COUNCIL *on* FOUNDATIONS

February 1, 2006

Office of Terrorist Financing and Financial Crime
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Office of Terrorist Financing and Financial Crime:

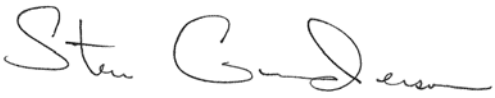
On behalf of the Treasury Guidelines Working Group, I am submitting the attached document in response to the invitation for public comments on the revised "Anti-Terrorist Financing Guidelines, Voluntary Best Practices for U.S.-based Charities" issued on December 5, 2005.

The Treasury Guidelines Working Group is a broadly representative group of more than 40 U.S. charities, foundations, religious organizations, corporations, umbrella associations, watchdog groups and advisors. The Working Group was created in the spring of 2004 and subsequently developed the Principles of International Charity that identifies eight principles to guide the anti-terrorism efforts of charities. The Principles of International Charity were submitted to the Treasury Department in March 2005.

The Treasury Guidelines Working Group requests that the Treasury Department withdraw the revised Guidelines and endorse in their place the Principles of International Charity. The Working Group's position is based on three principal concerns: 1) that the revised Guidelines contain provisions which suggest that charitable organizations are agents of the government, 2) that the revised Guidelines suggest the collection of more information on more individuals and organizations than did the initial Guidelines, and 3) that the revised Guidelines do much more than offer guidance to charities that might be helpful in achieving compliance with sanctions administered by the Office of Foreign Assets Control.

The attached comments represent the collective views and core concerns of the Treasury Guidelines Working Group members with respect to the revised Guidelines. Individual members may also submit additional or supplementary views. The attached comments reflect the consensus views of the individuals participating in the Working Group discussions rather than formal endorsement by their organizations because the process of obtaining formal endorsements could not be completed by the February 1, 2006 deadline for comments. A list of organizations and individuals formally endorsing the Treasury Guidelines Working Group's comments will be submitted at a later date.

Sincerely,



Steve Gunderson
President & CEO

Attachments

## I. Introduction

We appreciate the opportunity to comment on the document issued by the Treasury Department ("Treasury") on December 6, 2005, entitled: "U.S. Department of The Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities (the "revised Guidelines"). As we explain below, in our view, Treasury should rescind the revised Guidelines. Because we recognize that Treasury may well decline to do so, we also offer recommendations for resolving some of the most serious problems with the document. We make these recommendations with great reluctance, however, as we strongly believe that Treasury should withdraw the Guidelines and endorse the Principles of International Charity in their place.

*Background*

These comments represent the collective views of individuals who work with and on behalf of a broadly representative group of U.S. charitable organizations; members of the group also may submit additional comments. The group's deliberations were open to all interested parties, and its diverse membership includes representatives of private foundations, public charities, religious organizations, grantmakers, operational nongovernmental organizations, watchdog groups, corporations, employee matching gift funds, and umbrella groups whose members consist of hundreds of organizations from various parts of the charitable sector.

In 2003, many organizations now represented in the working group submitted or endorsed comments on the initial version of the Guidelines (the "initial Guidelines"), which was released in November 2002. Some of these comments were submitted directly to Treasury and others were included in comments submitted to the Internal Revenue Service in response to Announcement 2003-29, in which the Service requested comments on how it might clarify requirements that section 501(c)(3) organizations must meet with respect to international grantmaking and other international activities and on how additional guidance might reduce the possibility of diversion of assets for non-charitable purposes while preserving the important role of charitable organizations worldwide. The various submissions voiced a common theme: many of the practices suggested in the initial Guidelines were unworkable and unrelated to the prevention of the diversion of funds to terrorist activities and involved compliance costs so high as to deter U.S. organizations from engaging in international charitable activities.

In response to these various comments, in April 2004, Treasury invited organizations that commented on the initial Guidelines to participate in a charities forum to permit charities and Treasury to discuss the terrorist financing issue. The groups declined the offer to work directly with Treasury because they believed that an independent process would be more consistent with their non-governmental character. The groups believed that both charities and Treasury would be better positioned to deal with terrorist financing issues surrounding the sector if the charities were to work together in an open, independent forum separate from the government to review and study these issues and then continue its dialogue with Treasury.

