

## Legal Dimensions of International Grantmaking

### **The Principles of International Charity: An Effective Alternative to the *Voluntary Guidelines***

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By now, charitable organizations working internationally have no doubt heard of and perhaps even contributed to the “Principles of International Charity,” a document that describes the fundamental principles that safeguard charitable assets from diversion to terrorist and other non-charitable purposes. This document was drafted by representatives of a wide variety of U.S.-based organizations engaged in international charitable work

### **Changing Legal Environment**

Most U.S. charitable organizations were sensitive to the threat of diversion of assets to non-charitable uses before September 11, 2001, and abided by the relatively straightforward legal rules. The tax law prohibited support of non-charitable activities, including terrorism, and imposed special requirements for grants to most foreign organizations. The criminal law barred all U.S. persons—including organizations engaged in charitable work abroad—from knowingly providing material support for specific acts of terrorism or to specified foreign terrorist organizations.<sup>[1]</sup>

After September 11, the government’s efforts to stem the tide of funding to terrorist organizations prompted both new laws and “voluntary” guidance from the Treasury Department that presented challenges for organizations trying to figure out how to continue their international charitable activities legally. The effect of the uncertainty—and potentially severe penalties—associated with the government actions was to deter some organizations from pursuing their charitable missions at a time when global humanitarian needs were increasing.

#### **Quick Links :**

- [Principles of International Charity](#)
- [Anti-Terrorist Financing Guidelines: \*Voluntary Best Practices for U.S.-Based Charities\*](#)
- [Executive Order 13224](#)
- [USA Patriot Act](#)
- [Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know](#)

First, President George W. Bush issued Executive Order 13224, prohibiting transactions by U.S. persons with individuals and organizations listed on any terrorism watch lists issued by the U.S. government. E. O. 13224 also blocked any assets controlled by or in the possession of such entities and those who support them.<sup>[2]</sup> The Executive Order and the USA Patriot Act prohibited certain activities that were previously charitable: for example, before E.O. 13224, under the International Emergency Economic Powers Act, organizations were generally permitted to provide humanitarian assistance to organizations deemed to be associated with terrorism, such as a hospital that provided services to persons associated with terrorism.

Then, in November 2002, the Treasury Department issued the Anti-Terrorist Financing Guidelines: *Voluntary Best Practices For U.S.-Based Charities.*”

While the Guidelines were—according to their title—“*voluntary*,” the fact that they were issued by the Treasury Department in the post-9/11 environment prompted fears that “voluntary” effectively meant “compulsory.” For example, organizations worried that if they inadvertently funded terrorism, noncompliance with any one of the Guidelines' procedures might trigger a violation of the USA Patriot prohibition on knowingly providing support to terrorism (a felony offense). Furthermore, compliance with the Guidelines provided no safe harbor from enforcement action (such as asset blocking) for support of an organization only later identified by the government to have some association with terrorism.

Compounding the confusion created by the indeterminate nature of the Guidelines' application was the fact that they were poorly suited to their purpose. In general, they were unworkable, marginally related to diversion of charitable assets, and very likely to discourage international charitable involvement by U. S. organizations. Charitable organizations voiced nearly unanimous dissatisfaction with the Guidelines while emphasizing their commitment that charitable dollars not be used to finance terrorism. Grantmakers observed that the Guidelines failed to take into account the laws governing foreign grants or the extensive experience of U.S. grantmakers in administering foreign grant funds. Charities delivering direct services abroad noted that compliance with the Guidelines would be nearly impossible for them

After considering the comments, the Treasury Department asked charitable representatives to an April 28, 2004, discussion of the Guidelines, which ended in a formal invitation to continue the dialogue. The representatives instead proposed that the charitable sector, reflecting its non-governmental character, work apart from the Treasury Department to develop guidance in lieu of the Guidelines. Although the charities working group would be independent, it would inform the Treasury on its progress. The Treasury Department agreed.

