

*Cross-Border Philanthropy &
Counterterrorism Regulations:*

GUIDANCE FOR U.S. GRANTMAKERS

by Andrzej Kozlowski and Kia Sullivan



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The information in this article is not legal advice, and is provided only for general informative purposes. The reader should be aware that the legal context for anti-terrorist financing is fast evolving.

Charitable giving plays a critical role in the global response to humanitarian, development, environmental, and other challenges. U.S. grantmakers recognize the important function fulfilled by cross-border philanthropy, and have long played a leadership role in this domain. Philanthropic dollars flowing abroad from the United States have steadily increased over the last several decades¹ and show no signs of slowing. Among the factors contributing to this rise in foreign giving are the popularity of donor-advised funds, increased efforts in corporate social responsibility, donors' desire for leverage and diversification of their charitable dollars, and, of course, our rising global connectedness.

While opportunities abound for U.S. grantmakers to make a positive difference around the globe, grantmakers need to be aware of important regulatory requirements, particularly pertaining to anti-terrorist financing. International grantmaking entails an increased risk of diversion of charitable funds by terrorist organizations and their support networks. Despite this reality, many internationally engaged U.S. foundations, donor-advised funds, and corporations are not fully aware of anti-terrorist financing regulations, nor of the correct steps to follow, and the potential consequences of not following mandated steps. In addition to adverse publicity and damage to a foundation or company's reputation, these consequences can include asset freezing, civil penalties, the loss of 501(c)(3) status, and even criminal prosecution.

The goal of this report is to orient U.S. grantmakers to these issues by introducing the relevant measures and

responsible agencies, discussing the consequences of noncompliance, providing recommendations on how best to reduce the risks of diverting funds, and identifying key resources.

Anti-Terrorist Financing and the Charitable Sector

The U.S. government has made it clear that it considers the nonprofit sector to be at meaningful risk of exploitation by terrorists and their networks. The Treasury Department's Office of Foreign Assets Control (OFAC), an agency playing a central role in enforcing U.S. restrictions, asserts that "terrorist organizations have exploited charitable organizations, both in the United States and worldwide, to raise and move funds, provide logistical support, or otherwise cultivate support for their organizations and operations."² According to Treasury's 2015 National Terrorist Financing Risk Assessment, "Private donations from individuals and charitable organizations have continued to provide terrorist groups with a consistent flow of funds."³

The Financial Action Task Force (FATF), an international policy-making and standard-setting body dedicated to combating money laundering and terrorist financing, of which the United States is a leading member, has concluded that "the most commonly observed method and risk of abuse of non-profit organizations to support terrorism involves the

1 The Foundation Center, International Grantmaking Update 2010, based on grants awarded by a sample of the largest U.S. foundations.

2 OFAC Risk Matrix for the Charitable Sector (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf).

3 U.S. Department of the Treasury, 2015 National Terrorist Financing Risk Assessment ([https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National Terrorist Financing Risk Assessment - 06-12-2015.pdf](https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Terrorist%20Financing%20Risk%20Assessment%20-%2006-12-2015.pdf)).

diversion of funds.” In this scenario, “funds raised by non-profit organizations for humanitarian programs—disaster relief, humanitarian relief, cultural centers, relief of poverty, advancement of education, advancement of religion—are diverted to support terrorism at some point through the non-profit organization’s business process.”⁴ Other risks of abuse identified by the FATF include affiliation with a terrorist entity, abuse of programming, support for recruitment, and false representation.

The U.S. nonprofit sector has, for its part, challenged the assertions of Treasury and the FATF on the extent to which the global charitable sector plays a consequential role in supporting terrorist activities, and has also expressed concern about the potential chilling effect of new regulations on the activities of legitimate charities. In a 2015 memorandum to the FATF, the Charity and Security Network and the Council on Foundations contend that “minimal and incidental transactions by nonprofit organizations seeking to deliver services to civilians are too small to be a meaningful source of income for listed groups. In fact, studies of terrorist financing sources demonstrate that they rely on non-charity related sources of revenue, such as crime, kidnapping and financial fraud.”⁵

Executive Order 13224 and the USA Patriot Act

The environment within which U.S. grantmakers operate was dramatically altered by the events of and government response to September 11, 2001. Several post-9/11 measures, most notably Executive Order 13224 and the USA PATRIOT Act, introduced new rules and regulations whose impact would be heavily felt in the philanthropic community, particularly by U.S. grantmakers supporting foreign charities.

