

Treasury Department Issues Revised Anti-Terrorist Financing Guidelines Applicable to Both Foreign and Domestic Grants

On Monday, December 5, 2005, the Treasury Department issued revised Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities. The revised Guidelines replace the Guidelines issued by Treasury in November 2002, which established specific due diligence procedures for U.S. charities making grants and conducting activities overseas. The original Guidelines were widely criticized by the nonprofit sector as unnecessarily burdensome and poorly tailored to the objective of preventing funding of terrorist organizations. According to a Treasury press release, the revised Guidelines are effective immediately, although Treasury will accept comments on the revised Guidelines until February 1, 2006, which it will consider in finalizing the Guidelines. The revised Guidelines, the introduction to the revised Guidelines, and the Treasury press release regarding the Guidelines are available at the following links:

Revised Guidelines:

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

Introduction:

<http://www.treas.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml>

Press Release:

<http://www.treas.gov/press/releases/js3035.htm>

It is not clear that the revised Guidelines are an improvement from the original Guidelines. Several aspects of the revised Guidelines are similar to the prior version. The revised Guidelines still contain the four original sections: Governance, Financial Practice/Accountability, Disclosure/Transparency in Governance and Finances, and Anti-Terrorist Financing Procedures, which has been renamed "Anti-Terrorist Financing Best Practices." Much of the material in these sections remains the same from the prior version, although there are some important changes. For example, the original Guidelines provided that a charity's board "should maintain records of all decisions made" and that these "records should be made available for public inspection." The revised Guidelines have modified this statement to provide that "when appropriate, these [board] records should immediately be made available for inspection by the appropriate regulatory/supervisory and law enforcement authorities." The revised Guidelines also include a new section titled, "Fundamental Principles of Good Charitable Practice."

In the section on Anti-Terrorist Financing Best Practices, one obvious improvement from the prior Guidelines is the clarification that charities need only check OFAC's list of "Specially Designated Nationals" (the "SDN list"). The prior Guidelines stated that charities should check the SDN list, several other specific lists, and "any other official list available to the charity." In addition, it is encouraging that the revised Guidelines recognize that charities should be permitted to use a risk-based approach in determining what due diligence is needed to guard against the possibility of diversion of grant funds or other payments for terrorist activities.

Other aspects of the new best practices are troubling, however. For example, the prior best practices clearly applied only to distributions to foreign charities. The revised Guidelines apply to both domestic and foreign distributions of funds, stating that "charities should consider taking the following steps before distributing any charitable funds." The revised Guidelines refer simply to "recipients," rather than "foreign recipient organizations" from the original Guidelines. In addition, several organizations have already noted that they are concerned about a new recommendation in the revised Guidelines that a charity should "consult publicly available information, including information available via the Internet, to determine whether any of its key employees is suspected of activity relating to terrorism." The revised Guidelines explain that if a charity's vetting practices lead to a finding that "any of its own key employees, any of its recipients, or any of the key employees, board members, or other senior management of its recipients is suspected of activity related to terrorism" the charity should immediately report a "valid or potentially valid match . . . on the SDN list to OFAC" and "can provide information on any suspicious activity that does not involve an OFAC match through a referral form available on Treasury's website. "

As with the prior Guidelines, Treasury has been careful to state that the revised Guidelines are voluntary. We encourage you to review the revised Guidelines and to contact us with any questions. It is likely that many organizations making grants or other payments have adequate due diligence and grant administration procedures in place. Organizations not doing so already may want to consider whether it would be appropriate to (1) check grant recipients against the OFAC SDN list, and (2) add an anti-terrorism certification to grant agreements. Many organizations are likely to wait to see whether the Guidelines are modified again before incorporating other recommendations from the revised Guidelines.

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