### **An Alternative Approach**

Representatives of nearly 30 organizations convened a working group in June, welcoming all interested parties to join. As a result, the “Principles of International Charity” are informed by the views of a diverse membership of private foundations, public charities, religious organizations, nongovernmental organizations, watchdog groups, corporations, employee matching gift funds and umbrella groups including Independent Sector, Council on Foundations, InterAction and Grantmakers Without Borders, representing collectively thousands of individual organizations.

The working group planned to develop a “framework” of guiding principles and recommended practices, but soon abandoned the idea of suggesting practices. Although certain principles were fundamental to preventing diversion of charitable assets, the lesson from the Guidelines was that no one practice—or even set of practices—would be effective for every organization. The Principles are based on the premise that a practice that is consistent with the articulated principles will appropriately protect charitable assets. A commentary follows each of the eight principles for purposes of explanation, and in some cases, examples illustrate how the principle might be reflected in practice.

## Principles

“The Principles of International Charity,” absent the commentary, are as follows:

- Consistent with the privilege inherent in their tax-exempt status, charitable organizations must exclusively pursue the charitable purposes for which they were organized and chartered.
- Charitable organizations must comply with both U.S. laws applicable to charities and the relevant laws of the foreign jurisdictions in which they engage in charitable work. Charitable organizations, however, are non-governmental entities that are not agents for enforcement of U.S. or foreign laws or the policies reflected in them.
- Charitable organizations may choose to adopt practices in addition to those required by law that, in their judgment, provide additional confidence that all assets—whether resources or services—are used exclusively for charitable purposes.
- The responsibility for observance of relevant laws and adoption and implementation of practices consistent with the principles contained herein ultimately lies with the governing board of each individual charitable organization. The board of directors of each charitable organization must oversee implementation of the governance practices to be followed by the organization.
- Fiscal responsibility is fundamental to international charitable work. Therefore, an organization’s commitment to the charitable use of its assets must be reflected at every level of the organization.
- When providing charitable resources, fiscal responsibility on the part of the provider generally involves:
  - in advance of payment, determining that the potential recipient of monetary or in-kind contributions has the ability to both accomplish the charitable purpose of the grant and protect the resources from diversion to non-charitable purposes;
  - reducing the terms of the grant to a written agreement signed by both the charitable resource provider and the recipient;
  - engaging in ongoing monitoring of the recipient and of activities under the grant; and
  - seeking correction of any misuse of resources on the part of the recipient.
- When providing charitable services, fiscal responsibility on the part of a provider involves taking appropriate measures to reduce the risk that its assets would be used for non-charitable purposes. Given the range of services in which organizations engage, the specific measures necessarily vary depending on the type of services and the exigencies of the surrounding circumstances. The key to fiscal responsibility, however, is having sufficient financial controls in place to trace funds between receipt by the service provider and delivery of the service.
- Each charitable organization must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization. If this foundation is shaken, the organization’s ability to be of assistance and the safety of those delivering assistance is at serious risk.

## Comparison of Principles and Guidelines

The drafting of the Principles marked an affirmative turning point for charitable organizations. Instead of simply reacting to new laws and Treasury Department pronouncements, charitable organizations developed a constructive approach to protecting charitable assets from being used for terrorist purposes. The Principles are consistent with the charitable sector's long tradition of responsible international work governed by both U.S. legal requirements and common-sense procedures devised by individual organizations to address the challenges inherent in sending money, supplies and personnel abroad.

The Principles and the Guidelines have two things in common: both were drafted with the goal of minimizing the risk of diversion of charitable assets to terrorist purposes, and neither is the law. Beyond that, the Principles and the Guidelines differ in a number of ways, three of which are described below.

First, the working group of charitable organizations drafted the Principles with the advantage of hindsight. The Treasury had acted quickly in the year following the 9/11 terrorist attacks to issue guidance on international charitable donations in time for Ramadan. The working group, on the other hand, began deliberations almost two years later to draft an alternative. Many working group members had participated in similar conversations in 2003, to respond first to the Guidelines and then to the IRS's request for comments on international grantmaking. Consequently, while opinions diverged on many details, the group essentially came to even the earliest discussions with a consensus on fundamental issues. The Principles reflect seven months of concerted effort but are informed by an additional year or more of related discussions surrounding the Guidelines.