As a result, these organizations convened a working group to draft an effective alternative to the initial Guidelines and invited participation by all interested parties. The product of the group's deliberations, the "Principles of International Charity" (the "Principles"), which was

released in March 2005, describes the fundamental principles that guide the international charitable work of experienced U.S. organizations as they ensure that charitable assets will be used for their intended purposes and not diverted to terrorist or other non-charitable uses. The Principles reflect a range of due diligence procedures that have proven effective in minimizing the risk of diversion of charitable assets and mitigating the real security threat facing many of those delivering charitable assistance without discouraging international charitable activities by U.S. organizations. We have attached the Principles to this submission. In addition, we have attached comments on the initial Guidelines submitted by members of this working group.[1] Given the short public comment period on the revised Guidelines, we have decided that it is more efficient not to restate arguments made in the first round of comments on provisions that were included in the revised Guidelines without amendment, as the attached comments continue to apply.

In December 2005, the working group reconvened to consider the revised Guidelines.

*Call for Withdrawal*

Throughout its communications with concerned charities, Treasury has emphasized that the Guidelines are intended to assist charities attempting to protect themselves from terrorist abuse, a statement that is echoed in the introduction to the revised Guidelines. After reviewing the revised Guidelines, however, we have concluded that the revised Guidelines continue to suggest onerous and potentially harmful procedures to charities. Furthermore, they do so without providing any protection from terrorist abuse that is not already present under the laws and practices that are currently followed by those organizations for which the Guidelines were drafted, that is—according to the revised Guidelines—those "charities that attempt in good faith to protect themselves from terrorist abuse." Accordingly, we request that Treasury withdraw the Guidelines and endorse in its place the Principles of International Charity.

*Key Concerns*

In Section II, we describe the specific reasons why we have called for withdrawal. Immediately below, we highlight our three key concerns about the revised Guidelines:

First, the revised Guidelines contain provisions that suggest that charitable organizations are agents of the government. As we explained in the commentary to Principle 8 of the Principles:

> An organization's mission can require humanitarian workers to provide services in highly dangerous areas of the world. More than ever before, service providers must pay attention to the safety of their staff. This includes investigating the risks, providing

[1] We have attached comments on the initial Guidelines submitted by the American Bar Association Tax Section Exempt Organizations Committee, the Council on Foundations, Independent Sector and InterAction, OMB Watch, the Real Property Probate & Trust Section of the American Bar Association, and the U.S. Conference of Catholic Bishops.

> training to mitigate those risks, and—most importantly—developing understanding and acceptance by the community.
>
> An organization's ability to deliver charitable programs effectively will be compromised if its relationship to the community is not part of the security approach. The gravest risk to this relationship is association with a political position, a partisan entity or a particular U.S. or foreign government action. While an organization may itself give the community no reason to perceive its workers as anything but independent, *governments may engage in practices that have the unintended effect of increasing the risk to these workers.* For example, the use of armed forces out of uniform to deliver humanitarian assistance or *the inaccurate characterization of humanitarian workers as partners or agents of the government allows the misidentification of humanitarian workers—either purposefully or out of confusion—as extensions of government action.* The foundation of the relationship between a service provider and the community can also be shaken *if inquiries by the organization are perceived as undertaken on behalf of a government or as intelligence gathering.* The consequences to humanitarian workers when charitable assistance is confused with military or intelligence operations may be deadly to staff and may undermine the effectiveness of the programs they deliver. (*emphasis added)*

The revised Guidelines include provisions that may create the impression that charitable organizations are closely tied to the U.S. government, thereby threatening the safety of humanitarian workers who may be targeted as a result of their perceived lack of independence from the government.

