Inter-American Commission on Human Rights
Written Submission in Support of the Oral Testimony on

Restrictions on Financial Access for U.S. Nonprofit Organizations

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Thank you for the opportunity to present this testimony on financial access restrictions on U.S. nonprofit organizations. This issue presents a serious concern regarding freedom of association in the U.S., as organizations doing work abroad struggle to maintain their U.S. bank accounts and to send funds to their programs in foreign countries. This problem, commonly known as "derisking," impedes nonprofit organizations' ability to carry out their missions, whether that be in education, the arts, development, health care or humanitarian aid.

Introduction and Context

In recent years, access to financial services has become increasingly difficult for nonprofit organizations (NPOs) based in the United States that must conduct international financial transactions in order to operate overseas. Financial institutions (FIs) may delay, or refuse to make, transfers between organizations. Sometimes, NPOs are turned away as customers or have their accounts closed. A Charity & Security Network (C&SN) report, published in February 2017, established that these financial access problems are systemic, global and require urgent action by multilateral organizations, government, financial institutions, and NPOs.

This problem has developed over time, as a number of factors, including anti-money laundering (AML) and countering the financing of terrorism (CFT) regulatory obligations and oversight of FIs, have led to the phenomenon of "derisking." This refers to the trend of financial institutions terminating or restricting business relationships to avoid rather than manage risk. The most frequently mentioned driver of derisking, as cited by FIs, is the concern for running afoul of AML/CFT requirements.

Very large sums of money flow to and from illicit sources in the global financial system, and the U.S. counterterrorism laws use U.S. financial institutions as the first line of defense against terrorist financing and money laundering (AML/CFT). Banks are expected to act as monitoring and enforcement arms of government to identify, track and stop illicit money flows. This has increased banks' compliance costs substantially.

In addition, aggressive enforcement of the Bank Secrecy Act and AML/CFT laws compounds the "derisking" problem. Several major banks have received substantial fines for their role in terrorist financing and money laundering, which has had a chilling effect on other banks. In addition, federal bank regulators in the U.S. use an outdated manual that sets out the framework for intense review of bank practices, prodding bank examiners to push banks to conduct extensive due diligence on all NPOs, which can cost substantial time and resources.

Past statements from the Financial Action Task Force (FATF), a global standard setting body for AML/CFT laws, have classified NPOs as being "particularly vulnerable" to terrorist abuse, although such abuse is extremely rare**.** Although FATF eliminated such language from its recommended anti-terrorist financing policy for NPOs in June 2016, this outdated view persists in country-level regulation. Add to this the fact that most NPOs requiring international banking services are small and do not represent a significant source of income for banks. Therefore, the risk-benefit calculation is heavily weighted in favor of dropping these clients.

Background

Freedom of Association Includes Right to Access and Utilize Resources

Overview

Failure to facilitate financial access for U.S. NPOs violates the obligations of the United States under international law to respect and enable freedom of association. The ability to seek, secure and use resources is essential to the existence and effective operations of all associations.

The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.[1] The term "resources" encompasses a broad concept that includes financial transfers (e.g., donations, grants, contracts, sponsorships, social investments, etc.).[2] These legal obligations not only call upon States to avoid restricting civil society in its freedom of association, but also to *facilitate* access to funding.[3]

State laws and policies regarding resources significantly impact freedom of association "[F]or associations promoting human rights, including economic, social and cultural rights, or those involved in service delivery (such as disaster relief, health-care provision or environmental protection), access to resources is important, not only to the existence of the association itself, but also to the enjoyment of other human rights by those benefitting from the work of the association. Hence, undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole."[4]

International Law

The right to association is enshrined in international human rights law. The American Declaration on the Rights and Duties of Man ("American Declaration"), which is a source of legal obligations for the United States as a member of the Organization of American States, protects the right of association (Article XXII)[5]. This right is similarly provided for in other international human rights instruments, including the Universal Declaration of Human Rights (Article 20), as well as treaties that are legally binding on the United States, including the International Covenant on Civil and Political Rights[6] (ICCPR), specifically Article 22. The American Convention on Human Rights also provides for the freedom of association.[7]

In communication No. 1274/2004, the UN Human Rights Committee observed that "the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by

[1] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, April 24, 2013, par. 8. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

[2] Ibid., par. 10

[3] A/HRC/32/36, May 31, 2016, Par 91.

[44] Ibid. par 9

[5] https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm

[6] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[7] http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm

article 22 extends to *all activities of an association* […] (emphasis added)."[8] Therefore, Article 22 applies to the ability to access and utilize funds.

Article 6(f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly resolution 36/55) explicitly refers to the freedom to access funding, stating that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the freedom "to solicit and receive voluntary financial and other contributions from individuals and institutions."[9]

Other United Nations treaty bodies have emphasized the obligation of States to allow civil society to seek, secure, and utilize resources. Article 13 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[10] states, "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration." Although the Declaration is not a binding instrument, it was adopted by consensus by the General Assembly and contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding.[11]

Similar to the American Convention, the ICCPR provides that the right of association shall be subject only to restrictions that "are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[12] While countering terrorism and its financing are legitimate grounds for restricting freedom of association, international human rights law must be respected while doing so. Former UN Special Rapporteur Maina Kiai's interpretation of the ICCPR, as outlined in his 2013 report, states that in the realm of counter-terrorism financing laws, "the onus is on the Government to prove" that restricting the rights of civil society will promote security.[13] In order to meet the proportionality and necessity test in human rights law, he explains, restrictive measures must be the *least intrusive* means to achieve the desired objective.[14]

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[8] Human Rights Committee, communication No. 1274/2004, Korneenko et al. v. Belarus, Views adopted on 31 October 2006, para. 7.2.

[9] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, A/RES/36/55, November 25, 1981, http://www.un.org/documents/ga/res/36/a36r055.htm .

[10] General Assembly resolution 53/144, annex. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement

[11] The American Convention on Human Rights, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

[12] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

[13] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, April 24, 2013, par. 23. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

[14] On the principle of proportionality, which is also applied to other rights protected by the Covenant, such as freedom of expression, see Official Records of the General Assembly, Fortyninth Session, Supplement No. 40 (A/49/40), vol. II, sect. AA, communication No. 458/1991, Womah Mukong v. Cameroon, communication No. 458/1991, Views adopted on 21 July 1994.

FATF Sets the Stage for Counter-Terrorism Financing Laws

When FATF first established Special Recommendation VIII in 2001, it pronounced that NPOs are "particularly vulnerable" to terrorist abuse. This language remained when FATF adopted SRVIII as R8 in 2012. However, in June 2016, FATF removed the "particularly vulnerable" language, putting in its place a recommendation for a risk-based approach that is proportionate and avoids disrupting the activities of legitimate NPOs.

Although the letter of sanctions law in the U.S. imposes "strict liability" for violations,[15] international standards have been moving toward a more flexible risk-based approach (RBA) for nearly a decade. The FATF is the primary driver of this trend. FATF first introduced the RBA in 2007 to help ensure that measures to prevent money laundering and terrorist financing threats are commensurate to the risks identified. Previous approaches resulted in a "check the box" method of paper compliance rather than focusing on effective means to combat ML/TF. The RBA was formally adopted in 2012 as Recommendation 1.