Less than two weeks after the September 11 attacks, President Bush issued Executive Order 13224,⁶ “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism,”⁷ under the International Emergency Economic Powers Act (IEEPA). The order authorizes the U.S. Treasury to block the assets

of persons or organizations providing support, services, or assistance to terrorists and terrorist organizations.

Charitable giving, including humanitarian support, is subject to the far-ranging restrictions of the executive order.

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Among other things, the executive order blocks the assets of any persons who willfully “assist in, sponsor, or provide financial, material, or technological support” for acts of terrorism or to designated persons. Individuals and entities “otherwise associated with” designated persons are also blocked.⁸ A grantmaker could be penalized even if it did not know it was supporting a blocked entity or intend to do so. Re-granting by intermediate organizations may even expose the original grantor to an asset freeze, as may vendor relationships. An organization’s assets can be blocked pending completion of an investigation, something multiple U.S. entities have already experienced.⁹

The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), which passed in 2001 in response to the attacks of 9/11, strengthens existing laws and civil and criminal penalties for those who “willfully” provide or collect funds with the “intention” of supporting terrorist activities.¹⁰ This requirement of “intent” does not necessarily mean an intent to further the terrorist activities.¹¹ A grantmaker may be prosecuted if it is aware that the recipient organization is a designated Foreign Terrorist Organization (FTO), or if it is aware of a high probability or suspicion that it may be an

4 See Risk of Terrorist Abuse in Non-Profit Organizations: Financial Action Task Force Report, June 2014 (<http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>).

5 Memorandum to the FATF submitted by the Charity and Security Network and the Council on Foundations. (<https://www.charityandsecurity.org/sites/default/files/files/FATFUSEvalMemo2015.pdf>).

6 Executive Order 13224 of September 23, 2001 (<https://www.gpo.gov/fdsys/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-eo13224.pdf>).

7 According to Executive Order 13224, the term *terrorism* means “an activity that: (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction,

assassination, kidnapping, or hostage-taking.”

8 Under Executive Order 13224, “person” includes individuals, organizations, corporations, “groups,” and other entities.

9 Martin B. Schneiderman, “Seeking a Safe Harbor,” Foundation News and Commentary (May/June 2004); 2015 Memorandum to the FATF submitted by the Charity and Security Network and the Council on Foundations (<https://www.charityandsecurity.org/sites/default/files/files/FATFUSEvalMemo2015.pdf>).

10 18 U.S. Code § 2339C: Prohibitions against the financing of terrorism (<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-part1-chap113B-sec2339C.pdf>).

11 18 U.S.C. §23339B(a)(1): Holder v Humanitarian Law Project.

FTO, without performing due diligence to verify the recipient organization's legitimate status.

While PATRIOT Act provisions apply equally to the provision of support for domestic or foreign terrorist entities, the risks are understandably greater for grantmakers operating internationally. Based on the government's definition of "material support or resources," a broad range of activities by grantmakers could be implicated, including grants, technical assistance, personnel, and training.

The PATRIOT Act was reauthorized in 2006, and portions of the act were extended in 2011. In 2015, expiring provisions were renewed through 2019 by the passage of the USA Freedom Act (USAF). While the USAF amended the law to impose limits on the bulk collection of Americans' telecommunications records by U.S. intelligence agencies, other core provisions of the PATRIOT Act remain intact.

The IRS and Anti-Terrorist Financing Actions

As part of its role to ensure that U.S. tax-exempt organizations are compliant with all requirements for exemption and adhering to all applicable tax laws, the IRS is on the front lines of anti-terrorism enforcement. According to its 2017 work plan, the Tax Exempt/Government Entities Division has implemented a data-driven case selection process to identify high risk areas of non-compliance, citing international activity of tax-exempt organizations as one of its five strategic target areas. This effort specifically focuses on oversight of funds spent outside the United States, organizations operating as conduits, and report of foreign bank and financial accounts reporting.¹²

Coordinating with various agencies, including OFAC, the Department of Justice, and the Federal Bureau of Investigation (FBI) to implement anti-terrorist financing measures, the IRS conducts financial research and analysis to identify terrorist financing activities through its Criminal Investigation Counterterrorism Center, which uses analytical technology on income tax data to "identify potential patterns and perpetrators with a particular focus on the use of tax exempt organizations to fund terrorist activities."¹³

In addition to its oversight of U.S. grantmakers via 990 returns, the IRS has, for the first time, included anti-terrorism rules in its revenue procedure for equivalency determinations¹⁴

on foreign-based organizations. Released in September 2017, these new guidelines expressly prohibit organizations designated or identified as terrorist organizations from qualifying for equivalency, and require that the written advice