Second, the revised Guidelines suggest the collection of more information on more individuals and organizations than did the initial Guidelines, even though members of this working group and other commenters, such as the American Bar Association, described the information collection suggestions in the initial Guidelines as well beyond the capacity of most charitable organizations. While the revised Guidelines suggest that "charities should apply a risk-based approach" to determining which procedures to adopt, they also imply that the "increased risks associated with overseas charitable activity" might well justify adoption of all the procedures included in Section VI. Even if it were possible for charitable organizations to collect the suggested information, the costs involved in doing so would likely be prohibitive. In addition, we have noticed that Treasury's Office of Foreign Asset Control (OFAC) has issued guidance materials for other industry sectors engaged in international transactions – for example, banking, export and import, insurance, and money service businesses – that do not include similar suggestions for collecting information that is "reasonably available" or "reasonably discoverable" on organizations and individuals only remotely associated with the entity with which the U.S. organization is doing business. In contrast, we believe the revised Guidelines suggest that charitable organizations run a gauntlet of information collection and reporting procedures that exceed due diligence practices which are routinely followed by organizations and which have, to our knowledge, proved adequate to prevent the unintentional diversion of assets to terrorist uses.

Third, we are concerned that the revised Guidelines do much more than offer guidance to charities that might be helpful in achieving compliance with sanctions administered by OFAC.

While the revised Guidelines include procedures that are clearly related to the credibility of recipients of charitable assets and the ability to trace charitable funds, they also address issues already covered by state or federal laws or highly developed practices widely accepted in the charitable sector. The fact that Treasury opines on those issues in a document that also explains that violations of related laws involve substantial civil and criminal penalties gives those opinions more influence than they are due. Thus, we are concerned that the revised Guidelines will evolve into de facto legal requirements through incorporation into other federal programs, despite the inclusion of the word "voluntary" in the title. Mandatory compliance with the revised Guidelines is inconsistent with the risk-based approach to preventing the diversion of funds advocated in the revised Guidelines themselves.

## II. Comments on the Revised Guidelines

We have set forth below the reasons why we have called for withdrawal of the revised Guidelines and—in case Treasury declines to withdraw them—we have also included recommendations for addressing these concerns.

### A. Title

We believe that the title, "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices For U.S.-Based Charities," misstates both the content and the purpose of the Guidelines.

First, it is not accurate to present the Guidelines as a compilation of the charitable sector's "best practices." As commenters on the initial Guidelines noted, given the diversity of the charitable sector, there is simply no one set of "best practices" that applies to all organizations. Second, despite the continued use of the term *Voluntary* in the title, the revised Guidelines seem to be more than suggestions, in large part because they have been issued by a federal agency with regulatory authority over tax-exempt organizations. We are concerned that other government agencies will adopt the suggestions included in the *Voluntary* Guidelines as requirements because Treasury has indicated that these are, in fact, best practices.

The Guidelines have already been incorporated into at least one federal program. In commentary accompanying the regulations effective for the 2006 Combined Federal Campaign, the Office of Personnel Management stated that participants in the CFC "as a minimum, should follow the 'Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities.'" Further, we are aware that Internal Revenue Service agents—both in the context of audits and applications for exemption—have asked organizations if they are complying with the Guidelines. Thus, even though no statutory authority prescribes the issuance of the Guidelines, the incorporation of the Guidelines into other federal programs may confer on them de facto legal authority.

We understand that one of the reasons that Treasury retained the current title—despite many comments suggesting a change for some of the reasons noted above—is a concern that a new title would create confusion or uncertainty. We seriously doubt this to be the case. Any document produced and released by Treasury would be instantly credible. Moreover, since

information of this type is predominantly disseminated by internet, we believe organizations will access Treasury's website to find the most recent guidance. Should there be any confusion, the website and the revised Guidelines themselves can certainly resolve it with a simple explanation.

Thus, we believe that the "best practices" phrase should be deleted and the title should be changed to reflect the intended purpose, to a title such as "Suggestions for Complying with Anti-Terrorist Financing Laws."

### B. Introduction

The Introduction overstates the extent of diversion of charitable assets to terrorist purposes by broadly stating that:

> Investigations have revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations. This abuse threatens to undermine donor confidence and jeopardizes the integrity of the charitable sector, whose services are indispensable to both national and world communities.