The intention of the RBA was clear: to create a more pragmatic, flexible and rational approach in which the focus shifted to address actual risks through controls based on customers and the precise risks they posed. A series of guidance documents described how various sectors, including FIs and governments, could implement the RBA.[16] While the RBA moved the international standard away from an emphasis on technical compliance in favor of regulation that is effective, implementation of the RBA is an evolving process, as all stakeholders, including governments, NPOs and FIs, find ways of adjusting to these new methods.

U.S. Legal Framework

<u>Sanctions and Prohibition on Material Support</u>

The U.S. maintains an extensive system of sanctions on various countries and non-state armed groups in an effort to counter terrorism, narcotics trafficking and human rights abuses, among other reasons. When a group or country is sanctioned, their assets subject to U.S. jurisdiction are frozen. All transactions with them are prohibited, including transactions by FIs or NPOs.[17] The U.S. Treasury Department administers sanctions programs, and its Office of Foreign Assets Control (OFAC) can issue licenses that permit otherwise-banned transactions. Sanctions add to the compliance burdens on banks and NPOs and can have a compounding effect to AML/CFT requirements. In addition, the criminal prohibition against providing material support to Foreign Terrorist Organizations has been incorporated into the sanctions regime through Executive Order (EO) 13224.

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[15] 50 U.S.C. § 1705; Financial Action Task Force & Asia/Pacific Group on Money Laundering, "United States Mutual Evaluation: Anti-Money Laundering and Counter-Terrorist Financing Measures," at 88, December 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf.

[16] See Financial Access Task Force, "Guidance for a Risk-Based Approach: Effective Supervision and Enforcement by AML/CFT Supervisors of the Financial Sector and Law Enforcement," October 2015, http://www.fatf-gafi.org/media/fatf/documents/reports/ RBA-Effective-supervision-and-enforcement.pdf; Financial Access Task Force, "Guidance for a Risk-Based Approach: The Banking Sector," October 2014, http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf.

[17] Limited exemptions apply. 50 U.S.C. § 1702(b).

In the U.S., the legal framework governing sanctions and AML/CFT has changed little since 9/11 and does not adequately reflect the RBA set forth by FATF.[18] Although U.S. officials have articulated support for the RBA as policy, it is not a legal standard.[19]

Risk-based Approach

Under the RBA, each FI undertakes its own internal risk assessment, tailoring its ML/TF threat management program to its clients in order to manage risk effectively. This is a complicated and resource-intensive task because more work is required at the front end: FIs are expected to understand and assess specific risks and adopt policies to address them. This resulted in varying interpretations by FIs, leading to confusion within the industry. Banks have struggled to implement the RBA and have experienced significant variation and subjective determinations from federal regulators.

This complexity of the RBA was noted by the U.S. Comptroller of the Currency in 2016 when he said, "Banks must choose whether to enter into or maintain business relationships based on their unique business objectives, careful evaluation of the risks associated with particular products or services, evaluation of customers' expected and actual activity, and an assessment of banks' ability to manage those risks effectively. That's no easy task, given the complex environment in which banks operate. Multiple financial regulatory, law enforcement, and other agencies are involved in almost every situation."[20]

The Bank Secrecy Act and the USA PATRIOT Act

For more than 45 years, the Bank Secrecy Act (BSA) has been a cornerstone of U.S. AML policies, anchoring the broad initiative to curb abuse of FIs. In October 2001, Congress passed the USA PATRIOT Act amending the BSA to, among other things, protect the U.S. and international financial system against the threat of terrorism through powerful new authorities to counter the financing of terrorism. To better protect the gateway to the financial system—correspondent accounts— Title III of the Patriot Act imposed new requirements on U.S. FIs to restrict certain types of foreign accounts, implement minimum due diligence and record keeping procedures, verify customer identification and beneficial ownership and adhere to U.S. sanctions.[21] The purpose was to deter the use of financial institutions by terrorist financiers and money launderers and to assist law enforcement efforts through the creation of an audit trail to identify and track terrorist suspects through financial transactions.

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[18] The FATF Mutual Evaluation Report of the U.S. notes that, "The obligation of FIs to implement T[errorist] F[inancing]-related S[sanctions] is an absolute strict liability one." United States Mutual Evaluation at 105.

[19] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See material support provision at "Providing Material Support to Terrorists," 18 U.S.C. § 2339B and the International Emergency Economic Powers Act Title II of Pub.L. 95–223, 91 Stat. 1626 See 50 USC 1701 et. seq.

[20] Remarks by Thomas J. Curry, Comptroller of the Currency, before the Association of Certified Anti-Money Laundering Specialists 15th Annual Anti-Money Laundering and Financial Crime Conference, September 28, 2016, https://www.occ.treas.gov/news-issuances/speeches/2016/pub-speech-2016-117.pdf.

[21] For background, see Sue E. Eckert, "The US Regulatory Approach to Terrorist Financing," in Countering the Financing of Terrorism (Thomas J. Biersteker and Sue E. Eckert, ed., 2008). The U.S. Patriot Act, enacted on October 26, 2001, is an acronym for the "United and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism," PL 107-56.

FIs became part of the long arm of American law enforcement as they began playing a new role as the first line of defense against terrorism financing. New agencies were created within the Treasury Department (such as the Office of Terrorism and Financial Intelligence), and significant new resources were allocated to fight illicit finance.

As they have developed, AML/CFT measures constitute a complex system of regulatory requirements for FIs[22] that include: freezing transactions and assets, maintaining records and reporting high-risk transactions and suspicious activities; self-disclosures of cross-border movement of certain products (e.g., currency, monetary instruments) and financial accounts held in foreign jurisdictions; collection and verification of information on customers and beneficial owners and sharing of information with other financial institutions, regulatory authorities and law enforcement.[23] In the wake of the 2008 financial crisis, the Dodd-Frank Act in 2010 further amended the BSA with increased regulatory obligations for FIs and other regulated entities.[24]

Application of CFT Regime to Nonprofit Organizations

After the 9/11 attacks, the Bush Administration adopted a narrative of charities as "significant source of funds" for terrorist financing.[25] In the following years, greater information on terrorist financing threats and a more nuanced and evidence-based view emerged. Most examples of terrorist's abuse of charities involved non-U.S. organizations. The 9/11 Commission's Staff Monograph[26] found that extensive investigation "revealed no substantial source of domestic financial support" for the 9/11 attacks.

