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RIN 1557-AF05

Re: Fair Access to Financial Services - Proposed Rule

Department of the Treasury, Office of the Comptroller of the Currency

Docket ID: OCC-2020-0042

**Fair Access to Financial Services:  
Proposed Rule Comment Submission**

We applaud the Office of the Comptroller of the Currency's efforts to bring fair access to financial services with this Notice of Proposed Rulemaking. This is an important issue that affects a number of sectors as part of the global phenomenon known as "derisking." We appreciate the opportunity to comment on this proposal and highlight how this problem has affected our members.

As outlined in detail below, we support the proposed rule's language that banks not deny services in coordination with others. In addition, we suggest that the OCC advise financial institutions to avoid negative media searches due to the likelihood of retrieving disinformation, with the potential to create an inaccurate red flag; require any bank that denies a service on the basis of its "quantitative, risk-based standards established in advance" to make these standards available to the person denied service; and explicitly include "non-profit organization" in the proposed rule's definition of "person."

Charity & Security Network is a resource center for nonprofit organizations (NPOs) on issues at the intersection of national security and civil society. We strive to promote and protect NPOs' ability to carry out effective programs that promote peace and human rights, aid civilians in areas of disaster and armed conflict and build democratic governance. C&SN is made up of a broad cross-section of nonprofits, including charities working on humanitarian aid, development, peacebuilding, human rights and civil liberties, along with grantmakers, donors and faith-based groups.

**Nonprofits and Financial Access**

Any effort to achieve fair access to financial services must include NPOs.<sup>1</sup> A 2017 empirical study found that two-thirds of U.S.-based NPOs with international activities face difficulties in accessing financial services,<sup>2</sup> with the most common problem being delays in wire transfers. In focus group sessions

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<sup>1</sup> "The de-risking debate most often focuses on businesses losing their access to banking services. But the problem is clearly broader than that as charities are getting the cold shoulder as well. Hall brings attention to de-risking's consequences for nonprofits trying to deliver relief to refugees in areas such as Syria and Somalia. And, she notes, those charities 'don't de-risk their beneficiaries.'" Marc Hochstein, Editor in Chief, American Banker, *Best of BankThink 2015* at <https://www.americanbanker.com/slideshow/best-of-bankthink-2015-editors-choice>; American Banker, *BankThink, Bank Derisking Hurts Charities and Increases Risk of Laundering*, Nov. 4, 2015 at <https://www.americanbanker.com/opinion/bank-de-risking-hurts-charities-and-increases-risk-of-laundering>.

<sup>2</sup> Charity & Security Network, *Financial Access for U.S. Nonprofits*, [www.charityandsecurity.org/FinAccessReport](http://www.charityandsecurity.org/FinAccessReport)

conducted to supplement the statistical data in the report, NPO participants noted that delays typically lasted weeks or even months, severely impacting time-sensitive programming. For example, a U.S.-based NPO planned to carry out a winterization program in Afghanistan, but it was never implemented because by the time the funds were transferred, winter was over.<sup>3</sup> Another U.S.-based organization was prevented from sending immediate relief to the Rohingya minority in Myanmar in the midst of a dire humanitarian crisis.<sup>4</sup> “When programs are delayed or canceled because of the inability to transfer funds, peace is not brokered, children are not schooled, staff is not paid, hospitals lose power, the needs of refugees are not met and, in the worst cases, people die.”<sup>5</sup>

While the same study found smaller numbers of NPOs struggling with account closures or refusals to open accounts (15% in total<sup>6</sup>), the impact on NPO operations is significant. “You have 30 days to move your money” with no explanation or opportunity to correct perceived deficiencies is a daunting message to receive. NPOs faced with these situations must pull vital staff off of other projects to scramble for new banking services.