We recognize that some charitable funds may have been intentionally raised or diverted to support terrorist activities, but we worry that sweeping statements, such as the one quoted above, misrepresent the prevalence of terrorist abuse of the U.S. charitable organizations that are the intended audience for the revised Guidelines. We believe that charities acting in good faith to protect their charitable assets from diversion would be better served by the presentation of data on diversion. Consequently, we believe that Treasury should explain how many individuals and organizations have been designated terrorist entities or supporters, how much money has been frozen worldwide and how much of that has been in the U.S., and how many U.S. charities have lost their tax exemption as a result of terrorist activities. This information should also indicate the difference between charities that were intentionally diverting funds for terrorist purposes and those that, while acting in good faith, failed to prevent diversion of their funds. We believe the substitution of data for broad statements will have two positive effects: (1) it will not undermine donor confidence (which is a possible outcome of the Guidelines' sweeping statements); and (2) it will educate charitable organizations about the threat and realities of terrorist use of charitable assets, particularly as the crux of the concern appears to be the gravity of the terrorist use, rather than the prevalence or dollar amount of such diversions.

We also believe that the Introduction to the Guidelines should include a statement that compliance with the Guidelines is not legally required and that the Guidelines should not be used as a factor in determining whether an organization has acted "reasonably" or "prudently" under other legal requirements. The fact that government agencies are directing charitable organizations to follow the Guidelines demonstrates the real need for such a clear statement. If failure to abide by the Guidelines constitutes a violation of the terms of participation in a government program, then the Guidelines have become mandatory. This approach is inconsistent with the discretion required for a risk-based approach to preventing the diversion of charitable assets. It is also inappropriate given Treasury's stated intent to protect and assist

charities. Based upon our experience, many of the procedures included in the revised Guidelines—while well intentioned—are overly burdensome and unrelated to the threat of the unintended diversion of assets. Yet, if government agencies continue to incorporate the Guidelines into their operating procedures, they will become mandatory for charitable organizations. Based on the response to the initial Guidelines which were published only in an attachment to a press release, we believe that the publication of the revised Guidelines in the Federal Register may give government agencies even greater cause to defer to the Guidelines, even though they continue to be labeled "*Voluntary*."

A number of the mandatory statutory and regulatory provisions in federal tax law governing charities incorporate a "reasonable" or "prudent" behavioral standard. Failure of an organization to adhere to a "best practice" promulgated by the federal government when the operative regulatory standard is that of "reasonable" or "prudent" behavior suggests that the Guidelines may have real, immediate legal import and may not be "voluntary" in all circumstances absent a specific disclaimer that the Guidelines have no relationship to reasonable or prudent behavior as the concept is incorporated into federal tax law.

Effectively mandatory Guidelines will likely result in one of two unfortunate outcomes: first, charitable organizations may be forced to cease their international activities rather than bear the expense of compliance, or second, they may attempt to follow the many specific procedures detailed in the Guidelines in lieu of more effective measures that are tailored to specific circumstances to combat diversion of assets to terrorist purposes.

We believe that footnote 1 should explain to both the charitable sector and federal and state agencies that the Guidelines are not enforceable under the law, have no bearing on reasonable or prudent behavior as the concept is incorporated into federal tax law, and—just as compliance with the Guidelines does not constitute a defense in event of a violation of law—failure to comply with any particular provision of the Guidelines will not result in legal sanctions.

### C. Fundamental Principles of Good Charitable Practice

The revised Guidelines unfortunately blur the critical separation between the U.S. government and the charitable sector, inadvertently putting the charitable organizations and those who deliver assistance on their behalf at greater security risk from terrorists. While we commend Treasury for incorporating most of the provisions in the *Principles of International Charity* in the revised Guidelines, two are conspicuously absent:

> Principle 8: 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.

And part of Principle 2: "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."

We included those provisions in the Principles primarily out of concern for the safety of humanitarian workers who may be at risk because of their perceived association with governments, whether of the United State or of other countries. These provisions also, however, contribute to the ability of charitable organizations to protect their assets from diversion to non-charitable terrorist uses. The biggest challenge in determining whether a recipient of charitable assets presents a risk of diversion is in obtaining reliable information, and we believe that recipients are more likely to trust their grantors if they are confident that their grantors are not extensions of a government.

