

**IMPLICATIONS OF THE ANTI-TERRORIST FINANCING RULES FOR U.S.  
CHARITIES: COMPLIANCE WITH EXECUTIVE ORDER 13224  
AND THE USA PATRIOT ACT**

by

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The September 11, 2001 terrorist attacks on the United States resulted in new laws under which U.S. grant making nonprofits risk criminal prosecution, civil penalties and the freezing of their assets if they are found to have made grants to foreign or domestic individuals or organizations that engage in or support terrorism. These new laws particularly affect U.S. charities making grants for use abroad. This article describes the primary counter-terrorism measures of relevance to U.S. nonprofit grant makers. In particular, it describes the provisions of Executive Order 13224 and the USA Patriot Act, both of which were signed into law shortly after September 11, 2001. It also discusses the U.S. Department of the Treasury's "Anti-Terrorist Financing Guidelines" and the "Principles of International Charity" developed by the nonprofit community in response to those Guidelines. Finally, it offers some practical assistance in complying with current law.

**Executive Order 13224**

On September 14, 2001, President Bush signed Executive Order 13224, entitled "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism"<sup>1</sup> (the "Executive Order"). The Executive Order is not a law, but it carries the force of law as it represents the President's exercise of statutory authority

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<sup>1</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 5, 2001), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 44,751 (July 3, 2002) & Exec. Order No. 13,284, 68 Fed. Reg. 4,075 (Jan. 28, 2003) [hereinafter Exec. Order No. 13,224], *available at* <http://www.ustreas.gov/offices/enforcement/ofac/map/eolinks.shtml>. On June 6, 2003, pursuant to the authority granted to it by Section 7 of the Executive Order, the Office of Foreign Assets Control of the Treasury Department issued regulations to implement the Executive Order, entitled "Global Terrorism Sanctions Regulations." Those regulations can be found at 31 C.F.R. Part 594 and additional commentary to those regulations can be found at 68 Fed. Reg. 34,196 (June 6, 2002), *available at* <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-14251.pdf>.

granted by Congress under the International Emergency Economic Powers Act and the National Emergencies Act.<sup>2</sup> The Executive Order prohibits transactions with “persons” (including individuals and organizations) deemed by the Executive Branch to be associated with terrorism. It blocks any assets controlled by or in the possession of such individuals and organizations *and those who support them*. The Executive Order has far-reaching significance to nonprofit grant makers.

The Executive Order has neither a knowledge nor an intent requirement. Even if an organization has no intent to support terrorism and does not know it is providing support to such individuals or organizations or has otherwise become “associated with” a terrorist organization as defined in the Executive Order, its assets can be frozen by the government. The government does not have to provide any pre-freeze notice or opportunity to respond to the freeze, nor is there any requirement of prior notice of a determination of terrorist status.

Under the Executive Order, our government has the authority to freeze all assets of individuals and organizations identified as terrorists, controlled by terrorists, supportive of terrorists or otherwise associated with terrorists. It specifically prohibits donations to such individuals and organizations and all transactions involving property frozen under the Executive Order. Individuals and organizations whose property are *automatically* frozen include:

- those specifically listed in the Annex to the Executive Order;
- those determined by the Secretary of State “to have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States”; and

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<sup>2</sup> International Emergency Powers Act, 50 U.S.C. §§ 1701-1707; National Emergencies Act, 50 U.S.C. §§ 1601-1651.

- those determined by the Secretary of the Treasury “to be controlled by, or to act for on behalf of” such individuals and organizations.<sup>3</sup>

Under the Executive Order, the government *may* also freeze the assets of other parties who assist, sponsor or provide financial, material or technological support for, or provide other resources to or in support of, acts of terrorism or such individuals and organizations or are “otherwise associated with” such individuals or organizations.<sup>4</sup> Prohibited transactions include financial support, in-kind support, material assistance and technical assistance. Humanitarian donations, including food, clothing and medicine, to such individuals and organizations are included under the Executive Order. It also appears that the Executive Branch believes the Executive Order extends to re-granting by charitable grantees.