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regarding equivalency include such verification of a grantee's designation. These guidelines also encourage confirmation that the organization or its controlling officers, directors, or trustees are not foreign persons whose property and interests in property are blocked pursuant to an executive order or OFAC.¹⁵

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OFAC and the Enforcement of Sanctions

OFAC enforces U.S. economic and trade sanctions against specific countries and against terrorists, narcotics traffickers, proliferators of weapons of mass destruction, and other identified national security or economic threats. Charged with enforcing Executive Order 13224, OFAC levies penalties, imposes fines, freezes assets, and bars entities from operating in the United States. To date in 2017, OFAC has issued civil penalties and collected settlements of over \$118 million, mostly trade related.¹⁶

All U.S. grantmakers must comply with OFAC regulations. The regulations apply to any U.S. incorporated entities, along with their foreign branches, and in some cases to foreign subsidiaries owned or controlled by U.S. entities.¹⁷

OFAC publishes the Specially Designated Nationals and

12 IRS, Tax Exempt and Government Entities FY 2017 Work Plan, September 28, 2016 (as amended March 8, 2017).

13 IRS, Criminal Investigation Responds to Terrorism (<https://www.irs.gov/compliance/criminal-investigation/criminal-investigation-responds-to-terrorism>).

14 Through an equivalency determination, a U.S. grantmaker gathers information and materials in order to make a good faith determination that the organization

is the equivalent of a U.S. 501(c)(3) public charity.

15 IRS Revenue Procedure 2017-53, Section 5.09.

16 OFAC Civil Penalties and Enforcement Information (<https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx>).

17 U.S. Department of the Treasury, Basic Information on OFAC and Sanctions (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

Blocked Persons List (SDN list), which contains the names of companies and individuals connected with OFAC sanctions targets, including designated terrorists and other covered persons. A grantmaker would violate U.S. law by making a payment or undertaking any other prohibited transaction with any person on the SDN list.

Meeting OFAC requirements also requires adherence to OFAC country-based and other sanctions, published on the OFAC website.¹⁸ A grantmaker must take care not to transact with a sanctioned country, unless the transaction is covered by an OFAC general license exempting certain activities. General licenses will often allow, for example, for humanitarian programs to meet basic human needs, such as the provision of food and medicine, health services, or assistance to refugees and victims of conflict. If it appears that their desired charitable intervention is not covered by a general license, a grantmaker can apply to OFAC for a special license.

OFAC maintains a website with information “useful for federal, state, local, and private actors in combating terrorist abuse of the charitable sector.”¹⁹ Treasury publishes a list of “Designated Charities and Potential Fundraising Front Organizations for FTOs” (foreign terrorist organizations),²⁰ and also a list of charities designated under Executive Order 13224 with details on each charity.²¹

OFAC’s Risk-Based Approach

Grantmaking organizations face varying levels of risk based on the geographies in which they are working and other factors. Based on OFAC guidelines, grantmakers should develop an understanding of the risks they face and then implement proactive compliance programs, informed by best practices, commensurate to the risks. OFAC’s Risk Matrix for the Charitable Sector is a window into OFAC’s thinking on this topic.²²

Certainly, geography is an important factor in assessing risk. While certain conflict areas of the world present the highest level of risk and may call for additional measures, most grantmakers consider it best practice to at least check all

foreign grantees against the SDN list.

Another variable influencing risk is the level of restrictions a grantmaker places on the use of grant funds, and the degree of monitoring. Articulating a specific purpose for the use of funds, signing a written agreement, requiring grant reporting, and tracking expenditures are all means of oversight that can reduce risk. Conversely, general support grants, or grants made without a written agreement, are subject to higher levels of risk.

Treasury’s “Voluntary Best Practices”

For government guidance on how to avoid running afoul of counter-terrorism restrictions, grantmakers should look to the Treasury Department’s “Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities.”²³ Treasury’s guidelines can be implemented as “best practices” and are entirely voluntary. It is important to note, however, that following the guidelines does not provide a grantmaker with a “safe harbor.” Similarly, adhering to OFAC’s Risk Matrix is voluntary and “does not constitute a legal defense against any civil or criminal liability.”²⁴

Regardless, grantmakers making cross-border grants are encouraged to understand the Risk Matrix and, based on assessed risk, adopt the Voluntary Guidelines. This course of action both reduces the chance of an unintended diversion of funds and, in the event of an actual diversion, demonstrates to the relevant authorities that appropriate measures have been taken.