Many banks and regulatory officials are unaware of the risk assessment and due diligence measures NPOs routinely undertake, not only to comply with sanctions and CFT regulations, but also to account to donors and manage risks to operations and employees.<sup>7</sup>

In the weeks and months following the 9/11 attacks, national and international bodies erroneously identified charities as conduits for terrorist financing. This thinking was reflected in the Financial Action Task Force’s (FATF) initial Recommendation 8 on Nonprofits, which referred to the sector as “particularly vulnerable” to terrorist abuse.<sup>8</sup> More recently, government agencies and multilateral organizations have recognized that NPOs are not uniformly high-risk for terrorist financing and that they play an important role in aiding communities worldwide and in countering terrorist propaganda and recruitment.

This greater understanding of the NPO sector has resulted in a dramatic shift in the perception of NPOs in relation to terror finance risk by governments and the FATF. Eight years ago, Treasury data demonstrated that U.S. charities were not a significant source of terrorist support, indicating that U.S. groups made up

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<sup>3</sup> Ibid, pp. 81-82.

<sup>4</sup> Ibid, p. 50.

<sup>5</sup> Ibid, p. 94.

<sup>6</sup> Ibid, p. 40.

<sup>7</sup> The fact that NPOs are subject to a complex system of regulation and oversight at the federal, state and local levels, and required to register and be monitored by the IRS and state authorities is not well-understood. In addition to reporting requirements, many NPOs also adhere to voluntary self-regulatory standards and controls to improve individual governance, management and operational practice, beyond internal controls required by donors and others. These regimes primarily regulate raising, spending and accounting for funds, seek to protect the public from fraud, and encourage charitable giving. NPOs receiving federal grants undergo additional review by grant making agencies to comply with standards required by OMB (e.g. Agency for International Development recipients are subject to rigorous scrutiny, compliance, and independent auditing requirements). See Sue Eckert, *International and Domestic Implications of De-Risking*, Testimony before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, U.S. House of Representatives, June 26, 2018, at [https://charityandsecurity.org/system/files/Eckert%206\\_26\\_18%20Final%20Statement.pdf](https://charityandsecurity.org/system/files/Eckert%206_26_18%20Final%20Statement.pdf)

<sup>8</sup> Sue Eckert, *International and Domestic Implications of De-Risking*, Testimony before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, U.S. House of Representatives, June 26, 2018, at [https://charityandsecurity.org/system/files/Eckert%206\\_26\\_18%20Final%20Statement.pdf](https://charityandsecurity.org/system/files/Eckert%206_26_18%20Final%20Statement.pdf)

less than one percent of organizations with suspected ties to terrorists.<sup>9</sup> In 2015, FATF noted, “the threat environment has evolved, government experience implementing Recommendation 8 has advanced, and the non-profit organisation (NPO) sector and self-regulatory mechanisms have also continued to evolve.”<sup>10</sup> One year later, FATF revised Recommendation 8, removing the “particularly vulnerable” language, directing governments to first identify the subset of NPOs that are at risk for terrorist abuse, and then develop proportionate, risk-based measures to address the actual threats. Notably, the revision says such measures should not disrupt the activities of legitimate organizations.

After a series of informal statements made at financial industry gatherings over the past four years, the U.S. Treasury Department, in its 2020 update of the *National Strategy for Combating Terrorist and Other Illicit Financing*, stated that “U.S.-based tax-exempt charitable organizations play an important role in delivering aid to communities worldwide and in countering terrorist propaganda and recruitment.” It went on to state that financial institutions should “apply the risk-based approach to the opening and maintenance of charity accounts, as the vast majority of U.S.-based tax exempt charitable organizations are not high risk for terrorist financing.”<sup>11</sup>

More recently, in April 2020, Treasury issued a statement emphasizing the urgent need for aid in response to the COVID-19 pandemic, calling for a risk-based approach to counter-terrorism finance and anti-money laundering measures, in order to avoid hindering the efforts of legitimate humanitarian organizations. It recognized for the first time in a written statement that the NPO sector implements a range of risk mitigation measures, “including due diligence, governance, transparency, accountability, and other compliance measures, even in a crisis.” The statement went on to encourage financial institutions to use a risk-based approach “to allow transparent, legitimate aid organizations to access financial services.”<sup>12</sup> In November 2020, the banking regulatory agencies issued a Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations,<sup>13</sup> emphasizing that banks should use the risk-based approach and try to mitigate the potential risk some charities may pose.

