

## TERRORIST ABUSE OF NON-PROFITS AND CHARITIES: A PROACTIVE APPROACH TO PREVENTING TERRORIST FINANCING

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Sun Tzu writes, “[a]rmed conflict cannot be waged until it has been financed.”<sup>1</sup> Consequently, “[m]oney is the life-blood of terrorist operations,”<sup>2</sup> and without money, terrorists cannot function.<sup>3</sup> Terror financing came to light after September 11, 2001, and the Bush administration has prioritized waging a war against the financing of terrorist groups, including funds raised by terrorist activities channeled through non-profit organizations.<sup>4</sup>

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<sup>\*\*</sup> *Disclaimer:* This article is prepared and published for informational purposes only and should not be construed as legal advice. The views expressed in this column are those of the author and do not necessarily reflect the views of the author's law firm or its individual partners.

1. U.S. Dep't of the Treasury & U.S. Dep't of Justice, 2003 National Money Laundering Strategy 53 (2003), available at <http://www.treasury.gov/offices/enforcement/publications/ml2003.pdf>, citing SUN TZU, THE ART OF WAR 72-73 (Samuel Griffith trans., Oxford Univ. Press 1963).

2. Angela D. Hardister, *Can We Buy Peace on Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World*, 28 N.C. J. INT'L L. & COM. REG. 605, 606 (Spring 2003) (citations omitted).

3. David Aufhauser, Policywatch #812 War on Terror: Follow the Money, Washington Institute for Near East Policy (Dec. 8, 2003) (stating that Al-Qaeda's cash flow has been cut by two-thirds since the United States began its campaign against terror financing), available at <http://www.washingtoninstitute.org/templateC05.php?CID=1690>.

4. The Department of the Treasury, Office of Terrorism and Financial Intelligence website states, “[p]rotecting charities from terrorist abuse is a critical component of the global fight against terrorism. Charities provide essential services, comfort, and hope to those in need around the world. Unfortunately, terrorists have exploited the charitable sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and operations. This abuse threatens to undermine donor confidence and jeopardizes the integrity of the charitable sector, whose services are indispensable to the world community.” U.S. Dep't. of Treasury, Office of Terrorism and Financial Intelligence, Protecting Charitable Organizations (Mar. 9, 2007), <http://www.ustreas.gov/offices/enforcement/key-issues/protecting/>. Pat O'Brien, Assistant Secretary for the Treasury's Office of Terrorist Financing and Financial Crime, concludes, “[t]he abuse of charities by terrorist organizations is a serious and urgent matter . . . We are refor[ming] the need for both the U.S. Government and the

The Bush administration reports that more than \$139.1 million in assets were frozen worldwide, including \$36.7 million in the U.S., and an additional \$64 million in terrorist related assets were seized by authorities globally between September 11, 2001 and January 2004.<sup>5</sup> As of the Fall of 2002, \$7.3 million was seized from charities that U.S. investigators believe were linked to al-Qaeda or other terrorist organizations and \$5.7 million was frozen internationally by countries concerned that “spurious charitable organizations” were functioning within their borders.<sup>6</sup> Based on figures from the Department of Justice, one scholar suggests that Al-Qaeda received approximately 30% of its financial resources from donations solicited in the United States and abroad.<sup>7</sup> As of September 2006, the Treasury Department identified 43 charities worldwide and 29 associated individuals as Specially Designated Nationals (“SDN”)<sup>8</sup> for their support of terrorist organizations and operations.<sup>9</sup> The Treasury Report found that “these seventy-two charities and individuals comprise over fifteen percent of all U.S.-designated terrorist supporters or financiers, indicating the primary importance of charities as a critical means of support for terrorist organizations and activities.”<sup>10</sup>

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charitable sector to keep this challenge at the forefront of our complementary efforts [via the Guidelines].” Treasury Press Release, Treasury Updates Anti-Terrorist Financing Guidelines for Charitable Sector (Sept. 29, 2006), available at <http://www.treasury.gov/press/releases/hp122.htm>.

5. Press Release, Bush Administration Announces Budget Increase to Help Fight Terrorist Financing and Financial Crime (January 16, 2004), available at <http://www.treas.gov/press/releases/js1100.htm>.

6. Joel G. MacMull, *Removing the Charitable Veil: An Examination of U.S. Policy to Combat Terrorist Funding Charities Post 9/11*, 10 NEW ENG. J. INT’L & COMP. L. 121, 122 (2004) citing U.S. Stepping Up War on Terrorist Financing, Treasury Officials Say (Nov. 20, 2002) (statement of Under Secretary for Enforcement, U.S. Department of Treasury, Jimmy Durule, U.S. Senate Judiciary Committee); see U.S. Department of Justice Before the H. Comm. on the Judiciary, 107th Cong. (2003) (testimony of John Ashcroft, Attorney General), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=8>; Press Release, Testimony of Juan C. Zarate, Deputy Assistant Secretary, Terrorist Financing and Financial Crime, Department of the Treasury (Mar. 18, 2003), available at <http://www.treas.gov/press/releases/js139.htm> (discussing the freezing of \$125 million in terrorist organization assets).

7. See Fletcher N. Baldwin, Jr., *Introduction, Organized Crime, Terrorism and Money Laundering in the Americas*, 15 FLA. J. INT’L L. 3, 4 (2002) (writing that the Department of Justice figures suggest that al-Qaeda received approximately forty percent of its funds from drugs, twenty percent from extortion, ten percent from kidnapping, and the remainder from fundraising in the United States and abroad).

8. Specially Designated Nationals (“SDN”) are “designated parties with whom U.S. persons are prohibited from providing services or conducting transactions and whose assets are blocked.” U.S. persons, including U.S.-based charities, are prohibited from dealing with any of the parties included on the SDN List. U.S. Dep’t. of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, 11 (2006) (“Treasury ATF Guidelines”), available at [http://www.ustreas.gov/offices/enforcement/key-issues/protecting/docs/guidelines\\_charities.pdf](http://www.ustreas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf).

9. *Id.* at 14.

10. These figures only represent traceable funds and are therefore probably underestimates because it is often difficult to determine the sources of terrorist financing. *Id.* at 15; see sections IB and IC; see also Herbert V. Morais, *Fighting International Crime and its Financing: The*

This article argues that the government should adopt a more active role in monitoring terror financing via non-profit organizations. Part I of this paper addresses the problem of non-profit organizations and terror financing while summarizing the purpose of tax exemption and advantages of operating as a non-profit organization.<sup>11</sup> Additionally, it briefly defines terrorism and terror financing. Finally, it introduces the relationship between terror financing and non-profit organizations. Part II discusses the current government's counter-terrorism regulations most relevant to non-profit organizations and the flaws of these initiatives. Part III addresses the need for modification of existing regulations and proposes several proactive initiatives to reduce the revenue stream flowing through non-profits to finance terrorist operations without incapacitating legitimate charitable organizations.

## I. THE PROBLEM: NON-PROFIT ORGANIZATIONS AND TERROR FINANCING

### A. Non-profit organizations – overview

The Internal Revenue Service (“IRS”) is the primary federal agency with non-profit oversight responsibility. In 2002, there were more than 1.5 million tax-exempt organizations, including nearly 800,000 charities and 350,000 religiously-affiliated organizations that managed \$2 trillion in assets.<sup>12</sup> In 2000, Americans donated \$133 billion dollars to charities with humanitarian intent.<sup>13</sup> In 2004, American non-profit organizations received \$248.52 billion in charitable giving, a five percent increase over the previous year.<sup>14</sup>

The Internal Revenue Code (“IRC”) provides for exemption from federal income tax to organizations that meet the requirements described in §

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*Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 612 (2005) (“Pinning down the culprits of terrorist financing is problematic, however, when viewed in the context of Middle East culture and Islamic values. This is true for at least two reasons. First, the Koran imposes an obligation on all Muslims to contribute a portion of their wealth, called zakat, to religious charities. Second, there is growing support for Islamic movements that promote political, social and cultural causes.”).

11. Though the government has frozen assets of U.S.-based charities suspected of funneling money to terrorists and not non-profit organizations, all non-profit organizations are vulnerable. Consequently, this article will address issues concerning non-profit organizations and is not limited to U.S.-based charities.

12. Prepared Testimony of Deputy Treasury Secretary Kenneth Dam before Senate Subcommittee on Banking, Housing, and Urban Affairs Subcommittee on International Trade and Finance: U.S. Allies Work to Stop Terrorist Abuse of Charities, Department of State Washington File (Aug. 1, 2002), available at <http://canberra.usembassy.gov/hyper/2002/0801/epf410.htm>.

13. U.S. Dep’t of the Treasury, Contributions by the Department of the Treasury to the Financial War on Terrorism, Fact Sheet 12 (2002), available at <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf>.

14. FISHMAN and SCHWARZ, NON-PROFIT ORGANIZATIONS: CASES AND MATERIALS, 18 (Foundation Press, 3rd ed. 2006). Of the \$248.52 billion, approximately \$207 billion were from individual donations and approximately \$41 billion were from corporations and foundations. Independent Sector, Report to Congress and the Non-Profit Sector on Governance, Transparency, and Accountability of Charitable Organizations, June 2005, at 9.

