up a link to terrorism, it should attempt to verify that link with additional information.[84] Charities that locate suspicious

80. *Id.* at 9–10.

81. *Id.* at 10–12. The Revised Guidelines also note that a number of international governments and organizations keep their own terrorist watch lists. *Id.* at 12. In the Original Guidelines, charities were required to check a number of these lists, including "the list promulgated by the United Nations pursuant to U.N. Security Council Resolutions 1267 and 1390, the list promulgated by the European Union pursuant to EU Regulation 2580, and any other official list available to the charity." ORIGINAL GUIDELINES, *supra* note 61, at 6.

82. REVISED GUIDELINES, *supra* note 49, at 12.

83. *Id.* at 12–13.

84. *Id.* at 13.

individuals and organizations are encouraged to report such findings to the Treasury and the Federal Bureau of Investigation.[85]

III. CRITICISMS OF THE REVISED ANTI-TERRORIST FINANCING GUIDELINES

In theory, the Treasury's motivation behind promulgating the Revised Guidelines is a good one—to help charities ensure that they do not provide resources to grantees associated with terrorism. The particular manner in which the Treasury has chosen to implement this plan, however, raises a number of problems for grantors. And although the Treasury attempted to address many of the issues that charities had with the original version,[86] the Revised Guidelines are still stricken with a number of issues which prevent them from being optimally effective. In all, there are nine major criticisms of the Revised Guidelines: that they are not really voluntary, they do not explain how charities should conduct a risk assessment, the cost of compliance is too great, they ask for information that is unavailable from many foreign grantees, grantors are not properly trained to do the investigative work the Guidelines require, charities should not take on an investigative role that is quasi-governmental in nature, the current batch of terrorist watch lists are not easy to use, compliance with the Guidelines does not provide a safe harbor, and the due diligence requirements hurt a charity's ability to build goodwill in foreign countries. Each of these criticisms is detailed below.

A. The Guidelines are not truly "voluntary."

In the preamble to the Revised Guidelines, the Treasury explicitly states that the Guidelines "are voluntary and do not create, supersede, or modify current or future legal requirements applicable to . . . U.S. nonprofit institutions."[87] However, in a footnote on the previous page, the Treasury also states that even total compliance with the Guidelines will not preclude the government from criminally or civilly penalizing a nonprofit.[88] Unfortunately, even the mere accusation that a charity supports terrorism would have a devastating effect on its viability.[89] Therefore, because grantors would like to avoid the negative publicity which comes along with such accusations, many

85. *Id.*

86. *See* COMMENTS, *supra* note 60, at 1 ("Treasury would continue to work with the [charitable] sector to amend and revise the Guidelines to improve their utility for the [charitable] sector . . . .").

87. REVISED GUIDELINES, *supra* note 49, at 2.

88. *Id.* at 1 n.1.

89. Crimm 2005, *supra* note 27, at 215.

commentators believe that the Guidelines have essentially become de facto legal requirements.[90] Furthermore, because the Revised Guidelines provide insight into how the government will interpret anti-terrorism statutes with respect to charities, the fact that the Guidelines are technically not legally binding is of little consolation to responsible charities that wish to stay on the correct side of the law.[91] Therefore, despite their formal characterization as voluntary, charities may feel that they must comply with these provisions in order to avoid legal and practical difficulties.

B. The new "risk-based" approach does not tell charities how to assess risk.

After the release of the original Guidelines, a number of commentators lamented the Treasury's apparent willingness to create a "one size fits all" approach to due diligence—that is, that all grantors should complete all of the enumerated measures for all grantees, regardless of the circumstances.[92] Since that time, the Treasury has amended the Guidelines to adopt a scalable approach to due diligence,[93] but has done so without specifically indicating how the government will assess whether a charity's due diligence efforts were reasonable; this is because neither the Revised Guidelines nor any other Treasury Department document[94] definitively specify a set of factors to be used in making this assessment.[95] In other words, while charities now know that their

90. COMMENTS, *supra* note 60, at 2.

91. RAMOS ET AL., *supra* note 62, at 20.

92. *See* Anthony, *supra* note 7, at 931–32 (lamenting that the Guidelines do not "distinguish grants varying in size, purpose, nature, location, or the grantmaker's previous relations and experience with the grantee in its due diligence requirements").

