



GLOBAL NONPROFIT INFORMATION NETWORK 4. TREASURY DEPARTMENT ENFORCEMENT ACTIONS ARE UNCLEAR AND UNFAIR, AND PENALTIES ARE DISPROPORTIONATELY HARSH

The Treasury Department's "voluntary" best practices are the worst of both worlds, demanding burdensome investigation by charities¹ into their partners or grantees, but conferring no protection from legal sanction even if the Guidelines are painstakingly followed. The penalties for violating U.S. counterterrorism policies are very harsh: organizations can be destroyed, and officers sentenced to life imprisonment. Penalties are, in fact, harsher for charities than for corporations caught supporting terrorism. However, significant uncertainty remains as to what is required of charities and how the Guidelines are being used by the Treasury Department to evaluate charitable practices.

The "U.S. Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities"² leaves even the most conscientious charities at risk of legal sanctions. The Guidelines are full of detailed requirements but rooted in vague and undefined terms. Charities find no clear guidance regarding the steps they must take while investigating a partner or grantee, or how they should judge them, an ambiguity in the law that can lead to frozen assets and prosecuted officers. Charities must refrain from funding organizations that may "deal with" named terrorist organizations, or are "otherwise associated with" terrorists, or anyone who "is or has been implicated in any questionable activity."

Whether "deal with," or "otherwise associates with" means that an organization can be investigated for dealing with a local bank that has cashed a suspect check – or a grocer who has delivered foods to a named group – is not explained. Complicating charities' work is the fact that if a grantee is later revealed to have violated counterterrorism laws, regardless of how mild the offense or tenuous the connection, a charity can be sanctioned -- even though it had no intent to support terrorism, and mounted a thorough investigation (such as by using recommended due diligence procedures).

The government wants it both ways, and charities are trapped: the Guidelines are not truly voluntary, but fol-

lowing them confers no real protection from legal sanction. The Treasury Department helpfully – and ominously -- tells charities that "Nonadherence to these Guidelines, in and of itself, does not constitute a violation of existing U.S. law." But the threat of shutdown, even while an investigation is underway, and lack of clear guidance from Treasury, leaves charities with little choice but to follow the Guidelines, lest an inadvertent misstep or oversight makes them vulnerable to sanction. But even meticulous, good-faith efforts are no protection: "*adherence to these Guidelines shall not be construed to preclude any criminal charge, civil fine, or other action* by Treasury or the Department of Justice." [emphasis added]

Treasury has further confused the issue with a "Risk Matrix" that discourages giving to new organizations and those located in high-need areas, but again conveys no protection against legal sanction.³ Charities are supposed to avoid "high risk organizations." But the framework and risk factors used within the Matrix do little to help charities prevent the diversion of funds and detract from the more effective and proven methods of due diligence which many grantmakers engage in as a matter of course. The Matrix asks grantmakers to apply a formulaic chart of ambiguous factors that discourage innovation and risk. For example, offering "A written grant agreement with effective safeguards" is considered a "low risk" attribute, despite the fact that

a terrorist front would surely sign such a written agreement without hesitation. On the other hand, a charity that “primarily engages in work in conflict zones” may be “high risk,” discouraging charities from working in areas in which they are most needed.

Treasury has imposed a double standard, with penalties for charities accused of associating with terrorists far harsher than those imposed on private companies convicted of outright support for terrorists. Charitable organizations face a *de facto* death penalty if convicted of something as vague as renting a building from a member of a listed organization, and officers could face life in prison. But when Chiquita Brands International admitted paying off the right-wing paramilitary United Self-Defense Forces of Colombia (AUC) and leftist Revolutionary Armed Forces of Colombia (FARC) – both U.S.-designated terrorists organizations with brutal histories of murder, kidnaping and drug-smuggling – they were allowed to continue operations during the investigation and fined just \$25 million, a tiny percentage of Chiquita’s \$4.5 billion in revenues. No Chiquita executives were prosecuted. Companies such as G.E. and Coca-Cola routinely set up offshore subsidiaries that allow them to do business with designated terrorist state Iran (as Halliburton did until unfavorable publicity forced them to cease operations there in 2007). And, while a charity’s assets can be seized with no real recourse or appeal, even accused drug criminals are allowed to challenge the govern-

ment’s seizure of their property and to attempt to demonstrate their innocence.

Clear guidelines and legal acknowledgement of good faith efforts to comply – minus the threat of overly harsh penalties – would allow charities to do their work and target their donations more effectively, while keeping funds out of terrorists’ hands. The charade of “voluntary” guidelines imposes an intolerable bureaucratic and legal burden on charities, while distracting them from traditional due diligence that would be more effective in turning up suspicious players in overseas efforts. Charities need clear information from the federal government so they can carry out their work confident that their good-faith efforts will prevent legal sanction. And fairness demands that they be given the same due process that corporations and even drug dealers enjoy, and the penalties imposed be brought in line with those imposed on private industry.

¹ “Charities” refers to direct service organizations, advocacy organizations, foundations, and organizations supporting social change.

² http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

³ http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf

The **Global Nonprofit Information Network (GNIN)** was launched in March 2007 to foster information sharing focused on counterterrorism measures affecting charitable organizations and global civil society. The GNIN initiative is co-hosted by Grantmakers Without Borders (www.gwob.net), OMB Watch (www.ombwatch.org) and Urgent Action Fund for Women’s Human Rights (www.urgentactionfund.org).



- August 2008 -

(This is part four in GNIN’s seven part series on charities and counterterrorism policy.)