In 2015, the Department of Treasury issued a National Terrorist Financing Risk Assessment,[27] which discussed major sources of terrorist financing. While noting that "some charitable organizations, particularly those based or operating in high-risk jurisdictions, continue to be vulnerable to abuse for TF," the National Terrorist Financing Risk Assessment references sham or front organizations as the greatest threat to the nonprofit sector, rather than legitimate NPOs. The report stated, "there has been a shift in recent years towards individuals with no connections to a charitable organization recognized by the U.S. government soliciting funds under the

[22] The PATRIOT Act also expanded the range of institutions subject to BSA requirements to encompass all financial institutions, including money transmitters, security brokers/dealers, insurance companies and currency exchangers.
[23] For an overview of the U.S. AML/CFT regime, see Protiviti, "Guide to U.S. Anti-Money Laundering Requirements: Frequently Asked Questions," November 2014, https://www.protiviti.com/sites/default/files/united_states/insights/guide-to-us-aml-requirements-6thedition-protiviti_0.pdf.
[24] The Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, P.L. 111-203).
[25] The Role of Charities and NGOs in the Financing of Terrorist Activities: Hearing Before the Subcommittee on International Trade & Finance of the Senate Committee on Banking, Housing, and Urban Affairs, 107th Cong. (2002) (statement of Kenneth W. Dam, Deputy Secretary, U.S. Department of Treasury), https://www.gpo.gov/fdsys/pkg/CHRG-107shrg89957/html/CHRG-107shrg89957.htm.
[26] John Roth, Douglas Greenberg, and Serena Wille, Staff Report to the Commission, "National Commission on Terrorist Attacks upon the United States: Monograph on Terrorist Financing" at 3, 2004, http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf.
[27] Department of Treasury, "National Terrorist Financing Risk Assessment 2015," at 11, 2015, https://www.treasury.gov/ resource-center/terrorist-illicit-finance/Documents/National%20Terrorist%20Financing%20Risk%20Assessment%20 %E2%80%93%2006-12-2015.pdf.

auspices of charity for a variety of terrorist groups…"[28] Many features of U.S. legal and regulatory policy, however, continue to reflect the outdated view of high terrorist financing risks associated with the nonprofit sector. The original Special Recommendation VIII became embedded in various policies in the U.S. and around the world, and, as a result, the misperception that NPOs are "particularly vulnerable" still lingers today, resulting in constraints on the activities of legitimate NPOs.[29]

Enforcement

Since 9/11, U.S. agencies have intensified financial supervision and compliance examinations to ensure that the U.S. financial system is protected from ML/TF risks. Federal bank examinations are intended to set the terms for FIs' behavior regarding legal and enforcement compliance. Because enforcers of the BSA have the ability to recommend civil fines,[30] bank examiners have significant influence on FI behavior. Examinations are detail-intensive, covering a broad range of procedures and practices, from staff knowledge of emerging risks to management information systems. In particular, examination procedures assess whether bank controls offer reasonable protection from ML/FT risks, determine whether high-risk accounts are identified and monitored, and evaluate the adequacy of procedures to monitor and report suspicious activities.

Examiners' work is governed by the BSA/AML Examination Manual, which is produced by an interagency body.[31] It provides specific guidance for bank examiners to review FI compliance, including management of higher-risk customers. The Manual, last updated in 2014, includes a section on NPOs that does not reflect the June 2016 changes in FATF's R8. As such, it describes the entire sector as risky, stating, "the flow of funds both into and out of the NGO can be complex, making them susceptible to abuse by money launderers and terrorists."[32] It goes on to require FIs to conduct extensive background investigations of NPO customers, including details on their governance, financial procedures, volunteer and donor base, program operations and associations. For nonprofits that work outside the U.S., it adds the following steps: evaluating the principals; obtaining and reviewing the financial statements and audits; verifying the source and use of funds; evaluating large contributors or grantors of the NGO; and conducting reference checks. These steps not only duplicate the role of charity regulators, but go beyond confirming that the NPO has controls and risk mitigation measures in place, to require an unnecessary and unrealistic level of bank involvement in the internal affairs of its NPO customers.

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[28] Ibid., at 43.

[29] See Ben Hayes, Transnational Institute/Statewatch, "Counterterrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society," February 2012, https://www.tni.org/en/publication/counter-terrorism-policy-laundering-and-the-fatf.

[30] Federal Deposit Insurance Corporation Regulations, Risk Management Manual of Examination Policies, Sec. 14.1-3, https:// www.fdic.gov/regulations/safety/manual/section14-1.pdf; Office of the Comptroller of the Currency, Examinations: Overview, https:// www.occ.gov/topics/examinations/examinations-overview/index-examinations-overview.html.

[31] The FFIEC, an interagency body promoting uniformity in the examination and supervision of financial institutions, is comprised of the Board of Governors of the Federal Reserve System, FDIC, NCUA, OCC, CFPB, and OTS.

[32] FFIEC, "Bank Secrecy Act Anti-Money Laundering Examination Manual Bank," at 311-312, https://www.ffiec.gov/bsa_aml_ infobase/documents/bsa_aml_man_2014.pdf.

The upward trend in enforcement actions and fines against banks, along with the existing regulatory complexity in the AML/CFT/sanctions field, means that banks are facing a significant increase in compliance costs. FIs are reluctant to discuss specific spending on compliance, but some reports place the additional costs at upward of $4 billion annually. One bank reportedly employed 4,000 additional compliance staff in one year, at an additional cost of $1 billion.[33] According to a survey by ACAMS, enhanced regulatory expectations continue to represent the greatest AML compliance challenge, as cited by 60% of respondents.[34] The trend toward personal liability of compliance officers for regulatory violations further contributes to escalating costs and challenges.

Enhanced regulatory pressures, rising compliance costs and the chilling effect of enforcement actions and fines have resulted in financial institutions that increasingly withdraw from doing business with customers or regions perceived to carry higher risks. Fueled by concerns that "wrong" compliance decisions could result in reputational and regulatory costs, FIs have grown more risk-averse over the past several years. As documented by numerous policy reports and acknowledged by the FATF in October 2015, "de-risking is having a significant impact in certain regions and sectors."[35]

Derisking of NPOs

Reports of NPO problems with access to financial services began surfacing a decade ago. For example, on the eve of Ramadan in September 2006, the Federal Bureau of Investigation (FBI) conducted a raid on Life for Relief and Development, a Michigan-based organization that has been delivering humanitarian assistance around the world since the 1990s. Despite the fact that no criminal charges were filed, the publicity prompted Life's local bank to withdraw its services, thereby interrupting their humanitarian assistance programs.[36] With this event on its record, Life has continued to have problems accessing banking services, and more NPOs began reporting

[33] Laura Noonan, "Banks Face Pushback over Surging Compliance and Regulatory Costs," Financial Times, May 28, 2015, https:// www.ft.com/content/e1323e18-0478-11e5-95ad-00144feabdc0.

[34] Dow Jones & ACAMS, "Global Anti-Money Laundering Survey Results 2016," at 4, http://files.acams.org/pdfs/2016/Dow_ Jones_and_ACAMS_Global_Anti-Money_Laundering_Survey_Results_2016.pdf.