501(c)(3).<sup>15</sup> To receive the exemption, the organization must be formed as a corporation, community chest, fund or foundation.<sup>16</sup> Section 501(c)(3) discusses organizations that are “organized and operated exclusively” for religious, charitable,<sup>17</sup> scientific, educational or other specified exempt purposes.<sup>18</sup> Non-profit organizations that violate this non-diversion prohibition risk the revocation of their tax-exempt status. Under § 170(c)(2), contributions to 501(c)(3) organizations are tax deductible by the donor.<sup>19</sup>

A U.S. public charity<sup>20</sup> that is otherwise exempt under § 501(c)(3) and conducts part or all of its activities in a foreign country may qualify as a 501(c)(3) organization.<sup>21</sup> A public charity may create and direct its own programs overseas consistent with the charity’s exempt purpose. Alternatively, a public charity may grant funds directly to foreign organizations that use the funds for activities consistent with the public charity’s exempt purpose. If the grant recipient has received an IRS determination letter recognizing tax-exempt status, there is a presumed charitable purpose, though this presumption may be rebutted by evidence proving that the grant was not used for such purposes. However, if the recipient of the grant is a foreign or domestic organization that has not received an IRS determination letter, the granting charity must prove the grant was made in furtherance of an exempt purpose.<sup>22</sup> Contributions to a domestic 501(c)(3) organization may be deductible even though the organization uses the funds to finance an activity in a foreign country.<sup>23</sup>

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15. I.R.C. § 501(a) (2007).

All section references are to the IRC Code of 1986, as amended, unless otherwise indicated.

The IRS exempts organizations described in §§ 501(c), or (d), unless such exemption is denied under § 502 and § 503 of the IRC. However, this article will focus on 501(c)(3) organizations. To be exempt from paying federal tax, 501(c)(3) organizations must file an Application for Recognition of Exemption (Form 1023) with the IRS. Treas. Reg. § 1.501(a)-1(a)(2). For a history of the special tax exemptions provided to charitable organizations, see Mindy Herzfeld, *Restricting the Flow of Funds From U.S. Charities to International Terrorist Organizations – A Proposal*, 56 TAX LAW. 875, 876-79 (2003).

16. I.R.C. § 501(c)(3).

17. The IRS defines the term “charitable” to include “[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; . . . lessening of the burdens of Government; . . . lessen[ing of] neighborhood tensions; . . . eliminat[ing] prejudice and discrimination; . . . defen[se of] human and civil rights secured by law; or . . . combat[ing] community deterioration and juvenile delinquency.” IRC § 501(c)(3); see Treas. Reg. § 1.501(c)(3)-1(d)(2).

18. I.R.C. § 501(c)(3); see Treas. Reg. § 1.501(c)(3)-1.

19. I.R.C. § 170(c)(2).

20. Separate rules apply to grants by private foundations to foreign organizations, which are beyond the scope of this article.

21. Rev. Rul. 71-460, 1971-2 C.B. 231; see also Rev. Rul. 68-117, 1968-1 C.B. 235; Rev. Rul. 68-165, 1968-1 C.B. 253.

22. See Rev. Rul. 68-489, 1968-2 C.B. 210.

23. Rev. Rul. 75-65, 1975-1 C.B. 79; see Rev. Rul. 66-79, 1966-1 C.B. 48 (holding that contributions to a domestic charity described in § 170(c)(2) that are solicited for a specific project of a foreign charitable organization are deductible under § 170 where the domestic charity has reviewed and approved the project as being in furtherance of its own exempt purposes and has

There are several advantages to operating as a tax-exempt organization. First, exempt organizations are not required to pay income taxes. Second, contributions are deductible for federal tax purposes by the donors; consequently, charities are better able to attract income. In addition, 501(c)(3) organizations pay no property or sales taxes.

### ***B. Terrorism and Terror Financing***<sup>24</sup>

Terrorism,<sup>25</sup> as defined in Executive Order 13,224, means an activity that:

- (i) [I]nvolves a violent act or an act dangerous to human life, property, or infrastructure; and
- (ii) [A]ppears to be intended — (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.<sup>26</sup>

Terrorist organizations “deliberately establish, infiltrate or otherwise exploit” non-profit organizations to raise funds to finance terrorism and build terrorist support networks.<sup>27</sup> The financial support of terrorism requires both acquiring money through legal or illegal means and the unlawful movement of money to terrorist organizations.<sup>28</sup>

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control and discretion as to the use of the contributions.).

24. For more information regarding the roles of the IRS and the Treasury Department in the fight against terrorist financing, see MARTIN A. WEISS, CRS REPORT FOR CONGRESS, TERRORIST FINANCING: U.S. AGENCY EFFORTS AND INTER-AGENCY COORDINATION, Aug. 3, 2005, available at <http://www.fas.org/sgp/crs/terror/RL33020.pdf>. For more information regarding terrorist financing see *Terrorist Assets Report*, 2005, U.S. Dep’t. of Treasury, available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2005.pdf>; see also *Terrorist Assets Report*, 2004, U.S. Department of Treasury, available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2004.pdf>.

25. For a detailed discussion of the term, ‘terrorism,’ see Morais, *supra* note 10, at 603-10.

26. For further information on Executive Order 13,224, see section IIA1 below. Exec. Order No. 13,224 § 3(d); 66 Fed. Reg. 49,079 (Sept. 25, 2001), amended by Exec. Order No. 13,258, 67 Fed. Reg. 44,751 (July 3, 2002) & Exec. Order No. 13,284, 68 Fed. Reg. 4,075 (Jan. 28, 2003) (“Executive Order”), available at <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>; see also United Nations Convention for the Suppression of the Financing of Terrorism’s definition of “terrorism” and “financing of terrorism,” G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th plen. mtg., Annex, Agenda Item 160, U.N. Doc. A/RES/54/109 (2000).

27. See, e.g. Gary W. Jenkins, *Soft Power, Strategic Security and International Philanthropy*, 85 N.C.L. REV. 773 (Mar. 2007); Robert F. Worth & Hassan M. Fattah, *Relief Agencies Find Hezbollah Hard to Avoid*, N.Y. TIMES, Aug. 22, 2006; Morais, *supra* note 10, at 623; Heather Timmons, *British Study Charitable Organizations for Links to Plot*, N.Y. TIMES, Aug. 24, 2006; Ian Fisher, *Airplane Terrorism Case Prompts Questions About the Work of Islamic Charities in Britain*, N.Y. TIMES, Aug. 24, 2006.

28. Weiss, *supra* note 24. In addition, terrorists raise money used to finance terrorism from seemingly legitimate businesses and criminal enterprises such as drug trafficking and smuggling cigarettes or other goods. *Id.*

Charitable giving—collecting resources from voluntary donors and reallocating them to individuals in need—provides “a significant source of funds” and acts as a cover for terrorist organization financing.<sup>29</sup> Terrorists may use non-profits to obtain money by raising funds through non-profit organizations to support terrorist activities, transferring funds through non-profits to terrorists,<sup>30</sup> and establishing sham non-profits as direct covers for terrorist organizations.<sup>31</sup> The abuse may occur with or without the knowledge of the donors, officers and management of these organizations.<sup>32</sup>

### ***C. Relationship between non-profit organizations and terror financing in the United States***

Traditionally, charities help those in need and rectify atrocities. For terrorists, charities provide the perfect disguise for gathering significant sums of money to be used for terrorist activities. Terrorist organizations exploit non-profits through direct and indirect charitable abuse. Direct charitable abuse means that the non-profit organization deliberately engages in deceptive fundraising practices and then intentionally funnels the money to non-exempt purposes.<sup>33</sup> Indirect charitable abuse occurs when the non-profit organization mistakenly directs funds to terrorist activities.<sup>34</sup> As of March 2007, the Treasury Department has frozen assets of five U.S.-based charities for direct charitable abuse.<sup>35</sup> They are: the Global Relief Foundation, the Benevolence International Foundation, the Holy Land Foundation, the Islamic American Relief Agency, and KindHearts.<sup>36</sup> Based on publicly available information, no

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29. *Id.*

30. *Id.* Concerning charities, funds raised legally that are later transferred to terrorists become terrorist financing through money laundering. Money laundering has been defined as the transfer of “‘dirty’ money through the financial system in a way that it appears ‘clean.’” Daryl Shetterly, *Starving the Terrorists of Funding: How the United States Treasury is Fighting the War on Terror*, 18 REGENT U. L. REV. 327, 328 (2006).

31. See Victoria B. Bjorklund, Jennifer I. Reynoso & Abbey Hazlett, *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 239, 241-42 (2005). Deputy Treasury Secretary Kenneth Dam stated, “we do know that the mechanism of charitable giving . . . has been used to provide a cover for the financing of terror and that has been a significant source of funds.” Dam, *supra* note 12; Barnett F. Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, 6 INT’L J. NOT-FOR PROFIT L., Jan. 2004, available at [http://www.icnl.org/knowledge/ijnl/vol6iss2/special\\_5.htm](http://www.icnl.org/knowledge/ijnl/vol6iss2/special_5.htm) (“Al-Qaeda is not the only terrorist organization to make use of these mechanisms. Terrorists the world over have long used charities, for example, to help raise and move their funds — as the Irish Republican Army (IRA) did for decades in American cities such as Boston and New York.”).

32. Dam, *supra* note 12.

33. Jenkins, *supra* note 27, at 814.

34. *Id.* For a discussion of the frequency of indirect charitable abuse, see Bjorklund, *supra* note 31, at 234 (“if such diversions have been undertaken by U.S. donors or charities (rather than by donors or charities organized outside the U.S.), the activities have been hidden and not well known to the charitable sector.”).