While welcome and important, these statements do not have the force of law or regulation. As governments’ understanding of the sector has evolved, that progress has not been reflected in NPOs’ ability to access the financial services necessary to carry out their vital programming. Instead, the global phenomenon known as “derisking” has become, for most NPOs operating abroad, a significant hurdle and for many, an existential crisis. Although there are likely multiple drivers of the derisking crisis, the failure of the regulatory structure to keep pace with the evolving understanding of the sector is an important factor. As noted in a 2018 Congressional hearing, “[T]he fact that there have been no changes to regulations or guidance to encourage financial institutions to update their risk assessments of NPOs

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<sup>9</sup> See Charity & Security Network, *Treasury Data Shows Charities Not Significant Source of Terrorist Support*, at [https://charityandsecurity.org/counter-terrorist-financing/treasury\\_too\\_much\\_emphasis\\_charities/](https://charityandsecurity.org/counter-terrorist-financing/treasury_too_much_emphasis_charities/)

<sup>10</sup> Financial Action Task Force, *Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8)*, June 2015, p. 4 at <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>

<sup>11</sup> U.S. Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing*, February 2020 at <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

<sup>12</sup> *Treasury Underscores Commitment to Global Flow of Humanitarian Aid in Face of Covid-19 Pandemic*, April 9, 2020, at <https://home.treasury.gov/news/press-releases/sm969>

<sup>13</sup> <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-155a.pdf>.

ensures that de-risking of NPOs will continue. Without action by government, financial institutions will continue to be reluctant to bank NPOs.”<sup>14</sup>

### **Political Attacks against NPOs**

The OCC Proposed Rule correctly points out that banks often react to “pressure from advocates from across the political spectrum whose policy objectives are served when banks deny certain categories of customers access to financial services.” Some of our members, particularly humanitarian, development, peacebuilding, and human rights groups working in conflict-affected and high-risk areas, have been subject to bank derisking as a result of such attacks. These politically motivated groups are creating and using disinformation to delegitimize and disrupt the lawful work of NPOs and human rights defenders (HRDs) to further their ideological goals. These groups erroneously inform financial institutions that the NPO or HRD is associated with, working with, or funding a listed terrorist group, and raise the specter, usually in forceful yet unsubstantiated terms, that maintaining these accounts puts the bank at legal risk. Ostensibly, groups claim that their actions are aimed at strengthening security, but they are in fact contributing to insecurity by impeding legitimate mission-driven work. These tactics have similarly been used to close NPO’s and HRD’s online donation processing service accounts, a practice known as “deplatforming.”<sup>15</sup>

We therefore support the provision in the proposed rule that would require a bank to “not deny, in coordination with others, any person a financial service the covered bank offers.”<sup>16</sup>

### **Disinformation Hinders Banks’ Ability to Assess Risk**

The political attacks described above also include the disinformation these groups create. Politically motivated actors have masqueraded as journalists or think tanks. The disinformation they produce creates false positive “hits” for counter-terrorist financing in online searches as well as in commercial data aggregator and compliance databases.

Disinformation is false or misrepresented information that is created and used exclusively to malign a person or group. It is often made up of half-truths and things that sound plausible but are, nonetheless, not factual. Disinformation attacks have become more significant in recent years, especially among groups that target organizations based on where they deliver aid and who they are attempting to aid.<sup>17</sup>

This has presented numerous challenges to those seeking reliable, fact-based information. For this reason, negative media searches by banks have become a touchpoint in the search for derisking solutions as the rise in disinformation has made it extremely difficult to distinguish fact from fiction. A 2020 survey of financial services and other professionals seeking AML or Know Your Customer (KYC) data found that 85% use Google for due diligence or risk investigations, and 49% said that false positives remain a challenge.<sup>18</sup>

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<sup>14</sup> Sue Eckert, *International and Domestic Implications of De-Risking*, at [https://charityandsecurity.org/system/files/Eckert%2026\\_26\\_18%20Final%20Statement.pdf](https://charityandsecurity.org/system/files/Eckert%2026_26_18%20Final%20Statement.pdf)

<sup>15</sup> See Charity & Security Network, *Financial Services Deplatforming Hurts Aid, Peacebuilding* (2019) at <https://charityandsecurity.org/sites/default/files/Deplatforming%20Issue%20Brief.pdf>.

