CHARITY & SECURITY NETWORK

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To: www.regulations.gov
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Re: Anti-Money Laundering Effectiveness ANPR
Department of the Treasury, Financial Crimes Enforcement Network
Docket ID: FINCEN-2020-0011

ANPR Comment Submission: Opportunity to Address Financial Access for Nonprofits

With this Advance Notice of Proposed Rulemaking (ANPR), the Financial Crimes Enforcement Network (FinCEN) sets out to modernize the regulatory regime to address the evolving threats of illicit finance, with the aim of enhancing effectiveness and efficiency of AML programs.

Inherent in the recognition that the threats of illicit finance have evolved is a growing recognition that nonprofit organizations (NPOs) are not uniformly high-risk for terrorist financing and in fact play an important role in aiding communities worldwide and in countering terrorist propaganda and recruitment. 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 at "particularly vulnerable" to terrorist abuse.[1]

Over the past two decades, a 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. 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 less than one percent of organizations with suspected ties to terrorists.[2] 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."[3] 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

[1] 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
[2] 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/
[3] 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

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."[4]

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 use a risk-based approach "to allow transparent, legitimate aid organizations to access financial services."[5]

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.

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.[6] 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 ensures that de-risking of NPOs will continue. Without action by government, financial institutions will continue to be reluctant to bank NPOs."[7]

Nonprofits and Financial Access

Any discussion of anti-money laundering (AML) effectiveness must include a discussion of derisking, the practice by financial institutions of avoiding rather than managing risk, which has affected numerous sectors. The plight of unbanked communities, the decline in correspondent banking relationships, and

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[4] 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

[5] *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

[6] 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

[7] Ibid.

the struggle of NPOs, money service businesses and others to maintain bank accounts and transfer funds has been well-documented.[8]

A 2017 empirical study found that two-thirds of U.S.-based NPOs face difficulties in accessing financial services,[9] with the most common problem being delays in wire transfers. In focus group sessions conducted for 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.[10] 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.[11] "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."[12]

While the same study found smaller numbers of NPOs struggling with account closures or refusals to open accounts (15% in total[13]), 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.

When an NPO cannot move its program funds through the regulated banking system, it may resort to carrying cash, increasing the risk that money will fall into the wrong hands[14]. If the AML program is to be effective, and if information given to law enforcement is to have a high degree of usefulness, regulations cannot hinder the ability of legitimate NPOs to move their funds abroad through the regulated system. International funds transfers are essential to ensuring program success overseas and meeting the needs of beneficiaries, and NPOs want to keep their money within the transparent banking sector if at all possible.

Negative Media Searches

As noted in the ANPR, the AML Effectiveness Working Group recommended that relevant government agencies consider clarifying current requirements and supervisory expectations with respect to negative media searches, among other items. This has become a touchpoint in the search for derisking solutions

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[8] See GAO, *Humanitarian Assistance: USAID Should Improve Information Collection and Communication to Help Mitigate Implementers' Banking Challenges,* September 2018 (GAO-18-660); GAO, *International Remittances: Money Laundering Risks and Views on Enhanced Customer Verification and Recordkeeping Requirements,* Feb. 16, 2016 (GAO-16-65); FinExtra, *FSB Publishes Report on Correspondent Banking, Makes Remittance Recommendations,* March 16, 2018; Reuters, *Risk-averse Banks Cut Correspondent Relationships by 6%,* July 4, 2017.

[9] Charity & Security Network, *Financial Access for U.S. Nonprofits*, www.charityandsecurity.org/FinAccessReport

[10] Ibid, pp. 81-82.

[11] Ibid, p. 50.

[12] Ibid, p. 94.

[13] Ibid, p. 40.

[14] U.S. Treasury identified cash as a vulnerability in its most recent National Strategy, stating, "The same characteristics that make cash dependable and portable to everyday consumers are also attractive to criminals." See U.S. Treasury, *National Strategy for Combating Terrorist and Other Illicit Finance*, February 2020, p. 23 at https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf

as the rise in disinformation has presented numerous challenges to those seeking reliable, fact-based information. One component of this alarming trend is attacks on NPOs.

> 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.[15]

A single statement can be twisted into allegations of terrorism, and aid delivery in a natural disaster can give rise to accusations of theft.[16] 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.

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.[17] Organizations such as financial institutions or 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"[18] 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.[19]

Most people and organizations listed in the commercial databases never know they are listed, and banks almost never reveal why they are denying services to a customer. A handful of trials in the UK have found one of these data aggregator companies liable for libel by including disinformation about groups in its database, and attorneys representing the company have expressed their regrets in open court.[20]

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[15] InterAction, *Countering Disinformation in the NGO Space: A Together Project Initiative* (Fact Sheet).