[35] See, for example, Unintended Consequences of Anti-Money Laundering Policies for Poor Countries, Center for Global Development, November 9, 2015, http://www.cgdev.org/sites/default/files/CGD-WG-Report-Unintended-Consequences-AML-Policies-2015. pdf; Tracey Durner and Liat Shetret, Understanding Bank De-risking and Its Effects on Financial Inclusion, Oxfam and Global Center on Cooperative Security, November 2015, http://www.globalcenter.org/wp-content/uploads/2015/11/rr-bank-de-risking-181115-en. pdf ("Oxfam/GCCS Study"); Withdrawal from Correspondent Banking: Where, Why, and What to Do About It, World Bank, November 2015, http://documents.worldbank.org/curated/en/113021467990964789/pdf/101098-revised-PUBLIC-CBR-Report-November-2015.pdf ; Report on the G-20 Survey on De-risking Activities in the Remittance Market, World Bank, October 2015, http:// documents.worldbank.org/curated/en/679881467993185572/pdf/101071-WP-PUBLIC-GPFI-DWG-Remittances-De-risking-Report-2015-Final-2.pdf; Report to the G20 on actions taken to assess and address the decline in correspondent banking, Financial Stability Board, November 6, 2015, www.fsb.org/wp-content/uploads/Correspondent-banking-report-to-G20-Summit.pdf; FATF, "FATF takes action to tackle de-risking," October 23, 2015, http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html.

[36] Charity & Security Network, "US Muslim Charities and the War on Terror: A Decade in Review," December 2011, http://www. charityandsecurity.org/sites/default/files/USMuslimCharitiesAndTheWarOnTerror.pdf.

similar problems.[37] While the problem initially appeared to mainly impact Muslim charities, over time it has spread to include many types of NPOs.

After several years of hearing anecdotal evidence of derisking of NPOs and the impact it was having on these groups' ability to function, C&SN undertook a study of the problem. The resulting 2017 report, *Financial Access for U.S. Nonprofits*, is based on the first-ever empirical study of this problem as it relates to U.S.-based NPOs. The study looked at U.S.-based NPOs that conduct work in foreign countries.

Utilizing the U.S. Internal Revenue Service (IRS) definition of NPOs and obtaining basic data on these groups from IRS filings, C&SN commission a random survey of a sample of these organizations. This quantitative data was supplanted with qualitative information gathered through focus groups and stakeholder interviews with NPOs, financial institutions and U.S. government regulators.

Among the report's major findings:

- 2/3 of all U.S. nonprofits that work abroad are having financial access difficulties
- 15% of nonprofits report having these problems constantly or regularly
- Delays in wire transfers, which can last up to several months, are the most common problem, affecting 37% of nonprofits
- One-third of NPOs have experienced fee increases, and 26% have faced additional, unusual documentation requests
- 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

The Prevalence and Types of Problems NPOs Encounter Vary by Program Area

The prevalence of problems encountered by NPOs vary by the types of programs they run. NPOs operating educational programs are by far the most likely to encounter obstacles to financial access (see table below). Of all nonprofits experiencing problems, 80% work in education. In addition, approximately half of those with problems are working in development and poverty reduction, humanitarian relief and/or public health.

[37] Charity & Security Network, "Life for Relief & Development v. Bank of America, NA," August 19, 2016, http://www.charityandsecurity.org/node/1434.

Prevalence of Problems by Program Area*

Program Area	Percent of All Organizations		Percent of "Traditional" Charities	
	Reporting Problems	Not Reporting Problems	Reporting Problems	Not Reporting Problems
Education	80.9	69.5	64.7	35.3
Development/poverty reduction	52.0	31.6	70.8	29.2
Humanitarian relief	49.5	35.1	66.4	33.6
Public health	45.0	27.6	73.8	26.2
Medical services	34.0	33.0	64.6	35.4
Human rights/democracy building	21.5	16.3	68.0	32.0
Peace operations/peacebuilding	16.0	8.6	73.5	26.5
Other	27.9	34.2	56.9	43.1

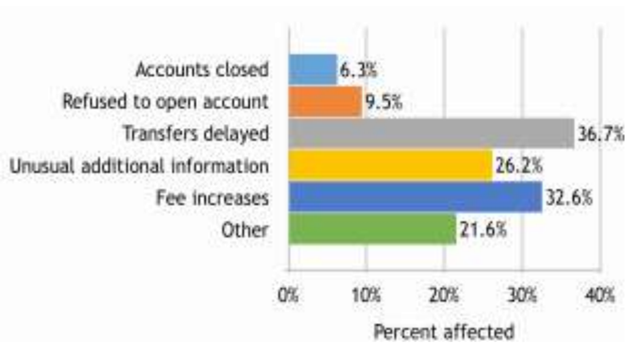
*Percentages do not total 100% because survey respondents were allowed to give more than one response.

As seen in the table above, the differences are far more pronounced when looking at "traditional" charities (larger groups or "outliers," such as universities or major health care centers, omitted). Those NPOs working in peace operations/peacebuilding, public health, development/poverty reduction, human rights/democracy building and humanitarian relief report the greatest percentage of financial access problems.

Fund Transfers Are the Most Common Banking Problem NPOs Face

The two most common problems encountered by NPOs are delayed wire transfers (affecting almost 37% of all NPOs) and increased fees (affecting approximately 33%). One out of every three NPOs has experienced either or both of these problems in attempting to utilize traditional banking channels to send resources to foreign countries (see graph below).

Prevalence of Financial Access Problems*



*Percentages do not total 100 % because survey respondents were allowed to give more than one response.

Delays in the transfer of funds lasting days, weeks or even months impact time-sensitive programming.

> *"You can't wait six weeks for a wire transfer," explained the director of an NPO.*

Another focus group participant stated that every one of their wires is questioned, even if it is going to a repeat destination or recipient.

NPOs report that wire requests are sent back with additional questions, but some are returned to the originating bank and denied with no explanation. Wires are sometimes denied because organizations, particularly Muslim charities, are confused with sanctioned persons or groups.

> *"There were two entities with similar names, one of which was on the SDN list" (Specially Designated Nationals list, maintained by the U.S. Treasury Department), explained one charity's director. "We had maddening conversations trying to prove who we weren't."*

Many NPOs attribute problems to correspondent banks rather than their own financial institution when wire transfers are held up. One NPO leader noted that intermediate banks do not save the data provided, so they end up asking for the same information with each new transaction.

> *Regulators have suggested that NPOs improve their relationship with their banks in order to facilitate easier transactions, but "a good relationship with a U.S. bank can't solve problems with intermediaries," one grantmaker observed.*

Additional/Unusual Documentation Requests Create Bottlenecks

Requests for unusual additional documentation can also delay wire transfers as the necessary information is compiled. The excessive nature of some requests means that the needed documents may not be readily available. More than a quarter of NPOs encountered unusual and often duplicative and unexplained documentation requests (see figure above), constituting a burden for NPOs.

> *"There's no internal communication within the banks. They request the same information and documentation over and over," explained one charity's director.*

Others say that lack of clarity about what information is actually required to ensure legal compliance is to blame.

The list of documents requested can be extensive, well beyond information normally supplied. If money is going to a vendor, some FIs will ask for service contracts, receipts, invoices and confirmation that there is no relationship with any sanctioned entity, according to an NPO officer. An NPO treasurer said his organization does not feel like it is dealing with one bank anymore. "Different branches are asking for different information."

NPOs Are Paying Higher Fees for Banking Services

One-third of NPOs report that their costs for financial services are going up. Financial institutions, facing increased compliance expenses, need to recoup these costs and pass them along to the customer. This hinders the ability of NPOs to conduct their work, since most NPOs are small and have limited resources.