<sup>16</sup> Section 55.1(b)(4) of proposed rule.

<sup>17</sup> InterAction, *Countering Disinformation in the NGO Space: A Together Project Initiative* (Fact Sheet).

<sup>18</sup> Arachnys, *AML/KYC Data Survey Report*, March 2020, pp. 8-9, at <https://bit.ly/3k4dzeM>

Banks and data aggregators use algorithms to seek out news on specific topics, which can skew results towards politically motivated sources. In addition, creators of disinformation can use “bots,” computer programs that can automatically generate messages and appear as genuine accounts. The combination of these technologies “creates a powerful tool for political manipulation”<sup>19</sup> and makes it extremely difficult to weed out truth from fiction. A 2017 study found that only 4% of respondents could correctly differentiate between true news and fake news.<sup>20</sup>

We suggest that the OCC advise financial institutions to avoid negative media searches due to the likelihood of retrieving false information with the potential to create an inaccurate red flag. Financial institutions should be advised to limit searches to information contained in U.S. government or United Nations lists such as U.S. Treasury’s Specially Designated Nationals list. Indeed, the U.S. Agency for International Development recently changed its contract and certification process to clarify that grantees need only check U.S. government and UN terrorist lists when screening partners and other persons and entities, among other changes.<sup>21</sup>

### **Transparency in Derisking Decisions**

In the proposal, the OCC notes a bank’s obligation to ensure that its “operations are consistent with its obligation to provide fair access to financial services, including through established written policies and procedures.” It would require that a bank “not deny any person a financial service the bank offers except to the extent justified by such person’s quantified and documented failure to meet quantitative, risk-based standards established in advance by the covered bank.”

Banks almost never reveal why they are denying services to a customer. This, combined with the likelihood for disinformation to fuel debanking decisions, means that innocent parties are often denied fair access to financial services. Providing transparency around denials of service could go a long way in correcting some of these misstatements of fact at the bank level.

We suggest that the OCC require any bank that denies a service on the basis of its “quantitative, risk-based standards established in advance” to make these standards available to the person denied service.

### **Definition of “Person”**

In the proposed rule, “person” is defined as “any natural person or any partnership, corporation, or other business or legal entity.” We suggest that this definition explicitly include “non-profit organization” to bring clarity and discourage any interpretation that would exclude NPOs.

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<sup>19</sup> *Faking It: Fake News and How It Impacts the Charity Sector* (2018), p. 6.

<sup>20</sup> <http://www.channel4.com/info/press/news/c4-study-reveals-only-4-surveyed-can-identify-true-or-fake-news> cited in *Faking It: Fake News and How It Impacts the Charity Sector* (2018).

<sup>21</sup> USAID, Certifications, Assurances, Representations, and Other Statements of the Recipient, Partial Revision May 18, 2020, p. 4 at <https://charityandsecurity.org/wp-content/uploads/2020/05/Certifications-ETC-ADS-Chapter-303.pdf>; Charity & Security Network, *USAID Revises Grantee Documents Relating to Anti-Terrorism Requirements* at <https://charityandsecurity.org/false-claims-act-lawsuits/usaaid-revises-grantee-documents-relating-to-anti-terrorism-requirements/>

Thank you for the opportunity to weigh in on this important rulemaking effort. If it would be helpful to discuss our specific or general views on the ANPR, please contact [ahall@charityandsecurity.org](mailto:ahall@charityandsecurity.org). We appreciate your consideration and look forward to working with you.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Hall". The signature is written in a cursive style and is positioned above a thin horizontal line.

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