93. REVISED GUIDELINES, *supra* note 49, at 2.

94. In 2007, the Treasury Department attempted to identify a series of risk factors for charities to use in its *Risk Matrix for the Charitable Sector*. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, RISK MATRIX FOR CHARITABLE SECTOR 1 (2007), http://www.ustreas.gov/offices/enforcement /ofac/policy/charity_ risk_matrix.pdf [hereinafter RISK MATRIX]. This document identifies eleven factors designed to help charities determine the risk level associated with a particular grantee. *Id.* at 2–3. The Risk Matrix, however, explicitly states that it is not a comprehensive list of factors. *Id.* at 1. Furthermore, the Risk Matrix "neither guarantees protection against terrorist abuse of charitable organizations nor shields against criminal or civil liability for violation of any law or regulation." Nina Crimm, *Muslim Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund*, 13 ROGER WILLIAMS U. L. REV. 375, 393–94 (2008). Therefore, the utility of this document to domestic charities may be limited at best. *See id.*

95. *See* COMMENTS, *supra* note 60, at 7 (claiming that despite its failure to specify risk factors, charities still have a number of other government sources to aid in the risk assessment process).

efforts are scalable, they still do not have any specific guidance regarding how they should scale them. Therefore, while the move towards a contextual due diligence program is a step in the right direction, grantors still need more guidance regarding how to make an accurate risk assessment before the Revised Guidelines will be optimally effective.

C. The Guidelines are not cost-efficient.

Completing the information-gathering procedures suggested in the Revised Guidelines will substantially increase charitable administrative costs.[96] In fact, the cost of list-checking alone can be as high as $500,000 for some charities.[97] The benefits of the additional procedures, however, have been questioned, especially since many commentators think that the diversion of charitable funds to terrorist operations is not nearly as widespread as the government believes.[98] If this is true, then the costs associated with the additional procedures may outweigh the benefits associated with the additional measures. However, the Treasury has not shown a willingness to use a cost-benefit analysis ("CBA") to evaluate its requirements, which is curious given the regulatory requirement that CBAs be used in many other contexts.[99] Therefore, any revision to the Revised Guidelines should involve an effort to assess the costs and benefits of completing any proposed due diligence requirements.

D. The Guidelines ask for information that is unavailable from foreign grantees.

The Revised Guidelines suggest that grantors obtain a broad range of information about their grantees, including all public

96. *See* Anthony, *supra* note 7, at 932 (noting that the Guidelines will "substantially increase the administrative costs associated with making international grants" and that those costs will "directly reduce the [amount of] funds that could otherwise be used for charitable purposes").

97. Teresa Odendahl, Waldemar Nielsen Visiting Chair in Philanthropy, Ctr. for Pub. & Nonprofit Leadership, Georgetown Pub. Policy Inst., Foundations & Their Role in Antiterrorism Enforcement: Findings from a Recent Study and Implications for the Future 5 (June 9, 2005) (transcript available at http://www.ncrp.org/downloads/NCRPinTheNews/TO-060705-FoundationCenter-Foundations_and_Their_Role_in_Antiterrorism_Enforcement.pdf).

98. *See* COMMENTS, *supra* note 60, at 3 (noting that a number of comments to the proposed (revised) Guidelines had objected to an unsupported statement that charitable funds were being diverted to terrorist organizations).