35. Jenkins, *supra* note 27, at 817-18.

36. The government alleged that Global Relief Foundation and Benevolence International Foundation had ties to Osama Bin Laden, while Holy Land Foundation, Islamic American Relief

cases of indirect charitable abuse were reported, but this does not mean the problem does not exist.<sup>37</sup> Consequently, this paper will address issues of direct and indirect charitable abuse and terror financing.

Charities and non-profit organizations are especially vulnerable to abuse for the financing of terrorism. First, non-profits are attractive to terrorist organizations because state and federal authorities do not closely regulate them.<sup>38</sup> Non-profit organizations are tax-exempt and receive less scrutiny from the IRS than for-profit organizations and individuals. Second, since the directors of non-profit organizations are volunteers, there is often limited board oversight of the organization's activities. Third, because non-profits are exempt from taxation, they retain more money than for-profit organizations. Fourth, many charities raise money in the United States and send it overseas, creating seemingly legal channels to transfer funds throughout the world. Since some charities target areas of conflict, charitable networks often reach out to the world's "breeding-grounds for terrorists," providing a cover for terror financing.<sup>39</sup> Finally, non-profit organizations, especially charities, are assumed to be legitimate.<sup>40</sup> David Aufhauser, former General Counsel of the Treasury Department, noted that charities are "ripe for the picking in the eyes of people who would like to visit violence throughout the world [because] there's a presumption of legitimacy for a charity," and charities are often found in the world's most troubled locations.<sup>41</sup>

The diversion of funds to terrorist organizations results in several

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Agency, and KindHearts were associated with Hamas. *See* Holy Land Found. For Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003), *cert denied*, 72 U.S.L.W. 3551 (2004); Benevolence Int'l Found., Inc. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002); Global Relief Found., Inc., v. O'Neill, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S.Ct. 531 (2003).

37. Directors, officers and donors of non-profits exploited by indirect charitable abuse may be unaware of this misuse. Jenkins, *supra* note 27, at 818; *see* Bjorklund, *supra* note 31, at 242.

38. For a discussion of the inadequate regulation of non-profit organizations, *see* section IIB4.

39. The Iceberg Beneath the Charity – Probes Uncover Submerged Links Between Charities and Terrorists, THE ECONOMIST (London) Mar. 13, 2003, *available at* <http://www.stopfundinghate.org/resources/news/031303Economist.htm> (quoting David Aufhauser, Former General Counsel of the U.S. Treasury Department); Bjorklund, *supra* note 31, at 238, 242 ("[T]hese organizations raised large amounts of money in the United States, which they sent overseas, often to or through people with jihadist connections. When the money went overseas, it became virtually untraceable, since it could be converted to cash and sent anywhere in the world"; "Once the associations are organized, they collect money and transfer money across national borders, but this activity does not raise red flags because it is considered in the normal course of operations of the association.").

40. DAY, BERRY & HOWARD FOUNDATION, INC., HANDBOOK ON COUNTER-TERRORISM MEASURES: WHAT U.S. NONPROFITS AND GRANTMAKERS NEED TO KNOW, at 11 (2004), *available at* <http://www.cof.org/files/Documents/Publications/2004/CounterTerrorismHandbook.pdf> (citing David Aufhauser, former General Counsel of the Treasury Department, Remarks at the May Meeting of the American Bar Association Tax Section in Washington, D.C. (May 9, 2003), *in* 41 EXEMPT ORG. TAX REV. 49 (2003), *available at* <http://www.independentsector.org/PDFs/counterterrorism.pdf>).

41. *Id.*

unintended consequences: (1) donors who unknowingly donate money to what they believe are well intended charities are defrauded; (2) individuals who knowingly donate money to terrorist organizations often go unprosecuted; (3) terrorist organizations indirectly receive federal government economic support to fund their atrocious crimes; (4) charitable dollars are siphoned off for noncharitable purposes, yet the non-profit organizations retain their tax-exempt status and go unprosecuted; (5) donors are less forthcoming in making charitable contributions to domestic charitable organizations;<sup>42</sup> and (6) U.S. charities decrease international charitable giving.<sup>43</sup> Thus, Former Secretary of the Treasury Paul O'Neill concluded that charitable abuse "corrupts the sanctity of charitable giving, diverts funds and resources from those in need, and betrays the trust and goodwill of donors and is a danger to us all."<sup>44</sup>

## II. GOVERNMENTAL COUNTER-TERROR INITIATIVES RELEVANT TO U.S. NON-PROFIT ORGANIZATIONS

Terrorism can be mitigated if:

[T]he flow of money to terrorist organizations is diminished. The first step in this latter effort is to simply acknowledge its importance. After all, the war on terror is not a conventional war. The enemies in question have no unified sovereign, military, or geographical purpose for their activities; rather, they place a premium on the death of innocents. Their principal means of fulfilling this objective is money, which allows them to recruit and train operatives, incite violence, acquire weapons, and evade justice.<sup>45</sup>

Disrupting terror financing is a challenging task. It is difficult to determine the destination of funds until they are actually delivered. In addition, terrorist networks evade authorities by constantly mutating.<sup>46</sup> President Bush stated, "al-Qaeda continues to adapt in the face of our global

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42. Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1341-42, 1349 (2004). For example, American Muslims are hesitant to donate their "zakat" (2.5% of a Muslim's annual income), even to reputable Muslim charities, because they fear their funds may ultimately reach terrorists, and they may be prosecuted as donors.

43. See Loren Renz et al., The Foundation Ctr., *International Grantmaking III: An Update on U.S. Foundation Trends*, at xiv (2004), available at <http://foundationcenter.org/gainknowledge/research/pdf/intlhls.pdf> (stating that seventy-eight percent of grant-makers think it is more difficult to donate funds internationally due to government regulation and the war on terrorism following September 11, 2001). For a discussion of how international philanthropy advances America's security interests see Jenkins, *supra* note 27.

44. Dam, *supra* note 12.

45. Aufhauser, *supra* note 3.

46. Eben Kaplan, *Tracking Down Terrorist Financing*, COUNCIL ON FOREIGN RELATIONS, Apr. 4, 2006, available at <http://www.cfr.org/publication/10356/>.

campaign against them.”<sup>47</sup> Preventative measures must continually evolve as well.

### ***A. Current government counter-terror policies***

Since September 11, 2001, the U.S. government has enacted counter-terrorism measures relevant to American non-profit organizations. This section discusses the government’s counter-terrorism regulations most relevant to non-profit organizations as of October 2006 and is not intended to be a comprehensive discussion of all counter-terrorism measures in the domestic and international arenas.

#### **1. Executive Order 13,224<sup>48</sup>**

Executive Order 13,224 (“Executive Order”), *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism*, was passed by President Bush in September 2001 as an effort to freeze any assets controlled by or in the possession of individuals or organizations<sup>49</sup> deemed by the Executive Branch to be associated with terrorism and those who are associated with or support them, including charities and non-profit organizations.<sup>50</sup> The Executive Order does not contain a knowledge or intent requirement; consequently, an organization or individual can violate the Executive Order even if it does not knowingly provide support to parties associated with terrorism. The reach of the Executive Order extends beyond those on the lists posted on government websites,<sup>51</sup> potentially to

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47. Eben Kaplan, *Rethinking Terrorist Financing*, COUNCIL ON FOREIGN RELATIONS, available at [http://www.cfr.org/publication/12523/rethinking\\_terrorist\\_financing.html](http://www.cfr.org/publication/12523/rethinking_terrorist_financing.html).

48. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001), amended by Exec. Order No. 13,258, 67 Fed. Reg. 44,751 (July 3, 2002) & Exec. Order No. 13,284, 68 Fed. Reg. 4,075 (Jan. 28, 2003) (“Executive Order”), available at <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf> (authorizing seizure of the property of twenty-seven designated foreign persons: twelve individuals and fifteen “foreign terrorist organizations” including three nongovernmental organizations); see Exec Order. No. 13,224, Annex, 66 Fed. Reg. 49,083 (Sept. 23, 2001) (containing the names of the designated foreign persons).

49. Exec. Order No. 13,224 § 3(c), 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.315.

50. Transactions prohibited under the Executive Order include financial support, in-kind support, material assistance and technical assistance. The Executive Order does not define these concepts. Exec. Order No. 13,224 § 1; 31 C.F.R. § 594.201(a). Exec. Order No. 13,224, available at <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>. Pursuant to the Executive Order, the President declared a national emergency based on the “continuing and immediate threat of further attacks” on the United States by foreign terrorists. The President has authority to declare a national emergency under the International Emergency Economic Powers Act of 1977 (IEEPA), 50 U.S.C. § 1705 (2000). The Executive Order states, “because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists.”

51. The Specially Designated Nationals list (“SDN list”) is “an integrated listing of designated parties with whom U.S. persons are prohibited from providing services or conducting transactions and whose assets are blocked.” Treasury ATF Guidelines, at 11, n. 12. The list is maintained on the Treasury Department’s website by the Office of Foreign Asset Control

individuals and organizations that could be listed due to associations with terrorists or acts of terrorism.<sup>52</sup>

Concerning his decision under the Executive Order to suspend humanitarian, medical, and agricultural transfers and donations, President Bush stated the following in a message to Congress:

Regrettably, international terrorist networks make frequent use of charitable or humanitarian organizations to obtain clandestine financial and other support for their activities. If these exemptions were not suspended . . . [they] could be used as a loophole through which support could be provided to individuals or groups involved with terrorism and whose activities endanger the safety of United States nationals, both here and abroad.<sup>53</sup>

Thus, charities and non-profits are not immune from the Executive Order.