Although the Executive Order does not appear to apply to an organization’s donors, a donor advised fund sponsor could find its assets frozen if it received funds from an individual or organization identified by the Executive Order or a government list (see below) and, on a donor’s advice, used the resources to further terrorist goals of an individual or organization on any of those lists.

### **The USA Patriot Act**

Under the USA PATRIOT Act<sup>5</sup> (the “Patriot Act”) signed into law on October 26, 2001, federal law imposes civil fines and terms of imprisonment for any entity providing material support or resources to be used in terrorist acts or by foreign terrorist organizations. It applies to any individual or organization who “*willfully* provides or collects funds with the *intention* that such funds be used” to carry out acts of terrorism or who

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<sup>3</sup> Exec. Order No. 13224 §§ 1(a), (b) and (c); 31 C.F.R. § 594.201(a)(1), (a)(2) and (a)(3).

<sup>4</sup> Exec. Order No. 13224 §§ 1(d)(i) and (d)(ii); 31 C.F.R. § 594.201(a)(4)(i) and (a)(4)(ii).

<sup>5</sup> “USA PATRIOT Act” is an acronym which stands for Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

knowingly conceals the source of funds used to carry out terrorism or to support foreign terrorist organizations. The provisions expanding criminal liability and increasing civil penalties for providing material or financial support for terrorism clearly affect nonprofit grant makers, though there are no provisions of the Patriot Act specifically directed at them.

Even before September 11, 2001, federal law imposed criminal sanctions on a person who provided material or financial support for terrorism and Foreign Terrorist Organizations.<sup>6</sup> The Patriot Act supplements those provisions and imposes fines and terms of imprisonment of up to 15 years for any entity that provides material support or resources *knowing or intending* that they be used in terrorist acts or by foreign terrorist organizations. If a terrorist act is actually committed as a result of that support or those resources, and the terrorism results in the death of any person, the maximum penalty is life in prison.<sup>7</sup>

There is also potential civil liability for nonprofit grant makers whose grants end up in the hands of terrorists. Private parties are provided with a specific civil cause of action against those who provide material support for terrorism. A successful plaintiff can recover from the nonprofit grant maker treble damages, court costs and attorneys fees.<sup>8</sup>

### **Checking the Lists**

There are several government lists for identifying terrorists and individuals with suspected connections to terrorism, all of which may be checked by a nonprofit before it makes a grant to that organization or individual. The primary list is the Specially Designated Nationals list (SDN list) maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC").<sup>9</sup> In addition, the Department of Justice maintains the

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<sup>6</sup> 18 U.S.C. §§ 2339A and 2339B, respectively.

<sup>7</sup> 18 U.S.C. §§ 2339A(a) and 2339B(a)(1).

<sup>8</sup> 18 U.S.C. § 2333.

<sup>9</sup> The OFAC SDN list is available at: <http://www.ustreas.gov/offices/enforcement/ofac/sdn>.

U.S. Government Terrorist Exclusion List (“TEL”),<sup>10</sup> the United Nations maintains a list,<sup>11</sup> and the European Union maintains a list.<sup>12</sup> The lists include not only the names of organizations and individuals, but variant spellings (English and foreign) and aliases.

The SDN list is long and changes constantly. It is difficult to search, but there are now commercial services that make checking the lists by computer easy, integrating the contents of the various lists and conducting searches on names of individuals and organizations in under a minute.<sup>13</sup> While it may be relatively easy to subscribe to a commercial list-checking service, other measures suggested by the government are more difficult to comply with.