99. *See* Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 836 (2007) (opining that the current administration's "avoidance [of cost-benefit analysis] is particularly ironic due to the fact that the George W. Bush administration has been a vocal proponent of [its use] to justify regulatory action").

filings, the names and addresses of subcontracting organizations and the grantee's sources of income, among others.[100] However, it may be difficult, if not impossible, for grantors to gather the information that the Revised Guidelines would like them to obtain for several reasons. First, while information is often readily available from American grantees, many foreign grantees simply do not keep detailed records.[101] Furthermore, even those charities with the information to create such reports may not have the technical ability to do so.[102] Lastly, due to the prohibitive costs associated with generating these records, grantees may simply choose to allocate their funds to minimize administrative costs; like many domestic nonprofits,[103] it seems probable that foreign charities would like to ensure that most of their resources go directly to those in need. Therefore, for any or all of these reasons, grantors may find it difficult to obtain the information that the Revised Guidelines require.

E. Charitable organizations are not suited to do the investigative work suggested by the Revised Guidelines.

In addition to the basic information required of grantees, the Revised Guidelines also suggest that grantors use public information, including government-sponsored terrorist watch lists, to help determine whether a prospective grantee is affiliated with terrorists.[104] Grantors, however, are ill-equipped to meet the investigative challenges of this decree. From a technical standpoint, government officials, with their extensive experience, would certainly seem more qualified than charitable employees to uncover information pertaining to terrorist activities.[105] Furthermore, it also

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100. REVISED GUIDELINES, *supra* note 49, at 10.

101. *See* Jenkins, *supra* note 99, at 821–22 (reporting that some reputable foreign charities have not registered for nonprofit status in their countries because the benefits of registration were "minimal").

102. *Id.* at 822.

103. *See* Hope Yen, *Internal Disputes Hampered Red Cross Response*, PITTSBURGH TRIB. REV., Feb. 28, 2006, http://www.pittsburghlive.com/x/pittsburghtrib/s_428256.html (describing how the Red Cross had been warned that it needed to lower its administrative costs).

104. REVISED GUIDELINES, *supra* note 49, at 10–11.

105. For example, U.S. government officials make up part of the Financial Action Task Force ("FATF"). FATF, which was established by the G-7 member states, has been "given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering." Financial Action Task Force, About the FATF, http://www.fatf-gafi.org (follow "About the FATF" hyperlink) (last visited Aug. 25, 2008). For an example of this group's work regarding terrorist financing, please see generally FATF TYPOLOGIES, *supra* note 6.

seems likely that the government could more efficiently conduct this research, which is especially important since many charities already have limited funding. Also, from a practical perspective, charities depend on their status as trusted, non-governmental sources to effectively do their work; however, particularly in politically volatile areas, requiring grantors to do full-fledged background exams on a grantee might erode the trust and good relationships that the charity had worked so hard to build.[106] Therefore, a grantee may find that its efforts to ensure funds are properly used may actually make it less effective in its region.

F. Compliance with the Revised Guidelines will require charities to take on a governmental role.

In a criticism related to the previous one, some commentators believe that by requiring charities to complete such extensive due diligence, the Treasury has effectively passed a governmental function on to private organizations without considering the consequences.[107] This reassignment is problematic for a number of reasons. First, assuming that terrorists actually receive funding through charities, it would seem irresponsible to require inexperienced charitable officials to investigate grantees when federal agencies are probably better suited to do so.[108] Second, given the distrust of our government in many foreign locales, even the appearance that a charity is taking on a governmental function could adversely affect the charity's ability to be of any real assistance, as the perceived association might cause it to lose credibility.[109] Lastly, the PATRIOT Act provisions that allow the government increased flexibility to gather intelligence have already been roundly criticized as being too expansive.[110] However, by requiring charities to conduct extensive research and then inform the government of suspicious conduct, the government will have effectively cast its investigative net even further. Therefore, the Treasury may want to reconsider suggesting that grantors take on

106. *See* Jenkins, *supra* note 99, at 826 (noting that charities need their independence in order to "bring diverse coalitions together").

107. *See* Anthony, *supra* note 7, at 936–37.

108. *See id.* at 936.