## 2. USA Patriot Act<sup>54</sup> and related laws

Federal law, strengthened by the USA Patriot Act (“Patriot Act”), imposes significant fines and terms of imprisonment<sup>55</sup> for any entity that willfully, knowingly or intentionally provides material support or resources to terrorism or terrorist organizations.<sup>56</sup> The term ‘material support or resources’ means “any property, tangible or intangible, or service, including currency, . . . financial services, lodging, training, expert advice or assistance, . . . facilities,

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(“OFAC”). For a discussion of the terrorist designation process see Angela D. Hardister, *Can We Buy Peace on Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World*, 28 N.C.J. INT’L L. & COM. REG. 605 (Spring 2003).

52. Individuals and organizations whose property and interests are automatically frozen are: (1) foreign persons explicitly listed in the Annex to the Executive Order itself; (2) foreign persons the Secretary of State determines “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States”; and (3) persons the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, determine “to be owned or controlled by, or to act for or on behalf of” such individuals or organizations. Exec. Order No. 13,224 § 1(a)-(c), 66 Fed. Reg. 49,079 (Sept. 23, 2001); 31 C.F.R. § 594.201(a)(1)-(3).

53. 147 Cong. Rec. H5964-05 (daily ed. Sept. 24, 2001) (message from President Bush).

54. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (“Patriot Act”) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Patriot Act contains several measures that strengthen the government’s ability to fight terrorism, including measures that ease restrictions on the government’s ability to investigate suspected terrorists, encourage information sharing among Federal law enforcement agencies and private industry, require financial institutions take affirmative steps to identify and eliminate money laundering, and bolster existing laws that prohibit the material or financial support of terrorists and terrorist organizations.

55. The Patriot Act imposes fines and terms of imprisonment of up to 15 years for any entity that provides material support or resources knowing or intending that they be used in terrorist acts or by foreign terrorist organizations. If the terrorism results in the death of any person, the maximum penalty is life in prison. 18 U.S.C. §§ 2339A(a), 2339B(a)(1).

56. See 18 U.S.C. § 2339A(b).

weapons . . .”<sup>57</sup> The term also likely includes grants and microfinance services.<sup>58</sup> In June 2002, the government criminalized the financing of terrorism.<sup>59</sup> The Patriot Act punishes any individual or organization who “unlawfully and willfully provides or collects funds with the intention that such funds be used” to carry out acts of terrorism or who “knowingly conceals . . . any material support or resources or any funds or proceeds of such funds” knowing or intending that the support or resources will be provided to terrorists.<sup>60</sup> Additionally, the Patriot Act amended Title 18 of the United States Code and provides private parties with a civil cause of action against those who materially support terrorism.<sup>61</sup> Though the Patriot Act contains a knowledge requirement, some non-profit organizations are concerned that if the government can link their grants to terrorist organizations, they may be found to have provided material support willfully, knowingly, or intentionally.<sup>62</sup>

### 3. IRS rules

Tax laws generally prohibit the diversion of charitable assets to any non-charitable purpose,<sup>63</sup> including material or financial support of terrorism. Public charities and private foundations risk the revocation of tax-exempt status if they violate this rule. Additionally, in November 2003, Congress enacted a new IRC § 501(p). New § 501(p) provides several consequences for an organization recognized as a terrorist organization or a supporter of terrorism, including the automatic suspension of tax-exempt status for an organization designated as a terrorist organization or added to any of the relevant U.S. government terrorist watch lists.<sup>64</sup> Section 501(p) also denies a

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57. 18 U.S.C. § 2339A(b).

58. DAY, *supra* note 40, at v.

59. 18 U.S.C. § 2339C.

60. §§ 2339C(a)(1), (c)(2).

61. § 2333(a); *see* § 2339C(f) (“In addition to any other criminal, civil, or administrative penalty, any legal entity . . . shall be liable to the United States for the sum of at least \$10,000 . . .”).

62. One scholar writes, “[s]uppose a U.S. private foundation makes a grant to a foreign organization working in Africa for the purpose of promoting community-based entrepreneurship and development through microfinance. The foreign grant recipient receives a single large grant (perhaps of \$500,000) and then redistributes funds to local individuals or community cooperatives (in small amounts of approximately \$250 to \$750) to assist them in starting their own small businesses. What if a handful of the several thousand small grants reach the wrong hands? Or, suppose an organization providing humanitarian aid in a war-torn or politically unstable region finds it necessary to interact with or offer goods to a group with questionable ties (or even a U.S. government-designated terrorist organization) in order to ensure that aid trucks are not destroyed en route to the needy. These are genuine areas of concern for U.S. funds active in the developing world where grantmaking is complex and precarious.” Jenkins, *supra* note 27, at 810.

63. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1.

64. I.R.C. §§ 501(p)(1)-(2); I.R.S. Ann. 2004-74, 2003-48 I.R.B. 1171; I.R.S. Ann. 2004-56, 2004-28, I.R.B. 41; Pub. L. No. 108-121, § 108, 117 Stat. 1335, 1339. Congress enacted amended § 501(p) as part of the Military Family Tax Relief Act of 2003, an extension of the authority granted to the Executive Branch under the Patriot Act. After President Bush signed the

charitable deduction with respect to any contributions to a terrorist or terrorist-sponsoring organization for all purposes of the IRC.<sup>65</sup>

#### 4. Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") released *The Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* in November 2002,<sup>66</sup> and released a revised version on September 29, 2006 ("Treasury ATF Guidelines"). The Guidelines were issued to assist non-profits and grant-makers engaged in domestic<sup>67</sup> and international grant-making in complying with the Executive Order and the Patriot Act. They provide "best practices" for international grant-making non-profits to safeguard charitable giving from terrorist exploitation.<sup>68</sup>

Some of the specific guidelines require an organization to conduct extensive due diligence concerning all organizations and individuals with

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Act into law, the Treasury immediately suspended the tax-exempt status of the Benevolence International Foundation, Inc., the Global Relief Foundation, Inc., and the Holy Land Foundation.

65. I.R.C. § 501(p)(4).

66. Treasury ATF Guidelines.

67. The Treasury ATF Guidelines may apply not only to international grant-making, but to domestic grant-making too. OMB Watch, Treasury Dept. Anti-Terrorist Financing Guidelines Miss the Mark, April 13, 2005, *available at* <http://www.ombwatch.org/article/articleview/2662/1/49?TopicID=2> ("Accordingly, the November 2002 Guidelines, which affect all U.S. charities, not just those making international grants, has enormous implications for all nonprofits."). For example, the second sentence of the Treasury ATF Guidelines Introduction discusses terrorist abuse of charitable organizations "both in the United States and worldwide." Treasury ATF Guidelines, at 2. In addition, section VI, subsection B, paragraph 6 states, in part, that "[a]s a precondition to the issuance of a charitable grant, the charity should require grantees to certify that they are in compliance with all laws, . . . or, in the case of foreign grantees, that they do not deal with any individuals, entities, or groups subject to OFAC sanctions . . ." *Id.* at 12. This implies that domestic grantees are covered by the Treasury ATF Guidelines. Similarly section VI, subsection C, requires that "[t]he charity should conduct basic vetting of its own key employees". *Id.* Thus, domestic grant-making may be covered and burdened by these rules.

68. Though the Treasury ATF Guidelines are labeled "best practices," they represent several practices newly introduced by the Treasury Department that are inconsistent with common non-profit organization practices. *Id.* at 2-14. Concerning international philanthropy, one author writes, "[t]here is no consensus within the grant-making community as to what constitutes 'best practice.' Practices vary according to the type and size of the grant-maker, the nature of their programs, the size and purpose of specific grants, the characteristics of the grantee, the geographical location of grants, and other grant-specific factors. The Guidelines in many instances go far beyond the current practice of most responsible and experienced international grant-makers. The implication is that these Guidelines, issued by a powerful enforcement agency of the U.S. government, are what Treasury considers acceptable and necessary—which is very troubling to grant-makers who do not or cannot follow these so-called 'best practices.'" Baron, *supra* note 31. Grantmakers Without Borders, a large network of non-profits engaged in global philanthropy, concludes that "[a]lmost without exception, the grantmaking community finds the Guidelines unproductive, unrealistic and detached from the real-life experiences of the charitable sector." Post 9-11 Grantmaking, Grantmakers Without Borders, *available at* <http://www.internationaldonors.org/advicegm/911.htm>; Jenkins, *supra* note 27, at 813-14.

which it transacts its affairs.<sup>69</sup> A charity must therefore conduct a “reasonable” pre-grant investigation.<sup>70</sup> The Treasury ATF Guidelines state that while the SDN List<sup>71</sup> is: “a critically important compliance tool that can assist charities in meeting their legal obligations under the variety of sanctions programs that OFAC administers, it should only form one part of a charitable organization’s broader risk-based approach to protect against the risks of terrorist abuse.”<sup>72</sup> Consequently, the charity’s search should include “publicly available information, to determine whether the grantee is suspected of activity relating to terrorism, including terrorist financing or other support.”<sup>73</sup> Additionally, if a charity has reason to believe a grantee is operating under a different identity or has used a different name in the past to avoid being associated with prior questionable activity, “the charity should undertake reasonable efforts to uncover any such prior identity or name.”<sup>74</sup>

The Treasury ATF Guidelines are voluntary, not mandatory; they do not have the force of law, therefore there is no explicit penalty for noncompliance.<sup>75</sup> They also do not amend or supersede existing statutes and regulations governing charities, nor do they ensure that organizations which comply with them will be safe from civil or criminal liability, asset blocking, or loss of tax-exempt status.<sup>76</sup> Scholars question whether the Treasury ATF Guidelines’ recommended reforms will actually help non-profit organizations differentiate illegitimate charities.<sup>77</sup>

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69. Treasury ATF Guidelines, at 9-13. Though the Treasury ATF Guidelines include suggestions regarding financial practices, governance, accountability procedures and other recommendations to help prevent the exploitation of charities, this article will focus on the diligence requirements.