[16] Girish Menon, Chief Executive of ActionAid, gave an interview to Sky News in 2017 in which he expressed the charity's concerns about a planned state visit of President Trump. That evening, something had appeared on LinkedIn about him "being an ISIS agent." He later discovered that the message originated from a fake news site in the United States. See International Broadcasting Trust, *Faking It: Fake News and How It Impacts the Charity Sector* (2018), p. 8, at https://ibt.org.uk/reports/faking-it/. Similarly, the Red Cross came under attack from a stream of fake news stories in the aftermath of Hurricane Harvey in Texas. In a video posted on Facebook that later went viral, it was alleged that the charity had stolen donated items from churches in Houston and then sold some of the items and burned others. The claim was found to be "mostly false" by online fact checking organisation Snopes. See https://www.snopes.com/red-cross-charging-victims-hurricane-harveydisaster-relief-services/ cited in *Faking It: Fake News and How It Impacts the Charity Sector* (2018), p. 7.

[17] Arachnys *AML/KYC Data Survey Report*, March 2020, pp. 8-9, at https://bit.ly/3k4dzeM

[18] *Faking It: Fake News and How It Impacts the Charity Sector* (2018), p. 6.

[19] 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).

[20] The WorldCheck database, a screening tool widely used in the banking sector, has listed Greenpeace, the Council on American-Islamic Relations, and People for the Ethical Treatment of Animals as having either criminal or terrorist ties. It often links to the websites of bloggers identified as Islamophobic by the Southern Poverty Law Center. Other nonprofits, including Doctors without Borders and Human Rights Watch, are listed without specific allegations. See The Intercept, *Flimsy Evidence and Fringe Sources Land People on Secretive Banking Watchlist*, June 23, 2017, at https://theintercept.com/2017/06/23/flimsy-evidence-and-fringe-sources-land-people-on-

Given this landscape, any expectation that financial institution compliance personnel can effectively search for and weed out disinformation on banking customers when conducting online searches or when using commercial products is unrealistic.

FinCEN should 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. This, combined with the lack of recourse or opportunity to correct invalid information at the financial institution, can cause innocent parties to lose banking services. 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.[21]

Strategic AML Priorities

This ANPR also seeks comment on whether regulatory amendments should be made so that an ''effective and reasonably designed'' AML program would require financial institutions to consider and integrate national AML priorities into their risk-assessment processes, as appropriate. FinCEN is considering whether the director of FinCEN should issue national AML priorities, to be called its ''Strategic Anti-Money Laundering Priorities,'' every two years (or more frequently as appropriate to inform the public and private sector of new priorities). The ANPR also seeks comment as to whether an ''effective and reasonably designed'' AML program should require that financial institutions reasonably manage and mitigate the risks identified in the risk-assessment process by taking into consideration the Strategic AML Priorities, as appropriate and among other relevant information.

The possibility of creating Strategic Anti-Money Laundering Priorities and requiring financial institutions to consider them as part of their risk assessment or other aspect of their AML programs presents both financial institutions and their customers with potential opportunities and challenges. A list of priorities, updated periodically, would allow banks to allocate finite resources at a time when compliance costs continue to increase and the risk landscape becomes more and more difficult to navigate. At the same time, designating any sector as a national strategic priority would result, at best, in that sector being put under additional scrutiny and at worst, derisked. If Treasury were to include charities among a list of Strategic AML priorities, the risk of widespread derisking could bring additional harm to beneficiaries already shortchanged due to the inability of NPOs to move program funds abroad.

There is, however, a way to remove the inherent biases and fear in a listing of priorities. First, all sectors identified as Strategic AML Priorities should only be designated after input from all stakeholders. More

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secretive-banking-watch-list/. For information on UK lawsuits against WorldCheck, see Middle East Monitor, *Pro-Palestinian group wins UK High Court battle over "terrorist" label*, Jan. 21, 2019, at https://www.middleeastmonitor.com/20190121-pro-palestine-group-wins-uk-high-court-battle-over-terrorist-label/; Finsbury Park Mosque and Reuters Limited, Claim No HQ16D00796, Statement in Open Court, Jan. 31, 2017, at https://inforrm.org/wp-content/uploads/2017/02/finsbury-park-mosque-statement-in-open-court.pdf

[21] 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/usaid-revises-grantee-documents-relating-to-anti-terrorism-requirements/

importantly, such a list of priorities could be reframed in a way that places an equal emphasis on both the reasons for accepting and the reasons for declining certain relationships and services. This new approach would seek to examine whether financial institutions have considered all relevant factors, in line with current agency policy and statements, in making decisions about the potential risks of banking a prioritized sector, whether the financial institution has looked at any risk mitigation measures put in place by the prioritized sector, and whether those measures have been understood and factored in a decision to either provide or decline services. In this approach, financial institutions would need to justify their decisions to decline services, subjecting a customer relationship to the same level of scrutiny as a decision to derisk.

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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. We appreciate your consideration and look forward to working with you.

Sincerely,

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