

Response to Comments Submitted on the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*

In response to the threat of terrorist financing in the charitable sector and to assist charities in protecting themselves from such abuse, Treasury initially released its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (Guidelines) in November 2002. After receiving numerous comments from the sector regarding these Guidelines, Treasury hosted an Initial Outreach Event in April 2004, at which time Secretary Snow committed that Treasury would continue to work with the sector to amend and revise the Guidelines to improve their utility for the sector in protecting against terrorist abuse. On December 5, 2005, after extensive discussions with other government authorities and the charitable sector, Treasury released a draft revised version of the Guidelines and invited public comment on the revisions.

Treasury received a total of nine submissions during the comment period from a wide range of organizations. A number of organizations prefaced their comments with a general recommendation that Treasury withdraw the Guidelines based on their perception that the Guidelines are potentially harmful to the charitable sector given existing regulations governing the operations of charities. We do not believe that the voluntary adoption of the Guidelines—whereby charities with a higher risk of vulnerability to terrorist financing should consider adopting the best practices to better defend against that risk—would adversely affect the financial health, or obstruct the day-to-day operations, of the charitable sector.

Treasury is uniquely positioned to provide recommended measures to the charitable sector that are particularly relevant for combating the ongoing and pervasive terrorist abuse and exploitation of charities. Such voluntary measures are intended to assist charities build upon pre-existing controls and protective measures by adopting and applying appropriate counter-terrorist financing safeguards. Treasury also believes the sector is better served through ongoing dialogue regarding the evolving nature of the terrorist threat, particularly with respect to the charitable sector, and effective voluntary protective measures that the sector can adopt to combat this threat.

Treasury initially conceived the Guidelines as a direct response to requests from the sector for policies and practices to protect against potential terrorist abuse and assist in compliance with new terrorist financing authorities, including Executive Order 13224. The Guidelines not only provide such measures in the form of voluntary “best practices,” but their release initiated a strong and ongoing dialogue with the charitable sector. This dialogue has led to a greater awareness of the risks of terrorist abuse in the charitable sector, and as a result, charities have adopted more proactive approaches to protect their assets and the integrity of their operations. Treasury’s engagement with the sector has also resulted in the evolution of the Guidelines into a more effective, relevant, and applicable resource for the sector. In addition, we encourage charities to consult other available publications or materials on good governance and sound charitable practices. We hope that the adoption of the policies and procedures contained in the Guidelines serve to strengthen donor confidence and contribute to the charitable sector’s continued vitality.

For the above reasons, Treasury has not withdrawn the Guidelines. Instead, after careful consideration of all comments and recommendations, Treasury has further amended the Guidelines to enhance their usefulness for the charitable sector in adopting practices that better protect it from the risks of terrorist abuse. The purpose of this document is to summarize the content of the comments received and describe our response, including any changes to the Guidelines and the reasoning supporting those changes. The summary of the comment submissions has been organized according to the layout of the Guidelines.

1) Title

Comments: Many commenters indicated that part of the title of the Guidelines, “*Voluntary Best Practices*,” is a misrepresentation for two reasons. First, the commenters stressed that it is inaccurate to suggest that the Guidelines are a compilation of the charitable sector’s best practices. Due to the diversity within the charitable sector, there is not a commonly agreed upon set of best practices that applies to all charities. Second, many commenters expressed the belief that the Guidelines are not voluntary. Their concern is based primarily upon the recent incorporation of the Guidelines into the memorandum accompanying the regulations for the 2006 Combined Federal Campaign (CFC), issued by the Office of Personnel Management (OPM). Moreover, concern exists that other federal agencies will adopt the recommendations included in the Guidelines as requirements, thus conferring upon the Guidelines de facto legal authority. A few commenters suggested that Treasury should change the title of the Guidelines to “*Suggestions for Complying with Anti-Terrorist Financing Laws*.”