70. *Id.* at 10.

71. As discussed *supra* note 8, the SDN List is an integrated list of individuals, organizations, and entities that the U.S. Government has designated pursuant to both country-based and list-based OFAC administered sanctions programs. U.S. persons, including U.S.-based charities, are prohibited from dealing with any of the parties included on the SDN List. In addition to checking appropriate SDN listings, charities should consult OFAC’s website for other information relating to sanctioned activities or countries that may implicate their operations . . . Although the SDN List includes persons meeting the criteria established in the authorities or Executive Orders that define certain OFAC sanctions programs, transactions with actors not named on the SDN List may nevertheless violate U.S. sanctions due to interests of designated parties in such transactions or prohibitions owing to country-based OFAC administered sanctions programs. For example, if a charity engages in a particular transaction with a party not on the SDN List that involves the property or interests in property of a designated actor, that transaction may be subject to OFAC sanctions. This underscores the importance of charities knowing their grantees and monitoring their programs and transactions through the use of appropriate diligence measures.” *Id.* at 11, n. 12-13.

72. *Id.* at 11, n. 13.

73. *Id.* at 10.

74. *Id.* at 9, n. 10.

75. *Id.* at 2; *see* section IIB2 for a discussion of the Treasury ATF Guidelines’ “quasi-legal” status.

76. *Id.*

77. Jenkins, *supra* note 27, at 288; Crimm, *supra* note 42, at 1440. For further discussion, *see* section IIB.

**B. Problems regarding the government's counter-terrorism initiatives**

The current government's counter-terrorism initiatives do not safeguard the non-profit sector from terrorist abuse. The laws in existence are reactive, designed to contain terrorist financing. Additionally, the regulations do not recognize the unique circumstances and financial constraints of non-profit organizations. Though the Treasury ATF Guidelines' diligence requirements are meant to ensure that non-profit grant-makers are familiar with grant recipients prior to donating to the organization, the collection and analysis responsibilities are beyond the abilities of most non-profit organizations. Furthermore, the Treasury ATF Guidelines suggest affirmative steps non-profits *may* take with respect to terror financing; however, non-profit organizations are not obliged to organize or re-organize themselves to comply with regulations or to better police terror financing.<sup>78</sup> Presently, existing law therefore does not curb the flow of money through non-profits to finance terrorist operations.<sup>79</sup>

**1. The government regulations are reactive, rather than proactive.**

The presently existing laws are generally reactive, not proactive; they punish and contain those who violate the law, rather than actively police or require non-profits to modify their procedures to help prevent the distribution of money to terrorist organizations.

**2. The Treasury ATF Guidelines contain onerous information collection responsibilities and most non-profits are ill-prepared to perform them.<sup>80</sup>**

Although the information collection procedures recommended by the Treasury ATF Guidelines are meant to improve non-profits' transparency and accountability,<sup>81</sup> the suggestions are onerous, unrealistic, beyond the capabilities of most non-profits, and unlikely to divert funds from terror financing.

The search for and review of publicly available information to vet grantees will yield varying and unverified information about certain organizations. The Treasury ATF Guidelines recommend non-profits require "[c]opies of any public filings or releases made by the grantee, including the most recent official registry documents, annual reports, and annual filings with

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78. See Treasury ATF Guidelines, at 2-14. This article does not advocate that the Treasury Guidelines become binding law.

79. A 501(c)(3) organization that financed terrorism could, however, have its exemption revoked. See I.R.C. § 501(p).

80. This article addresses some of the deficiencies in the Treasury ATF Guidelines. For an analysis of additional problems with the Treasury ATF Guidelines, see Jenkins, *supra* note 27, at 59-60 (discussing the shift of government investigatory responsibilities to non-profits); Christine Holland Anthony, Note, *The Responsible Role for International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks*, 39 VAND. J. TRANSNAT'L L. 911, 924-32 (May 2006).

81. Press Release, U.S. Dep't of the Treasury, Treasury Updates Anti-Terrorist Financing Guidelines for Charitable Sector (Sept. 29, 2006), available at <http://www.ustreas.gov/press/releases/hp122.htm>.

the pertinent government.” This information, however, is often unavailable or unattainable in the developing world, and organizations that conduct charitable activities overseas may not have access to the internet or other means to transmit this information. One author asks, “[h]ow would a grant-making organization check foreign language records in a foreign country where record systems may not be state of the art, where documents may be scattered geographically as well as throughout governmental, administrative, judicial, and other operations?” Is it possible to undertake a thorough verification that a foreign recipient organization does not appear on any U.S. or foreign governmental or U.N. list linking the organization to terrorism, money laundering, or other illegal activities?”<sup>82</sup> Consequently, non-profits will have difficulty obtaining the requisite information.

In addition, the Treasury ATF Guidelines require non-profits to check the potential grant recipient against OFAC’s SDN List.<sup>83</sup> However, “the reliability of these terrorist watch lists is questionable at best.”<sup>84</sup> The watch lists contain several generic names without providing specific information such as birth date, social security number, or previous address to identify individuals resulting in false positives.<sup>85</sup> In addition, the lists are constantly updated and therefore require non-profits to continuously check them. Furthermore, grantees may change their names to avoid recognition. Thus, non-profits may incur additional staffing and administrative expenses, yet still obtain unreliable information.<sup>86</sup>

Assuming a non-profit is able to collect the requisite publicly available information, the organization may have difficulty assessing the terror financing risk. Most directors and officers of non-profit organizations have no experience or training in intelligence and are therefore ill-prepared to perform this critical responsibility. Consequently, the information collection responsibilities have limited value, and the diligence requirement is unlikely to divert funds from terrorists.

These onerous and ill-conceived collection responsibilities are especially worrisome to non-profits because of the ambiguous status of the Treasury ATF Guidelines. Despite the word “voluntary” in its title, some scholars believe that the Treasury ATF Guidelines are beginning to attain a “quasi-legal status.”<sup>87</sup> While one scholar infers some “minimal reasonable due diligence

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82. Crimm, *supra* note 42, at 1444.

83. See Treasury ATF Guidelines, at 9-12.

84. Amy K. Ryder Wentz, Note, *Unreasonable Conditions Impeding Our Nation’s Charities: An Unconstitutional Condition in the Combined Federal Campaign*, 53 CLEV. ST. L. REV. 689, 697 (2005).

85. *Id.*; Baron, *supra* note 31; Anthony, *supra* note 80, at 925; see also Charlie Savage, *No-Fly List Almost Grounded Kennedy*, BOSTON GLOBE, Aug. 20, 2004, at A2 (discussing that Senator Edward Kennedy, Massachusetts, was prevented from boarding airplanes between March 1 and April 6, 2004 because his name appeared on a terrorist watch list).

86. Anthony, *supra* note 80, at 932; see generally Jenkins, *supra* note 27, at 820-25 (discussing the “chilling effect” on non-profits); Baron, *supra* note 31.

87. Jenkins, *supra* note 27, at 802; see Crimm, *supra* note 42, at 1440. *But see* Press

standard,” the standard itself remains unclear.<sup>88</sup> Failure to comply with, or exceed, the Guidelines themselves may be viewed by the Treasury as a breach of fiduciary duties.<sup>89</sup>

**3. In order to comply with the Treasury ATF Guidelines diligence recommendations, non-profits will incur considerable costs.**

Non-profit organizations will incur substantial costs if required to perform the requisite diligence described in the Treasury ATF Guidelines. First, non-profits will require additional staff and resources to search for, analyze, and organize the diligence. Small non-profits, and those that have limited resources or donate to recipients in technologically remote locales, may be unable to afford the increased administrative costs required by the pre-grant investigations, and therefore may be forced to discontinue their activities.<sup>90</sup> As a result, funding to grantees in developing regions of the world, areas that need the money the most, may diminish. Second, board members who are valuable resources to non-profit organizations may be deterred from serving on non-profit boards due to the potential exposure to liability under the combined Patriot Act, Executive Order, and Treasury ATF Guidelines.<sup>91</sup> Third, well-intentioned donors may also be open to liability under the regulations; consequently, donors may suspend their donations to legitimate non-profit organizations.

The National Committee for Responsive Philanthropy concludes:

Nonprofits are being required . . . to undertake actions with potential deleterious consequences for their programs and

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Release, Nat'l. Comm. on Responsive Philanthropy, *Philanthropic Grantmaking Institutions Must Refrain from Placing Inappropriate, Ineffective, and Unnecessary Responsibilities for Anti-Terrorism Enforcement onto the Shoulders of Non-Profit Grant Recipients* (June 28, 2005), available at <http://www.ncrp.org/anti-terrorism.asp> (“There is no reason, legal or otherwise, to give Treasury’s voluntary guidelines the weight of law. Overreaction to the guidelines, resulting in the imposition of list-checking certifications on non-profit grant-recipients, should be opposed.”)

88. Crimm, *supra* note 42, at 1440.

89. *Id.* at 1441.

