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## The Responsible Role for International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks

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# NOTES

## The Responsible Role for International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks

### ABSTRACT

*This Note argues that a collaborative information collection and sharing effort would protect charities from becoming law enforcement agencies and would ensure that U.S. altruism is properly monitored and reaching the areas of the world most in need. A robust system of international charitable giving is a vital element in the promotion of “civil society” and the fight against terrorist attitudes and sympathies. The U.S. government and non-profit sector must combine resources and efforts to continue to promote global charitable participation with an updated approach to grant-making and fund oversight.*

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The Preamble to The Principles of International Charity begins:

International charitable work fills critical gaps in the global socioeconomic infrastructure. Governments alone cannot solve every social problem. Businesses alone cannot meet every economic need. Without international charity, more people in the world would die of hunger and disease, fewer children would learn to read and write, and more people would live in poverty. There would be more environmental destruction and fewer scientific advances. The participation of charitable organizations based in the United States is vital to maintaining a level of international charity sufficient to address some of the world's most critical needs.<sup>1</sup>

A wide-variety of U.S. charitable organizations, including private foundations, public charities, corporate foundations, corporate grantmaking programs, donor advised funds, friends' organizations, churches, and religious organizations provide monetary or in-kind support abroad.<sup>2</sup> These resources fund and provide charitable services through medical care, food, agricultural training, disaster relief, shelter, education, clothing, water, professional exchanges, institutional reform, technical assistance, and support of human rights and civil liberties.<sup>3</sup> The role and influence of U.S. altruism is far-reaching and relied on by millions around the world.<sup>4</sup> Furthermore, the goodwill that U.S. altruism creates is an important

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1. COUNCIL ON FOUNDATIONS, PRINCIPLES OF INTERNATIONAL CHARITY 1 (2005), available at [http://www.cof.org/files/Documents/International\\_Programs/2005\\_Publications/Principles\\_Final.pdf](http://www.cof.org/files/Documents/International_Programs/2005_Publications/Principles_Final.pdf) [hereinafter PRINCIPLES OF INTERNATIONAL CHARITY].

2. *Id.* at 1; Barnett F. Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, 6(2) INT'L J. NOT-FOR-PROFIT L. (2004), [http://www.icnl.org/JOURNAL/vol6iss2/ar\\_baron.htm](http://www.icnl.org/JOURNAL/vol6iss2/ar_baron.htm). See generally, COUNCIL ON FOUNDATIONS, COMMENTS ON U.S. DEPARTMENT OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2003), [http://www.cof.org/files/Documents/Legal/Treasury\\_Comments\\_06.03.pdf](http://www.cof.org/files/Documents/Legal/Treasury_Comments_06.03.pdf); AMERICAN BAR ASSOCIATION, COMMENTS IN RESPONSE TO INTERNAL REVENUE SERVICE ANNOUNCEMENT 2003-29, 2003-20 I.R.B. 928 REGARDING INTERNATIONAL GRANTMAKING AND INTERNATIONAL ACTIVITIES BY DOMESTIC 501(C)(3) ORGANIZATIONS (2003), available at <http://www.abanet.org/tax/pubpolicy/2003/030714exo.pdf>.

3. PRINCIPLES OF INTERNATIONAL CHARITY, *supra* note 1, at 1.

4. See generally Ian Wilhelm, *Foundations Gave \$3-Billion to Overseas Projects Last Year, Report Says*, CHRON. PHILANTHROPY, Nov. 25, 2004, at 12 (U.S. grants to international agencies and charities peaked at \$3.2 billion in 2002).

byproduct of the global reach of U.S. charities, especially with the popularity and credibility of the U.S. government waning abroad.<sup>5</sup>

Despite the importance of and dependence on international grants from the United States and the increasing desire of U.S. individuals to support charitable programs worldwide, the U.S. Tax Code still limits charitable contribution deductions solely to domestic charities.<sup>6</sup> Domestic non-profit organizations use donated funds to provide grants or operate programs internationally.<sup>7</sup> Historically, Congress distinguished its tax treatment of international donations from domestic donations because grants abroad did not relieve the government of any burden to justify the loss of tax revenue.<sup>8</sup> This policy was articulated and adopted at a time when the United States displayed feelings of isolationism due to political instability around the world.<sup>9</sup> This distinction between domestic and international charitable contributions seems archaic as the growth of globalization in the marketplace and the prominence of international organizations reveals the interdependence of economic and political influences.<sup>10</sup> The International Monetary Fund, United Nations, World Bank, and other international organizations exemplify the global approach taken to economic, political, and humanitarian issues in each participating country.<sup>11</sup> Even President George W. Bush acknowledged the role of the United States in the field of international charity, calling for tsunami relief participation and appointing two former presidents to lead the private fund-raising effort.<sup>12</sup> In reality, this distinction of permitting a tax deduction only when international grants originate from domestic organizations is a beneficial policy as it augments the government's ability to monitor potential fund diversion to foreign terrorist organizations.

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5. PRINCIPLES OF INTERNATIONAL CHARITY, *supra* note 1, at 1. See generally GMI Poll Press Release, <http://www.gmi-mr.com/gmipoll/release.php?p=20050202> (last visited Mar. 29, 2006).

6. I.R.C. § 170(a), (c) (2006).

7. Robert Paine, *The Tax Treatment of International Philanthropy and Public Policy*, 19 AKRON TAX J. 1, 5 (2004).

8. H.R. REP. NO. 75-1860, at 19-20 (1938), *cited in* Bob Jones Univ. v. United States, 461 U.S. 574, 590 (1983). See also *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) (stating that the justification of charitable contribution deductions derives from the governmental burden charitable activity relieves).

9. See generally ISOLATIONISM: OPPOSING VIEWPOINTS (Bruno Leone et al. eds., 1994).

10. Paine, *supra* note 7, at 22.

11. See generally About the International Monetary Fund, IMF, Introductory Information, <http://www.imf.org/external/about.htm> (last visited Mar. 29, 2006); UN in Brief, <http://www.un.org/about/index.htm> (last visited Mar. 29, 2006); The World Bank, <http://www.worldbank.org> (last visited Mar. 29, 2006).

12. *Former Presidents Bush and Clinton Promote Fundraising for South Asia Tsunami Victims* (NBC television broadcast Feb. 19, 2005).

In addition to the Tax Code effectively limiting international grantmakers to reporting domestic charitable organizations, responses to the terrorist acts of September 11, 2001, have substantially increased the government's oversight capacity.<sup>13</sup> These executive, legislative, and administrative actions have impacted significantly the operation and participation of international grantmaking organizations.<sup>14</sup> Early allegations against the Afghan Support Committee, the Revival of Islamic Heritage Society, and the Holy Land Foundation indicated the potential for the diversion of charitable monies to terrorist organizations.<sup>15</sup> Consequently, the government enacted Executive Order 13224 and the USA Patriot Act to allow more stringent punishment and to increase the risk of civil liability associated with grant funds diverted to terrorist organizations, even without knowledge of such diversion.<sup>16</sup>

The Department of Treasury issued a release entitled "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities" in an effort to assist international grantmakers understanding of and compliance with the Executive Order and Patriot Act obligations.<sup>17</sup> Many grantmakers and operating foundations have criticized the "one-size fits all" approach of the Voluntary Financing Guidelines for failing to account for current IRS due-diligence requirements or the history and experience a grantmaker has with a specific grantee.<sup>18</sup> The Guidelines are also unworkable in requiring information unavailable in the developing world or unattainable without subjecting grant recipients to

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13. See Timothy R. Lyman et al., *International Grantmaking after September 11: Dealing with Executive Order 13224 and the USA Patriot Act*, INT'L DATELINE (Council on Foundations, Washington, D.C.), Fall 2002 (Special Insert), at 1-4, available at <http://www.cof.org/files/Documents/Newsletters/InternationalDateline/IDfall02insert.pdf> (discussing Executive Order 13224, the USA Patriot Act, and other anti-terrorism related measures).