Account Closures Are a Smaller Problem with Bigger Impact

Although account closures and refusals to open account (reported by 6.3% and 9.5% of NPOs, respectively) are less common than transfer delays, they can have an extraordinary impact, affecting approximately 546 nonprofits. Some banks have taken deliberate action to limit business with charities, according to a financial institution manager. The bank indicated its intention to wind down all business with charities due to costs associated with risk management, he explained.

If an NPO has all of its accounts at a single bank, closures can leave a group entirely without banking services. "You have 30 days to move your money" is a daunting message to receive, particularly when no explanation or opportunity to correct perceived problems is offered.

> *"They wouldn't give a reason," said one NPO treasurer, adding, "We'd had a relationship with them for more than 20 years. We just got a letter and had to move our money. All of our transactions were with that bank."*

A forced account closure can create shockwaves throughout an organization, regardless of its size, sending personnel frantically searching for new banking services. And once an organization has had an account closed, other banks may be reluctant to accept the NPO as a new customer.

> *"Once you're flagged, it's very difficult to find another bank that will be willing to do business with you," said the director of one charity.*

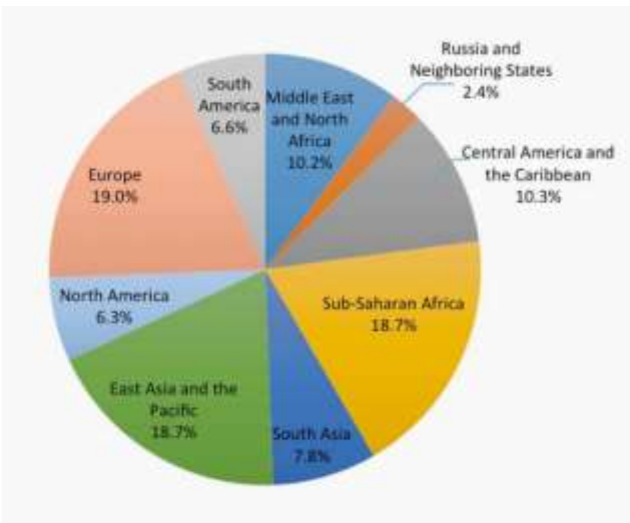
Wire Transfers Destined for All Parts of the World Encounter Problems

It might be assumed that NPOs face the greatest difficulties with transfers destined for geographic locations subject to violent conflict. However, focus group participants began to paint a different picture. They noted problems not only in Burma, Egypt, Yemen, Iran and Sudan, for example, but also with wires to Europe. "Problems exist in more countries than not," said one participant.

"Certain words in the name of the recipient account holder, such as Crimea or Iran, will trigger a problem, even if the wire recipient is based in Europe."

A Syrian-focused charity explained that the word "Syria" in its name has raised red flags at financial institutions. Even groups providing assistance to Syrian refugees in Turkey or Lebanon have experienced serious delays and questions about their financial transfers.

Affected Fund Transfer Destinations by Region



The survey data underscores the broad geographic impact and reinforces the point that difficulties with wire transfers are global (see Figure 7). Rather than being confined to conflict zones or geopolitical hotspots, the problem affects transactions to South Asia, Middle East & North Africa (MENA), Sub-Saharan Africa, South America and beyond. Survey respondents were asked to identify to which countries their delayed financial transfers were headed. Exhibit 7 shows the distribution of the countries mentioned, by world regions, based on IRS categories of countries. For example, Turkey is listed as part of Europe.[38] The Americas collectively account for almost one in four countries mentioned (23%). Surprisingly, regions that might be expected to be particularly affected for geopolitical reasons do not dominate the regional breakdown: the Middle East and North Africa account for 10% of all country mentions; South Asia (including Afghanistan and Pakistan among others) for 8%; and Russia and other former members of the Soviet Union (outside of the Baltics) for a mere 2%.

Faith-Based and Secular Organizations Are Equally Impacted

While certain characteristics of NPOs, such as the organization's size, do impact a group's ability to access banking services, other characteristics do not. One of the questions at the outset of this study was whether faith-based organizations, particularly those that self-identify as Muslim, face greater obstacles than secular groups.

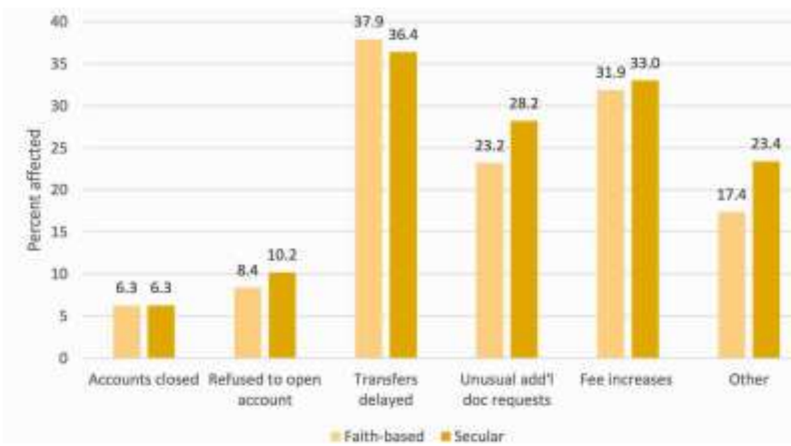
In his 2017 report on the rights to freedom of peaceful assembly and of association on his follow-up mission to the U.S.[39] (A/HRC/35/28/Add.2, May 29, 2017), former UN Special Rapporteur Maina Kiai noted that Muslim charities feel particularly targeted by counter-

[38] Using the regional breakdowns in IRS Form 990 Schedule F, see Appendix C.
[39] A/HRC/35/28/Add.2, May 29, 2017.

terrorism measures and "this has had a chilling effect on charitable giving, which is a pillar of their religious practice." Of the nine organisations whose assets have been seized by the Department of Treasury, seven are Muslim charities. At least six other Muslim organisations have been targeted for investigation and raids. These latter investigations were heavily publicized, "creating a perception that they were engaged in terrorist financing, despite the fact that no designation or criminal proceedings subsequently took place." The damage caused to these organisations' reputations cannot be understated, and it continues to fuel the erroneous perception that Muslim organizations are inextricably tied to terrorism financing.

Overall, the data show that the likelihood of financial access difficulties is roughly the same between faith-based and secular NPOs (see figure below). Where there are differences, it was noted that faith-based organizations have relatively fewer requests for additional documentation than secular groups (23% versus 28%), as well as fewer other demands imposed by financial institutions (17% versus 23%).

Faith-Based or Secular by Problem Type*



*Percentages do not total 100% because survey respondents were allowed to give more than one response.

An insufficient number of survey respondents self-identified as Muslim charities to analyze them separately. However, anecdotal evidence that Muslim groups are having a particularly difficult time with banking continues to surface. Problems with account closures and refusals to open accounts came up in discussions with Muslim- and Syrian-focused charities more frequently than with other charities.

