

Chapter 5

Flawed Quasi-Mandatory Federal Guidance Has Negative Effects on Charities and Foundations

Since 2001, the Department of the Treasury (Treasury) has released two voluntary tools for nonprofits, the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities (Guidelines)*¹²⁶ and the *Risk Matrix for the Charitable Sector (Risk Matrix)*.¹²⁷ Although designed to “assist charities [and foundations] that attempt in good faith to protect themselves from terrorist abuse,”¹²⁸ each has proven to be highly problematic, and many within the nonprofit sector have called for their withdrawal, including Council on Foundations, Save the Children, InterAction, Grantmakers Without Borders, and OMB Watch.¹²⁹ Nonetheless, Treasury continues to promote these policies, falsely characterizing them as examples of the “close” relationship it has with the nonprofit sector and “how this partnership can produce significant results.”¹³⁰ Treasury is half right in that its “voluntary” tools have had “significant results”; however, those results are largely negative.

Treasury Guidelines

In November 2002, Treasury released its first of three versions of the Guidelines (the latest version was released in September 2006). Directed at both charities and foundations, the Guidelines are comprised of suggested governance, transparency, financial, and grantmaking practices. Arguably, U.S. foundations that make grants overseas feel the largest impact due to an entire section within the Guidelines that describes special procedures for organizations that distribute funds, goods, or services to organizations outside the U.S. Much of this chapter summarizes the problems the international grantmaking recommendations have caused for foundations. William P. Fuller and Barnett F. Baron, the president and executive president of the Asia Foundation, respectively, eloquently summed up the general complaints against the Guidelines in their 2003 article, “How the War on Terror Hits Charity”:¹³¹ “The voluntary guidelines contain too many vague and undefined terms that leave grantmakers vulnerable to legal action ... [p]erhaps most important, the new requirements risk undermining cooperative relationships between organizations and their overseas partners ... destroy[ing] relation-

¹²⁶ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf

¹²⁷ http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf

¹²⁸ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf, Footnote 1.

¹²⁹ Council on Foundations letter to Treasury Secretary Henry Paulsen, Dec. 18, 2006, on behalf of 40 charities, seeking withdrawal of the Treasury Guidelines, at http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf. Grantmakers Without Borders letter to the Department of Treasury Opposing Risk Matrix, May 30, 2007, at http://www.gwob.net/advocacy/GwoB_Treasury_Letter-Risk_Matrix.pdf.

¹³⁰ http://hsgac.senate.gov/public/_files/051007Poncy.pdf

¹³¹ William P. Fuller and Barnett F. Baron, “How the war on terror hits charity,” *The Christian Science Monitor* (July 29, 2003) as seen at <http://www.csmonitor.com/2003/0729/p11s01-coop.htm>.

ships of trust and the ability of US foundations to operate freely and effectively.”

History of Guidelines

Treasury first published the Guidelines in November 2002, without public comment or input. In May 2003, in response to criticisms of the Guidelines from the nonprofit sector, the IRS sought comments on ways U.S. charities and foundations might prevent the diversion of charitable assets to terrorists.¹³² Many nonprofits used that opportunity to call for the withdrawal of the Guidelines, noting that the suggested practices did not reduce the risk of diversion of charitable assets to terrorists and placed charities and foundations in a government investigator role.

There is no one set of procedures for safeguarding charitable assets against diversion to terrorists.

In April 2004, organizations that submitted comments to the IRS were invited to meet with Treasury officials to voice concern over the Guidelines. Then-Treasury Secretary John Snow indicated a willingness to answer public comments and revise the Guidelines. Meeting participants established the Treasury Guidelines

Working Group, which released the *Principles of International Charity* (Principles)¹³³ as an alternative to the Guidelines in March 2005. The Principles are designed to more “accurately reflect the diversity of due diligence procedures that effectively minimize the risk of diversion of charitable assets.”¹³⁴ Unlike the Guidelines, the Principles take into account the different ways that charities and foundations operate internationally and in the U.S., recognize that there is no one set of procedures for safeguarding charitable assets against diversion to terrorists, and stress the importance of due diligence and financial controls. Instead of replacing the Guidelines with the Principles, Treasury published a revised version of the Guidelines in December 2005, and after another round of public comments, released the current version in September 2006.¹³⁵ Although there were some improvements, the fundamental problems remain.