14. *Id.*

15. *Recommendations to Safeguard International Grantmaking and Ensure More Effective Compliance with the Voluntary Financing Guidelines*, INT'L DATELINE (Council on Foundations, Washington, D.C.), Third Quarter 2003 (Special Insert), at 1, available at <http://www.cof.org/files/Documents/Newsletters/InternationalDateline/LD3Q03.pdf> [hereinafter *Recommendations to Safeguard Grantmaking*].

16. Janne G. Gallagher, *Grantmaking in an Age of Terrorism: Some Thoughts About Compliance Strategies*, INT'L DATELINE (Council on Foundations, Washington, D.C.), Third Quarter 2004, at 3, available at <http://www.cof.org/files/Documents/Newsletters/InternationalDateline/2004/LD2Q2004.pdf>.

17. UNITED STATES DEPARTMENT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002), available at <http://www.treas.gov/press/releases/docs/tocc.pdf> [hereinafter VOLUNTARY TREASURY GUIDELINES].

18. See, e.g., Letter from Dorothy S. Ridings, President and CEO, Council on Foundations, to Internal Revenue Service (Aug. 5, 2003), available at <http://www.cof.org/files/Documents/Legal/COF%20Comments/ZIRSCCommentsLetter8.05.03.pdf>.

significant safety risks.<sup>19</sup> Unfortunately, the increased risk of liability and criminal sanctions do not justify the due-diligence required. Effectively, the Guidelines have discouraged the provision of support in the areas of the world where it is needed most, as these are often the same places with the highest risk of fund diversion.<sup>20</sup> In particular, smaller grantmaking organizations are unable to afford the substantial increase in administrative costs associated with pre-grant inquiries and the oversight of international grants necessary to limit liability and prevent fund diversion.<sup>21</sup> Furthermore, the Guidelines fail to acknowledge non-legal monitors on charitable entity behavior, including the importance of reputation and maintenance of public confidence, as their survival depends on public and private funding.<sup>22</sup>

The Council on Foundations and the American Bar Association have endorsed a risk-based approach to address the difficulties arising from the new liabilities associated with international grantmaking.<sup>23</sup> This approach considers procedures many larger grantmakers already observe and outlines factors a grantor should consider to assess the likelihood of fund diversion and, consequently, to determine the level of oversight and due-diligence required to limit liability.<sup>24</sup> This solution, however, does not account for the fact that a higher risk assessment is likely on account of the same reasons heightened due diligence is difficult, if not impossible, to perform.<sup>25</sup>

This Note argues for a collaborative effort of information collection and sharing between government agencies tasked with identifying terrorist organizations and charitable organizations, of all sizes, with experience and information regarding specific grantees in certain regions and with procedures often already in place for monitoring international grants. U.S. humanitarian, educational, and economic efforts abroad are vital elements in the long-term struggle to eradicate terrorism.<sup>26</sup> The fight against terrorism would suffer if U.S. charitable efforts with indirect effects of ameliorating terrorist motivations were significantly discouraged. A reporting requirement similar to the IRS rules for domestic charities providing official U.S. government approval would compromise the credibility and independence of foreign grantees and severely limit their efficacy.

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19. See generally Herbert N. Beller, *2003 WTD 138-15 ABA Members Seek to Prevent Diversion of Assets from U.S. Charities to Terrorists*, WORLDWIDE TAX DAILY, July 14, 2003.

20. Baron, *supra* note 2.

21. *Id.*

22. Victoria B. Bjorklund et al., *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 245 (2005).

23. See generally Gallagher, *supra* note 16.

24. *Id.*

25. Baron, *supra* note 2.

26. *Id.*

Thus, the government must act collectively with non-profit organizations and pool their resources, capabilities, and individually acquired information to maintain a grantee database that would identify the true risks of fund diversion while allowing access and encouraging participation of charitable organizations of all sizes. This collective due-diligence effort will ensure U.S. altruism reaches the populations and areas of the world most in need and frequently most susceptible to terrorist movements. Furthermore, the availability and accessibility of grantee information would allow foreign support to mobilize more quickly, thereby improving response time when natural disasters present most immediate needs.<sup>27</sup>

## I. GENERAL HISTORY OF DOMESTIC CHARITABLE GIVING AND THE POLICIES UNDERLYING THE DEVELOPMENT OF TAX EXEMPTIONS AND DEDUCTIONS

Throughout documented history, civilizations have designated certain groups as exempt from paying taxes.<sup>28</sup> Historically, early governments provided tax exemptions exclusively for religious entities.<sup>29</sup> The Bible's *Book of Ezra* reads: "We also notify you that it shall not be lawful to impose tribute, custom, or toll upon any of the priests, the Levites, the singers, the doorkeepers, the temple servants, or other servants of this house of God."<sup>30</sup> Following the Reformation, the British Statute of Charitable Uses of 1601 began providing tax benefits to secular charities.<sup>31</sup>

### A. *Tax Relief Given to Those Organizations Whose Activities Reduce the Burden on Government by Addressing Poverty, Health, Education, and Science*

In 1983, the Supreme Court confirmed Congressional justifications for creating a statutory charitable tax exemption, quoting a House of Representatives Report:

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by

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27. Milton Cerny & Michael W. Durham, *NGO Response to Tsunami: Now and the Future*, 37 TAX NOTES INT'L 487, 489 (2005).

28. Paine, *supra* note 7, at 11.

29. Paine, *supra* note 7, at 11.

30. *Ezra* 7:24 (New Revised Standard Version).

31. An Act to redress the Mis-employment of Lands, Goods, and Stocks of Money heretofore given to certain charitable Uses, 43 Eliz. 1, ch. 4 (1601) (Eng.).



appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.<sup>32</sup>

This concept of preferential treatment for charitable organizations has a long history in the laws of the United States and traces its origins to charitable exemptions from the English law of trusts.<sup>33</sup> In an 1891 restatement of the English law of charity, Lord MacNaghten stated, "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."<sup>34</sup>

### B. *Development and Expansion of This Historical Policy to Modern Day*

This justification for the government's distinguishing and officially promoting charitable activity has survived and developed through time.

Charities generate primary public benefits either by providing goods or services that are deemed to be inherently good for the public, or by delivering ordinary goods or services to those who are recognized as being especially needy. Healthcare and education are examples of products deemed to be inherently good; providing them to anyone, irrespective of need, is considered to produce public benefits. Providing food and shelter for the poor or otherwise disadvantaged is an example of benefiting an especially needy class; it makes no difference that the goods provided are themselves mundane. In summary, charities provide primary public benefits in two ways: especially good goods to ordinary people, and ordinary goods to the especially deserving.<sup>35</sup>

The notion of charity encompasses a great and broad diversity of works and support. The Supreme Court commented in 1877: "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."<sup>36</sup> The Court later reconfirmed this broad notion, stating that "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide,

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32. H.R. REP. NO. 75-1860, at 19–20 (1938), *cited in* *Bob Jones Univ. v. United States*, 461 U.S. 574, 590 (1983). *See also* *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) (The justification of charitable contribution deductions derives from the governmental burden charitable activity relieves.).

33. *Bob Jones Univ.*, 461 U.S. at 589.