Treasury Response: Although we acknowledge the concerns of the commenters, the title of the Guidelines remains unchanged, because it does not misrepresent the purpose and intent of the Guidelines. We believe the Guidelines represent sound best practices that help to prevent terrorist abuse of charitable organizations, and were, in fact, conceived after reviewing a wide spectrum of existing due diligence best practices employed by the sector. To address the concerns of the commenters, we have revised the Introduction to the Guidelines to state more clearly that these best practices are neither exhaustive nor comprehensive. Rather, the Guidelines represent one set of best practices specifically aimed at combating terrorist financing. Other best practices may exist that would be more suitable for combating other abuses that charities may face, but which may also be relevant or helpful in protecting charities from terrorist abuse. Nonetheless, the Guidelines contain many best practices that will help charities in adopting an appropriate risk-based approach to protect their assets and operations from terrorist financing abuse and facilitate their compliance with existing U.S. legal obligations, including the Office of Foreign Assets Control (OFAC) administered sanctions programs.

Similarly, we disagree that the Guidelines may become de facto legal requirements. We have been clear both in the Introduction to the Guidelines, as well in our public discourse regarding the Guidelines, that they are voluntary and do not create, modify, or supersede any existing U.S. legal requirements. In addition to the title, their voluntary nature is reiterated throughout the text of the Guidelines. We have also amended Footnote 1 (formerly Footnote 3) to make clear that non-adherence to the Guidelines does not, in and of itself, constitute a violation of existing U.S. law. Moreover, the incorporation of the Guidelines into the CFC commentary does not indicate the evolution of the Guidelines from a voluntary undertaking to a legal requirement, but, in fact,

speaks to their usefulness as practical advice to protect charities from abuse. The incorporation of the Guidelines by other federal agencies encourages consistency across the U.S. Government and signals the acceptance of the central tenet of the Guidelines – charities should apply a risk-based approach in adopting appropriate measures to protect themselves against the threat of terrorist abuse. For these reasons, we have not changed the title to the Guidelines.

2) Introduction

Comments: Many commenters expressed concern that the introductory paragraphs broadly overstate the extent of diversion of charitable assets to terrorist organizations and their support networks. In particular, several comments singled out the following sentence: “Investigations have revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations.” The commenters recommended that Treasury include data and other information to support these statements.

Treasury Response: We have taken this comment under advisement and have revised the sentence quoted above by including an Annex that describes and references the various indicators of terrorist financing in the charitable sector. There exists a large library of open source information describing the use of charities by terrorists and their supporters that is available to the public. Terrorist financing risk in the sector is evidenced by: i) open source media reports; ii) designations of charities; iii) results of investigations and prosecutions of charities and individuals associated with charities; and iv) international actions. The Annex also notes that much of the information evidencing the terrorist financing risk in the charitable sector is available on Treasury’s Web site at <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>.

3) Fundamental Principles

Comments: Several commenters noted that the Guidelines do not include two principles from *Principles of International Charity*, which was developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors and released in March 2005. The first principle asserts that charitable organizations are non-governmental entities and are not agents for enforcement of U.S. or foreign laws or their policies. The second principle states that each charity “must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization.”

Treasury Response: We agree with both of these principles. Therefore, we have revised the first principle in Fundamental Principles to state: “Charities are independent entities and are not part of the U.S. Government. Like all U.S. persons, charitable organizations must comply with the laws of the United States, which include, but are not limited to, all OFAC administered sanctions programs.” With this revision, we recognize the necessity of independence for charities to perform their work effectively. We also acknowledge that charities, by virtue of their separation from the government, are not agents for the enforcement of U.S. or foreign laws or their respective policies. Moreover, we do not believe that charities become agents of the

government by virtue of their obligation to abide by U.S. law, or by applying any of the best practices within the Guidelines. Based on this revision, we do not think it is necessary to revise the Fundamental Principles further to include the second principle, because our revision captures the meaning, and is consistent with, the second principle. The recognition of the independence of charities ensures that the foundation forming a charity's relationship with the community it serves will not be shaken.

4) Governance, Financial Practice, and Disclosure/Transparency

Comments: This section will group together comments falling under the sections for Governance, Financial Practice, and Disclosure/Transparency in Governance and Finances, due to the interrelated nature of those comments. Several commenters suggested combining the Financial Practice section with the Disclosure/Transparency section into one section, entitled "Accountability." The commenters felt that such a section, dealing only with financial practices, would be more applicable to Treasury's expertise.