In addition to omitting the provisions of the Principles listed above, the revised Guidelines add provisions that link charitable organizations more closely to the U.S. government, potentially undermining the trust between U.S. charities and foreign recipients and creating additional cause for extremist groups to target humanitarian workers. The press release would lead a reasonable reader to question the independence of U.S. charities by stating that " . . . the Treasury has worked *hand-in-hand* with the U.S. charitable and donor community . . . " (emphasis added) Moreover, the Guidelines include new reporting provisions stating that charities should report findings of individuals "suspected of activity relating to terrorism" to OFAC and/or the FBI. These reporting provisions are coupled with enhanced information collection procedures, including: (1) vetting of the charitable organization's own key employees, (2) collecting information on each place of business of the organization (rather than just the principal place of business), and (3) identifying branches, in addition to subsidiaries and affiliates, that receive resources and services from the charity.

The threat to humanitarian workers is undeniable. Reports of attacks on aid workers have become alarmingly commonplace. The president of the International Federation of the Red Cross and Red Crescent Societies, Juan Manuel Suarez del Toro, connects "the growing politicization of humanitarian aid and the erosion of respect for our independent and impartial work, with the corollary of increasingly frequent attacks on our staff."[2] Based upon the genuine fear that the Guidelines will exacerbate the real threat to humanitarian workers, we believe that Treasury should incorporate the omitted provisions of the Principles into the revised Guidelines and remove provisions that blur the line between charitable organizations and the government.

### D. Governance, Financial Practice/Accountability, and Disclosure/ Transparency in Finances and Governance

The revised Guidelines include three separate sections on governance, financial practice/accountability, and disclosure/transparency in finances and governance. We appreciate that Treasury removed some of the more problematic provisions from these sections that were

[2] Pierre Hazan and Jean-François Berger , "Humanitarian Action: From Risk to Real Danger," *Red Cross Red Crescent: The Magazine of the International Red Cross and Red Crescent Movement,* 2004 -1, available at < http://www.redcross.int/EN/mag/magazine2004_1/4-9.html>.

included in the initial Guidelines, but we find the provisions that remain in the revised version to be troubling.

The Governance section generally fails to take into account the complexity of its various recommendations because these deceptively complicated issues fall outside the core experience and expertise of the Treasury Department. Section III.B. illustrates this problem. It recommends that the governing body of a charity should consist of at least three members without appropriate exceptions, which moves well beyond any existing requirements of federal tax law and could present compliance difficulties for trusts and religious entities organized as "corporations sole," as well as run directly counter to state law governing nonprofit corporations and trusts. By comparison, when the Panel on Nonprofit Sector Reform made a similar recommendation in June, 2005, it included required appropriate exceptions for houses of worship and certain affiliated entities, as well as for existing organizations, such as organizations formed as a corporation sole or as trusts with fewer than three trustees.[3]

Because the Guidelines carry extraordinary weight, we believe that a provision recommending a three-member board without appropriate exceptions is ill-advised. Frankly, we believe that this recommendation is unnecessary because, as shown by the very existence of the Panel Report, the nonprofit sector is addressing these very important governance issues independently and thoroughly.[4] Keeping in mind that the Guidelines are drafted for charities that in good faith are attempting to prevent diversion of charitable assets, we are confident that any organization that is diligent enough to consult the Guidelines will already have determined its appropriate board size and structure and will have done so by consulting guidance available from organizations and advisors with relevant expertise. We believe that the inclusion of additional recommendations on governance standards that do not appear to be drawn from a comprehensive understanding of the operations of charitable organizations confuses this important effort, rather than adds value.

More importantly, Section III.B.4. makes recommendations that infringe upon existing legal protections by stating that board records should be available for public disclosure and should immediately be made available for inspection by the appropriate regulatory/supervisory and law enforcement authorities. First, making records of all board decisions subject to public

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[3] Panel on the Nonprofit Sector (convened by Independent Sector), *Strengthening Transparency, Governance, and Accountability of Charitable Organizations, a final report to Congress and the Nonprofit Sector*, June 2005, pp. 75-78.

