



TO: CHIEF PROFESSIONAL OFFICERS, LOCAL UNITED WAYS

FROM: OFFICE OF THE GENERAL COUNSEL, UNITED WAY OF AMERICA

DATE: NOVEMBER 16, 2004

SUBJECT: ADVICE OF COUNSEL-POLICIES & PROCEDURES POST 9/11

EXECUTIVE SUMMARY

To ensure that local United Way member organizations (“Members”) comply with heightened national security concerns about providing financial or other “material support or resources” to terrorist organizations, the Office of General Counsel recommends that Members (at the minimum):

1. Screen all agencies receiving funds (“Funded Agencies”) against federal terrorism “watch lists” prior to engaging in dealings with them. Federal law prohibits transactions with all persons and organizations on these lists. As these lists are updated from time to time, we provide Internet links to the lists maintained by various federal departments and agencies.
2. Obtain certifications from Funded Agencies that they are not terrorists or terrorist organizations and do not knowingly provide any kind of support to such persons or organizations. A model form for this purpose is attached for use by Members.
3. Provide a certificate to partnering corporations (“Donors”) who request one, stating that the Member does not, and will not knowingly, apply donated funds so as to provide any kind of support to terrorists or terrorist organizations. A model form for this purpose is also attached for use by Members.

These steps are prudent in light of the criminal and civil liability that United Way of America, Members and Donors may face if any of them knowingly deal with or provide material support or resources to terrorists or terrorist organizations, as well as the possible loss of tax exempt status if such support leads to designation of the Member or Donor as a terrorist organization or addition of that Member or Donor to a federal “watch list.”

I. BACKGROUND & POST 9/11

A. BACKGROUND

Recently, partnering corporations (“Donors”) have presented many of the local United Way member organizations (“Members”) with compliance documents requesting that our Members certify that pledge funds and resources will not go to fund terrorist organizations. Donors in this post 9/11 climate, of course, are interested in ensuring that funds collected and distributed as a result of a partnership between a Donor and a Member will be utilized for its intended purpose.

In response to such repeated requests by Donors, the Office of the General Counsel is providing you herein with: (i) the background for such requests and (ii) the framework for which Members may work post 9/11.

B. POST 9/11

In response to the September 11th attacks, the federal government has instituted and strengthened several new and existing measures to combat terrorism: (i) Executive Order 13224 and related Treasury and State Department Regulations; (ii) IRS and Treasury Department guidelines; and (iii) the USA Patriot Act.

II. LEGAL MEASURES

A. Executive Order 13224 and related Treasury and State Department Regulations

Executive Order 13224 carries the force of law and prohibits transactions with individuals and organizations considered by the executive branch of the federal government to be associated with terrorism. There are various statutes that support the directives in Executive Order 13224, including the International Emergency Economic Powers Act (as amended by the Patriot Act) which permits the executive branch to freeze and confiscate assets controlled by or in the possession of these entities.

There are several lists of persons and organizations that have been designated as terrorists or terrorist organizations, and each of them should be checked to ensure that Members are not dealing with such a person. The lists are:

- The list of persons and entities designated under Executive Order 13224 (at <http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf>).
- The Treasury Department’s “master list” of specially designated nationals and blocked persons (at <http://www.treas.gov/offices/enforcement/ofac/sdn/>).
- The State Department’s list of foreign terrorist organizations (at <http://www.state.gov/s/ct/c4291.htm>).

Each of these lists should be checked by Members, even though some persons or organizations may appear on more than one list. In addition, these lists change over time, so Members should have in place procedures for keeping up to date with such changes.

B. IRS AND TREASURY GUIDELINES

The U.S. Tax Code, Treasury Regulations adopted thereunder, and various rulings of the U.S. Internal Revenue Service generally prohibit the diversion of charitable assets

to any non-charitable purpose. The material or financial support of terrorism is, of course, prohibited. Violation of these laws invites the risk of revocation of an organization's tax-exempt status. In 2003, Congress adopted an amendment to the Tax Code providing for the automatic, revocation of tax-exempt status for an organization designated as a terrorist organization under the Patriot Act or added to any of the relevant U.S. terrorist watch lists.

The Treasury Department also issued the Voluntary Treasury Guidelines in effort to guide non-profits and grantmakers in their compliance with the Executive Order and Patriot Act. The Voluntary Treasury Guidelines consist of four parts: (i) governance; (ii) disclosure and transparency in governance and finances; (iii) financial practices and accountability; and (iv) anti-terrorist financing procedures. The Voluntary Treasury Guidelines are voluntary; and do not have the force of law, but outline best practices and anti-terrorist financing compliance program for non-profits and grantmakers. The Voluntary Treasury Guidelines propose that internationally active foundations and non-profits implement compliance programs similar to those already required of private institutions by the Patriot Act and Bank Secrecy Act. However such compliance programs are onerous and would require an organization to conduct extensive due diligence of all entities with which it contracts, including vendors, financial institutions, grantees and partners.