In the event that Treasury should choose to keep the practices pertaining to governance in the Guidelines, the commenters recommended the following specific changes:

- Section III.B: A few commenters noted the need for an appropriate exception to the suggestion that the governing board of a charity consist of at least three members. They explained that this provision does not take into account certain trusts, religious organizations, and corporation soles, which may not be able to have more than one member on the board.
- Section III.B.4: Many commenters expressed concern with the provision recommending that governing board records be immediately turned over to appropriate law enforcement authorities, stating that such a provision goes beyond federal and state disclosure laws and constitutional protections.
- Section V.B: Two commenters noted that the definition of "key employees" expands on the definition contained in Form 990 from the Internal Revenue Service (IRS), and it could be interpreted to include people who exert influence over charitable activities, but who are not directly related to the charitable projects.
- Section V.A.3: One commenter remarked on the lack of a definition for subsidiaries or affiliates and cited the need for clarification.
- Section IV.C: One commenter stated that the provision in the Guidelines recommending independent audits for charitable organizations if the charity's annual gross income exceeds \$250,000 is inconsistent with the auditing standards issued by OMB Circular A-133.

Treasury Response: Based on the comments received, we extensively reorganized these three sections to clarify the objectives of each section:

- We changed the original section, “Governance,” to “Governance Accountability and Transparency.” Within this section, we incorporated all provisions relating to governance from the original “Disclosure/Transparency” section.
- We renamed the original “Financial Practice/Accountability” section to “Financial Accountability and Transparency” and incorporated all provisions relating to financial practice from the original “Disclosure/Transparency” section.
- We revised the original “Disclosure/Transparency” section and renamed it “Programmatic Verification,” which conveys the purpose of its remaining provisions more clearly, and aligns more closely with existing international best practices for non-profit organizations. It also incorporates the provisions on how charities should best review the programmatic operations of their grantees, which were originally located in the final section on anti-terrorist financing best practices.

We also considered the specific comments received on these three sections and made the following revisions (the section numbers correspond with the current sections in the Guidelines).

- Section III.B: We deleted the provision calling for a minimum of three members on the governing board of a charity. We agreed with the commenters that this provision did not adequately take into account the existence of certain types of organizations that would not be able to meet this recommendation. Thus, we revised the section that originally discussed best practices for a charity’s board of directors, renaming it, “Independent Oversight.” Within this section, we added a preamble conveying the importance of both independent oversight of charitable organizations and flexibility for an organization to choose the oversight structure that best fits its needs. We have also included the acknowledgement that independent oversight may be unfeasible for certain charitable organizations, such as houses of worship and corporation soles. The remaining provisions within this oversight section merely highlight certain basic principles that are hallmarks of good governance: i) independence of the governing board; ii) development of conflict of interest policies and procedures; iii) accountability of the governing board; and iv) record-keeping.
- Section III.B.2: We agreed with one commenter’s concern about the confusion caused by a governance provision calling for the board to adopt, implement, and oversee practices consistent with the principles contained in the Guidelines. We understand that some may interpret the provision to mean that the best practices provided in the Guidelines are either mandatory or represent a comprehensive list of best practices to protect against terrorist financing in the charitable sector. As stated earlier, the Guidelines do not purport to be an exhaustive compilation of best practices, and are voluntary. Therefore, we have changed this provision to clarify that members of a charity’s governing board are responsible for the oversight of practices that will effectively safeguard charitable assets.
- Section III.B.6: We have added a footnote (Footnote 6) defining subsidiaries and affiliates, as the terms are used in the Guidelines. The definition is similar to the one used by Form 990: “Subsidiaries or affiliates are organizations that are subject to the general supervision or control of a parent or central organization.”

- Section III.B.7: In response to some commenters' concern with the provision governing the disclosure of records, we revised the provision to state the following: "When served with process or when other appropriate authorization exists, charities should produce requested records maintained in accordance with these Guidelines to the appropriate regulatory/supervisory and law enforcement authorities in a timely fashion."
- Section III.C: We agreed with the commenters who noted the difference between the definition of key employees in the Guidelines and the definition used by the IRS. We amended the definition of key employees to mirror the definition used by the IRS in Form 990.
- Section IV.C: We disagree that the Guidelines are inconsistent with the audit standards set forth by OMB Circular A-133. First, OMB Circular A-133 only applies to audits performed on expenditures of federal grants or awards. While many charities may receive federal grants, the Guidelines are intended to provide best practices that charities may apply regardless of whether they receive federal funds or private donations. Second, while Circular A-133 sets standards among federal and state governments regarding the audits of non-profit organizations expending federal awards, it does not preclude charities from having additional independent audits performed if they wish. Third, as stated in the eighth footnote of the Guidelines, the \$250,000 threshold figure is drawn from the June 2005 final report to Congress of the Panel on the Nonprofit Sector, convened by Independent Sector, and is thereby consistent with industry's suggested threshold. Finally, the Guidelines are not obligatory, but voluntary steps that charities may choose to take as additional protective measures. Thus, the provision on financial audits remains unchanged in the Guidelines.