34. *Id.*

35. Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Synthesis*, 27 STETSON L. REV. 395, 402 (1997).

36. *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303, 311 (1877).

or which supplements and advances the work of public institutions already supported by tax revenues.”<sup>37</sup>

### C. Current Tax Laws Applicable to Charitable Organizations.

Citing the benefits they provided society,<sup>38</sup> Congress enacted a statutory tax exemption for charities in 1894.<sup>39</sup> This charitable exemption was soon abolished when the Supreme Court declared the income system passed in the 1894 statute unconstitutional for reasons unrelated to the charitable exemption provision.<sup>40</sup> Following the adoption of the Sixteenth Amendment legalizing a federal income tax,<sup>41</sup> every income tax Act since 1913 has included a charitable exemption provision.<sup>42</sup>

The War Revenue Act of 1917 first authorized individual taxpayer deductions on contributions made to charitable organizations.<sup>43</sup> This initial deduction provision made no mention of any geographical restriction on the charitable contributions qualifying for a deduction.<sup>44</sup> In a Senate floor debate over this provision, Senator Hollis explained the rationale supporting preferential treatment for charitable organizations: “[f]or every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent.”<sup>45</sup>

Currently, § 170 of the Internal Revenue Code allows a deduction for individual taxpayer contributions to charitable organizations,<sup>46</sup> while § 501(c)(3) of the Internal Revenue Code exempts certain charitable and non-profit organizations from paying federal tax.<sup>47</sup>

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37. *Bob Jones Univ.*, 461 U.S. at 591.

38. 26 CONG. REC. 585–586 (1894).

39. Wilson Tariff Act, ch. 349, 28 Stat. 509 (1894).

40. *Bob Jones Univ.*, 461 U.S. at 589 n.14. See *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

41. U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

42. *Bob Jones Univ.*, 461 U.S. at 589 (citing Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525 (1958)).

43. War Revenue Act, Pub. L. No. 65-50, 40 Stat. 300 (1917).

44. *Id.*

45. 55 CONG. REC. 6728 (1917). See also, e.g., 44 CONG. REC. 4150 (1909); 50 CONG. REC. 1305–1306 (1913).

46. I.R.C. § 170(a)(1) (2006).

47. I.R.C. § 501(c)(3).

D. *Rise of Global Economic Markets and Consequently, the Growing Interest and Need of Global Altruism*

Congress and the Supreme Court have explicitly recognized the benefits of domestic altruism.<sup>48</sup> With a rise in globalization, international charitable participation became an imperative component to the development and promotion of “civil society.”<sup>49</sup>

The development and maintenance of market capitalism depends on private altruistic investment.<sup>50</sup> In an increasingly international community, charities become an important source of humanitarian relief and aid.<sup>51</sup> Although a market economy is the best way to improve quality of life and provide for social welfare, a market economy provides goods and services only to those who are able to pay.<sup>52</sup> Obvious winners and losers entice the growth of discontent.<sup>53</sup> Consequently, governments are often compelled to moderate this discontent lest market disruptions or even revolutions develop.<sup>54</sup> Balance is imperative, however, lest such social welfare programs hamper market incentives and potentially displace market economy motivations.<sup>55</sup>

The development of the market economy in Russia exemplifies the importance of private, or non-governmental, altruism.<sup>56</sup> Russian President Vladimir Putin eventually came to recognize the role of charity in alleviating the problems associated with market capitalism:

To reduce these problems and stimulate the further growth of institutions of civil society, we do not need to invent anything new. Our own experience and international experience has already proved the productiveness of an entire range of approaches. It is necessary to gradually transfer to the nongovernmental sector functions which the state should not or is unable to perform effectively.<sup>57</sup>

The promotion of “civil society” is a collaborative effort of the most prominent international organizations including the United

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48. See *supra* text accompanying notes 41, 46.

49. See PRINCIPLES OF INTERNATIONAL CHARITY, *supra* note 1, at 1 (discussing the significance of international charity).

50. Darryll K. Jones, *The Neglected Role of International Altruistic Investment in the Chinese Transition Economy*, 36 GEO. WASH. INT'L L. REV. 71, 72-73 (2004).

51. Joannie Change et al., *Cross-Border Charitable Giving*, 31 U.S.F. L. REV. 563 (1997).

52. Jones, *supra* note 51, at 73.

53. *Id.*

54. *Id.*

55. Lan Cao, *Chinese Privatization: Between Plan and Market*, 63 LAW & CONTEMP. PROBS. 13, 15-16 (2000).

56. *Id.*

57. Vladimir Putin, President of Russia, Address to the Federal Assembly of the Russian Federation (May 26, 2004), available at [http://www.kremlin.ru/eng/speeches/2004/05/26/1309\\_type70029\\_71650.shtml](http://www.kremlin.ru/eng/speeches/2004/05/26/1309_type70029_71650.shtml) (last visited Mar. 30, 2006).

Nations, the World Trade Organization, and the International Monetary Fund.<sup>58</sup> Understanding “civil society” requires the conceptual and operational identification of the role of “civil society,”

as a public actor in the promotion of sustainable human development, the eradication of poverty and the building of a healthy public life—whether at the local, national or global levels<sup>59</sup> . . . In its’ [sic] simplest conception, civil society is the network of autonomous associations that rights-bearing and responsibility-laden citizens voluntarily created to address common problems, advance shared interests, and promote collective aspirations. As a legitimate public actor, civil society participates alongside state and market institutions—not replacing them—in making and implementing public policies designed to resolve collective problems and advance the public good<sup>60</sup> . . . From these fundamental social values that underlie individual motivation and the ability to associate together in common cause, other more civic values including voluntarism, philanthropy, and public-spiritedness grow and develop, providing the civic glue that binds the social fabric into a cohesive whole, and healthy public life.<sup>61</sup>

Working towards “civil society” confronts the poverty, economic difficulties, and political unrest which often fosters the development of terrorist attitudes and sympathies.<sup>62</sup> Thus, the role of the United States in promoting “civil society” by supporting and facilitating non-governmental aid through international charitable activity becomes a vital component in the fight against terrorism.<sup>63</sup>

### III. TAX LAWS OF THE UNITED STATES DO NOT PROVIDE A DEDUCTION FOR CHARITABLE CONTRIBUTIONS MADE DIRECTLY TO INTERNATIONAL ORGANIZATIONS AND THE INDIRECT BENEFITS OF THIS POLICY IN THE WAKE OF THE 2001 TERRORIST ATTACKS

The Revenue Act of 1938 modified the original 1917 provision to allow a charitable contribution deduction only when the recipient organization was created or organized in the United States.<sup>64</sup> The House Ways and Means Committee disallowed the charitable deduction on contributions to foreign charities unable to recognize

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58. See Kumi Naidoo, *The Promise of Civil Society*, 12(1) ASIAN REV. PUB. ADMIN. 1, 3 (2000), available at <http://unpan1.un.org/intradoc/groups/public/documents/EROPA/ARPA-JanJun2000-KumiNaidoo.pdf> (arguing that formal institutions are necessary for a “civil society”).

59. *Id.*

60. *Id.* at 4.

61. *Id.* at 7.

62. *Id.* See generally Baron, *supra* note 2.