So far, the assets of a few U.S. nonprofits have been frozen because they were determined by the government to have supported terrorist organizations abroad,<sup>14</sup> but it is unlikely that the assets of U.S. nonprofits who follow appropriate procedures for tracking the use of funds granted for charitable projects abroad will be frozen or that civil or criminal penalties will be imposed. Nonetheless, Executive Order 13224 and the Patriot Act have caused substantial concern within the nonprofit community. Larger and more established nonprofits have modified their due diligence, accounting and reporting requirements in response to these new laws, but the due diligence apparently required by the government in order to comply with these new laws is overwhelming, expensive and confusing for many

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<sup>10</sup> The TEL is available at: <http://www.state.gov/s/ct/rls/fs/2004/32678.htm>.

<sup>11</sup> This list was promulgated by the United Nations pursuant to U.N. Security Council Resolutions 1267 and 1390 and is available at: <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

<sup>12</sup> Promulgated by the European Union pursuant to EU Regulation 2580, this list is available at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/1\\_340/1\\_34020031224en00630064.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/1_340/1_34020031224en00630064.pdf).

<sup>13</sup> See, e.g., <http://www.ofac.us/index.cfm>.

<sup>14</sup> See *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) cert. denied, 72 U.S.L.W. 3551 (2004); *Benevolence International Foundation, Inc. v. Ashcroft*, 200 F.Supp.2d 935 (N.D. Ill. 2002); and *Global Relief Foundation, Inc. v. O’Neill*, (7th Cir.), cert. denied, 1245. Ct. 531 (2003). All involved criminal sanctions under the Patriot Act as well as Executive Order asset blocking.

nonprofits. In fact, many nonprofits are totally unaware of Executive Order 13224 and the Patriot Act.

### **U.S. Department of the Treasury Anti-Terrorist Financing Guidelines**

In November, 2002 the U.S. Department of the Treasury released its “Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities” (the “initial Voluntary Guidelines”).<sup>15</sup> These Guidelines were closely studied by the nonprofit community in general, and in June of 2003, the Council on Foundations submitted to the Treasury Department comments on the initial Voluntary Guidelines.<sup>16</sup> In March of 2005, “Principles of International Charity”, developed by a Treasury Guidelines Working Group (the “TGWG”) of charitable sector organizations and advisers,<sup>17</sup> were submitted to the Treasury Department as an alternative to its initial Voluntary Guidelines. As a result of the Council on Foundation comments, comments of many other groups in the nonprofit community, and the Principles of International Charity, the Treasury Department released revised Anti-Terrorist Financing Guidelines on December 5, 2005 (the “revised Voluntary Guidelines”).<sup>18</sup> The TGWG reviewed these within the period for public comment and submitted further comments calling for the withdrawal of the Treasury Department’s revised Voluntary Guidelines and its endorsement of the Principles of International Charity.<sup>19</sup>

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<sup>15</sup> U.S. Department of the Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* 6 (2002), available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf>.

<sup>16</sup> Council on Foundations, *Comments on U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, available at: [http://www.cof.org/files/Documents/Legal/Treasury\\_Comments\\_06.03.pdf](http://www.cof.org/files/Documents/Legal/Treasury_Comments_06.03.pdf).

<sup>17</sup> The Principles of International Charity are available at: [http://www.independentsector.org/PDFs/treasury\\_guidelines.pdf](http://www.independentsector.org/PDFs/treasury_guidelines.pdf). The Treasury Guidelines Working Group is a broadly representative group of over 40 U.S. charities, foundations, religious organizations, corporations, umbrella associations, watchdog groups and advisors created in the spring of 2004.

<sup>18</sup> The revised Voluntary Guidelines are available at: <http://www.treasury.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml>.

<sup>19</sup> See press release entitled “U.S. Charities Call for U.S. Department of Treasury to Withdraw Anti-Terrorist Financing Guidelines” dated 2/21/06 at: <http://www.cof.org>

The Treasury Department's Voluntary Guidelines are tagged "voluntary best practices". They do not provide safe harbors. The preamble to the initial Voluntary Guidelines states:

Compliance with these guidelines should not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated pursuant to the Anti-Terrorism in Effect of Death Penalty Act of 1986, as amended, or the International Emergency Powers Act, as amended.