90. Jenkins, *supra* note 27, at 820-24; see Report to Congress and the Non-Profit Sector on Governance, Transparency, and Accountability of Charitable Organizations, June 2005, 20-21, available at <http://www.fmaonline.net/media/Section%20-%20Principles%20Guiding%20Improved%20Accountability.pdf> (“Regulation that is not responsive to the diversity of the non-profit sector has the potential to increase the administrative and financial obligations of compliance to a level that will force some organizations to curtail or even cease their legitimate charitable activities. Particular consideration should be given to any actions that might deter donors or discourage responsible volunteers from serving on boards.”).

This article considered a size threshold that would exclude small non-profits from these diligence responsibilities, but rejected it. To preclude fund diversion to terrorists, all non-profit organizations should be held to the same standard, regardless of size, otherwise terrorists will simply modify their tactics and target small non-profits, perpetuating, rather than eliminating, the problem.

91. There has not been widespread panic yet probably because many individuals outside academia do not understand these regulations or comprehend that they might be liable as a director of a non-profit organization.

services, but affording the nation no greater protection against the flow of charitable resources to support terrorism and affording foundations no greater security that their assets will not be threatened by governmental seizure or other actions. For grant recipients, given the multiple lists and their ever-changing contents, effective compliance is a virtual impossibility, leaving grant recipients even more exposed and vulnerable.<sup>92</sup>

**4. The federal and state agencies responsible for monitoring non-profit organizations provide inadequate supervision, therefore they are unlikely to detect terror financing issues.**

Federal and state agencies responsible for non-profit enforcement and supervision are inadequate. The IRS, the federal agency primarily responsible for the regulation of non-profits, inadequately monitors non-profit organizations. One author writes that the IRS is so understaffed compared to the quantity of exempt organizations “that it would take 79 years to audit them all at the present rate. Most applications for non-profit status are rubber-stamped by the IRS; even convicted felons have been approved.”<sup>93</sup> Ted Chapler, the executive director of the Iowa Finance Authority, which coordinates tax-exempt financing for non-profits stated, “[u]ntil I looked, I thought being declared a nonprofit was pretty hard. Then I found something like 95 or 99 percent who apply get approved. It’s like getting your driver’s license.”<sup>94</sup> Some charities that engage in terror financing have even received financial support from government-sponsored grant programs. For instance, the government approved a U.S. Agency for International Development (USAID) grant to the Holy Land Foundation for Relief and Development, whose assets were ordered to be blocked for funding the HAMAS terrorist organization.<sup>95</sup> Hence, even the federal government is not closely monitoring non-profit organizations.

In addition, the attorney general is responsible for the enforcement and oversight of non-profit organizations in most states. Obstacles also impede attorney general enforcement regarding non-profit organizations:

Staffing problems and a relative lack of interest in monitoring non-profits makes attorney general oversight more theoretical than practical. Only thirteen states have charities sections within attorney general offices . . . These states are home to 55 percent of U.S. charities and have 65 percent of national

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92. Press Release, National Comm. for Responsive Philanthropy, *Philanthropic Grantmaking Institutions Must Refrain from Placing Inappropriate, Ineffective, and Unnecessary Responsibilities for Anti-Terrorism Enforcement onto the Shoulders of Nonprofit Grant Recipients* (June 28, 2005), available at <http://www.ncrp.org/anti-terrorism.asp>.

93. FISHMAN and SCHWARZ, *supra* note 14, at 9.

94. *Id.*

95. Fund-Raising Methods and Procedures for International Terrorist Organizations, Testimony of Steve Emerson Before the House Financial Services Subcomm. on Oversight and Investigations, 106th Cong. 4 (2002), available at <http://www.au.af.mil/au/awc/awcgate/congress/021202se.pdf>.

charitable revenues . . . In ten states, there is no general system of registration and reporting for charities.<sup>96</sup>

Professors Dukeminier and Johanson add that because the attorney generals' offices have such limited resources, "[u]nless newspaper publicity is given to some alleged irregularity, the attorneys general rarely investigate the internal workings of charitable foundations."<sup>97</sup>

### III. ALTERNATIVE PROPOSALS TO PROACTIVELY POLICE TERROR FINANCING IN THE NON-PROFIT SECTOR

The government should modify existing U.S. policies to reduce the revenue stream flowing through non-profits to finance terrorist operations. New regulations should strike a balance between depriving terrorists of funding and incapacitating non-profit organizations with regulatory restriction. The following proposals take a proactive approach to policing terror financing.

#### ***A. The government or a qualified intermediary organization should perform pre-grant investigations.***

As previously mentioned, non-profit organizations are ill-equipped and lack the expertise and resources to perform pre-grant investigations. Instead, the government (federal or state) or a qualified intermediary should assume this role. The same submission procedure could apply for the government or a qualified third party intermediary. Non-profit organizations should submit the name and any other necessary information regarding a potential recipient organization to an independent third party conducting the pre-grant investigation prior to transferring the funds. This information could be submitted via an online form. The investigating organization, for example, the federal government, state governments, or qualified third parties, should perform the necessary diligence and communicate its investigatory findings to the non-profit organization in a reasonable amount of time.

A third party organization is better equipped to perform this investigatory role than a non-profit organization. A third party charged with this task could specialize in diligence and therefore be capable of performing the research and analyzing the results efficiently and effectively. In addition, a third party would be properly trained and could devote its resources primarily to the diligence and investigation of potential grantees. Consequently, their investigations could help prevent the misuse of non-profit funds, especially for terrorist activities. In addition, if a third party assumed this burden, directors, officers and donors may not be hindered from participating in non-profit organizations due to liability concerns.

#### **1. The government should assume the diligence burden.**

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96. FISHMAN and SCHWARZ, *supra* note 14, at 248.

97. JESSE DUKEMINIER, ET AL., WILLS, TRUSTS, AND ESTATES, 760 (7th ed. 2005).

Either the federal government or state governments could carry out pre-grant investigations.<sup>98</sup> Two models exist for an expansion of the federal government's role in diligence responsibilities: the government may assume full investigatory responsibilities or the government may outsource to private contractors. The Brady Act is an example of the former, and airport security provides an example of the latter. Additionally, state governments can individually or collectively assume this burden.

Ideally, the Federal Government should assume the diligence burden. The government is the most qualified because it has the expertise and resources to undertake this diligence. The government already has oversight responsibilities for non-profits and terror financing, therefore it possesses the requisite information to complete this diligence.<sup>99</sup> Additionally, the federal government could release non-profits from liability following voluntary or mandatory submission. For example, in five cases the Treasury froze assets of non-profit organizations.<sup>100</sup> Regarding those cases one scholar wrote:

The facts of the alleged cases do not suggest that additional diligence by the charitable sector would have prevented diversion of funds. Because all of these entities were organized under U.S. law, filed with and had all their paperwork approved by the IRS, and acquired an IRS determination letter, the government was best positioned to uncover these alleged charitable fronts.<sup>101</sup>

The first model requires the government to assume full investigatory responsibilities. According to this model, the government assumes the costs,

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98. Under Executive Order 13,224, President Bush delegated broad power to the Secretary of the Treasury, in the exercise of his discretion and in consultation with the Secretary of State and the Attorney General "to employ all powers granted to the President by IEEPA and UNPA" and to "take such other actions than the complete blocking of property or interest in property . . . [that the Secretary concludes is] consistent with the national interests of the United States, considering such factors as he deems appropriate." Exec. Order No. 13,224, § 5, 66 Fed. Reg. at 49,081. Exec. Order No. 13224, §§ 5-6, 66 Fed. Reg. 49,079 (Sept. 25, 2001), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 44,751 (July 3, 2002) & Exec. Order No. 13,284, 68 Fed. Reg. 4,075 (Jan. 28, 2003) ("Executive Order"), *available at* <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>.

99. The Office of Foreign Assets Control (OFAC), an office within the Department of the Treasury, administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. OFAC's duties include regulating the freezing of assets, collecting information on "foreign terrorist organizations," and publishing and updating an ongoing list of designated persons. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under U.S. jurisdiction. Office of Foreign Assets Control, U.S. Dep't Treasury, Our Mission, *available at* <http://www.ustreas.gov/offices/enforcement/ofac/mission.shtml>; Office of Foreign Assets Control, U.S. Dep't Treasury, Frequently Asked Questions, *available at* <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#1>.

100. *See supra* notes 36-37.

101. Jenkins, *supra* note 28, at 818; *see generally* Anthony, *supra* note 79, at 931-37 (advocating a collaborative information collecting and sharing effort to protect charities).

creates the databases, hires employees, interacts with citizens and groups, and oversees day-to-day responsibilities.

The Brady Handgun Violence Prevention Act (Brady Act) is an example of the first model.<sup>102</sup> The Brady Act, which went into effect in its present version on November 30, 1998, requires federal firearms licensees to request background checks on individuals attempting to receive a firearm. The Brady Act required the United States Attorney General to create the National Instant Criminal Background Check System (NICS), a computerized background check system developed by the Federal Bureau of Investigation that is designed to reference available records on persons disqualified from receiving firearms. The Federal Firearms Licensees must verify the identity of a customer and wait for permission to initiate background checks on individuals purchasing or redeeming firearms, and in some circumstances, fire arms related permits. Prior to November 30, 1998, the Brady Act required up to a five days waiting period for the completion of the background check before purchasing a handgun, however the NICS computerized system now responds within minutes to most background check inquiries.<sup>103</sup>

The government already exerts oversight with respect to firearm watch lists. Similarly, the government creates and supervises the maintenance of the SDN List and other terrorist watch lists. Because the government is already charged with these responsibilities, they are in the best position to perform the related diligence. Thus, government assumption of the diligence burden could provide a viable, efficient model for non-profits; however, it is unlikely that the government will undertake the complete assumption diligence model (Model 1).<sup>104</sup>

The second model for expanding the federal government's role to include due diligence requires a federalized intermediary with outsourcing to private contractors. Airport security provides an example of this model. The Aviation and Transportation Security Act, passed by the 107th Congress on November 19, 2001, created the Transportation Security Administration, a federal agency currently housed in the Department of Homeland Security that is responsible for security for all modes of transportation in the United States, including commercial airports, trains and ferries.<sup>105</sup> Following September 11, 2001,

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102. 18 U.S.C. § 921.