109. Sharon P. Light, *The Principles of International Charity: An Effective Alternative to the Voluntary Guidelines*, INT'L DATELINE (Council on Founds., Wash., D.C.), First Quarter 2005, at 3–5, http://www.cof.org/files/Documents/Newsletters/InternationalDateline/2005/legaldimension_Sharonlight.pdf.

110. *See* Heath H. Galloway, *Don't Forget What We're Fighting For: Will the Fourth Amendment be a Casualty of the War on Terror?*, 59 WASH. & LEE L. REV. 921, 930 (2002) (opining that the government's leeway to conduct surveillance under the "PATRIOT [Act] could result in constitutional sacrifices that contravene our democratic principles and undermine the foundation of our free society").

such an extensive investigatory role.

G. The current government-sponsored terrorist watch lists are very difficult to use.

The Revised Guidelines suggest that grantors "assure" themselves that potential grantees do not appear on any of the major federal government watch lists.[111] While in theory checking names against a list should not be difficult, in practice this task is extremely complicated for several reasons. First, lists such as the SDN list do not provide dates of birth and passport numbers for all listed persons, nor do they provide physical descriptions or other information that might make identifying suspected individuals easier.[112] Second, the lists themselves contain a great number of generic names, which is problematic because it is unlikely that inexperienced charitable investigators will be able to differentiate between terrorists and non-terrorists with the same common name.[113] Third, these lists are updated frequently, which means that charities will be forced to expend even more of their limited resources to periodically check the lists to ensure that one of their current or potential grantees is not a recent addition.[114] Lastly, there are an incredible number of reputable lists to check. In addition to the SDN list, the federal government also publishes its Terrorist Exclusion List ("TEL"), and a number of foreign governments and agencies, such as the European Union and the United Nations, publish their own lists as well.[115] And although the Revised Guidelines no longer have an explicit reference to many of these additional lists, the Treasury's ambiguous "risk-based" approach could be read to require examination of those lists in appropriate situations. Therefore, the Treasury may want to consider creating a single consolidated list so that charities will have an easier time using this vital tool.

H. The Guidelines do not provide charities with a safe harbor to make international grants.

Unfortunately for nonprofit organizations, even word-for-word

111. REVISED GUIDELINES, *supra* note 49, at 11.

112. Amy K. Ryder Wentz, *Unreasonable Conditions Impeding Our Nation's Charities: An Unconstitutional Condition in the Combined Federal Campaign*, 53 CLEV. ST. L. REV. 689, 697 (2005–06).

113. *See* Jenkins, *supra* note 99, at 823; *see also* Wentz, *supra* note 112, at 697 (detailing how airline employees attempted to bar Senator Edward Kennedy from a flight after finding that another individual with the same name was on a terrorist watch list).

114. *See* Cindy G. Buys, *United States Economic Sanctions: The Fairness of Targeting Persons from Third Countries*, 17 B.U. INT'L L.J. 241, 263 (1999) (explaining that organizations must routinely check the SDN list for updates).

115. ORIGINAL GUIDELINES, *supra* note 61, at 6.

compliance with the Revised Guidelines does not provide absolute protection from prosecution.[116] As a consequence, many charities are likely to be uncertain about whether they have done enough to ensure that grantees properly use donated funds,[117] which may lessen charitable willingness to make international grants.[118] Given that the Treasury has recognized that charities play a pivotal role in providing essential services worldwide,[119] it is curious that it would not provide a safe harbor for grantors to ensure these donations are still made. Traditionally, the Department of Justice has not allowed safe harbors for criminal statutes;[120] however, the failure to provide a haven for well-intentioned charities may unfairly sacrifice the potential benefits of charitable giving in exchange for greater prosecutorial discretion.[121] Therefore, the Treasury should consider adding a safe harbor provision to give charities peace of mind that they have done sufficient due diligence when giving to international grantees.

I. The strenuous due diligence requirements chill charitable giving, harming one of our primary ways to build the goodwill we need to fight terrorism.