¹³² <http://www.irs.gov/pub/irs-drop/a-03-29.pdf>

¹³³ http://www.usig.org/PDFs/Principles_Final.pdf

¹³⁴ *Ibid.*

¹³⁵ For a comparison of the 2005 draft and 2006 Guidelines, see <http://www.ombwatch.org/npadv/TreasGuidelinesSidebySide06.pdf>.

Why the Treasury Guidelines Should be Withdrawn

The Treasury Guidelines Working Group is not alone in its call for the withdrawal of the Guidelines. Widespread objections have followed each version of the Guidelines,¹³⁶ underscoring problems with the underlying policies behind, and propagated by, them. Most troubling to foundations is the fact that no version of the Guidelines acknowledges the tremendous amount of due diligence already being performed by grantmaking organizations. Federal tax law requires foundations to ensure grant funds are used for charitable purposes.¹³⁷ This obligation is taken very seriously, and foundations closely monitor their grants with site visits, pre-grant inquiries, the advice of local advisors and partners, and ongoing accountability throughout the life of a grant.

Ironically, Treasury says it created the Guidelines to protect organizations against the *unintended* diversion of charitable funds to terrorist organizations. However, within its justification for the Guidelines, the only cases cited exemplify *intentional* diversion of funds.¹³⁸ There is no apparent explanation for this discrepancy. Dr. Nancy Billica, a political science professor from the University of Colorado, Boulder and a consultant for Urgent Action Fund, has done extensive research on the effects counterterrorism measures have on the nonprofit sector, specifically foundations that grant overseas. One foundation she interviewed noted, “Charitable organizations are already vigilant, already taking steps; many are already going beyond the law. Many are taking extra steps just to be sure their charitable assets are not being diverted to terrorist or other illegal purposes. We have to agree to disagree with Treasury on this assessment of the problem.”¹³⁹

To further complicate the issue, the Guidelines offer no legal protection to an organiza-

¹³⁶ See OMB Watch Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/OMBWtreascomms.pdf>.

See also Council on Foundations Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/WGcomms.pdf>.

See also Muslim Public Affairs Council Letter to U.S. Department of Treasury, January 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/MPACTreascomments.pdf>.

See also Kinder USA Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/KUSAtreascomms.pdf>.

See also Muslim Advocates Letter to U.S. Department of Treasury, Feb. 1, 2006, available at <http://www.ombwatch.org/npadv/PDF/treascomms/MATreascomments.pdf>.

See also Friends of Charities Association (FOCA) Letter to U.S. Department of Treasury, Dec. 5, 2005, available at <http://www.ombwatch.org/npadv/PDF/treascomms/FOCATreascomments.pdf>.

See also Treasury Guidelines Working Group Letter to U.S. Department of Treasury Dec. 16, 2006 available at http://www.usig.org/PDFs/TGWG_Letter_to_Treasury.pdf.

See also Grantmakers Without Borders Letter to U.S. Department of Treasury, Dec. 22, 2006, available at <http://www.internationaldonors.org/news/1222pressrelease.htm>.

¹³⁷ IRC 501(c)(3).

¹³⁸ <http://www.ustreas.gov/press/releases/reports/0929%20finalrevised.pdf>, Footnote 15, and “Violent Islamist Extremism; Government Efforts to Defeat It: Hearing Before the Senate Homeland Security and Governmental Affairs Committee” (2007) (statement of Chip Poncy, Director of Strategic Policy at the Treasury Department’s Office of Terrorist Financing and Financial Crimes).

The following is excerpted from Chip Poncy’s testimony in front of the Senate Homeland Security Committee on May 10, 2007:

SEN. LIEBERMAN: ... But the connection therefore between the local charities – American-based charities – and foreign terrorist groups is knowing. I mean, this is not – they’re not being duped by, you know, Hamas or Hezbollah. They intend to support them, correct?

MR. PONCY: That is certainly our view of it.

¹³⁹ http://www.urgentactionfund.org/new_site/assets/files/philanthropy_at_risk/Philanthropy_072507.pdf, p. 9.