Treasury’s Voluntary Guidelines were first released in 2002 and were criticized for going beyond what was necessary, costing too much to implement, and having the potential to create a dampening effect on international grantmaking. In response, a coalition of charitable sector organizations, the Treasury Guidelines Working Group (TGWG), released its own Principles of International Charity²⁵ in 2005. Treasury published a final, revised version of its guidelines in 2006.

18 OFAC Sanctions Program and Country Information (<https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>).

19 U.S. Department of the Treasury, Protecting Charitable Organizations (<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx>).

20 U.S. Department of the Treasury, Designated Charities and Potential Fundraising Front Organizations for FTOs (<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx>).

21 U.S. Department of the Treasury, Background Information on Charities Designated Under Executive Order 13224 (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities_execorder_13224-a.aspx).

22 OFAC Risk Matrix for the Charitable Sector (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf).

23 U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf).

24 OFAC Risk Matrix for the Charitable Sector (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf).

25 Principles of International Charity (Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, March 2005) (http://www.usig.org/PDFs/Principles_Final.pdf).

Recommended Actions for U.S. Grantmakers

While the existing regulatory landscape pertaining to anti-terrorist financing may be complex and daunting, valuable resources and practical procedures are available to implement. U.S. grantmakers may wish to consider some or all of the following actions before supplying charitable resources abroad.

- 1 Review the recommendations of the [Treasury Department's Voluntary Guidelines](#), [OFAC's Risk Matrix for the Charitable Sector](#), and [TGWG's Principles of International Charity](#).
- 2 Orient and train staff and board members on current anti-terrorist financing requirements and on the consequences of noncompliance.
- 3 Conduct a comprehensive risk assessment for current or planned international grantmaking operations, drawing particularly on guidance from OFAC's Risk Matrix.
- 4 Design compliance procedures in accordance with your organization's level of tolerance for risk (see 3 above), drawing on the Treasury Department's Voluntary Guidelines as a core resource.
- 5 As part of your compliance program, establish a list-checking policy, including which watch lists to check, and specific list-checking steps to follow. Section VI of the Treasury Department's Voluntary Guidelines covers list-checking in detail.²⁶ While the primary list referenced by the Treasury Department is the Specially Designated Nationals list (SDN list), you may wish to consider including other lists when screening to avoid contravening anti-terrorism measures in effect in other countries, which may have listed individuals not reflected on the SDN list.²⁷ Other than the SDN list, common lists included in screening are the United Nations Security Council Sanctions list and the European Union terrorist list.
- 6 Before each grant to a foreign country, review OFAC economic and trade sanctions to ensure that the grant will not be running afoul of any current embargoes.

7 Document your organization's assessment of risk, due diligence and list-checking steps, and grantmaking procedures.

8 Consider consulting with competent legal counsel or obtaining specialized support to develop and implement your compliance procedures, and stay abreast of new regulations pertaining to anti-terrorist financing.

Concluding Thoughts

It is the view of the authors that U.S. grantmakers should not avoid direct international grantmaking for fear of running afoul of counter-terrorism regulations. The likelihood of any negative outcome is low if basic steps are taken, while the benefits to the global community afforded by cross-border philanthropy are beyond measure. Each grantmaker must become familiar with the requirements, assess the risks in accordance with its goals, and develop a compliance program that allows it to further its charitable mission with confidence.

In spite of the restrictions introduced post-9/11, the generosity of U.S. donors has continued to grow, with total giving to "international affairs" estimated at \$22.03 billion for 2016.²⁸ Effectively in the last 17 years, U.S. foundations, donor-advised funds, corporate giving programs, and globally engaged operating charities have demonstrated they are motivated to navigate the new requirements and are fully capable of doing so effectively.

26 Treasury reiterates in the Voluntary Guidelines: "Depending upon the risk profile of an individual charitable organization, adopting all of these steps may not be applicable or appropriate. When taking these steps, charities should apply a risk-based approach" (https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf).

27 Treasury's Voluntary Guidelines note: "Charities operating in a foreign jurisdiction may choose to take the additional precautionary measures of determining whether that jurisdiction maintains a national list under United

Nations Security Council Resolution 1373." United Nations Security Council Resolution 1373 was passed in September 2001 following the 9/11 attacks to combat international terrorism. The measure is binding on member states (https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf).

28 U.S. international giving continued to grow steadily in the years following 2001 (Global Impact 2013 Assessment of U.S. Giving to International Causes, <https://charity.org/sites/default/files/userfiles/pdfs/Assessment%20of%20US%20Giving%20to%20International%20Causes%20FINAL.pdf>).

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