63. Baron, *supra* note 2.

64. Revenue Act of 1954, Pub. L. No. 83-591, § 170, 68 Stat. 730, 58–61 (1954).

any governmental burden relieved to justify the loss of tax revenue.<sup>65</sup> The Committee report reads:

[t]he exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.<sup>66</sup>

Currently, individual taxpayers may take an income tax deduction for a charitable contribution.<sup>67</sup> Deductions, however, are prohibited for contributions made directly to foreign charitable organizations unless a bilateral tax treaty applies.<sup>68</sup> The United States has entered into three bilateral tax treaties which provide for reciprocal deductions of cross-border charitable contributions.<sup>69</sup> The U.S.-Canada Treaty,<sup>70</sup> the U.S.-Mexico Treaty,<sup>71</sup> and the U.S.-Israel Treaty<sup>72</sup> permit an income tax deduction for a U.S. taxpayer who makes a direct contribution to a charity in one of these three countries. This deduction is applied only against foreign source income.<sup>73</sup> Thus, even these rare allowances of deductions from direct contributions to foreign charities are severely limited.

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65. Paine, *supra* note 7, at 5.

66. H.R. REP. NO. 75-1860, at 19-20 (1938), *cited in* Bob Jones Univ. v. United States, 461 U.S. 574, 590 (1983).

67. I.R.C. § 170(a)(1) (2006).

68. I.R.C. § 894 (limiting the application of the Code "to any taxpayer with due regard to any treaty obligation of the U.S. which applies to such an organization").

69. *E.g.*, Convention Between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income, art. 15-A(1), U.S.-Isr., Nov. 20, 1975, KAV 971, 1975 U.S.T. LEXIS 594 (as modified Jan. 26, 1993) [hereinafter U.S.-Isr. Tax Treaty].

In the computation of taxable income of a citizen or a resident of the United States for any taxable year under the revenue laws of the United States, there shall be treated as charitable contribution under such revenue laws contributions to any organization created or organized under the laws of Israel (and constituting a charitable organization for the purpose of the income tax laws of Israel) if and to the extent such contributions would have been treated as charitable contributions had such organization been created or organized under the laws of the United States . . . .

70. See Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, US-Can., Aug. 31, 1994, 2030 U.N.T.S. 236.

71. See Tax Convention with Mexico, U.S.-Mex., Sept. 18, 1992, KAV 3508, 1992 U.S.T. LEXIS 193.

72. U.S.-Isr. Tax Treaty, *supra* note 70, art. 12.

73. Paine, *supra* note 7, at 9.

*A. Individual Tax Deductions for International Charitable Efforts  
Must be in Conjunction with Grantmaking or Operations of Domestic  
Non-Profit Organizations<sup>74</sup>*

Although deductions are not permitted for contributions made directly to foreign charities, a taxpayer may deduct a charitable contribution to a domestic charity who in turn distributes funds to a foreign charity.<sup>75</sup> This deduction is contingent on the domestic charity not acting as a mere conduit,<sup>76</sup> that simply transmits funds to foreign organizations and on the donor card not specifically “earmark[ing]”<sup>77</sup> funds for overseas dispersal. If a donor earmarks a contribution to a domestic charity for a specific foreign organization, the IRS will consider the ultimate recipient to determine whether the donor may deduct the gift.<sup>78</sup> The IRS considers a domestic organization a mere conduit if the individual donor exercises enough influence and control over the organization to effectively determine the contribution’s distribution.<sup>79</sup> The IRS is wary of donation strategies attempting to subvert the requirements of § 170(c)(2)(A).<sup>80</sup> Revenue Ruling 63-252 states: “A given result at the end of a straight path is not made a different result because reached by following a devious path.”<sup>81</sup> A domestic organization must allocate such contributions to a general fund over which it has complete control to determine its final destination.<sup>82</sup>

*B. Ironically a Beneficial Policy: This Limits the Scope of Funds Sent  
Abroad which Must be Scrutinized and Monitored to Prevent  
Diversion to Terrorist Organizations*

This distinction in the U.S. Tax Code has been widely criticized as discouraging international charitable giving.<sup>83</sup> However, mandating that domestic organizations pool donations to send abroad for individuals to receive a tax deduction has great importance in the

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74. Like the United States, most major donor countries, including Germany and the United Kingdom, allow deductions only for gifts to domestic charities that then may spend funds abroad or make grants to local partners. Cerny & Durham, *supra* note 27, at 492.

75. Treas. Reg. 1.170A-8(a)(1) (1986) (“[E]ven though all, or some portion, of the funds of the organization may be used in foreign countries for charitable or educational purposes,” a charitable deduction is permitted.).

76. See Rev. Rul. 63-252, 1963-2 C.B. 101.

77. *Id.*

78. *Id.*

79. Rev. Rul. 66-79, 1966-1 C.B. 48.

80. *Id.*

81. Rev. Rul. 63-252, 1963-2 C.B. 101 (quoting *Minn. Tea Co. v. Helvering*, 302 U.S. 609, 613 (1938)).

82. Rev. Rul. 66-79, 1966-1 C.B. 48.

83. See generally Paine, *supra* note 7.

current effort to monitor international grantmaking and to prevent fund diversion to foreign terrorist organizations. There would be exponentially greater difficulty of oversight if every individual donation required separate tracking and due diligence. Ironically, a contentious element of unequal treatment of international charitable contributions became an important aspect in allowing altruism abroad to continue following the terrorist attacks of September 11, 2001, and the drastic attempts to prevent fund diversion. Effectively limiting international grantmakers to reporting domestic non-profit organizations allows the government to confine the scope of oversight without resorting to even more draconian measures.

#### IV. RESPONSES TO SEPTEMBER 11, 2001 TERRORIST ATTACKS HAVE HAD SIGNIFICANT EFFECTS ON CHARITIES AND NON-PROFIT ORGANIZATIONS MAKING INTERNATIONAL GRANTS OR WITH ACTIVITIES ABROAD

##### A. *Executive Order 13224*

President George W. Bush signed Executive Order 13224 two weeks after the terrorist attacks of September 11, 2001.<sup>84</sup> This Executive Order prohibits U.S. persons from engaging in transactions with any individuals or organizations associated with terrorism as deemed by the Executive Branch.<sup>85</sup> As a consequence, the government may freeze or block assets controlled by, or in the possession of, such terrorist entities or those who are found to support them.<sup>86</sup> Pursuant to this Executive Order, assets of several U.S. charities have been specifically blocked,<sup>87</sup> including the Holy Land Foundation,<sup>88</sup> the Global Relief Foundation,<sup>89</sup> and the Benevolence International Foundation.<sup>90</sup>

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84. Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001). The Executive Order is an exercise of a grant of authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2006), and the National Emergencies Act, 50 U.S.C. §§ 1601-1651.

85. *Id.*

86. *Id.*

87. Robin Krause, Legal Background and Discussion of the U.S. Treasury Department Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities 5 (presentation at Patterson, Belknap, Webb & Tyler L.L.P.) (on file with author).

88. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp.2d 57 (D.D.C. 2002).

89. Global Relief Found., Inc. v. O'Neill, 207 F. Supp.2d 779 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

90. Benevolence Int'l Found., Inc. v. Ashcroft, 200 F. Supp.2d 935 (N.D. Ill. 2002).

The authority of Executive Order 13224 derives from the International Emergency Economic Powers Act of 1977 (IEEPA) allowing the President to declare a national emergency.<sup>91</sup> Such a declaration permits the President to respond to any threat to the national security, foreign policy, or economy of the United States.<sup>92</sup> The IEEPA empowers the President to investigate, regulate, and prohibit transactions involving property subject to the jurisdiction of the United States in which a foreign country or foreign national has an interest.<sup>93</sup>

Accordingly, Executive Order 13224 effectively prohibits U.S. charitable organizations from engaging in “prohibited transactions” with persons suspected of or known to be supporting terrorism.<sup>94</sup> Multiple and dispersed government lists provide names of identified individuals and terrorist organizations.<sup>95</sup> Transactions are also prohibited with persons “otherwise associated” with any listed persons.<sup>96</sup> “Prohibited transactions” include financial support, in-kind support, material assistance, technical assistance, and humanitarian assistance including the provision of food, clothing, and medicine.<sup>97</sup>

Executive Order 13224 presents significant challenges to international grant-making organizations.<sup>98</sup> The government lists of terrorist organizations are not consolidated and must be obtained from multiple agencies and continually monitored for additions or changes.<sup>99</sup> Further problems arise with respect to “false positives” when only names are provided.<sup>100</sup> Without Social Security numbers or any other forms of positive identification, the common occurrence of “Ahmed Mohammed” and other names shared by many people on these lists further discourages participation by organizations attempting to satisfy the new rules.<sup>101</sup> These problems are especially

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91. Krause, *supra* note 88, at 1.