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tion. The Introduction to the Guidelines states, “Non-adherence to these Guidelines, in and of itself, does not constitute a violation of existing U.S. law. Conversely, adherence to these Guidelines does not excuse any person (individual or entity) from compliance with any local, state, or federal law or regulation, nor does it release any person from or constitute a legal defense against any civil or criminal liability for violating any such law or regulation.”¹⁴⁰ In other words, even if an organization adopts every practice suggested by the Guidelines, it can still have its assets frozen and its operations shut down, and, as explained in Chapter 3, there are no meaningful appeals or independent review of this action. As a result, nonprofits feel tremendous pressure to adopt the practices prescribed within the Guidelines, despite their ineffectiveness and the damage they have on the relationships charities and foundations have with local partners.

Negative Impacts: Flawed Guidelines Treated as Mandatory

Although Treasury makes multiple references within the Guidelines to their voluntariness, the reality does not support this. Minimally, the fact that the Guidelines were released by the federal agency with regulatory authority over tax-exempt organizations gives the Guidelines weight at odds with their supposed voluntariness. In addition, private organizations and other government agencies are using the Guidelines in mandatory contexts. As a result, many organizations feel compelled to follow them.

For example, when Life for Relief and Development tried to open a bank account, the bank conditioned the account on the group’s compliance with a checklist that mimicked the Guidelines’ requirements. Despite the fact that the Guidelines are supposed to be flexible, allowing organizations to adapt individual practices as they deem appropriate, the end of the checklist stated that “[i]f the answer to any of the above questions are NO, the organization should take the immediate necessary legal and administrative steps to comply with the guidelines.”¹⁴¹

The Treasury Guidelines Working Group has also learned of situations where IRS agents have asked about compliance with the Guidelines in the context of IRS audits and tax exemption applications.¹⁴² Organizations must decide whether to divert resources from charitable work to ineffective and discriminatory counterterrorism measures or to fight back, potentially losing funding and diverting time and attention away from their core mission.

Negative Impacts: List Checking

Treasury has placed a heavy emphasis on checking names against terrorist watch lists as a means of determining whether or not transactions with an employee, grantee, or other contact violate counterterrorism laws. Even though this list-checking is not required by federal law, the Guidelines put tremendous emphasis on this process, asking organizations to “conduct a reasonable search of publicly available information to determine whether the grantee is suspected of activity relating to terrorism, including terrorist financing or other support.”¹⁴³ Organizations are asked to check “key employ-

¹⁴⁰ http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf, Footnote 1.

¹⁴¹ http://www.ombwatch.org/npadv/compliance_checklist.pdf

¹⁴² http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf

¹⁴³ Guidelines, Sec. VI (B)

ees, members of the governing board, or other senior management” and “assure itself that grantees do not appear on OFAC’s master list of Specially Designated Nationals (the SDN List).” In addition, charities are told to “be aware that other nations may have their own lists of designated terrorist-related individuals, entities, or organizations pursuant to national obligations arising from United Nations Security Council Resolution 1373 (2001).”

The Guidelines never clearly explain a list-checking procedure. No definition is provided of “key employees ... or senior management,” and no clarification is given on when in the grantmaking process the lists should be checked. In addition, the Guidelines ignore complaints about the the lists, including their inaccuracy, the use of secret evidence for adding names to the lists, and the lack of clear standards for being added to or taken off the lists. Also, some foreign governments have used terrorist watch lists to suppress political opposition, making use of non-U.S. lists problematic.¹⁴⁴

Many foundations have adopted list checking as part of their grantmaking practices because they see it as an easy means of proving compliance with the Guidelines; 69 percent of respondents in a Grantmakers Without Borders survey engaged in list checking.¹⁴⁵ Many organizations that list-check use special software that costs \$500 to \$1,000 per year.¹⁴⁶ The Charles Stewart Mott Foundation requires all its grantees that re-grant Mott funds to list-check. Its website notes that “[p]ursuant to the provisions of Executive Order 13224 and the USA PATRIOT Act, the Charles Stewart Mott Foundation requires all organizations doing re-granting with Mott funds to check the terrorism watch lists issued by the U.S. government and to refrain from providing financial or material support to any listed individual or organizations.”¹⁴⁷