> *One participant characterized the financial access crisis as "the worst existential threat to Muslim organizations since 9/11."*

Financial Access for NPOs Is Not Improving

Although media reports on derisking are more frequent, only recently have they underscored the plight of NPOs in this global phenomenon or the impact it has on the various stakeholders. In reality, NPOs have faced these challenges for some time, and the situation is not improving. When asked about their perception of the change over time of the banking problem for nonprofits, 69% report that the problem has stayed the same, while approximately 14% say it is worse. Only about 17% believe the problem to be improving.

Perception of Change in Severity

Some say the problem is due to the pervasive view of charities as being "particularly vulnerable" to terrorist abuse, which, despite evidence to the contrary, lingers. "You can't shake the perception," explained one financial institution representative.

NPOs Utilize a Variety of Strategies to Cope with Financial Access Problems, Some of Which Put the Safety of Their Staff and the Integrity of the Financial System at Risk

Organizations operating in crises cannot simply hit the pause button on programs to address famine-induced starvation or the mass migration of refugees. For the vast majority of NPOs, canceling a program is not an option (see table below), and the survey confirmed that: only 3.4% of NPOs do so. Instead, when traditional means of moving money become unavailable, NPOs find workarounds, and the data show that they are utilizing a variety of strategies.

Strategies Used to Address Problems*

Strategies	Percent of NPOs Utilizing
Carry cash	41.7
Cancel the program	3.4
Find another financial institution	36.5
Use money remitter (Western Union or similar)	29.4
Perform a transaction successfully later	67.2
Other	24.9

*Percentages do not total 100% because survey respondents were allowed to give more than one response.

Of significant concern is the data indicating that nearly 42% of NPOs resort to carrying or sending cash when traditional banking channels become unavailable. This tactic entails significant risk for all parties, especially for those operating in conflict zones. There is the physical risk to NPO staff and beneficiaries and the associated liabilities of cash. NPOs are aware of the risks and prefer not to use cash.

"We hate [carrying cash], but the problems made it necessary," said the director of one NPO.

Most often, NPOs are able to successfully perform a transaction later. While delays may create a ripple effect throughout programs, in these cases the money remains in traditional banking channels. Other NPOs seek out alternative financial institutions (37%) or ways to move money such as MSBs (29%). However, NPO participants indicate that this latter alternative is becoming increasingly difficult as well. "Unless you're sending smaller amounts, it's just like any other wire because it goes through SWIFT (Society for Worldwide Interbank Financial Telecommunication) and OFAC (U.S. Treasury's Office of Foreign Assets Control) reviews," explained one NPO treasurer.

Some nonprofits are concerned about the potential risks of using MSBs. One NPO representative said, "I'm not comfortable with compliance around MSBs. I have more confidence in the banking system, but we [if they are not available, we] need to work around them." "This is very risky because it adds an extra layer of vetting, and there's also the possibility that the individuals will run with the money," noted an NPO leader.

In most cases, funds ultimately make their way to intended recipients, but delays can cause dire humanitarian consequences. In addition, finding workarounds to banking problems is time consuming and resource-intensive. It squanders limited NPO resources and diverts money away from programming and its beneficiaries. As one NPO director put it, "The side solutions help in an emergency but cannot be normal routine."

Impact

Despite the beginning of a dialogue, there remains an environment of misunderstanding the respective perspectives, as well as reinforced stereotypes. The lack of an overarching process to facilitate collective discussion and responsibility for solutions has contributed to strained relations among stakeholders.

Two overriding impressions resulting from stakeholder meetings are particularly noteworthy. First, there is a sense of frustration among all stakeholders: frustration among NPOs that their problems are not taken seriously and that they are perpetually seen as too risky to bank; frustration among policymakers and regulators that their statements and efforts are not sufficient to address derisking concerns; and frustration within the financial sector for being blamed by both NPOs and government, caught in the middle. The second preponderant view is apprehension: fear to speak out and openly criticize the shortcomings of the current system, given risks of enhanced regulatory scrutiny and potential backlash.

The longer the derisking problem persists, the longer U.S. nonprofit organizations will be restricted in their freedom to associate, to carry out their missions, because of an inability to maintain bank accounts and to send funds abroad. The impacts on NPOs include a chilling effect on donors and fundraising, increasing compliance costs and challenges, and a need to scale back programs.

For example, after maintaining its business account at a U.S. bank for many years, one charity applied for a new account at the suggestion of the bank, citing security reasons. The bank declined to open the new account (encountered about 10% of the time for NPOs surveyed) and then refused to reopen the old account, freezing the charity's funds forcing delays in the payment of employees' salaries. The bank gave the charity 2–3 days to transfer its funds to another FI. The charity was ultimately able to find a small local bank to take its business, but that institution did not provide services for making overseas payments.

One American charity funded a dormitory for 400 underprivileged students in Afghanistan so that they could attend university. Fundraising efforts focused on providing students with standard-sized beds, instead of cushioned mats on the ground, and other items that would permit them to comfortably focus on their studies. Information on individual students, their background of need and programs of study were made available to donors to encourage support.

Wire transfers destined to the program began to experience delays and were eventually denied entirely. No reason was provided. Unable to transfer funds and ashamed by their inability to fulfill their commitment, the NPO apologized to the local partner and was forced to abandon the students, some of whom were likely unable to continue their studies.

Some NPOs reported that each and every wire takes a minimum of 2 weeks, often longer, to reach their final destinations. For many NPOs supported by grants with specific timelines by which funds must be expended, such delays damage program operations and the reputation of the NPO. When they are uncertain as to their ability to transfer funds in support of grants, some NPOs actually reported forgoing grant opportunities.

NPOs recounted a wide range of information requests by FIs, especially related to wire transfers, including a variety of requests from branches of the same institution. Of particular concern were requests for personal information of those initiating transactions, such as home addresses, driver licenses, passports and copies of utility bills. One bank requested information on every working director of the NPO, as well as every board member, including passport information of those individuals and of their parents. Another NPO indicated that the FI wanted the maiden names of mothers of the individuals undertaking the transactions.

NPOs may not always be able to be transparent or proactive about individuals being served, for security or ethical reasons. In certain countries with repressive governments, NPOs and those who work for them are targeted or surveilled. Providing identifying information can link individuals with foreign funding and endanger NPO staff and beneficiaries. Many NPOs expressed the need to keep confidential information on staff in these difficult operating environments; while there is no concern with providing names, addresses, etc. to the U.S. bank, the possibility that information in the wire transfer may pass on to intermediary banks in such countries can be problematic.