92. *Id.* at 4–6.

93. *Id.*

94. Baron, *supra* note 2.

95. Gallagher, *supra* note 16, at 2.

96. *See generally* Gallagher, *supra* note 16; Krause, *supra* note 88.

97. Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001).

98. Baron, *supra* note 2.

99. *Id.* This includes:

any list of the U.S. Government, the United Nations, or the European Union identifying it as having links to terrorism or money laundering . . . and, the Department of the Treasury’s Office of Foreign Assets Control Specially Designated Nationals List . . . the U.S. Government’s Terrorist Exclusion list maintained by the Department of Justice, the list promulgated by the United Nations pursuant to U.N. Security Council Resolutions 1267 and 1390, the list promulgated by the European Union pursuant to EU Regulation 2580, and any other official list available to the [charity].

VOLUNTARY TREASURY GUIDELINES, *supra* note 17, § IV(B)(2).

100. Baron, *supra* note 2.

101. *Id.*



significant for smaller organizations unable to absorb additional administrative costs associated with the required and onerous due diligence requirements.<sup>102</sup> Thus, the expense of compliance with Executive Order 13224 has effectively deterred many otherwise legitimate international grants and has severely limited the potential impact of smaller charitable organizations.<sup>103</sup>

### B. *The Patriot Act*

Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act” (Patriot Act) by an overwhelming margin<sup>104</sup> in response to the September 11, 2001 terrorist attacks.<sup>105</sup> On October 26, 2001, President Bush signed the Patriot Act into law; the Act’s stated purpose was to strengthen the federal government’s ability to combat terrorism.<sup>106</sup> Among other things, the Patriot Act removes certain limitations on the government’s ability to investigate suspected terrorists, requires financial institutions to be more proactive in identifying and stopping money laundering, mandates information sharing among law enforcement agencies and the private sector, and significantly strengthens existing laws prohibiting material and financial support to terrorists and terrorist organizations.<sup>107</sup> The Patriot Act is much broader in scope than Executive Order 13224, but many of its statutory amendments impact international charitable grantmaking just as directly.<sup>108</sup>

Prior to September 2001, 18 U.S.C. § 2339A—known as the Antiterrorism and Effective Death Penalty Act (AEDPA)—prohibited the provision or concealment of material support or resources with the intent or knowledge it will be used in the commission of specific terrorist acts by foreign terrorist organizations.<sup>109</sup> Congress initially passed the AEDPA in response to the 1995 Murrah Federal Building

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102. *Id.*

103. *Id.*

104. James Kuhnhehn, *Anti-Terror Act Passes Senate; Goes to Bush; Feingold Lone Dissenter on Bill to Expand Police Powers*, MILWAUKEE J. SENTINEL, Oct. 26, 2001, at A1.

105. See generally Neil A. Lewis & Robert Pear, *A Nation Challenged: Terror Laws near Votes in House and Senate*, N.Y. TIMES, Oct. 5, 2001, at B8.

106. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 31 U.S.C. and 18 U.S.C.).

107. *Id.*

108. Lyman et al, *supra* note 13, at 2.

109. 18 U.S.C. § 2339A-B (2005); A “foreign terrorist organization” is an organization so designated by executive order or by notification by the Secretary of State to Congress of the intention to designate the organization as a foreign terrorist organization under the 8 U.S.C. § 1189(a) of the AEDPA.

bombing in Oklahoma City.<sup>110</sup> The AEDPA initially defined “material support” to include monetary support and provision of certain services, but excluded the provision of medicine and religious materials.<sup>111</sup> The Patriot Act amended this provision to significantly expand the definition of “material support or resources.”<sup>112</sup> Under the current AEDPA, “material support” includes “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel transportation, and other physical assets, except medicine or religious materials.”<sup>113</sup>

The Patriot Act augments criminal penalties for those found liable under provisions of the AEDPA.<sup>114</sup> In addition to enhancing criminal liability, the Patriot Act provides a private civil cause of action against those found to have provided support for terrorism.<sup>115</sup> Any U.S. national who is injured in person, property or business “by reason of an act of international terrorism” may recover threefold damages sustained and attorney’s fees.<sup>116</sup> The statute’s definition “international terrorism” includes activities “involv[ing] violent acts or acts dangerous to human life.”<sup>117</sup>

Regardless of the inherent charitable or humanitarian nature of an organization’s operations, grantmakers and non-profit entities are not immune to potential legal liability.<sup>118</sup> Ironically, those international grantmakers and charities who are attracted to and direct the most resources to dangerous global “hotspots” become particularly vulnerable to terrorist influence.<sup>119</sup> The “presumption of

110. Antiterrorism and Effective Death Penalty Act of 1996 § 302, 8 U.S.C. § 1189 (1996).

111. See 18 U.S.C. § 2339A(b) (2000).

112. USA Patriot Act of 2001 §§ 805, 811(f), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 31 U.S.C. and 18 U.S.C.).

113 18 U.S.C. §§ 2339A(b). *But see* Humanitarian Law Project v. Dep’t of Justice, 352 F.3d 382, 405 (9th Cir. 2003) (holding that portions of the definition of “material support” are unconstitutionally vague).

114. Deborah Pearlstein, *Criminal Justice and the Erosion of Rights*, AM. PROSPECT, Oct. 2004, at A8.

115. 18 U.S.C. § 2333 (2006). Criminal penalties include fines and imprisonment for up to 15 years for providing material support or resources with knowledge or intent for use in terrorist acts or by foreign terrorist organizations. EDGARDO RAMOS ET AL., HANDBOOK ON COUNTER-TERRORISM MEASURES: WHAT U.S. NONPROFITS AND GRANTMAKERS NEED TO KNOW ABOUT IT 14 (2004) [hereinafter HANDBOOK].

116. 18 U.S.C. § 2333.

117. 18 U.S.C. § 2331(1). See *Boim v. Quranic Literary Inst.*, 127 F. Supp.2d 1002 (N.D. Ill. 2001), *aff’d* 291 F.3d 1000 (7th Cir. 2002) (parents permitted to bring an action for civil damages under 18 U.S.C. § 2333 against U.S. charities who allegedly provided financial support to aid and abet terrorist activities of Hamas).