Section IV of the initial Voluntary Guidelines focused on steps that grant makers should follow before making grants to "foreign recipient organizations" ("FROs"). The recommended steps included (i) collecting a broad range of information about the FRO, (ii) conducting a basic vetting of the FRO, including checking to make sure it did not appear on certain government lists identifying parties with links to terrorism or money laundering, and (iii) reviewing the financial operations of the FRO. Its broad requirements were modified by the revised Voluntary Guidelines. The Council on Foundations' comments issued in June, 2003 expressed the opinion that the initial Voluntary Guidelines failed to accomplish the objective of guarding charitable funds from diversion to terrorist activities without "killing legitimate good works" because they adopted a "one size fits all" approach which would greatly increase the administrative costs of making international grants without helping U.S. nonprofits identify and take appropriate precautions with respect to the small number of such grants that are actually at risk for diversion.

The revised Voluntary Guidelines adopted some of the recommendations of the Council on Foundations, but they also imposed even more onerous data collection guidelines. Moreover, although they are referred to as "voluntary guidelines", the nonprofit sector has been concerned that other government agencies will adopt the suggestions in the revised Voluntary Guidelines as a minimum standard.

The revised Voluntary Guidelines state that they are intended to assist charities in developing a risk-based approach to guard against the diversion of charitable funds for use by terrorists and their supporting networks. Section VI of the revised Voluntary Guidelines, promulgating anti-terrorist financing best practices, recommends that nonprofits collect the following basic information about the grantee before distributing any charitable funds or in-kind contributions:

- the recipient organization's name in English, and the language of origin, and any current or other names used to identify the recipient;
- the jurisdictions in which the recipient maintains a physical presence;
- information regarding the individuals who formed the organization and the organization's operating history;
- data regarding each place of business of the recipient (not just its principal place of business);
- a statement of the recipient's principal purpose, including a detailed report of its projects and goals;
- the names and addresses of individuals, entities, or organizations to which the recipient provides or proposes to provides funding, services or material support, to the extent reasonably available;
- the names and addresses of any subcontracting organizations utilized by the recipient;
- copies of all public filings or releases made by the recipient, including official registry documents, annual reports, and annual filings with the government, as applicable; and
- the recipient's sources of income.

Under the revised Guidelines, basic vetting of recipients would involve:

- a reasonable search of public information, including information available via the internet, to determine whether the recipient is suspected of terrorist activity, including terrorist financing or other support;
- checking of the OFAC SDN list;

- full name in English, the language of origin, and the acronym or the names used by, nationality, citizenship, current country of residence and place and date of birth of key employees, board members or other senior management of the recipient’s principal place of business, and key employees of the recipient’s other business locations;
- consultation of publicly available information to ensure that key employees, board members or other senior management of the recipient are not suspected of activity relating to terrorism; and
- imposition of a requirement that the recipient certify that it does not employ, transact with, provide services to or otherwise deal with any individuals, entities or groups that are sanctioned by OFAC or with any persons known to the recipient to support terrorism.

Additional guidelines suggest that the U.S. nonprofit should conduct basic vetting of *its own key employees* and, if it finds one of its own employees or anyone connected with the foreign recipient organization on the OFAC SDN list, report the match to OFAC. If such data is gleaned from a source other than from the OFAC SDN list, it is to be reported to the Department of the Treasury and to the Federal Bureau of Investigation.

The TGWG recommended the Principles of International Charity<sup>20</sup> as an alternative to the revised Voluntary Guidelines in part because it is extremely concerned that the revised Voluntary Guidelines continued to suggest “onerous and potentially harmful procedures to charities.” The TGWG concluded that the revised Voluntary Guidelines suggest the collection of more information on more individuals and organizations than the initial Voluntary Guidelines, that it is impossible for charitable organizations to collect that information and that, even if they were able to, the costs of doing so would be prohibitive. There is also substantial concern that the revised Voluntary Guidelines do not, in fact, reflect the voluntary best practices of U.S. nonprofits.