103. See generally NICS Program Summary, National Instant Criminal Background Check System, Federal Bureau of Investigation, available at <http://www.fbi.gov/hq/cjisd/nics.htm> (also follow Detailed NICS Program Information link).

104. On October 18, 2004, the Treasury posted a list of twenty-seven charities worldwide that it had designated as supporters of terrorism. On the same day, the United States Justice Department rejected requests by Muslim groups to provide a list of charities to which they could safely donate, stating it was "impossible . . . Our role is to prosecute violations of criminal law . . . We're not in a position to put out lists of any kind, particularly of any organizations that are good or bad." William Fisher, In Terror War, Not All Names Are Equal, April 21, 2006, available at <http://www.antiwar.com/ips/fisher.php?articleid=8883>.

105. Transportation Security Administration, Our History, available at <http://www.tsa.gov/research/tribute/history.shtm> (noting that in March 2003, the TSA was moved

federal security screeners under the TSA took over the responsibility for airport screening, but in 2004 the TSA began permitting airports to opt out of the federal screening program and return to private contractors. Private screening companies must apply to and be approved by the TSA, abide by the TSA's security standards, receive training from the TSA, and be supervised by federal supervisors.<sup>106</sup>

This airport security model blends participation by the federal government and qualified third party intermediaries. Federal supervision provides a framework for, and ensures private contractor compliance with, the government initiatives. Additionally, the second model reduces the government's financial burden.

States can also assume pre-donation investigation responsibilities, either individually<sup>107</sup> or in cooperation with regional offices.<sup>108</sup> However, state assumption of diligence is not a viable solution. If states are charged with conducting the due diligence, a fragmented information-sharing system will result. Furthermore, a chain is only as strong as its weakest link. If the administration wants to prevent terror financing, it must ensure a consistent standard for all states, rather than permit states to develop their own more deferential standards and procedures. Directly abusive charities will naturally target states with the least stringent diligence standards, perpetuating the

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from the Department of Transportation to the Department of Homeland Security that was created on November 25, 2002 by the Homeland Security Act of 2002).

106. Karen Lee Scrivo, *Private Airport Security Firms Could Get Back in Screening Business*, August 8, 2003, *available at* <http://www.govexec.com/dailyfed/0803/080803cd1.htm>; *see* Sara Kehaulani Goo, *Air Security Agency Faces Reduced Role*, THE WASHINGTON POST, April 8, 2005, A01, *available at* <http://www.washingtonpost.com/ac2/wp-dyn/A35333-2005Apr7?language=printer>; Sara Kehaulani Goo, *Dulles, BWI Consider Security Shift*, THE WASHINGTON POST, November 18, 2004, *available at* <http://www-washingtonpost.com/wp-dyn/articles/A58538-2004Nov17.html>. Under the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or "SAFETY Act," the Department of Homeland Security may designate and therefore provide limited liability protection to companies that develop and implement private screening technology, including private passenger baggage and screening companies, and customers who benefit from the Seller's designated technology, in this case airports. Consequently, airports that opt out of screening services provided by the government that are designated under the SAFETY Act are immune from liability if the private screening company fails to prevent a terrorist attack. 6 U.S.C. § 441-444; *First Line Receives Safety Designation, SMS Headlines*, March 31, 2005, *available at* [http://www.sms Holdings.com/news/news\\_0305.htm](http://www.sms Holdings.com/news/news_0305.htm); Greta Wodele, *Aviation Screening Firm May Get Some Liability Protection*, March 7, 2005, *available at* <http://www.govexec.com/dailyfed/0305/030705tdpm1.htm>.

107. For example, states also maintain sex offender registries. *See* New York State Division of Criminal Justice Services, *Sex Offender Registry*, *available at* <http://criminaljustice.state.ny.us/nsor/index.htm>. Departments within State Attorney General Offices that oversee charitable organizations could also expand to fulfill this role.

108. For example, the Port Authority of New York and New Jersey oversees and maintains the bridges, tunnels, airports, PATH and bus terminals that are central to both states' trade and transportation interests. *See* History of The Port Authority of NY & NJ, *available at* <http://criminaljustice.state.ny.us/nsor/index.htm>.

problem. Additionally, states lack the resources to provide these services.<sup>109</sup>

## **2. Private third party intermediaries should assume the diligence burden.**

An alternative to federal government or state oversight of pre-grant investigations is if a non-profit contracted with a qualified intermediary organization that would assume the diligence responsibility. The third party private company would specialize in diligence, and therefore be capable of performing the research and analyzing the results efficiently and effectively. Concerns regarding the company's reputation and biased research may exist, but natural competition encourages private companies to uphold the highest standards in order to succeed in the market.<sup>110</sup> Furthermore, a third party intermediary could offer non-profits the opportunity to contract away liability, provide insurance, limit the expense to the non-profit, and increase the quality of the diligence performed. However, private companies have high barriers to entry into this market because many non-profits do not have sufficient funds to compensate for these services and private companies may not want to assume the liability without substantial remuneration.

Title companies provide an example of qualified intermediaries. Under the Patriot Act, anyone purchasing or selling property must be checked against the Treasury Department's Office of Foreign Assets Control's SDN List of people blocked from participating in "any transaction or dealing . . . in property or interests in property" by United States persons or within in the United States.<sup>111</sup> Though the burden to check the SDN List was formerly on the attorney, attorneys felt conflicted policing their clients and possibly violating the attorney-client privilege due to reporting requirements. Attorneys also did not want to assume this task because of the administrative and financial costs required to establish internal anti-money laundering programs, as required under § 352 of the Patriot Act, and the accompanying potential liability.<sup>112</sup> Consequently, title companies now perform this investigatory function, often charging a minimal fee for checking the names of parties to a real estate transaction against the SDN list.<sup>113</sup>

An example of diligence-intensive third party intermediaries is the hedge fund compliance industry. The hedge fund compliance industry provides extensive research for hedge fund managers on prospective investment entities to determine whether they are in compliance with the Patriot Act, the Securities Act of 1933, the Investment Advisers Act of 1940, and other

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109. See *supra* section IIB4.

110. Alternatively, a race to the bottom may exist, with firms relaxing the requirements to acquire customers.

111. Brian Braiker, *The 'Patriot' Search*, NEWSWEEK, June 3, 2004, <http://www.newsweek.com/id/53827>; Exec. Order No. 13,224 § 2(a).

112. Jay Hollander, *Real Estate Professionals Targeted by the USA Patriot Act?*, <http://www.hollanderco.com/articles/RealEstateProfessionalsTargetedByTheUSPatriotAct.php>.

113. For example, one title company charged buyers up to thirty dollars per person involved in the transaction in 2004. Braiker, *supra* note 112.

relevant laws.<sup>114</sup> Through due diligence of potential investments including other hedge funds, a third party can ensure that its client is conforming with Anti-Money Laundering procedures. Hedge funds that do not outsource this work to compliance businesses conduct the diligence internally.

The third party intermediary model provides for diligence by specialized research entities and the potential for decreased liability. However, unlike hedge funds, many non-profits lack sufficient funds to employ private contractors.<sup>115</sup> As a result, a competitive, specialized diligence market for non-profits may not develop.

***B. The Internal Revenue Service should provide terror financing screening at the time of 501(c)(3) formation and approval.***<sup>116</sup>

In September 2002, the IRS recognized that “[s]ince the events of September 11, 2001, concern has been expressed that purportedly charitable organizations may be transferring funds outside the United States to organizations or individuals suspected of supporting terrorist activities.”<sup>117</sup> The IRS should provide terror financing screening at the time of 501(c)(3) organization formation and approval by creating Schedules to IRS Forms 1023 and 990 (“Form 1023” and “Form 990”) that address terror financing safety measures. The creation of these Schedules should: (1) highlight actions taken by the non-profit to safeguard the organization from terror financing; (2) increase officer and director awareness and vigilance regarding the misuse of non-profits by terrorists; and (3) help the IRS identify non-profit organizations that require additional supervision.

In order for an organization to obtain a determination of its tax status and be treated as exempt under Section 501(c)(3), most organizations must file Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*.<sup>118</sup> Form 1023 asks several questions, including questions which address the non-profit organization’s structure, history, activities, compensation and other financial arrangements, members and other individuals who receive benefits from the non-profit, fundraising, and financials. The Schedule to Form 1023 could be added to section IX, entitled *Financial Data*.

Most non-profit organizations claiming tax-exempt status under Section

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114. See e.g. HedgeOp ComplianceTrak Guide, available at <http://www.hedgeop.com/Guide.aspx>.

115. Since the Treasury ATF Guidelines are unclear, the cost of such diligence cannot be estimated at this time.

116. See Stephen Townley, *The Hydraulics of Fighting Terrorism*, 29 HAMLINE L. REV. 65, 104-05 (winter 2006) (supporting increased non-profit disclosure obligations generally).