As the 9/11 Commission noted, international charitable grants are one of the primary weapons we can use in the fight against terror[122] in that they engender positive feelings about America, and perhaps make people more likely to help Americans if necessary.[123] However, it is believed that by requiring grantors to go through each

116. REVISED GUIDELINES, *supra* note 49, at 1 n.1.

117. *See* Jenkins, *supra* note 99, at 844.

118. *Id.* at 831.

119. REVISED GUIDELINES, *supra* note 49, at 3.

120. *See* Center for Democracy, Third Sector & UCLA Ctr. for Civil Soc'y, Philanthropy and Homeland Sec., Panel Discussion at the Carnegie Endowment for International Peace (Mar. 11, 2004), http://www8.georgetown.edu/centers/cdacs/PhilanthropyHomelandSecurity.pdf, at 16–17 (transcribing the statement of David Aufhauser, former General Counsel for the Treasury Department, that the Department of Justice, as a matter of law, will not create a safe harbor to statutes imposing criminal sanctions).

121. Interestingly, critics in other areas of the law do not believe that safe harbors are necessarily the "panacea" that regulated entities would like them to be. For example, a critic of the Medicare Anti-kickback regulations explained that while a "safe-harbor approach constrained this [prosecutorial] discretion somewhat . . . socially appropriate conduct falling outside the safe harbors is still subject to broad prosecutorial discretion." James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J.L. & MED. 205, 220 (1996).

122. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363–64 (W.W. Norton & Co. 2004).

123. *See* Jenkins, *supra* note 99, at 830.

of these due diligence steps, domestic charities may be discouraged from making donations to international groups.[124] In fact, a recent study indicated that seventy-eight percent of grantors believe that the new regulations have made international grantmaking more difficult than it had been previously.[125] Therefore, it is unsurprising that some domestic charities, especially those of Muslim origin, have decreased their international donations.[126] Unfortunately, the areas where many of these donations would have gone, such as the Middle East, are among the areas where positive American sentiment would be most valuable.[127] As a result, America may be wasting a valuable opportunity to build the types of relationships it needs to defeat terrorism at its roots, particularly in those areas most in need of outside assistance.[128]

IV. REVISING THE REVISED GUIDELINES TO ADDRESS CHARITABLE CONCERNS

Although the Revised Guidelines have elicited considerable criticism since their publication, the basic idea underlying the Guidelines—that there should be safeguards in place to ensure that charitable resources are not diverted to support terrorism—is worth supporting.[129] However, the exact manner in which the Treasury would like to implement these measures fails to recognize the considerable costs[130] that international grantors will incur if they abide by each and every suggestion. For this reason, some

124. *See* Written Testimony of David Aufhauser, General Counsel Before the House Financial Services Committee Subcommittee on Oversight and Investigations, U.S. House of Representatives (Sept. 24, 2003) (on file with U.S. Dep't of the Treasury), http://www.treas.gov/press/releases/js758.htm (noting that since the government began its campaign against charities, donors have been apprehensive of making donations).

125. Odendahl, *supra* note 97, at 1.

126. Laurie Goodstein, *Since 9/11, Muslims Look Closer to Home*, N.Y. TIMES, Nov. 15, 2004, at F1 (noting that since the federal government began investigating charities, Muslims have increased their donations to domestic charities and decreased their international contributions).

127. *See* Frank Rich, *It's All Newsweek's Fault*, N.Y. TIMES, May 22, 2005, at 13 (explaining that anti-American sentiment in the Middle East has reached an all-time high).

128. *See* Jenkins, *supra* note 99, at 802 (noting that the government's "collective actions have created an inadvertent chill that impedes effective grantmaking in unforeseen ways and may paradoxically decrease our collective security").

129. *See* OMB Watch, Comments on the U.S. Department of the Treasury *Revised* Anti-Terrorist Financing Guidelines (70 FR 73063) 1 (Feb. 1, 2006), www.ombwatch.org/npadv/PDF/treascomms/OMBWtreascomms.pdf (explaining that "Treasury's efforts to prevent diversion of charitable assets to terrorists" is "laudable").