118. See generally HANDBOOK, *supra* note 116.

119. *Edited Transcript of the May 9, 2003 ABA Tax Section Exempt Organization Committee Meeting*, 41 EXEMPT ORG. TAX REV. 49, 65 (2003) (David

legitimacy for a charity” also contributes to the vulnerability of terrorist infiltration and influence to those performing first-hand missions abroad.<sup>120</sup> Consequently, law enforcement and investigation activities may focus on international charitable organizations—even though no provision of the Patriot Act is specifically directed at such nonprofits and grantmakers.<sup>121</sup>

### C. Treasury Department Guidelines: “Voluntary Best Practices”

On November 7, 2002, the U.S. Department of Treasury issued the “U.S. Department of the Treasury Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities” (Voluntary Best Practices or Guidelines).<sup>122</sup> The Treasury Department issued this document to help charities and grantmakers understand and comply with the Executive Order 13224 and the Patriot Act.<sup>123</sup> Ideally, compliance with these laws would lead to a reduction in both purposeful and inadvertent terrorist funding. The Guidelines, however, do not have the force of law, and in contrast with the Executive Order and the Patriot Act, do not constitute actual prohibitions.<sup>124</sup> Further, the Guidelines are purely voluntary, and its procedures apply only to distributions of domestic funds made to foreign organizations.<sup>125</sup>

Importantly, compliance with the Guidelines will not immunize an organization from a variety of consequences for *support* of foreign terrorist organizations, including asset blocking, loss of tax-exempt status, or civil or criminal liability.<sup>126</sup> The preamble to the Guidelines states: “Compliance with [the Guidelines] should not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated.”<sup>127</sup>

The Guidelines consist of four categories of recommendations for non-profits and grantmaking foundations: Governance, Disclosure and Transparency in Governance and Financing, Financial Practices

Aufhauser, then General Counsel of the Treasury Department, stating that international charities are “ripe for the picking in the eyes of people who would like to visit violence throughout the world . . .”).

120. *Id.*

121. HANDBOOK, *supra* note 116, at 1–3.

122. *Id.* at 20

123. *Id.* at 20–21

124. See VOLUNTARY TREASURY GUIDELINES, *supra* note 17, *passim* (using “should” throughout).

125. *Id.* § IV.

126. HANDBOOK, *supra* note 116, at 21.

127. VOLUNTARY TREASURY GUIDELINES, *supra* note 17, at 2.

and Accountability, and Anti-Terrorist Financing Procedures.<sup>128</sup> Generally, the first three categories do not require substantial procedural changes, as each is consistent with federal and many state law regulations to which non-profits and grantmaking foundations are usually already compliant.<sup>129</sup> The specific recommendations regarding governance, disclosure, and transparency in financing, and financial practices and accountability are often included in standard recommendations to nonprofits. Most well-run foundations followed these procedures well before September 11, 2001.<sup>130</sup>

The Anti-Terrorist Financing Procedures section presents the greatest obstacle for non-profits and international grantmaking foundations. These antiterrorist financing guidelines pose serious challenges because in several areas, they differ substantially from common procedures for international grantmaking charitable organizations currently followed.<sup>131</sup> The stated purpose of these Guidelines is to ensure funds are not diverted to foreign terrorist organizations.<sup>132</sup> The Guidelines recommend a “know your grantee”<sup>133</sup> approach which parallels the similar “know your customer” compliance programs required of private financial institutions.<sup>134</sup> This guideline requires international grantmakers to obtain basic information regarding foreign grantees, including: name in English, in language of origin, and other names or acronyms used;<sup>135</sup> jurisdictions in which foreign grantee maintains a physical presence;<sup>136</sup> address and phone number;<sup>137</sup> principal purpose of foreign grantee with a detailed report of its goals and projects;<sup>138</sup> names and addresses of organizations which the grantee provides or proposes to provide funding or material support;<sup>139</sup> names and address of subcontracting organizations used; copies of public filings

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128. *Id.* at 2–5.

129. HANDBOOK, *supra* note 116, at 22.

130. *Id.* (citing InterAction, *Private Voluntary Organization (PVO) Standards*, available at <http://www.interaction.org/pvostandards/index.html>; BBB Wise Giving Alliance, *Standards for Charity Accountability* (2003), available at <http://www.give.org/standards/spring03standards.pdf>; BBB WISE GIVING ALLIANCE, STANDARDS FOR CHARITY ACCOUNTABILITY: IMPLEMENTATION GUIDE (2003), available at <http://www.give.org/standards/impguide03.pdf>).

131. *Id.*

132. VOLUNTARY TREASURY GUIDELINES, *supra* note 17, § IV.

133. Beller, *supra* note 19, ¶ 9.

134. HANDBOOK, *supra* note 116, at 23 (citing Bank Secrecy Act of 1970, Pub. L. 91-508 (codified as amended at 31 U.S.C. §§ 5311–5355); USA Patriot Act of 2001 tit. III, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 31 U.S.C. and 18 U.S.C.)).

135. VOLUNTARY TREASURY GUIDELINES, *supra* note 17, § IV(A)(1).

136. *Id.* § IV(A)(2).

137. *Id.* § IV(A)(3), (4).

138. *Id.* § IV(A)(5).

139. *Id.* § IV(A)(6).

or releases made by the grantee including annual reports;<sup>140</sup> and the foreign grantee's existing sources of income including official grants, private endowments, and commercial activities.<sup>141</sup>

Along with this basic information, the Guidelines suggest an organization conduct extensive due diligence on its foreign grant recipients.<sup>142</sup> The vetting procedures recommended in the Guidelines include: conducting a reasonable search of public information, including information via the internet, to determine whether the foreign grantee is or has been implicated in questionable activity;<sup>143</sup> verifying the grantee does not appear on any list of the U.S. government, United Nations, or European Union as having links to terrorism or money laundering;<sup>144</sup> obtaining the full name in English, in the language of origin, and any other name or acronym used, and nationality, citizenship, current country of residence, place and date of birth for key staff of foreign grantee's principal place of business;<sup>145</sup> requiring the foreign grantee to certify that it does not employ or deal with any entities or individuals on the lists or known to support terrorism;<sup>146</sup> and determining the identity of foreign grantee's financial institutions with which it maintains accounts and seeking bank references for purposes of determining whether the financial institution is a shell bank, operating under an offshore license, licensed in a jurisdiction considered uncooperative in international fight against money laundering, licensed in a jurisdiction that the Treasury Department has determined to be a primary money laundering concern, or licensed in a jurisdiction lacking in adequate anti-money laundering controls and regulatory oversight.<sup>147</sup>

Although the Voluntary Treasury Guidelines do not carry the force of law, they reveal likely interpretations of the legal requirements in response to the September 11th terrorist attacks and provide insight as to the extent to which parties found supporting foreign terrorist organizations will face enforcement action.<sup>148</sup>

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140. *Id.* § IV(A)(8).

141. *Id.* § IV(A)(9).

142. HANDBOOK, *supra* note 116, at 23.

143. VOLUNTARY TREASURY GUIDELINES, *supra* note 17, § IV(B)(1).

144. *See supra* note 100 and accompanying text (discussing the variety of lists that nonprofits must monitor).

145. VOLUNTARY TREASURY GUIDELINES, *supra* note 17, § IV(B)(3).

146. *Id.* § IV(B)(4).

147. *Id.* § IV(C)(1)–(4).

148. HANDBOOK, *supra* note 116, at 20.

V. THE NEED FOR GOVERNMENT AND CHARITABLE ORGANIZATIONS TO  
LAUNCH A COLLABORATIVE EFFORT OF INFORMATION  
COLLECTION AND SHARING

A collaborative information collection and sharing effort would protect charities from becoming law enforcement agencies and would ensure U.S. altruism is properly monitored and reaching the areas of the world most in need. A robust system of international charitable giving is a vital element in the promotion of “civil society” and the fight against terrorist attitudes and sympathies. The U.S. government and non-profit sector must combine resources and efforts to continue to promote global charitable participation with an updated approach to grant-making and fund oversight.