117. Ann. 2002-87, 2002-39 I.R.B. 624 (Sept. 4, 2002) (requesting comments to proposed changes to IRS Form 990).

118. An exception is made to publicly supported organizations that satisfy Section 501(c)(3) and whose annual gross receipts are normally not more than \$5,000. I.R.C. § 508(c)(1)(B); Treas. Reg. § 1.508-1(a)(3)(B).

501(c)(3) are required to file Form 990, *Return of Organization Exempt From Income Tax*.<sup>119</sup> Form 990 asks questions about the non-profit organization, including questions regarding the non-profit organization's activities and operations, financials and compensation, and membership. The Form 990 also requires that additional information be provided in attached schedules in some circumstances, for example, to list compensation of current officers, directors, and key employees. The Schedule to the Form 990 could be added to Part VI, *Other Information*, or a new Part XII could be added to the form.<sup>120</sup>

The Form 1023 and Form 990 Schedules should include a series of inquiries regarding non-profit organization grant-making and contain two types of questions. The first set of questions should be short answer and ask the non-profit organization to: (1) describe the steps that have been or will be taken to ensure its grantees are not involved in or funding terrorist activities; and (2) list the organization's contributions in the last five years and the form of donation (for example, check, money wire, cash).<sup>121</sup> Additionally, the Schedules should ask a series of "yes" or "no" questions designed by the Department of Treasury to elicit information regarding terror financing indicators. For example:

Has your non-profit organization contributed any funds to any organization or individual listed on the SDN list?<sup>122</sup>

Has your non-profit organization contributed any funds to any organization affiliated with an organization or individual on the SDN list?<sup>123</sup>

Does your non-profit organization's total annual gross income exceed \$250,000, and, if so, has an independent certified public accounting firm audited the finances of your organization and issued a publicly available audited financing statement?<sup>124</sup>

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119. Most non-profit organizations must file annual information returns with the IRS on Form 990, 990-EZ or 990-PF even if they obtain recognition of tax-exempt status and are not required to pay income tax. I.R.C. § 6033; *see* Rev. Proc. 83-23 (providing exceptions to this rule). Section 6033 sets forth the statutory requirement to file an annual return and § 6033(b) provides the information required to be included in such returns.

120. *See* Herzfeld, *supra* note 15, at 896-99 (discussing terror screening questions on Form 990).

121. In Announcement 2002-87, the IRS requested comments regarding "what further steps, if any, the [IRS] should take to more effectively identify on Form 990 transactions that present a risk of the diversion of charitable funds, including the following:

- (i) Should a separate schedule of grants to foreign organizations be required?
- (ii) Should domestic charities conducting foreign activities be required to provide more specific information about the flow of funds involved in these activities, or about the recipients of these funds?
- (iii) Should transactions other than grant-making, such as sales or leases where funds flow outside the United States, also be more extensively reported?"

122. *Id.*

123. *Id.*

124. Treasury ATF Guidelines, n. 8. "The \$250,000 figure is drawn from the June 2005 final report to Congress of the Panel on the Nonprofit Sector, convened by Independent Sector. This report . . . recommends independent financial audits for charities that have more than

Has your organization made disbursements in currency, rather than by check or wire transfer, during the past year?

If so, has your organization maintained detailed internal records of such currency disbursements?<sup>125</sup>

Additionally, the Schedules should provide an opportunity for the individual to explain its answers in certain situations.

The Schedules should also require an officer or other authorized individual<sup>126</sup> to sign them separately, thereby forming a sworn statement<sup>127</sup> that the individual has examined the Schedules and to the best of his or her knowledge the information is true, correct, and complete.<sup>128</sup> The certification would contain a knowledge qualifier and provide that the director or officer signatory is protected from liability if the director or officer was provided with inaccurate information. Though this article recognizes that the signators may become apprehensive, directors or officers are currently required to sign verifications on the Form 990 and 1023 Schedules, which contain knowledge qualifiers.

The additional questions on the Forms 990 and 1023 Schedules are cost-effective and efficient: they do not require the non-profit to expend additional resources and do not increase the non-profit or IRS' administrative burden significantly because they streamline the paperwork while increasing the transparency and public accountability of non-profit organizations. The effectiveness of this proposal may depend on the IRS's vigilance and supervision of non-profit organizations.<sup>129</sup>

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\$250,000 in total annual revenue.”

125. *Id.* at 7.

126. Dep't of the Treasury, Instructions for Form 1023 (Rev. June 2006), at 4, *available at* <http://www.irs.gov/pub/irs-pdf/i1023.pdf> (requiring the signature of an officer, director, trustee or other official who is authorized to sign for the organization. The signature must also be accompanied by the title or authority of the signer and the date.).

127. PricewaterhouseCoopers LLP, *What You Should Know Before Signing Your Organization's Form 990-PF: A Guide for Foundation Officers*, 3 (2004, updated 2007), *available at* <http://www.coloradofunders.org/docs/Know%20Sign%20Form%20990-PF.pdf>.

128. Form 1023 certification, Form 1023 (Rev. 6-2006), at 12. Arguably, certification of information in a document emphasizes the seriousness of the information contained in the document. Certifications of information are not uncommon for non-profit organizations. *See also* IRC Form 990 (2006), Return of Organization Exempt From Income Tax, at 9. Directors and/or officer's are also required to sign some for-profit documents. For example, directors and officers of public companies are required to file and sign certain forms with the SEC with respect to their stock ownership. *See* Form 3s, periodic reports, Form 4s, annual reports, *available at* <http://www.sec.gov/cgi-bin/srch-edgar>. In addition, certain officers are required to certify documents related to the financial statements and internal financial control procedures under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, also known as the Public Company Accounting Reform and Investor Protection Act of 2002, July 30, 2002. These certifications are appended to periodic reports on Form 10-Q and annual reports on Form 10-K. *See* <http://www.sec.gov/cgi-bin/srch-edgar>.

129. One scholar writes, “Congress should amend section 6033 to specify additional information to be required of a section 501(c)(3) organization in its annual filing on Form 990. In

***C. An officer or director should review terror financing indicators for non-profits prior to exemption certification.***

Prior to receiving a determination letter<sup>130</sup> and obtaining effective exemption status, the IRS should require an officer or director of a non-profit to review terror financing indicators. More specifically, the IRS should insist that a director or officer from each non-profit organization seeking exemption read materials published and distributed by the government explaining terror financing laws and non-profit terror financing patterns. The materials should also include basic financial literacy materials, such as how to read a balance statement or income statement in order to help officers and directors understand and track the path of the money in their non-profit organizations. The IRS should also require that an officer or director sign a statement on Form 1023 certifying that: (1) she has read and understands the information sent to her; and (2) based on the information she has reviewed, she does not know of any terror financing issues in her organization and/or has disclosed any potential issues to the appropriate governmental agency. The non-profit organization should also make these materials available to other directors and officers.

Directors and officers cannot help prevent terror financing without knowing the warning indicators. The proposed certification educates and increases the vigilance of non-profit directors and officers without creating liability.

### CONCLUSION

On September 24, 2001, President George W. Bush stated,:

We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network. . . . We will starve terrorists of funding.”<sup>131</sup>

Non-profit organizations present a real and identifiable terror financing threat. While the proposals discussed in Part III of this paper will help increase

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section 6033, Congress provided a detailed list of the information it requires from charitable organizations on an annual basis. Although the statute also gives the [IRS] discretion to require additional information and provides that the annual filing must include ‘such other information for purposes of carrying out the internal revenue laws as the Secretary may require,’ a more specific requirement by Congress would provide insulation from a later attack on the validity of the Service’s actions.” Herzfeld, *supra* note 15, at 900-01.

130. A determination letter is a letter to the non-profit organization that states if the IRS will “recognize” the organization as tax-exempt and if the organization qualifies as a public charity.

131. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

vigilance and decrease terror financing, they alone are not sufficient. The successful implementation of many of these models is impossible unless the government clarifies the ambiguities contained in the Treasury ATF Guidelines.

Additionally, the government should increase the regulatory framework for charitable organizations. Non-profits must comprehend the relationship between international philanthropy and terror financing, and implement proactive procedures before this abuse can be eliminated. Furthermore, the government must rectify federal and state deficiencies in the supervision of non-profits by creating a federal administrative agency established to oversee the activities of non-profit organizations, including terror financing activities.<sup>132</sup>

These problems cannot be solved without the necessary institutional commitment. The government has the capabilities to address these issues. Only when they choose to implement proactive policies will they take a measurable step towards eliminating “the life-blood of terrorist operations.”<sup>133</sup>

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132. This article recognizes that the Executive Office of Terrorist Financing and Financial Crime, the Financial Crimes Enforcement Network, and the Office of Foreign Assets Control exist under the Department of the Treasury umbrella. Nevertheless, this article advocates increasing collaboration and monitoring of non-profit organizations by one of these departments or a separate department within the Treasury. Several scholars support the creation of a separate federal administrative agency, see e.g. Joel G. MacMull, *Removing the Charitable Veil: An Examination of U.S. Policy to Combat Terrorist Funding Charities Post 9/11*, 10 *NEW ENG. J. INT’L & COMP. L.* 121, 134 (2004).

133. *Bush Launches Financial Strike*, CBS NEWS, Sept. 24, 2001, available at <http://www.cbsnews.com/stories/2001/09/24/national/main312248.shtml>.