130. *See supra* note 96 and accompanying text.

commentators have suggested the Treasury abandon the Guidelines and replace them with a more charity-friendly approach.[131] As a practical matter, however, the Treasury seems highly unlikely to engage in any wholesale revision to the Guidelines—especially since it believes that adopting its suggestions will not "obstruct the day-to-day operations . . . of the charitable sector."[132] Therefore, the most realistic method charities can advocate for specific revisions may be to look for those changes that will lower administrative burdens while retaining the provisions that are at the heart of the Revised Guidelines' ability to stop terrorist financing.

Specifically, the Treasury should consider making four categories of changes to the Revised Guidelines. First, Treasury should formalize a list of "risk factors" that it will use to assess whether a grantor has made a reasonable effort to obtain information about a grantee. Second, the Treasury should use those risk factors to create individualized safe harbors for each grantee. Third, the Treasury should replace its disparate terrorist watch lists with one, easily accessible list for charities to search. Lastly, in creating this safe harbor, the Treasury should allow some of its more onerous due diligence measures to be scaled back depending on the specific grantee.

A. Formalize the risk factors that the Treasury will use to assess whether a grantor has engaged in a "reasonable" amount of due diligence.

The first step the Treasury should take to balance charitable and security interests would be to explicitly adopt a definitive set of risk factors it will use to assess whether a grantor's due diligence measures were reasonable. If grantors are informed of the assessment criteria prior to making a grant, charities may be more likely to make international grants, as they could use the enumerated factors to assure themselves that they will not be held liable for donating funds to terrorists.

Interestingly, in 2007, the Treasury appeared to take a step towards creating such a list with the publication of its Risk Matrix for the Charitable Sector.[133] This document, however, falls well short of meeting the needs of domestic grantors for two reasons. First, the Risk Matrix does not limit the Treasury's prosecutorial

131. *See* United States International Grantmaking, Treasury Department Asked to Withdraw Anti-Terrorism Financing Guidelines, Dec. 18, 2006, http://www.usig.org/legal/treasuryguidelinesletter.asp (detailing how an organization composed of prominent charitable organizations wanted Treasury to withdraw the Revised Guidelines and replace them with the group's "Principles of International Charity").

132. *See* COMMENTS, *supra* note 60, at 1.

133. *See* RISK MATRIX, *supra* note 94, at 1.

discretion; rather, it is designed solely to "help charities identify and categorize" potential grantees.[134] Therefore, even after the promulgation of this document, charities still have no definitive guidance as to how their efforts will be assessed by the government. Second, the document explicitly states that it is not intended to be a "comprehensive" list of factors, thereby opening the door for the Treasury to consider other factors in determining whether a grantor behaved reasonably.[135] Therefore, the Risk Matrix has likely had very little impact on charitable concerns regarding the uncertainty surrounding the Revised Guidelines.

B. Use the newly-adopted risk factors to create grantee-specific safe harbors.

After creating its list of risk factors, the Treasury should use that list as part of a plan to create safe harbors for grantors. In short, the safe harbor system would guarantee grantors who undertake a pre-set portion of the Revised Guidelines immunity from prosecution by the Treasury. The specifics of any safe harbor system could vary. The following paragraphs, however, lay out one proposed system.