[4] Many organizations provide guidance on recommended governance practices. *See, e.g.*, BBB Wise Giving Alliance (www.give.org), "Standards for Charitable Accountability; Evangelical Council for Financial Accountability (www.ecfa.org), "Standards of Responsible Stewardship for Members;" Council on Foundations (www.cof.org), "Principles and Practices for Effective Grantmaking;" Donors Forum of Chicago (www.donorsforum.org), " Illinois Nonprofit Principles and Best Practices;" Independent Sector (www.independentsector.org), "Guidelines for the Funding of Nonprofit Organizations," "Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations," and "Compendium of Standards, Codes, and Principles of Nonprofit and Philanthropic Organizations;" InterAction (www.interaction.org), "Private Voluntary Organization (PVO) Standards;" and The Maryland Association of Nonprofit Organizations (www.marylandnonprofits.org), "Standards for Excellence Certification Program" and "Standards For Excellence: An Ethics and Accountability Code for the Nonprofit Sector."

inspection represents a level of disclosure beyond that required by the current disclosure requirements in the Internal Revenue Code, the Freedom of Information Act, and state "government in the sunshine" laws. Second, the revised Guidelines added the recommendation that board records should immediately be made available for inspection by the appropriate regulatory/supervisory and law enforcement authorities. We find this suggestion especially troubling as it both treats U.S. charitable organizations as information providers to the government and overlooks the constitutional protections accorded charitable organizations. We doubt that Treasury intended to suggest that regulatory/supervisory and law enforcement authorities are entitled to inspect board records without complying with constitutional or other legal protections by obtaining a warrant or other appropriate authorization for that purpose.

The remaining provisions in the sections on governance, financial practice/ accountability, and disclosure/transparency in finances and governance are unnecessary because, as the comments on the initial Guidelines noted, they describe a number of actions that are required of most grantmakers under applicable provisions of the federal tax laws. The specific provisions set forth in these sections are unnecessarily detailed and restrictive, and are unlikely to be more effective than general good operating practices in preventing the use of funds to support terrorism. Accordingly, we request that Treasury delete the provisions included in the Governance section from the revised Guidelines entirely. We also request that Treasury combine the provisions included in the sections on financial practice/accountability, and disclosure/transparency in finances and governance into a single section entitled "Accountability," which lists only the principles applicable to financial accountability that would be considered relevant to Treasury in the event of an investigation concerning the alleged use of funds to support terrorism.

### E. Anti-Terrorist Financing Best Practices

This section includes three significant improvements over the corresponding section in the initial Guidelines: first, the list checking recommendation has been simplified and clarified; second, the provision recommending checking bank references has been deleted; and third, the Guidelines incorporate a risk-based approach to due diligence. We commend Treasury for those changes.

However, there are additional changes to this section that will, unfortunately, increase the burden on organizations to collect information that they are ill-equipped to pursue or analyze and that have little utility in preventing the diversion of charitable funds to terrorist purposes. These information gathering activities will also hinder legitimate and needed service delivery, and inadvertently expose humanitarian workers to greater security risks. The revised Guidelines suggest the collection and retention of an even greater and more detailed quantity of information regarding all recipients of charitable funds and in-kind contributions, domestic and foreign, and even on the charitable organization's own employees. Further, the revised Guidelines broaden the scope of information recommended for collection to information "reasonably available" (*see*, VI.A.3.) and "reasonably discoverable" (*see*, VI.A.6.). Compliance with the Guidelines' recommendations for additional information collection may create the impression that the charity is collecting information on behalf of the U.S. government, which could impact the charity's effectiveness and safety in many parts of the world. The section, in fact, recommends that the

charity report to OFAC or the FBI suspicious activity or valid or potentially valid matches should the charity engage in list-checking, confirming the doubts of any recipient that may find it problematic or even hazardous to receive charitable assistance from what it deems to be an arm of the U.S. government.