However, other foundations are refusing to adopt list-checking into their grantmaking practices, citing constitutional objections to the existence and application of the lists. Furthermore, many organizations see list-checking as an unnecessary burden that fails to identify terrorists. No organization surveyed by Grantmakers Without Borders encountered a true hit when

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list-checking (highlighting the comprehensive and effective due diligence that organizations are customarily engaging in). Typically when a “hit” is encountered, time and resources are wasted investigating what turns out to be a false positive. This is largely due to the extensive inclusion of common Muslim or Latino names on the SDN list.¹⁴⁸ Despite its widespread use, list-checking provides no legal protection to organizations. For example, the Holy Land Foundation was prosecuted by the U.S. government for

¹⁴⁴ <http://terrorwatchlist.org>

¹⁴⁵ Most check both their international grantees and their U.S.-based grantees against the Terrorist Exclusion List maintained by the Secretary of State and the SDGT list maintained by the Office of Foreign Assets Control.

¹⁴⁶ <http://www.mott.org/toolbox/resources/patriotact/resources.aspx>

¹⁴⁷ *Ibid.*

¹⁴⁸ “The OFAC list *How a Treasury Department Terrorist Watchlist Ensnarers Everyday Consumers*,” The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (March 2007) <http://www.lccr.com/03%202007%20OFAC%20Report.pdf>.

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providing charitable support to non-listed organizations.¹⁴⁹

The Guidelines offer no alternatives to list checking and do not acknowledge circumstances when list checking is not necessary, such as when a grantee is well known to the grantmaker. As an alternative, the Council on Foundations recommends four steps: assess the risk that a grant will wind up in the hands of terrorists; based on the outcome of the risk assessment, decide whether an anti-terrorism compliance program is necessary; if a compliance program is needed, devise and implement a program that is appropriate; and finally, document all the steps taken.¹⁵⁰ At the end of the day, effective prevention of diversion of funds comes down to organizations knowing their grantees and establishing relationships that encourage trust and transparency.

Negative Impacts: Certification Requirements

The Guidelines also call for charities to include certification language in all grant agreements. While the language of these certifications may seem harmless to U.S. organizations accustomed to signing certifications on everything from anti-discrimination to conflict of interest policies, they can have a much different effect on non-U.S. organizations. Terry Odendahl, the 2004-2005 Neilson Chair on Philanthropy at the Georgetown Public Policy Institute, conducted a survey on programmatic changes within foundations due to the Guidelines. She found that among foundations that had adopted certification language, the program officers viewed the certification language as “useless and embarrassing, damaging trust in their work with the very groups that could make a difference in improving the conditions that lead to terrorism.”¹⁵¹

The Guidelines suggest specific language for grantee certifications:

You will take all reasonable steps to ensure that your organization does not and will not knowingly provide material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.¹⁵²

Grantmakers Without Borders questioned the effectiveness of certification language in a 2006 letter written to Treasury, saying, “It is doubtful that an individual with malevolent purposes would hesitate to sign such an agreement. It would be more productive to suggest more traditional methods that create transparent relationships that inspire trust and confidence.”¹⁵³ Despite these concerns, many foundations have adopted certification language into their grant agreements, including the Ford Foundation,¹⁵⁴ the

¹⁴⁹“Prosecutors Say Charity Aided Terrorists Indirectly,” *The New York Times* (Sept. 18, 2007), at <http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html>.

¹⁵⁰ <http://www.cof.org/files/Documents/Newsletters/InternationalDateline/2004/LD2Q2004.pdf>

¹⁵¹ Georgetown Public Policy Institute’s Center for Public & Nonprofit Leadership Presents “Safeguarding Charity in the War on Terror” (June 14, 2005).

¹⁵² Guidelines, Sec. VI B (6).

¹⁵³ http://www.internationaldonors.org/news/gwob_letter_122206.pdf

¹⁵⁴ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004).