Under this proposed system, the requirements for a grantor to be within a safe harbor would be proportional to the risk of that particular grant, as measured by the risk factors finalized as part of the previous step. In other words, if the risk factors tell the Treasury a grantee is low-risk, then the safe harbor would require less due diligence, whereas if the risk factors indicate a particular grant is high-risk, then the safe harbor may require most, if not all of the steps laid out in the Revised Guidelines. Using this approach could be desirable because it would allow the Treasury to continue its flexible approach to due diligence while retaining its ability to incorporate many of the existing Guidelines. The determination regarding which portions of the Guidelines should apply to which grantors is best left to the Treasury itself, given its extensive experience in dealing with the diversion of charitable funds.[136]

Furthermore, this program could be implemented in an easy, cost-efficient way through the internet. In short, the Treasury could establish a website where grantors are invited to give general information regarding grantees in answers to questions based on the list of risk factors discussed above. If the grantor's answers to the pre-set questions suggest that the grant is very typical, the Treasury

134. *See* Crimm, *supra* note 94, at 393.
135. *See* RISK MATRIX, *supra* note 94, at 1.
136. For examples of cases where the government has designated a domestic charity as a sponsor of terrorism, see Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779 (N.D. Ill. 2002), *aff'd* 315 F.3d 748 (7th Cir. 2003).

may elect to automatically channel that grant into an area where the requirements for the safe harbor will be pre-set based on the government's evaluation of the likely risk level. In cases such as these, the process could be done entirely through the internet, and would require minimal government expenditure other than the cost of maintaining the website.

However, there may be some situations where the government cannot tell after receiving basic information where a grant should be channeled. In those cases, charities should be able to communicate directly with a government agent, whose job would be to make a grantee-specific compliance plan for that particular grant. In either case, the grantor will be immune from prosecution so long as the grantor can prove it input data that accurately reflected the grantor's material information and is able to provide documentation that it undertook all of the steps required to be within the safe harbor.

A safe harbor plan would be desirable for at least three reasons. First, it would eliminate charitable uncertainty and unease regarding the enforcement of anti-terrorism statutes by providing a definitive answer to questions regarding the steps a charity should take to avoid prosecution.[137] This would be desirable because it would "unchill" international giving, particularly in areas where grants may be at the greatest risk of diversion.[138] Second, including the Revised Guidelines as part of an optional safe harbor plan might have the paradoxical effect of increasing compliance with the Guidelines, as the opportunity to reach a safe harbor could be a sufficient incentive for currently noncomplying charities to step up their procedures.[139] Lastly, including the Revised Guidelines as part of an optional safe harbor program would reaffirm what the Treasury has claimed all along—that the Guidelines are actually part of a voluntary program, and do not serve as de facto legal requirements.[140]

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137. *See* Friends of Charities Ass'n, Comments of the Friends of Charities Association (FOCA) on Treasury Department's 12/5/05 "Voluntary Charity Guidelines" 3 (Feb. 7, 2006), http://www.ombwatch.org/npadv/PDF / treascomms/FOCAtreascomments.pdf.

138. *See* Montgomery E. Engel, *Donating "Blood Money": Fundraising for International Terrorism by United States Charities and the Government's Efforts to Constrict the Flow*, 12 CARDOZO J. INT'L & COMP. L. 251, 284–85 (2004).

139. *See* Jenkins, *supra* note 99, at 841 ("[T]he real benefit [of a safe harbor] would be to provide a formal mechanism offering incentives to funders to follow certain procedures and ensuring that assets would not be seized or frozen, nor individuals criminally prosecuted, if they followed the procedures.").

140. *See* REVISED GUIDELINES, *supra* note 49, at 1 n.1.

C. Create a consolidated terrorist watch list to facilitate grantor research.

Although the exact contents of a safe harbor plan should be government-determined, one component of any safe harbor plan appears certain: the Treasury's insistence that grantors check terrorist watch lists before making a grant.[141] However, even the government has had difficulty coordinating all of its information into one comprehensive document.[142] Thus, it may be unreasonable to expect charities, that lack the experience the government has in navigating these lists, to do an efficient and effective job vetting their potential grantees. Therefore, it may be wise to devote more government resources towards the creation of a comprehensive terrorist watch list.

Two benefits would follow from the creation of a comprehensive list. First, by requiring charities to look at only one list, the administrative costs for charitable compliance would decrease, leaving more money for actual charitable use.[143] Second, because a comprehensive list would likely be more user-friendly than having to check a number of lists, the chances of an inexperienced charitable researcher missing a suspected entity would be greatly diminished by the fact that the government has already done the difficult job of combining the information.