A. *Critique U.S. Responses Intended to Prevent Diversion of  
International Grants to Individual Terrorists and Foreign  
Terrorist Organizations*

A tax law specialist in the IRS’s Exempt Organizations Division (Office of Rulings and Agreements) admitted the IRS has “a fine line to dance” in its efforts to regulate grants to international charities to prevent diversion to terrorist organizations.<sup>149</sup> Consequently, these efforts “must avoid taking actions that will inadvertently hurt the charitable communities’ ability to provide funds and services in places . . . that have a great need for charitable giving.”<sup>150</sup> Unfortunately, government actions intending to prevent terrorist funding, from Executive Orders to legislation such as the Patriot Act to administrative guidelines such as the Voluntary Best Practices, have collectively hampered the ability of grantmakers, large and small, to continue altruistic services internationally.<sup>151</sup>

1. “One-Size Fits All” Approach Does not Accommodate the Reality of the Extensive Diversity of International Grantmakers in the United States

The “one-size fits all” procedures of these governmental responses to terrorist funding are incompatible with the reality of international grantmaking in the United States.<sup>152</sup> Private foundations, corporate foundations, corporate matching gift

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149. J. Christine Harris, *IRS Reps Explain Rules on Charities, Terrorist Activity*, PLANNED GIVING DESIGN CENTER, Nov. 22, 2004, <http://www.pgdc.com/usa/item/?itemID=250149> (last visited Mar. 30, 2006).

150. *Id.* (quoting Leonard Henske, Jr.).

151. See *Recommendations to Safeguard Grantmaking*, *supra* note 15, at 1. See generally HANDBOOK, *supra* note 116.

152. Baron, *supra* note 2. See also Beller, *supra* note 19.

programs, and public charities including community foundations, donor-advised funds, operating organizations providing funding and in-kind services, and religious congregations and organizations support international activities with cash grants and humanitarian aid.<sup>153</sup> The Guidelines do not address scalability.<sup>154</sup> The government does not distinguish grants varying in size, purpose, nature, location, or the grantmaker's previous relations and experience with the grantee in its due diligence requirements.<sup>155</sup> Consequently, smaller grantmakers, unable to afford increased administrative costs associated with such extensive due diligence, are not making grants they otherwise would.<sup>156</sup> Larger foundations with extensive procedures and practices already in place to monitor international grants have not been as dramatically effected.<sup>157</sup>

In reality, even though the risk of diversion to terrorist organizations is very small, the new Guidelines "would substantially increase the administrative costs associated with making international grants, even when there is no realistic risk of diversion. This would amount to many millions of dollars in administrative expenses that would directly reduce the funds that could otherwise be used for charitable purposes."<sup>158</sup>

*B. The Council on Foundations and American Bar Association's Proposal for a Risk-Based Approach Based on Current Practices and Procedures Larger Grantmaking Foundations Already Observe*

Identifying and specifying the limited threat of fund diversion to terrorist organizations, the Council on Foundations<sup>159</sup> and the American Bar Association (ABA)<sup>160</sup> endorsed a risk-based approach to address the difficulties arising from the new liabilities associated

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153. Baron, *supra* note 2.

154. *Id.*

155. *Id.*

156. *Id.*; Cerny & Durham, *supra* note 27, at 492.

157. See, e.g., Beller, *supra* note 19, ¶ 92.

158. Baron, *supra* note 2 (citing The Council on Foundations response, delivered to Treasury on June 20, 2003).

159. "The Council on Foundations is a membership organization of more than 2,000 grantmaking foundations and giving programs worldwide. [The Council] provide[s] leadership expertise, legal services and networking opportunities—among other services—to [its] members and to the general public." See The Council on Foundations, About the Council on Foundations, <http://www.cof.org/index.cfm?containerID=18&menuContainerName=&navID=0> (last visited Mar. 30, 2006).

160. "The ABA is the largest voluntary professional association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public." See About Us: The American Bar Association, <http://www.abanet.org/about/home.html> (last visited Mar. 30, 2006).

with international grantmaking.<sup>161</sup> In response to the request for public comments on current international grant-making rules and proposed Treasury Guidelines by the IRS, the Council on Foundations and the ABA have argued a risk-based approach would better achieve the objective of the Guidelines without effectively prohibiting grants with the blanket approach.<sup>162</sup> “This risk based approach could help minimize the burden on [grant-makers] in cases where increased oversight and due diligence is not justified from a risk analysis perspective.”<sup>163</sup>

International charitable grantmakers generally observe standard practices and procedures consistent with the “know your grantee” approach.<sup>164</sup> Consequently, replacing Section IV of the Guidelines with a risk-based approach expanding the “know your grantee” procedures would help the grantmaker identify those grants presenting the greatest risk of diversion to terrorist organizations and would provide additional and specific steps the grantmaker could take to reduce the possibility of diversion when high-risk grants have been identified.<sup>165</sup> The premise of the risk-based approach is that there is “a continuum of risk and that experienced grantmakers are best placed to make thoughtful and informed judgments as to where on the continuum a particular payment belongs.”<sup>166</sup> The ABA has identified a “Continuum of Risk Factors,” including: the domestic organization’s familiarity with the foreign recipient, limitations on fund use through various means, internal and external financial accounting mechanisms, and identity verification and identification of known supporters of terrorism.<sup>167</sup> After considering such factors, a U.S. grantmaker would then use the information to perform risk assessments, determine at what level of risk of diversion a payment would be, implement procedural anti-diversion steps consistent with the risk level, and document the assessment information and maintain for record keeping for three years.<sup>168</sup> Ideally, this risk-based approach intends “to strike an appropriate balance between the need to protect charitable funds from terrorist diversion and the equally important need to allow U.S. charities to continue providing humanitarian relief and helping to build free and democratic societies in chaotic nations that have been devastated by war, famine, disease, and internal turmoil.”<sup>169</sup>

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161. See The American Bar Association, <http://www.abanet.org/dch/committee.cfm?com=TX319000> (last viewed Mar. 30, 2006).

162. Baron, *supra* note 2.

163. *Id.*

164. Beller, *supra* note 10, ¶ 9, 90.

165. *Id.* ¶ 144.

166. Baron, *supra*, note 2.

167. *Id.*

168. *Id.*

169. *Id.*



Other interested groups, including members of InterAction<sup>170</sup> and Independent Sector,<sup>171</sup> have criticized this “all purpose list of risk factors that would justify additional due diligence” required for international grantmakers and humanitarian relief agencies.<sup>172</sup> A significant limitation of the proposed risk-based approach is the reality that the higher risk assessment likely exists on account of the same reasons heightened due diligence is difficult, if not impossible, to perform.<sup>173</sup> Furthermore,

those countries where the risk is posited to be the highest are also some of those countries where humanitarian crises are most acute and where the intervention of American non-governmental organizations is most critically needed. They are also frequently countries where the U.S. government interest in providing assistance through non-governmental organizations is very high, both for humanitarian reasons and for political reasons of encouraging stability and development as a bulwark against political extremism and terrorism.<sup>174</sup>

*C. Use the Practices and Procedures Already in Place, but Make the Information Collected Available to All Grantmaking Organizations Through the Use of a Secure Database*

This proposed risk-based approach considers the procedural practices many grantmakers already observe and makes assessments using information available or already obtained. According to the ABA’s findings, many public charities and private foundations currently use extensive procedures and safeguards to ensure their international grants are used in furtherance of exempt purposes and are not diverted for nonexempt purposes.<sup>175</sup> These practices often include:

- An extensive pre-grant review and inquiry to determine the ability of a foreign grantee to achieve the purposes intended to benefit

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170. InterAction.org, <http://www.interaction.org> (last visited Mar. 30, 2006) (“InterAction is the largest alliance of U.S.-based international development and humanitarian nongovernmental organizations. With more than 160 members operating in every developing country, we work to overcome poverty, exclusion and suffering by advancing social justice and basic dignity for all.”).