Charles Stewart Mott Foundation,¹⁵⁵ and the Kellogg Foundation.¹⁵⁶

Most grantees feel they are powerless to oppose certification language. Odendahl noted in her report that “numerous groups, particularly in the global south that have been defunded or believed that they are about to be fear such action as a consequence of refusing certification.”¹⁵⁷ Unfortunately, few groups were willing to go on the record “because they are justifiably concerned that once identified this way they might lose even more scarce grant money.”¹⁵⁸ In 2004, the ACLU and the Drug Policy Alliance very publicly rejected grants from the Ford and Rockefeller Foundations, citing certification language as the reason.¹⁵⁹ The executive director of the ACLU, Anthony Romero, commented that “the language of the contracts governing the Ford and Rockefeller grants was broad and ambiguous, leaving them open to interpretation that could impede free speech and limit advocacy work not only at [the ACLU] but also at other nonprofits.”¹⁶⁰ The Drug Policy Alliance issued a press release titled “We’ve Paid a Price for Free Speech,” referring to the grant money it lost by refusing certification.¹⁶¹

Case Study: The Guidelines’ Influence and the Combined Federal Campaign

Operated out of the U.S. Office of Personnel Management, the Combined Federal Campaign (CFC) is the largest workplace charitable giving campaign in the world; in 2006, it collected \$271 million in donations.¹⁶² Through the CFC, federal government employees may contribute to participating charities and foundations by deducting donations from their paychecks. Charities and foundations must undergo an extensive application process to participate in the CFC, providing specific information about their auditing, governance, and program functions, as well as a completed and signed copy of their IRS Form 990 for their most recent fiscal year.¹⁶³

In 2004, the CFC began to require participating charities and foundations to sign a funding agreement certifying that they did not “knowingly employ individuals or contribute funds to organizations” found on terrorist watch lists created by the U.S. government, United Nations, or European Union. If a matching name was found, the organization was required to notify the CFC within 15 days. Mara Paternoster, then the CFC Director, was quoted in *The New York Times* as saying that organizations participating in the CFC had an affirmative duty to check their employees against the watch

¹⁵⁵ <http://www.iaa.com/resources/PatriotAct.pdf>, p. 40.

¹⁵⁶ Interview by GWOB, anonymous source.

¹⁵⁷ Terry Odendahl, Georgetown Public Policy Institute’s Center for Public & Nonprofit Leadership Presents “Safeguarding Charity in the War on Terror” (June 14, 2005).

¹⁵⁸ *Ibid.*

¹⁵⁹ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004). See also Ian Wilhelm, “Charity Returns Grant Money Over Antiterrorism Provision,” *The Chronicle of Philanthropy* (Dec. 9, 2004).

¹⁶⁰ Stephanie Strom, “A.C.L.U. Rejects Foundation Grants Over Terror Language,” *The New York Times* (Oct. 19, 2004).

¹⁶¹ Ian Wilhelm, “Charity Returns Grant Money Over Antiterrorism Provision,” *The Chronicle of Philanthropy* (Dec. 9, 2004).

¹⁶² “History of Charitable Fundraising Within the Federal Service,” Office of Personnel Management, available at https://www.opm.gov/cfc/html/cfc_hist.asp. “CFC Rings the Register With Fourth Consecutive Record-Setting Charity Drive” (July 26, 2007) Office of Personnel Management, available at <http://www.opm.gov/news/cfc-rings-the-register-with-fourthconsecutive-recordsetting-charity-drive,1204.aspx>.

¹⁶³ <http://www.opm.gov/cfc/html/faq.asp#Charitable>

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lists.¹⁶⁴

CFC participants that tried to accommodate this new requirement had minimal guidance, unsure if the names of volunteers, consultants, vendors, trustees, or partner organizations should be checked. Other organizations withdrew from the CFC program in protest.¹⁶⁵ For Amnesty International, this meant sacrificing an expected \$330,000 in CFC donations.¹⁶⁶ Still other organizations called for the policy to be withdrawn, citing inaccuracies and ambiguities on the lists, as well as the unnecessary administrative burden.¹⁶⁷