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<sup>20</sup> See fn. 17, *supra*.

In particular, the revised Voluntary Guidelines, while adopting many of the concepts in the Principles of International Charity, failed to include two critical Principles of International Charity. The first of these was that each charitable organization must safeguard its relationship with the community in order to deliver effective programs and that this relationship is founded on local understanding and acceptance of the independence of the grantee organization. This Principle notes that, if the foundation of local understanding and acceptance of independence were shaken, the grantor organization's ability to be of assistance, and the safety of those delivering assistance, would be at serious risk. The second Principle that was omitted stated clearly that charitable organizations are non-governmental entities and are not agents for enforcement of U.S. or foreign laws or the policies reflected in them. The TGWG's position is that U.S. nonprofit grant making entities must be politically neutral, and be seen by the grantee as politically neutral, in order to avert risk to humanitarian workers. It is therefore quite concerned that the revised Voluntary Guidelines remove provisions blurring the lines between charitable organizations and the government and will pose a real threat to humanitarian workers.

### **The Principles of International Charity**

The Principles of International Charity recommend a risk-based approach to grant making which (i) helps the grant maker to identify those grants that may present a greater risk for diversion, and (ii) describes additional steps the grant maker may take to minimize the possibility of diversion for grants so identified. They set forth reasonable guidelines which may vary according to circumstance. The Principles of International Charity recommend that, depending on the circumstances, in addition to the usual due diligence conducted by a nonprofit making grants for use abroad, the grant maker may employ a number of supplementary practices. These practices include, but are not limited to:

- Supplementing its pre-grant investigation by checking its grantees and their board members against the terrorist lists and/or requiring grantees to certify that they have not and will not knowingly provide material support or resources for acts of violence or terrorism;

- Disbursing large grants in semi-annual installments, with successive payments contingent upon receipt and satisfactory review of six-month interim reports (rather than the usual annual financial and progress reports required from grantees);
- For a small U.S. grant making organization with no overseas staff which has been funding an organization abroad for many years and has developed a close working relationship with the grantee over time, the use of formal grant agreements specifying the charitable purposes for which each grant may be used, regular monitoring reports from the grantee, and periodic site visits and project assessments by the grant maker, a consultant or other reputable organization on the grant makers' behalf;
- For a U.S. based relief or development organization with overseas staff, reliance on its knowledge of the community and its continuing presence there to have confidence that its pre-grant investigation and subsequent monitoring of the use of the grant are sufficient to reduce the risk of diversion of charitable funds. If such organization does not have an established relationship with a new grantee, it might decide that additional inquiry regarding the bona fides of the board members and key employees of the grantee, and requiring a certification that it will not finance terrorism, are appropriate;
- For a U.S. corporation having an employee matching gift program, the delegation of the due diligence required to appropriately exercise its responsibility to a vendor, with a requirement that the vendor supplement its usual practices to verify that the grantee organizations do not appear on any list of terrorists or terrorist organizations.

### **Conclusion and Recommendations**

In light of the new anti-terrorist financing laws and the revised Voluntary Guidelines, the author recommends that U.S. nonprofits making grants for use abroad adapt the following practices:

- Familiarize yourself with the provisions of Executive Order 13224 and the Patriot Act;

- Read the revised Voluntary Guidelines;
- Read the Treasury Guidelines Working Group's Principles of International Charity;
- Educate your staff and board regarding anti-terrorist financing requirements;
- Always check grantee organizations and their board members against the OFAC SDN list;
- Conduct due diligence to ensure that the proposed donee is a bona fide charitable organization with the ability to carry out the project for which the grant is to be made;
- Assess the likely risk of diversion based on the grantee and circumstances;
- Manage the risk by taking steps most likely to prevent diversion; and
- Keep good records of your due diligence, grant procedures and risk assessments.

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