> *"We don't like to give the name and address of beneficiaries for security reasons. Even seemingly innocuous information, such as purpose of funds, can present a security risk in certain countries; in such cases, we use generic characterizations, like 'charitable grants,' because of security concerns."*

Throughout the C&SN study's engagement with numerous NPOs, conversations consistently began with the same point: an understanding of the important security concerns that the U.S.

government and financial institutions are promoting. At no time did interviewees express anything less than full support for the objectives underlying U.S. AML/CFT or sanction policies that have resulted in enhanced scrutiny by FIs. In fact, NPOs underscored that when operating in conflict zones, they are directly at risk of terrorist activities and want to do everything possible to protect their employees, beneficiaries and programs. While trying to ensure that both they and their partners fully comply with U.S. law, NPOs noted that working toward legal compliance creates tensions with the principles that underlie their stated missions.[40]

Many NPOs expressed the view, however, that banks seem increasingly reluctant to work with them. Because of the pervasive view that the nonprofit sector is high risk and low profit, FIs tend to require additional, labor-intensive due diligence and seem less than desirous of taking on NPOs as clients. There was also a feeling that FIs are "trigger-happy" in terms of looking for opportunities or excuses to end relationships with NPOs rather than finding ways to make them work. By the time NPOs are informed of questions or issues, FIs have often already made decisions to deny transfers or close accounts. This results in delays and complications for achieving the NPOs' missions. Rarely are NPOs given any information concerning the reasons accounts are terminated or not opened or wire transfers are delayed. Many NPOs expressed concern that their business was not valued, likely because it is not large or lucrative enough.

Response to De-Risking

To address the problem of derisking, FATF issued a statement in 2015 reiterating that regulators and supervisors should use a risk-based approach in supervising financial institutions' compliance with AML/ CFT measures. It notes that when failures are detected, governments should take appropriate and proportionate action, stating that the RBA is not a "zero tolerance" approach. Emphasizing that FIs should manage (not avoid) risks, FATF urged banks to prevent the "wholesale cutting loose of entire countries and classes of customer, without taking into account, seriously and comprehensively, their level of money laundering and terrorist financing risk and applicable risk mitigation measures for those countries and for customers within a particular sector."[41]

Recognition of the unintended consequences of AML/CFT regulatory policies by U.S. officials has been measured. Until November 2016, there was no mention of NPOs in public statements or any recognition of the financial access difficulties NPOs have reported.[42] It was not until late 2015 that Treasury officials responsible for illicit finance began to acknowledge that certain sectors—correspondent banking and MSBs—are indeed experiencing difficulties in accessing financial services, even while reiterating the appropriateness of current policy: "We believe our risk-based AML/CFT standards are the right ones—for correspondent banking, MSBs and really all cross-border financial services."[43] The gradual recognition by U.S. officials of financial

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[40] International humanitarian law is based on the basic principles of humanity, impartiality, neutrality and independence. International Committee of the Red Cross, What is International Humanitarian Law? July 2004, https://www.icrc.org/eng/assets/files/other/ what_is_ihl.pdf

[41] "FATF takes action to tackle de-risking," October 2015.

[42] Under Secretary Szubin's remarks on November 14, 2016 include a reference to NPOs as part of the stakeholders Treasury is engaged with—the first time NPOs have been mentioned—but there has still been no discussion or efforts to address NPOs problems with financial access.

[43] Remarks by Acting Under Secretary Adam Szubin at the ABA/ABA Money Laundering Enforcement Conference, November 16, 2015. https://www.treasury.gov/press-center/press-releases/Pages/jl0275.aspx.

access problems has been limited, however, to certain regions of the world, such as the Caribbean, and to the specific sectors of correspondent banking and MSBs. "Treasury has been focused on this issue for some time now, and over the course of our engagement we have come to understand that some sectors and jurisdictions are affected more than others, but overall, there is no evidence to suggest a global systemic impact."[44]

When asked about financial access problems, government officials have consistently indicated that closing customer accounts is a business decision of financial firms and that it is not the government's place to interfere with banks' assessment of risk. "Treasury cannot direct any bank to open or maintain a particular account or relationship—such decisions must be made by banks themselves," according to U.S. Treasury's Jennifer Fowler.[45] Then Acting Under Secretary Szubin reiterated this point in 2016 by saying, "While the U.S. government cannot instruct the private sector on who to bank, we encourage you to continue to take the time and effort to assess your controls and the risks presented by individual clients and, where you cannot manage effectively that risk, make conscientious decisions."[46]

As more NPOs experienced problems, the C&SN responded by forming a Financial Access Working Group in 2014 to coordinate research, education and advocacy work on the issue, bringing the issue to the attention of U.S. officials and Congressional oversight committees.

Reports by NPOs of difficulty with financial access have continued to grow; periodic meetings with government representative have been held but not resulted in concrete steps to address the issues. A significant group of NPOs sent a letter in February 2016[47] to the U.S. Departments of Treasury and State asking them to convene a multi-stakeholder dialogue as part of a broader effort to ensure that registered, law-abiding NPOs are able to access the global financial system and calling for a public statement making clear that charities are not by definition high-risk customers. The letter noted that: "It is increasingly difficult for these nonprofit organizations (NPOs) to access financial services that are necessary to keep their operations going. Banks may delay, or refuse to make, transfers between organizations. Sometimes, NPOs are turned away as customers or have their accounts closed. For example, in the spring of 2015, one charity was unable to pay for fuel needed to supply power to a hospital in Syria because of the banks' lengthy delays in transmitting funds… The banks and the U.S. Treasury Department are blaming each other for the problem and to date have done little to solve it."[48]

Treasury and State responded in a May 2016 joint letter stating that, "It is important to emphasize the Treasury Department's view that the charitable sector as a whole does not present a uniform or unacceptably high risk of money laundering, terrorist financing or sanctions violations." The letter adds that banks should take a risk-based approach to conducting due

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[44] Remarks by Acting Under Secretary Adam Szubin at the ABA/ ABA Money Laundering Enforcement Conference, November 14, 2016. https://www.treasury.gov/press-center/press-releases/Pages/jl0608.aspx.
[45] Jennifer Fowler, "Treasury Efforts to Protect and Support the Charitable Sector," Treasury Notes Blog, April 28, 2016, https:// www.treasury.gov/connect/blog/Pages/Treasury-Efforts-to-Protect-and-Support-the-Charitable-Sector.aspx.
[46] Remarks by Acting Under Secretary Adam Szubin at the ABA/ ABA Money Laundering Enforcement Conference, November 14, 2016. https://www.treasury.gov/press-center/press-releases/Pages/jl0608.aspx.
[47] Letter to Jacob Lew, Treasury Secretary, and John Kerry, Secretary of State, February 25, 2016, http://www.charityandsecurity. org/system/files/Sign%20on%20Ltr%20Fin%20Access_1.pdf. The 58 NPO signatories to the letter included umbrella groups with more than 300 member organizations combined and represented more than 8.3 billion annually in humanitarian aid and services to the world's most needy.
[48] Ibid.

diligence on nonprofit customers but that, "Treasury expects banks to apply their due diligence obligations reasonably— not that they be infallible in doing so..."[49] In a July 21, 2016 response, the group of nonprofits asked the Treasury to update the Bank Examiners Manual section on NPOs that refers to the entire sector as "high-risk" to comport to the new FATF R8.