Second, the Treasury drafted the Guidelines without any particular knowledge of international charitable work. Working group participants have had years or decades of relevant experience, enabling them to incorporate the full range of international charitable activities into the document. The Guidelines, although written for all charitable organizations, addressed only issues relevant to large grantmaking foundations and failed to address issues applicable to, for example, organizations that provide direct services or make very small grants. In contrast, the Principles address situations important to the range of charitable organizations engaged in international work. The risks of diversion vary by the type of activity—grantmaking versus humanitarian assistance, for example—and the amount of money involved. Because the group itself is composed of grantmakers, both large and small, and humanitarian service providers, the Principles naturally reflect the range of their experiences, making the Principles useful to the entire charitable sector.

Third, the Treasury drafted the Guidelines with the single-minded goal of eliminating any opportunity for charitable dollars to find their way into terrorist financing streams. Thus, the Guidelines included practices that required U.S. organizations to perform what was essentially the governmental function of gathering intelligence. For example, the Guidelines procedures included obtaining detailed background information about staff and directors of foreign organizations, which would threaten the relationships between U.S. and foreign organizations and deter charitable activities. More significantly, however, these sorts of procedures endanger workers delivering services around the world. In the last six months, workers from Doctors Without Borders in Afghanistan and CARE International in Iraq have been murdered, underscoring the reality that charitable workers have become targets. Therefore, in contrast to the Guidelines, the Principles state clearly that “[c]haritable organizations . . . are non-governmental entities that are not agents for enforcement of U.S. or foreign laws or the policies reflected in them” and that the relationship between the charitable organization and the community it serves is critical to

securing the safety of those delivering assistance.

## **Status of the Guidelines and of the Principles**

Treasury officials have made numerous public statements indicating they have come to understand that the Guidelines are not the most effective approach to solving the problems associated with charitable funding and terrorist financing. The Treasury's receptiveness to the views of charitable organizations is just one indication that compliance with the Guidelines will not become mandatory. Still, the IRS has asked for comments on how to better regulate international grantmaking, and the government's concern over the terrorist threat has not diminished.

Certain Treasury Department officials have expressed a generally favorable initial reaction to the Principles as currently drafted. The Treasury has offered to provide additional information to further inform the working group's drafting process. For example, the Treasury believes that the group would benefit from a better understanding of the procedures surrounding lists of suspected or known supporters of terrorism. The Guidelines included a procedure that involves checking the lists for grantees and persons associated with grantees. The Treasury views the lists as a useful tool for U.S. charitable organizations, while commentary in the Principles raises concerns over the legality and fairness of the lists. The dialogue on this and other issues between the working group and the Treasury will continue.

Meanwhile, the Principles have been circulated widely for comment and will again be circulated when they are finalized to give charitable organizations an opportunity to endorse the Principles, indicating their support for this effective alternative to the Guidelines.

## **About the Authors and Editors**

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The Council on Foundations coordinates the Legal Dimensions in International Grantmaking series with assistance from the Day, Berry & Howard Foundation ("promoting positive developments in the law, legal scholarship and legal education"). Inquiries may be addressed to the Council's International Programs staff at 202/466-6512 or to Timothy Lyman, president of the Day, Berry & Howard Foundation, at 860/275-0329.

## **Footnotes**

[1] 18 U.S.C. §§ 2339A and 2339B.

[2] Exec. Order No. 13224, 66 Fed. Reg. 49079 (September 25, 2001). The Executive Order is an exercise of a grant of authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707, and the National Emergencies Act, 50 U.S.C. §§ 1601-1651. For a plain language guide to the measures adopted since September 11, 2001, see "Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know," available from the Council website at [www.cof.org](http://www.cof.org).