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November 8, 2010

By Hand and Facsimile
(202-622-6415)

Mr. Chip Poncy, Director
Office of Strategic Policy for Terrorist Financing & Financial Crimes
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Mr. Poncy:

On behalf of the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors (the "Working Group"), I am writing to respond to your June 29, 2010 letter regarding the future of the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (the "Guidelines"). This will be our final communication on behalf of the Working Group which as explained below, has disbanded.

As you are aware, the Working Group has long believed that the *Guidelines* are problematic, both substantively and as a matter of policy. For example, its central premise—that U.S. charities "continue to be abused and exploited by terrorist organizations, particularly those charities operating in high-risk regions around the world"—is vastly overstated. Nearly all of the examples of "abuse" described in the *Annex to the Guidelines* involve foreign charities. As of May 2010, only eight of the 547 parties listed on OFAC's SDN list (1.5%) are U.S.-based charities.¹ Indeed, as Treasury recently acknowledged, "[t]here are approximately 1.8 million charities in the United States, the vast majority of which face little or no terrorist financing risk."² Given these figures, we believe the claims in the *Guidelines* of "exploitation and abuse"

¹ See U.S. Department of the Treasury, *Protecting Charitable Giving: Frequently Asked Questions*, at <http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf>.

² *Id.*

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are exaggerated and suggest, wrongly, that all charitable activities benefiting particular geographic areas or cultural groups must be viewed with suspicion. Further, such claims communicate a heightened degree of governmental suspicion that cannot help but chill vital charitable activity.

More fundamentally, however, the Working Group believes that serious policy concerns arise when a regulatory agency like Treasury prescribes a single set of “voluntary best practices” outside of the time-tested process of notice and comment that is prescribed by the Administrative Procedures Act. Given the agency’s rulemaking function and coercive authority, its issuance of “voluntary” guidance can be confusing—if not misleading—because there is a danger that these aspirational standards will be viewed as black-letter law. This is precisely what has occurred with the *Guidelines*, which prescribe a single set of due-diligence procedures, but fail to place those procedures in the context of the laws that govern international charity and prohibit terrorist financing. The applicable laws allow organizations to structure their charitable operations with far more flexibility than the *Guidelines* suggest.

Treasury is aware of the Working Group’s concerns. For more than seven years, the Working Group has reached out to Treasury in good faith to discuss the *Guidelines*, their impact, and their compliance costs. While Treasury has engaged in a dialogue with representatives of the Working Group—which we appreciate—it has adopted few of the Working Group’s core recommendations. Treasury has suggested, however, that it made changes to its guidance “based on extensive consultation between Treasury and the charitable and Muslim communities.”³ See, for example, Treasury’s 2006 revision to the *Guidelines* (including the *Annex to the Guidelines*) and its *Risk Matrix from the Charitable Sector*. As you are aware, at the same time Treasury made these claims, the Working Group and other organizations within the sector were calling upon the agency to withdraw this guidance entirely.

By letter dated April 15, 2010, the Working Group renewed its request that Treasury withdraw the *Guidelines* and issue guidance in its stead that explains the governing legal framework and points to a growing body of sector-produced “best practices” guidance for organizations working abroad, such as the Working Group’s *Principles of International Charity*. Copies of the Working Group’s letter and proposed alternative guidance are enclosed as Exhibit 1 to this letter. We believed this was a constructive approach that would meet Treasury’s needs while providing necessary relief from the *Guidelines*.

³ *Violent Islamist Extremism: Government Efforts to Defeat It: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs* (May 10, 2007) (Test. of Chip Poncy, Director, Office of Strategic Policy for Terrorist Financing and Financial Crimes, U.S. Dep’t of Treasury).

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In response to the Working Group's proposal, you have advised that Treasury plans to (1) *expand* the *Guidelines*, (2) issue "*additional* guidance documents" for the nonprofit sector, and (3) update "the Annex of the *Guidelines* to help clarify the current risk and types of exploitation of charities by specific terrorist organizations in certain high risk regions." You explain that expanded guidance is necessary, stating:

[R]evoking the *Guidelines* would [not] be beneficial because it would send the wrong message in face of the fact that charities continue to be abused and exploited by terrorist organizations, particularly those charities operating in high risk regions around the world. The *Guidelines* serve as a key tool for assisting charities in responding to the real and ongoing threat of terrorist abuse of the sector.

In your June 29 letter, you invite "input and suggestions from the charitable sector once again to help [Treasury] in the development of the next iteration of the *Guidelines*. . . . [as well as] additional products and information that can help charities address the threat of terrorist exploitation while promoting their charitable mission." While the Working Group appreciates this gesture, it is clear from the passages quoted above that we are at an impasse. Further, the Working Group is quite uncomfortable with your suggestion that charities should serve as a vehicle for government messages, which seems fundamentally at odds with the historic role of charities in our society. Consequently, after considering our collective progress over the past seven years and giving much thought to views expressed in your letter, the Working Group has determined that further discussions regarding the *Guidelines* and related guidance would be unproductive.

The Working Group has therefore disbanded. Its members remain, however, steadfastly committed to implementing due diligence practices that are appropriate to their operations, to avoid the misuse of funds for any illegal purpose, including providing support to terrorists. Thank you for your willingness to have conversations with us over the last seven years.

Sincerely,

A handwritten signature in black ink, appearing to read 'MSO', followed by a long horizontal flourish.

Marcus S. Owens

Enclosure