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December 19, 2017

Re: Discussion Draft: Counterterrorism and Illicit Finance Act of 2017

Dear Chairman Pearce, Ranking Member Perlmutter, Chairman Hensarling and Ranking Member Waters,

I am writing on behalf of the Charity & Security Network to submit comments for the record in the November 29, 2017 joint hearing “Legislative Proposals to Counter Terrorism and Illicit Finance.” We appreciate your attention to the important issue of protecting the financial system, as nonprofit organizations depend on banking services in order to operate their programs.

The Charity & Security Network is a resource center for diverse nonprofits stakeholders that support legal frameworks that protect their ability to provide essential services around the world. We see this mission as complementary to anti-money laundering and counterterrorist financing (AML/CFT) goals.

We agree that the Bank Secrecy Act and related laws (BSA) are outdated and need to be modernized to keep pace with changes in the global financial system and technological advances. A combination of factors, including lack of clarity on regulatory expectations for banks and enforcement action under the current system, has contributed to the global trend of “derisking,” the practice of financial institutions limiting or ending their relationships with customers due to perceived risk of AML/CFT sanctions. This trend has well-documented, widespread effects on a variety of stakeholders, including nonprofit organizations (NPOs) that operate international programs and money service businesses, as well as on correspondent banking relationships.¹

The need to address this issue is pressing. Customers that lose accounts or are unable to move money through the regulated financial system are forced to use less transparent, safe and regulated channels, undermining AML/CFT goals. There is widespread recognition that this problem needs to be addressed, with the Financial Action Task Force (FATF) making inappropriate derisking a priority.²

¹ World Bank/ACAMS “Stakeholder Dialogue on De-risking: Findings and Recommendations” 2016 Available online at <http://files.acams.org/pdfs/2016/Derisking-Final.pdf>, Center for Global Development, “Unintended Consequences of Anti-Money Laundering Policies for Poor Countries” 2015 Available online at <https://www.cgdev.org/sites/default/files/CGD-WG-Report-Unintended-Consequences-AML-Policies-2015.pdf>, Global Center for Cooperative Security and Oxfam America, “Understanding Bank De-risking at Its Effects on Financial Inclusion” 2015 Available online at <http://www.globalcenter.org/wp-content/uploads/2015/11/tr-bank-de-risking-181115-en.pdf>

² <http://origin.misc.pagesuite.com/pdfdownload/49562644-b850-4c9e-837c-6ef888bc5e3f.pdf>

Given the central role the U.S. financial system and its impact on the global financial system, the U.S. is in a unique position to take action that will reverse the derisking trend. We urge the committee to broaden its discussion of BSA modernization and take a comprehensive approach that will address the derisking problem and provide relief to both banks and their customers.

The negative impact of derisking

The testimony of John Byrne of the Association of Certified Anti-Money Laundering Specialists (ACAMS) noted the “collateral damage that can and does occur with confusion regarding risk in today’s AML regime.” He said that “derisking” by banks is often a logical response to the uncertain regulatory environment, and “impacts access to the traditional banking sector and has harmed victims in conflict zones from receiving funding for water, utilities and other resources.”

U.S. NPOs that operate internationally have been hard hit by derisking, to the detriment of their programs, especially those that provide life-saving assistance to civilians affected by conflict and disaster. In February this year we published the first empirical study³ of the financial access problems U.S. nonprofits are experiencing, using IRS data and responses to a statistical scientific sample survey. The results, accurate within a 5.4% margin of error, show that:

- 2/3 of all U.S. nonprofits that work abroad are having financial access difficulties
- Delays in wire transfers, which can last up to several months, are the most common problem, affecting 37% of nonprofits
- 15% of nonprofits report having these problems constantly or regularly
- Transfers to all parts of the globe are impacted; the problem is not limited to conflict zones or fragile and failing states
- When money cannot be transmitted in a timely manner, 42% of nonprofits report that they carry cash.
- One-third of NPOs have experienced fee increases, and 26% have faced additional, unusual documentation requests that can significantly delay program delivery.

Contradictory standards: strict liability v. the risk-based approach

Since the 2001 amendments to the BSA, the global regulatory framework for AML/CFT has evolved away from strict liability, check-the-box compliance standards to a risk-based approach. The FATF has been a leader in this change, aiming for greater effectiveness in AML/CFT programs. In its December 2016 evaluation report on the U.S., FATF has noted that:

“Measures applied to NPOs are risk-based, and focused on targeted outreach and engagement with NPOs most at risk for abuse by terrorists. Striking the right balance and avoiding the disruption of legitimate NPO activities can be challenging, particularly in higher-risk conflict zones. As violations of TF-related TFS⁴ are strict liability offenses,

³ Sue Eckert, Kay Guinane and Andrea Hall, “Financial Access for U.S. Nonprofits,” Charity & Security Network February 2017 Available online at <https://www.charityandsecurity.org/FinAccessReport>

⁴ Terrorist financing and Terrorist financing sanctions

the authorities should continue to work with the NPO community to understand and mitigate the real TF risks that exist, while engaging stakeholders on banking challenges that some NPOs may face when working in conflict zones. The U.S. authorities are aware of the continuing challenges in this difficult area and are encouraged to continue their efforts, including work with the private sector.” [paragraph 234]⁵

To truly modernize the BSA, Congress should clearly incorporate the proportionate, risk-based approach FATF calls for and eliminate strict liability standards. This could give greater clarity to banks and increase their willingness to serve NPO customers.

Solutions in development

Responding to the multiple stakeholders with financial access problems and the frustrations of banks dealing with regulatory uncertainty and often inconsistent messages from bank examiners and policymakers, earlier this year the World Bank and ACAMS launched a multi-stakeholder dialogue to tackle financial access barriers to NPOs. The effort involves regulators, banks and NPOs and is moving forward.

We encourage the committee members to engage with these stakeholders on the causes of derisking and explore how Congress (and BSA modernization) can be part of the solution.

Comments on the draft bill

While we urge the committee to take a more comprehensive approach than the Discussion Draft provides, we also have some initial comments on some of its proposals that we urge you to consider. They are:

- *Customer data privacy:* how would the proposed increased information sharing impact the privacy of data provided by customers? Banks often ask NPOs very detailed questions, sometimes involving confidential information, about the specifics of their programs, donors, staff and leadership. We are concerned about the impact of information sharing on the privacy and confidentiality of this information, particularly if shared with foreign governments. This issue needs further research and clarification.
- *Beneficial ownership:* We support proposed section 5333(d)(2)(C)(xiii) which excludes churches, charities and other nonprofit entities that are recognized as tax-exempt by the Internal Revenue Service and file required annual returns, such as Form 990, from beneficial ownership reporting. This recognizes the extensive information nonprofits provide to the IRS and the fact that, because nonprofits’ resources must benefit the public, they do not have “owners.”

⁵ Financial Action Task Force, “Mutual Evaluation of the United States” December 2016 Available online at <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html>

Conclusion

The hearing statements and testimony clearly pointed out the need to update the BSA. We encourage the committee to take a comprehensive approach that establishes a framework based on a proportionate, risk-based approach that facilitates use of transparent and regulated financial channels.

We stand ready to engage with the committee to provide additional information, answer questions and work cooperatively toward a constructive outcome.

Yours truly,

A handwritten signature in black ink that reads "Kay Guinane". The signature is written in a cursive style with a prominent initial "K" and a long, sweeping underline.

Kay Guinane, Director