171. INDEPENDENT SECTOR, 2003 ANNUAL REPORT, [www.independentsector.org/PDFs/2003ar.pdf](http://www.independentsector.org/PDFs/2003ar.pdf) (last visited Mar. 30, 2006).

Independent Sector is committed to strengthening, empowering, and partnering with nonprofit and philanthropic organizations in their work on behalf of the public good. Its membership of nonprofit organizations, foundations, and corporate philanthropy programs collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

172. Baron, *supra* note 2.

173. *Id.*

174. *Id.*

175. Beller, *supra* note 19, ¶ 15.

from the grant;<sup>176</sup> and, the ability to safely protect diversion of funds to non-charitable purposes.

- Written grant agreements specifying the responsibilities of both the U.S grantor and the international grantee closely defining the purposes for the grant and stating any reporting requirements the grantor requires of the grantee.<sup>177</sup> Following the uncertainty of new government requirements after September 11, 2001, many grantors include explicit anti-terrorist and anti-diversion financing provisions in these grant agreements.<sup>178</sup>
- Requirement of funds transmitted electronically or by check.<sup>179</sup> Only using cash grants as a last resort and only when banking systems in the grantee's country are not trustworthy.<sup>180</sup>
- Written report requirements at regular intervals specifying the international grantee's use of funds.<sup>181</sup>
- Site visits or further inquiries depending on the degree of attention needed or desired including visits before, during or after the dispersal of funds.<sup>182</sup>

Generally, grantmakers tailor their oversight and procedural safeguards according to their experience with a particular recipient, the size and purpose of the grant, and the administrative capacity of the grantmaker.<sup>183</sup> The risk-based approach would develop and more formally structure this framework already followed. This information, which grantmakers collect and maintain for review of future grantmaking decisions is vital to the success of each individual grantmaking body.

A collaborative information sharing effort would enhance the "know your grantee" approach and, more importantly, would sustain and promote local relief and aid organizations. Local charitable and relief organizations provide important advantages over their grantors and counterparts in the United States, including knowledge of local language, religion, customs, and a staff who often live permanently in a resource deprived area.<sup>184</sup> Frequently, Christian affiliated organizations provide aid indirectly through Muslim relief agencies to which aid recipients may be more receptive.<sup>185</sup> The recent tsunami in Southeast Asia exemplified how, as in many disasters, local governments and local relief organizations provide the most immediate response and care despite devastating personal losses,

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176. *Id.* ¶ 16.

177. *Id.*

178. *Id.* ¶ 46.

179. *Id.* ¶ 16.

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.* ¶ 18–56.

184. Cerny & Durham, *supra* note 27, at 492.

185. *Id.* at 6.

incomplete staffing, and damaged facilities.<sup>186</sup> Having a source of grantee information already in place would greatly improve the ability to respond to the immediate needs following a disaster, allowing foreign support to mobilize more quickly as due-diligence information on local grantees could be quickly accessed.<sup>187</sup>

Consequently, consolidating this information and making it available to grantmakers of every size and capacity would address many of the current concerns regarding appropriate levels of due diligence. Furthermore, it would be up to each grantmaker to determine what level of due diligence is required.<sup>188</sup> The difficulty with devising a practicable approach which would not discourage international grantmakers stems from a broad dispersal of collected information among government agencies and non-profit organizations. A means of sharing information would benefit each individual grantmaker while ensuring U.S. altruism abroad collectively continues to grow.

*D. Charities are not Law-Enforcement Agencies and Should not be Tasked With Investigative Requirements to Make International Grants as Other Checks Monitor Charitable Behavior and such Requirements Diminish Grant Efficacy*

International grantmakers are required to check numerous government lists of terrorist organizations which must be obtained from multiple agencies and continually checked for additions or changes.<sup>189</sup> These lists must be consolidated, updated, and made available in a useable format to grantmakers.<sup>190</sup> Non-profit organizations and grantmakers are not law-enforcement agencies.<sup>191</sup> Beyond responsibly monitoring dispersion of funds, the government should not rely on charities to investigate and track the activities of terrorists.<sup>192</sup> Many governments in Asia, Africa, and the Middle East regulate nonprofit organizations from “a national security perspective,” using police, security, and intelligence agencies.<sup>193</sup> If U.S. grantmakers were required to forge relationships with these agencies to obtain confidential information about their grantees, this would likely lead to increased scrutiny over the grantees themselves

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186. *Id.* at 2.

187. *Id.* at 6–7.

188. *Recommendations to Safeguard International Grantmaking*, *supra* note 15, at 3.

189. Baron, *supra* note 2. *See supra* note 100 and accompanying text (discussing the variety of lists that nonprofits must monitor).

190. Baron, *supra* note 2.

191. Beller, *supra* note 19, ¶ 10.

192. *Id.* *See also* Brad Wolverton, *13 Nonprofit Groups Sue Federal Government Over Terrorism Rules*, CHRON. OF PHILANTHROPY, Nov. 25, 2004, at 12.

193. Baron, *supra* note 2.

by these law-enforcement bodies and possibly increase demands for corrupt and illegal payments to ensure government concurrence.<sup>194</sup> Furthermore, if U.S. grantmakers are required to collect detailed information about the staff, trustees, donors, and sub-contractors generally, not just those related to the grant itself, much skepticism of the grantors true motivations would arise.<sup>195</sup> Again, the chances of jeopardizing the ability of grantees to perform services for which the grant was made are greatest in countries with repressive host governments where the need for assistance is usually the most acute.<sup>196</sup>

There also exist several checks on the activities of charitable organizations which should be considered before tasking charities themselves with law enforcement duties.<sup>197</sup> There is a long legal history in the United States of defining what is and is not charitable activity.<sup>198</sup> An extensive, albeit imperfect, press, watchdog, and donor system of scrutiny at the federal, state, and local levels already strictly scrutinize and criticize the improper behavior of organizations and their managers.<sup>199</sup> The survival of charitable organizations greatly relies on their public reputations, as public and private funding sustains most exempt entities.<sup>200</sup> Charitable organizations can maintain public confidence by fulfilling the public purposes for which they qualified for exempt status,<sup>201</sup> and, thus do not need and should not be required to perform investigations as law-enforcement agencies.

## VI. CONCLUSION

The U.S. government and non-profit sector share the same objectives of preventing charitable fund diversion to foreign terrorist organizations without suppressing this vital element in alleviating conditions in the world where terrorist sympathies often thrive. U.S. altruism plays a delicate role in U.S. foreign policy. A responsible balance is possible through a collaborative information sharing effort. The government must consolidate and provide grantors regular updates on suspected terrorists and terrorist organizations. Charitable organizations must likewise consolidate and share

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194. *Id.*

195. *Id.* at 8.

196. *Id.*

197. Bjorklund, *supra* note 22, at 245.

198. *Id.*

199. *Id.*

200. Steven Toscher & Chard Nardiello, *IRS Scrutiny of Tax Exempt Organizations*, 28 L.A. LAW. 18, 20 (2005).

201. *Id.*

information from years of experience and procedures already in place regarding international grantees. Information sharing would accomplish these mutual objectives without sacrificing the autonomy and credibility of either government law enforcement agencies or grantmakers and their grantees who cannot be perceived as agents or authorities of the U.S. government. A concerted effort on the part of the government and the non-profit sector collectively is imperative to the promotion and success of international charitable giving and the fight to eradicate terrorist attitudes worldwide.

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