By Nov. 10, 2004, when there was no change in the CFC program, the ACLU led a group of charities, including OMB Watch, that filed a lawsuit in the U.S. District Court for the District of Columbia.¹⁶⁸ The complaint alleged that the CFC policy violated the First Amendment rights of participating charities and foundations and was made without the required open rulemaking process.¹⁶⁹ At a press conference announcing the lawsuit, Mitch Bernard, litigation director for plaintiff Natural Resources Defense Council, said, “Turning law abiding charities into government agents imposes an illegitimate burden on civic and religious groups.” Bernard also noted that the lists are developed in secret, and “often lack even the most basic information for screening out mismatches against common names.”¹⁷⁰ The undue influence of the Guidelines became clear in February 2005 when the Department of Justice, representing CFC, filed a motion to dismiss the case, claiming the Guidelines as authority for the CFC requirement and noting similar certifications by private foundations as justification.¹⁷¹

Shortly after the lawsuit was filed, the CFC issued “corrective” guidance,¹⁷² clarifying its earlier regulations. Participating organizations were now required to check employees (but not volunteers, consultants, or vendors), all cash donors (not in-kind contributors), and exclude recipient regrants. The memo did not provide information on how often to check the lists but clearly indicated that lists must be checked for the annual application to qualify as a CFC participant. It further explained that if a match is found at the time of application, even if it is a false positive, the group “may not complete the certification and will be denied participation in the CFC.”¹⁷³ After a charity is accepted in the program, the rule would have required any later match to be reported to the Office of Personnel Management “immediately.” The “appropriate” steps would then be taken against the reporting organization, which could include suspension from the

¹⁶⁴ Adam Liptak, “A.C.L.U. Board Is Split Over Terror Watch Lists,” *The New York Times* (July 31, 2004). Available at <http://query.nytimes.com/gst/fullpage.html?res=9803E4D71E3DF932A05754C0A9629C8B63>.

¹⁶⁵ ACLU Press Release Citing Government “Blacklist” Policy, “ACLU Rejects \$500,000 from Funding Program” (July 31, 2004) at <http://www.aclu.org/safefree/general/18526prs20040731.html>.

¹⁶⁶ Amnesty International Press Release (Nov. 10, 2004).

¹⁶⁷ See Statements From Nonprofits Challenging The CFC Watch-List Policy (Aug. 12, 2004) at <http://www.aclu.org/safefree/general/18518res20040812.html>.

¹⁶⁸ http://www.aclu.org/FilesPDFs/cfc_complaint.pdf

¹⁶⁹ *Ibid.*

¹⁷⁰ <http://www.aclu.org/FilesPDFs/nrdc.pdf>

¹⁷¹ Defendant’s Motion to Dismiss, *ACLU et al. v Office of Personnel Management*, U.S. District Court (D.C) No. 1:04cv01958 EGS, Feb. 7, 2005, available at <http://www.ombwatch.org/npa/CFCMtnDismiss.pdf>.

¹⁷² CFC Memorandum 2004-12.

¹⁷³ *Ibid.*

program, retraction of funds already disbursed, and notification of “investigative and/or enforcement authorities.”

In November 2005,¹⁷⁴ the CFC shifted its position away from mandatory list checking, instead proposing new certification language that permitted participating charities and foundations to determine internally how best to comply with counterterrorism measures. The new certification states:

I certify that the organization named in this application is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U.S. Department of the Treasury’s Office of Foreign Assets Control. The organization named in this application is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanctions program can be found at <http://www.treas.gov/ofac>. Should any change in circumstances pertaining to this certification occur at any time, the organization will notify OPM’s Office of CFC Operations immediately.¹⁷⁵

Many organizations applauded this new approach.¹⁷⁶ On Nov. 7, 2005, the Office of Personnel Management formally withdrew the list-checking requirement. As a result, the lawsuit was voluntarily dismissed.¹⁷⁷

Despite improvements to the final rule, the Guidelines are still referenced within the introduction to the CFC regulation and portrayed as the best standard of compliance: “Charities, however, as a minimum, should follow the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines . . . even though OPM will not mandate list-checking by applicants for the 2006 and subsequent campaigns, it continues to encourage charities to check the SDN List and the TEL as a way to help ensure compliance with applicable regulations and as an important part of implementing the type of risk-based compliance program proposed by the Guidelines.” Consequently, the organizations that challenged the CFC policy could only claim a partial victory. They successfully eliminated mandatory list-checking but failed to completely squelch the Guidelines’ influence.