D. Identify specific portions of the Guidelines that can be scaled as part of an adjustable safe harbor.

Obviously, the components of a reasonable search will vary depending on the specific facts pertaining to a grantee; however, there appear to be several areas of the Guidelines which would be prime candidates to be reduced (or possibly eliminated) for low-risk grants. Specifically, the Treasury should consider lessening or eliminating the following requirements depending on the circumstances: the degree to which other nation's lists should be checked, the degree to which the grantee's key employees must be vetted prior to a grant, the degree to which the grantor must investigate the grantee's sources of income, the degree to which the grantor must obtain the names and addresses of any subcontracting organizations used by the grantee, and the degree to which grantors should conduct on-site audits of a grantee.

Although these requirements appear to be disparate in nature,

141. *See id.* at 11 n.13 (noting that "the SDN List is a critically important compliance tool" for charities in the war against terrorism).

142. *See* Eric Lichtblau & John Schwartz, *Disarray Thwarts Terrorist List, Inquiry Finds*, N.Y. TIMES, Oct. 2, 2004, at A12.

143. Under the current system, some charitable organizations have spent up to $500,000 to ensure compliance with list-checking requirements alone. *See* Odendahl, *supra* note 97, at 5.

they are all similar because, in some situations, they would all require a grantor to do much more work than would truly be necessary to verify an entity's charitable structure. For example, consider the situation where grants are made to the international equivalent of a large, respected American charity, such as the United Way. In cases such as these, while it would be smart to get basic information from the charity, some of the requirements, such as obtaining lists of each of the people who supply the grantee with money, the grantee's key employees, and all of its subcontracting organizations, would simply be too onerous for a grantor to obtain while retaining any resources to donate. Furthermore, the suggestion that a grantor conduct on-site inspections of charitable property could significantly increase a grantor's administrative costs while offering little information other than the affirmation that the respected charity is in fact a charity. Lastly, it simply seems inefficient to require charities to check the anti-terrorism lists of other nations, particularly when the respected charity is highly unlikely to be on any such list. Although this example is not intended to depict a typical scenario, it does indicate how in some cases, requiring compliance with each of the Guidelines would be unreasonable. Therefore, the Treasury should consider these provisions in particular when it considers which components of the Revised Guidelines it should scale back depending on the situation.

CONCLUSION

Following its determination that terrorists have used charitable organizations to move and raise funds, the Financial Action Task Force ("FATF") explained that government oversight of charities should be "flexible, effective, and proportional to the risk of abuse."[144] And while the federal government has taken steps towards achieving these goals through its issuance of the Revised Guidelines, its effort has been hampered by the expansive regime of federal anti-terrorism statutes and by the Guidelines themselves, as the governmental interpretation of these sources has coerced charities into completing extensive due diligence for each potential grantee before making any donation.[145]

Unfortunately, this restrictive scheme has substantially increased charitable administrative costs, while offering little in the way of guidance to ensure that charities will not be held civilly or criminally liable for unwittingly aiding terrorists. Therefore, the

144. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, COMBATING THE ABUSE OF NON-PROFIT ORGANISATIONS: INTERNATIONAL BEST PRACTICES 2 (2002), www.fatf-gafi.org/dataoecd/39/19/34033761.pdf.

145. Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1446–47 (2004).

Revised Guidelines need further revision. In short, the Treasury should modify its current "voluntary" program with one that creates a variable safe harbor for charities based upon an explicit set of risk factors decided upon in advance by the government. Furthermore, to facilitate charitable due diligence, the Treasury should create a comprehensive terrorist watch list, as well as consider lessening several of its more onerous requirements. Perhaps with these revisions to the Revised Guidelines, the federal scheme regulating charitable grants will finally be responsive to legitimate charitable concerns while maintaining the government's ability to ensure terrorists do not obtain charitable resources.

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