While attached comments of working group members on the corresponding section of the initial Guidelines apply equally to this section, we can add some context from three years of experience attempting to follow certain Guidelines provisions. It has been difficult to make the inquiries suggested by the initial Guidelines, and the information collected appears to be of limited value in the effort to apply a risk-based approach to prevent the diversion of assets to terrorist purposes. Based on our experience collecting identifying information, we more firmly believe that identification of terrorist connections is properly the job of law enforcement, with its greater skill and intelligence sources. We point out that the Senate Finance Committee has been unable over the course of a two-year investigation to determine whether action is required with respect to 25 Muslim charities, even on the basis of more information than a U.S. charity could possibly gather when attempting to comply with the recommendations in the Guidelines. Specifically, the Committee requested:

> copies of all IRS materials -including information protected by Section 6103 of the Internal Revenue Code -for the [25 named] . . . charities, foundations, other tax exempt organizations, and other groups. The material should include Form 990s and Form 990 PFs, including the donors list for both types; Form 1023s, the charities' applications for tax exempt status, and any and all materials from examinations, audits and other investigations, including criminal investigations.[5]

In November 2005, Chairman Charles Grassley announced the end of the Committee's investigation, concluding, "We did not find anything alarming enough that required additional follow-up beyond what law enforcement agencies are already doing."[6] A few weeks later, however, the Committee issued another statement saying its lack of action does not mean the groups had been "cleared." The Committee, the statement said, "will continue to gather information and examine the operations of the charities."[7] If the Finance Committee with access to confidential information and two years in which to review it cannot find something that law enforcement has missed, it is difficult to envision that charities will be any more successful.

In our judgment, this section contains a list of procedures that are administratively difficult to administer, most of which are only remotely likely to produce any information helpful to the charity in determining whether there is a risk of diversion. Accordingly, we recommend that Treasury withdraw this section completely and endorse in its place the Principles of International Charity. Failing that, we urge Treasury to modify this section to more appropriately balance the value of information that could realistically be collected given the limited investigatory powers of private citizens against the resource constraints of charitable

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[5] Letter to Commissioner Mark Everson from Senator Charles E. Grassley, December 22, 2003.

[6] Mary Beth Sheridan, "U.S. Muslim Groups Cleared: Senate Panel Finds Nothing 'Alarming' in Financial Data," *Washington Post*, Nov. 19, 2005; A12.

[7] Memorandum re: Committee Review of Certain Charities, December 6, 2005, U.S. Senate Committee on Finance.

organizations. In addition, based on the arguments in Section II.A. above, we do not believe it is appropriate to re-name the section "Anti-Terrorist Financing *Best Practices*." (*emphasis added*)

## III. Conclusion

As the Treasury Department recognized in the Introduction to the revised Guidelines, the "services [of the charitable sector] are indispensable to both national and world communities." Sadly, the need for those services abroad has grown significantly since September 11, 2001, for reasons unrelated to nationality or ideology. All around the world, people have suffered the devastation of natural disasters, including floods, typhoons, tsunamis, landslides, earthquakes, hail and drought. Alongside these one-time events are the chronic disasters of HIV/AIDS, starvation, malnutrition, and poor access to water, schools and health care services.

U.S. organizations have answered the call for help time and again, highly alert to the fact that terrorists seek funding wherever it might be available. To combat this risk, these organizations have followed a body of laws, regulations and sector-wide practices that have proven effective in preventing the use of charitable dollars for the financing of terrorism.

We are not aware of any diversion of charitable assets absent the intentional complicity of the U.S. organization. Therefore, we firmly believe that terrorists have not found a ready source of funds in U.S. charitable organizations that are acting in good faith to protect their assets from diversion. Yet those organizations confront – in addition to the unavoidable difficulties of international charitable work – the significant hurdles raised by the Guidelines, which include increased administrative costs and danger to workers on the ground.

We urge Treasury to consider the success of these organizations and recognize that the Guidelines, as opposed to the Principles, are unhelpful and counterproductive. In our view, Treasury should withdraw the Guidelines and endorse the Principles in their stead. We very reluctantly offered recommendations for improving the Guidelines in these comments, only because we fear that the Guidelines will survive despite their shortcomings.

We would be pleased to meet with you and your staff to further explain our position and respond to any questions you may have.