U.S. efforts to clarify regulatory expectations have taken place through the Financial Stability Board and the FATF.[50] In August 2016, several U.S. banking regulators issued a "Joint Fact Sheet on Foreign Correspondent Banking," intended to dispel myths about U.S. supervisory expectations, including the belief that banks should conduct due diligence on the individual customers of foreign financial institutions (a practice referred to as "know your customer's customer," or KYCC).[51] For the first time, Treasury officials also penned an accompanying blog, Complementary Goals – Protecting the Financial System from Abuse and Expanding Access to the Financial System, providing additional guidance.[52]

In October 2016, the OCC also issued guidance concerning expectations for banks to reevaluate risk in their foreign correspondent banking relationships but did not create any new supervisory expectations. Rather, it reiterates current expectations that banks assess these risks as part of their ongoing risk management and due-diligence practices and provides "best practices" for banks to consider when conducting their reevaluations.[53] In addition to further regulatory guidance, U.S. officials' informal statements have emphasized that the U.S. government "has never advocated a standard of perfection" since "it would promote neither efficiency nor transparency."[54]

As noted previously, the Treasury has conducted outreach to the nonprofit sector and organized meetings to facilitate a dialogue on banks' expectations. These sessions brought together

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[49] Letter to Kay Guinane, Charity & Security Network, from Jennifer Fowler, Deputy Assistant Secretary, Department of Treasury, and Andrew Keller, Deputy Assistant Secretary, Department of State, May 13, 2016, http://www.charityandsecurity.org/system/ files/Joint%20Response%20letter%20to%20NPO%20on%20reduced%20access%20to%20financial%20services%20May%20 2016%20signed.pdf.

[50] See FATF, Guidance on Correspondent Banking, October 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Correspondent-Banking-Services.pdf; FATF, Guidance for a Risk-Based Approach: Money or Value Transfer Systems, February 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-money-value-transfer-services.pdf and Financial Stability Board. "Report to the G20 on actions taken to assess and address the decline in correspondent banking," November 6, 2015. www.fsb.org/wp-content/uploads/Correspondent-banking-report-to-G20-Summit.pdf.

[51] See August 30, 2016, "Joint Fact Sheet on Foreign Correspondent Banking" by Treasury and regulators clarifying U.S. government's approach to supervision and enforcement and describing expectations of U.S. regulators, the supervisory examination process, and the use of enforcement actions. U.S. Department of Treasury & Federal Banking Agencies, "Joint Fact Sheet on Foreign Correspondent Banking," August 30, 2016, https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20 Correspondent%20Banking%20Fact%20Sheet.pdf. While characterized by the government as "clarifying" regulatory expectations, many FIs consulted viewed it as restatement of existing standards without providing any new guidance.

[52] Nathan Sheets, Adam Szubin, and Amias Gerety, "Complementary Goals - Protecting the Financial System from Abuse and Expanding Access to the Financial System," Treasury Blog, August 30, 2016, https://www.treasury.gov/connect/blog/Pages/Complementary-Goals---Protecting-the-Financial-System-from-Abuse-and-Expanding-Access-to-the-Financial-System.aspx.

[53] See OCC BULLETIN 2016-32, Risk Management Guidance on Periodic Risk Reevaluation of Foreign Correspondent Banking, October 5, 2016, https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html.

[54] Remarks by Acting Under Secretary Adam Szubin at the ABA/ABA Money Laundering Enforcement Conference, November 16, 2015, https://www.treasury.gov/press-center/press-releases/Pages/ jl0275.aspx.

representatives from charities, banks, financial supervisors and government to discuss issues that banks face regarding NPO accounts, including delays in financial transactions and banking access challenges. NPOs have pushed back but have left dissatisfied and critical of informational sessions unable to move the dialogue forward. This has led to a general sense of frustration among all participants, including policymakers. In general, however, relations with the NPO sector have been challenging. “It hasn’t been an easy relationship” is how one policymaker characterized the situation. Recognizing the frustration of many NPOs in not knowing why accounts have been closed or transfers denied, U.S. officials unfortunately are not in a position to be able to provide such information or remedy the situation. As they have repeatedly stated, the government cannot “tell banks what to do.”

C&SN’s report made concrete recommendations to address these problems, including a multi-stakeholder dialogue to forge solutions. The World Bank and Association of Certified Anti-Money Laundering Specialists (ACAMS) launched such a dialogue, with banks, NPOs and government officials, in early 2017, and several workstreams have emerged from that process:

- Clarifying regulatory requirements, including revising the Bank Examination Manual section on nonprofits (pending), developing guidance, and creating risk-sharing policies;
- Facilitating information provision by and on NPOs, including standardizing information collection for banks’ due diligence on NPO customers;
- Using technology to streamline the due diligence process and/or provide alternatives to correspondent banks; and
- Establishing alternative financial channels for humanitarian crises when the traditional banking system is unable to provide the needed services.

Recommendations

C&SN believes there are steps that IACHR can take to scale back the derisking problem as it impacts NPOs. For immediate relief, the Commission can request international bodies or the U.S. government to create special banking channels for humanitarian crises.

In addition, the Commission should encourage the U.S. government to take the following steps:

- Institute safe harbour protections:
    - FIs that bank NPOs in good faith and meet certain criteria would be held harmless if funds inadvertently ended up in the wrong hands.
    - This would give U.S. banks confidence that they can do business with higher-risk customers and regions, provided they maintain rigorous risk-mitigation controls that are recognized by regulators.
- Improve implementation of the risk-based approach:
    - As the FATF noted in its 2016 mutual evaluation of the U.S., terrorist financing and sanctions violations are strict liability offenses. There is an inherent tension between strict liability and a risk-based approach that appears to contribute to narrowing financial access for NPOs.
    - The notion of residual risk acceptance, inherent in the risk-based approach, is not always reflected in current rules or enforcement policies.

- Develop clear guidance standards to reduce guesswork and compliance costs:
    - Guidance and standards must be consistent, practical, relevant to today's financial services market, and proportionate to any actual risk identified.
    - They should clearly outline what information is required to ensure legal compliance by both banks and NPOs while remaining flexible enough to adapt to various types of FIs and NPO customers.
- Promote transparency, information sharing, proportionality to recalibrate risk perception:
    - To reassure banks that they will not face severe penalties for inadvertent violations and to operationalize official statements rejecting zero tolerance, the government should formalize the standards for and mechanics of the enforcement process to reflect the risk-based approach. In particular, it should clearly differentiate between actions taken in good faith and those that are negligent or intentional.
    - Intermediate sanctions, such as those used by the IRS for tax-exempt organizations, could make the process much more proportionate and ease FI fears of taking on clients perceived to be riskier.
- Create incentives to encourage appropriate risk management:
    - Monetary incentives, such as tax credits, or reputational incentives, such as recognizing FIs who engage in—rather than avoid—effective risk management of NPOs and other customers perceived as high risk, should be explored.
    - A structure for NPOs to pool accounts may provide an incentive for FIs by streamlining administration and lowering costs.

Conclusion

Thank you for the opportunity to present background, data, impact and recommendations on this issue. Constraints on financial access for U.S. NPOs has a serious, negative impact on their freedom of association, as it impedes their ability to function. While the multi-stakeholder dialogue convened by the World Bank and ACAMS is a productive step on the path to enabling financial access for U.S. NPOs, more can and should be done. The U.S. government should play an active role in making legislative, regulatory and policy changes that will have a positive impact on NPOs' freedom of association by removing barriers to their financial access. Multilateral organizations such as IACHR may be able to encourage the U.S. government to take proactive steps towards solving this problem.