5) Anti-Terrorist Financing Best Practices

Comments: The majority of the comment submissions expressed concerns with various provisions in this section. The following summarizes the specific comments:

- Section VI: One commenter noted the difficulty of assessing risk pursuant to the Guidelines' risk-based approach without any corresponding advice.
- Sections VI.A and B: Several comments focused on the amount of information-collection provisions, regarding them as onerous, unrealistic, and having limited value in protecting against terrorist financing.
- Sections VI.B.1 and 4: Many commenters objected to the inclusion of the publicly available information, including the Internet, as a means to vet grantees or employees. They argued that Internet searches would yield widely varying and unverified information about certain organizations or individuals.
- Section VI.B.3: A few commenters objected to the incorporation of other government lists of designated parties created pursuant to UNSCR 1373. They claimed that Treasury is inadvertently legitimizing these other lists by citing to them.

- Section VI.B.5: A few comments focused on the provision suggesting that charities request certifications from grantees with whom they contract or work. They suggested deleting the provision or at least revising the certification to adopt the approach of the 2006 CFC. This approach would involve a grantee certifying its compliance with U.S. law, as opposed to certifying that it has checked certain lists.
- Section VI.D: Some commenters recommended deleting the voluntary reporting provision in its entirety, arguing that it creates the impression that charitable organizations are agents of the U.S. Government.
- One commenter suggested the Guidelines should explicitly state that it is permissible for a charity to engage in normally prohibited transactions with a group, entity, or individual on the Specially Designated Nationals and Blocked Persons List (SDN List) if OFAC issues a license to charities for such transactions.

Treasury Response: We have made the following revisions to the anti-terrorist financing best practices section based on the comments (the section numbers correspond with the current sections in the Guidelines):

- Section VI: In response to the comment requesting further assistance in assessing the risk of terrorist abuse or exploitation, Treasury continues to produce information and engage in outreach to assist charities in understanding the nature of ongoing terrorist abuse. Such materials and outreach are available on or through the Treasury Web site and are further described or referenced in the Annex to the Guidelines.
- Sections VI.A and B: We disagree with the comment that the information-collection procedures are burdensome and of little utility. We recognize that the information-collection practices are expansive and are purposefully designed so that a charity can gather as much information as possible to ensure the greatest transparency and accountability over charitable operations. This type of information-gathering is essential for the charity to know its grantees and to be assured that its assets will not be diverted to terrorist organizations or their support networks. Moreover, the general risk-based approach governing the Guidelines affords charities the opportunity to tailor the scope of these information-collection procedures to the terrorist financing risk they face. A charity should perform its own terrorist financing risk assessment based on its particular operations and projects. Depending on its particular risk profile, a charity should then choose appropriate protective measures that will adequately safeguard its assets from terrorist financing abuse and ensure their delivery to legitimate beneficiaries. As stated above, the best practices of the Guidelines are not a comprehensive or exhaustive listing of all best practices. Charities are free to apply other measures that they believe will protect their assets from diversion.

In order to lessen any perceived administrative burden on charities, we have amended the Guidelines by replacing the word “recipient” with “grantee” throughout the document and defining “grantee”. This revision is intended to clarify the information-collection recommendations by explaining what charities should do for immediate grantees versus

downstream grantees. “Grantee” is defined as an immediate grantee of charitable resources or services. To the extent reasonably practicable, charitable organizations should also apply or ensure the existence of applicable safeguards in any downstream sub-grantees or recipients to protect charitable resources from diversion. Finally, we caution charities against entering into a relationship with a grantee where any doubts exist about the grantee’s ability to ensure safe delivery of charitable resources.