The Risk Matrix for the Charitable Sector

In March 2007, without public announcement or comment, OFAC published the Risk Matrix on its website. The Risk Matrix is directed toward grantmakers, particularly

¹⁷⁴ *Federal Register*: March 29, 2005 (Volume 70, Number 59) Proposed Rules, pp. 15783-15784 at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-6023.htm>.

¹⁷⁵ *Federal Register* 70, Nov. 7, 2005, at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-22186.pdf>.

¹⁷⁶ “CFC Shifts Position on Terrorist List Checking,” *OMB Watcher* (April 4, 2005).

¹⁷⁷ 5 C.F.R. Part 590 at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-22186.pdf>.

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foundations with international programs. It asks organizations to apply a formulaic chart of ambiguous factors, eventually branding each grantee or grantmaking practice as “high,” “medium,” or “low” risk. Treasury recommends that the higher the risk, the more voluntary practices a grantmaker should adopt from the Guidelines.

This action ignored a June 2006 request¹⁷⁸ from the Treasury Guidelines Working Group asking Treasury for a public comment period. The Working Group wrote, “We believe that there should be an opportunity for interested groups to comment on the risk matrix before it is issued in final form. We believe the risk matrix is more likely to be a useful document if it is informed by the experience of foundations that make grants internationally and public charities that conduct activities overseas.” Within footnote 5 of the Risk Matrix, OFAC implies consultation with the charitable community by thanking the American Bar Association’s Committee on Exempt Organizations of the Section of Taxation for its “instructive comments on risk factors.”¹⁷⁹ However, these comments were informally given, without the endorsement of the ABA, to the IRS (not OFAC), in response to a request on how charities operate their international programs. They were not intended to be the basis of a “risk matrix.” Few organizations have found the risk matrix useful, and it is questionable if any are using it. Immediately following its release, Grantmakers Without Borders called for its withdrawal.¹⁸⁰

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The factors used within the Risk Matrix unfairly label U.S. grantmakers that fund emerging, grassroots organizations overseas as engaging in “high risk” behavior. Coined as social change

philanthropy, it is these types of grants that often result in bottom-up development and empower local communities to address the social, economic, and environmental inequalities within their communities. The Risk Matrix stigmatizes this valuable and legitimate form of grantmaking and discourages other U.S. funders from adopting similar missions and supporting similar grantees. Treasury ignores the fact that it is done with the same degree of care and professionalism as other means of philanthropy. As a result, the Risk Matrix can force local communities out of their own development picture.

The risk factors listed within the Risk Matrix shed little light on what circumstances constitute a “high” risk situation. For example, organizations with a history of legitimate charitable activities are considered “low” risk, and organizations that have little or no history are “high” risk. However, recent scandals at the Smithsonian Institution and the American Red Cross demonstrate that even organizations with a long history of legitimate charitable activities are susceptible to corruption.¹⁸¹ Charities working in conflict zones or “regions known to have a concentration of terrorist activity” are deemed

¹⁷⁸ Treasury Guidelines Working Group Letter to Under Secretary Levey for Terrorism and Financial Intelligence, June 19, 2006. Available at http://www.ombwatch.org/npadv/PDF/public_comment_riskmatrix.pdf.

¹⁷⁹ Risk Matrix, Footnote 5.

¹⁸⁰ http://www.internationaldonors.org/advocacy/GwoB_Treasury_Letter-Risk_Matrix.pdf

¹⁸¹ Floor speech of Sen. Charles Grassley, Ranking Member, Senate Finance Committee, March 19, 2007, at <http://finance.senate.gov/press/Gpress/2007/prg031907h.pdf>

“high” risk, without providing any guidance on what regions meet these criteria. The Risk Matrix asks grantmakers to supplant traditional methods of due diligence with a series of risk factors, despite the fact that the location or age of an organization provides little insight into the actual use of a charitable grant. Few grantmaking tools more effectively guarantee that funds are used for their intended charitable purpose than the grantor/grantee relationship and the mutually agreed upon standards of transparency and accountability they entail. Rooted in the long-standing practice of “knowing your grantee,” strong relationships promote trust and transparency while respecting the complicated realities that exist for a grantee. This is a more effective deterrent to terrorism than the poorly conceived Risk Matrix.