- Sections VI.B.1 and 5: We agree with commenters that the Internet often provides information that may be false or unverified. For this reason, we have removed the clause suggesting that charities look to the Internet for further information about potential grantees or employees. However, the Guidelines still encourage charities to employ all reasonably available means, including publicly available information, to determine the level of risk accompanying a particular charitable operation or when engaging in appropriate vetting procedures. List-checking alone does not guarantee the safe delivery of charitable assets to intended beneficiaries. Properly using publicly available resources, such as open source media reports or other federal agency lists and information, can provide a charity with adequate and comprehensive information from which to make informed decisions about the kinds of protective measures it should take.
- Section VI.B.4: We do not agree with commenters that Treasury is legitimizing the UNSCR 1373 lists adopted by other governments by merely providing information that such lists exist. The purpose of including information on UNSCR 1373 lists in the Guidelines is not to endorse such lists, but to provide charities with an understanding of the varying laws under which they may operate in other jurisdictions. However, in response to the objections raised in some comments and to clarify the purpose of the information, we have added the following sentence to Footnote 14: “The Guidelines do not legitimize or endorse the UNSCR 1373 lists adopted by foreign jurisdictions.”
- Section VI.B.6: We agree with the importance of carrying a consistent message throughout the U.S. Government. For that reason, we have accepted the suggestion of one commenter to align the certification more closely with the one adopted in the 2006 CFC. The new provision also delineates different certifications for U.S. and foreign grantees. Instead of having grantees certify that they checked the SDN List, the new certification suggests that U.S. grantees certify that they are in compliance with all laws restricting U.S. persons from dealing with parties subject to OFAC sanctions. With regard to foreign grantees, they should certify that they do not deal with parties subject to OFAC sanctions or anyone else known to support terrorism.
- Section VI.D: We disagree with the notion that the voluntary reporting provision creates the impression that charities are agents of the U.S. Government. As with all parts of the Guidelines, this provision is voluntary and charities are not under any obligation to report any information. This provision is also consistent with U.S. guidance to other sectors regarding terrorist financing or other illicit finance risks. In addition, we have clearly acknowledged in the Fundamental Principles of the Guidelines that charitable organizations are independent entities and are not a part of the U.S. Government. The voluntary reporting measure explains what steps a charity may proactively take to assist in protecting itself from

abuse by terrorists and their support networks. Since charities occasionally have direct access to evidence of terrorist activities in the course of their operations, voluntarily reporting such evidence provides the appropriate authorities with the opportunity to conduct further investigations, and helps reduce the threat that terrorist financing poses to the charitable sector. Thus, the provision is an important component of anti-terrorist financing best practices, and it remains in the Guidelines with only minor changes.

- While the comment regarding OFAC’s licensing authority is accurate, we believe that the Guidelines make sufficient reference to this authority in Footnote 2 (formerly Footnote 8), which states: “OFAC can issue licenses to U.S. persons to engage in transactions that would otherwise be prohibited, if there is a policy-permissible reason to do so, and if permitted by statute.” In addition, the footnote refers to further information, available on OFAC’s Web site, regarding licensing procedures for non-profit organizations wishing to undertake humanitarian activities in sanctioned countries. To provide more information on licensing, we have added the link to OFAC’s Web site, which has information about the types of available licenses and the process for requesting a license.

Conclusion

As the Annex to the Guidelines illustrates, the risk of terrorist abuse of the charitable sector is both ongoing and significant. Recognition of this reality is the first step in finding ways to protect both donors and charities.

Treasury is sensitive to the concerns raised by the charitable sector and appreciates the insightful comments submitted. The release of these revised Guidelines reflects a further positive development in the ongoing dialogue between the charitable sector and Treasury. Treasury believes that the Guidelines offer a framework of voluntary best practices that is attuned to the unique challenges and risks facing charities. These best practices provide the necessary framework to safeguard against terrorist abuse of the charitable sector by offering protective measures to help ensure that the vital services provided by charities are not exploited by terrorists or their organizations.

Treasury remains deeply committed to working with the charitable community on future initiatives to combat terrorist abuses. While Treasury believes that the Guidelines represent a positive step in combating terrorist abuse of the charitable sector, the Guidelines also underscore the need for continued public outreach as a critical element of our comprehensive approach to combating terrorist abuse of the charitable sector.