C. USA PATRIOT ACT

In October 2001, President Bush passed an act entitled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, more commonly known as the USA Patriot Act ("Patriot Act"). President Bush passed the Patriot Act shortly after the September 11th terrorist attacks in order to strengthen the Federal government's ability to combat terrorism. The Patriot Act is very broad sweeping, thereby impacting many other statutory regulations. As a result of the increasing number of Donor requests for our Members to certify compliance with the Patriot Act, we must ourselves examine the Patriot Act and how we are impacted by it.

(i) What Does the Patriot Act Require of Non-Profits?

As applied, the Patriot Act is broad and will require specific changes to the way a non-profit conducts business. Importantly, the Patriot Act expanded certain provisions in existing law that have been interpreted to impact non-profits because they create criminal and civil liability for an individual or an entity that provides financial or other "material support or resources" to terrorists.

The U.S. government has shown a willingness to pursue nonprofits under the Patriot Act for providing material support to terrorists or terrorist organizations. It has taken action against several Muslim charities that may have had dealings with terrorists or terrorist organizations.

(ii) Criminal Liability Defined - "material support or resources"

Criminal (and civil) liability may be imposed for knowingly providing "material support or resources" to terrorists and foreign terrorist organizations. The key term in the legislation is "material support or resources," which is defined broadly as:

currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. 2339A(b) (as amended by section 805 of the Patriot Act). Penalties include substantial fines and up to 15 years imprisonment.

In 2002, federal law was also expanded to include the criminalization of financing terrorism. An individual or organization may be punished for willfully providing or collecting funds with the intention that the funds be used to carry out acts of terrorism, or for one who knowingly conceals the source of funds used to carry out acts of terrorism or to support foreign terrorist organizations (“FTO’s”).

All of these offenses require some degree of knowledge, intent or willfulness on the part of the person financing or providing material support or resources for terrorism. Case law has examined the level of knowledge that is needed to sufficiently bring criminal charges. For our purposes, it is important to note that a “knowing” violation can occur when an individual has good reason to think that a certain fact is true and consciously avoids confirming that fact. An outside law firm which produced a handbook entitled *Handbook on Counter-Terrorism Measures* (“IS Handbook”) for a collective of charitable groups, non-governmental organizations and grant making foundations advises that it is conceivable that a non-profit organization may be held to have knowingly supported terrorism if the non-profit makes a grant to (or partners with) a highly suspicious organization without confirming whether or not the organization is an FTO. However this has not been tested in the courts.

As with Executive Order 13224, an important means of avoiding criminal liability under the “material support” provision is to do some basic research on Funded Agencies prior to making a grant to ensure that they are not on the federal “watch lists.” It is also worthwhile to obtain certifications from Funded Agencies that they are not linked with terrorists or terrorist organizations.

(iii) Civil Liability

Non-profits and grantmakers should also be concerned with potential civil liability should their assistance end up in the wrong hands. Private parties are entitled to a specific cause of civil action against those who provide material support for terrorism. The Patriot Act specifically sets forth that a plaintiff can recover damages as a result of an injury to his or her person, property or business by reason of an act of terrorism, and such person, his or her heirs, survivors may sue in the appropriate district court of the United State and shall recover threefold the damages sustained, court costs and attorney’s fees. Further a plaintiff does not have to await the determination of a criminal action before bringing a civil complaint.

There is little case law on civil liability for non-profits under the Patriot Act. Most of the case law at this time pertains to non-profits who have directly and

knowingly supported terrorism over an extended period of time. What happens, for instance, if the charitable donations end up in the wrong hands either mistakenly or through a diversion of funds? This question may present a more realistic possibility than a non-profit affirmatively supporting an FTO if we are to presume that most non-profits are well intentioned. It will be difficult to predict how the Patriot Act will be applied in this situation. However, non-profits will want to be guided by the fundamental elements establishing liability as described herein.

III. Summary

The legal measures mentioned herein are broad sweeping and provide minimal practical guidance with respect to compliance requirements. At this time, a consensus does not exist among regulators or within the legal community as to what constitutes sufficient due diligence to avoid liability. In the absence of clear requirements, it is incumbent upon charities to make a good faith and reasonable effort to ensure that their funds are not allocated or distributed to terrorist organizations.

In order to address this need, the Office of General Counsel recommends that the local United Way organizations establish a compliance program to include the following:

1. Screen all Funded Agencies against federal terrorism “watch lists” prior to engaging in dealings with them.
2. Obtain certifications from Funded Agencies that they are not terrorists or terrorist organizations and do not knowingly provide any kind of support to such persons or organizations. A model form for this purpose is attached for use by Members.
3. Provide a certificate to Donors who request one, stating that the Member does not, and will not knowingly, apply donated funds so as to provide any kind of support to terrorists or terrorist organizations. A model form for this purpose is also attached for use by Members.

A more detailed discussion of the Patriot Act and federal laws prohibiting the funding of terrorist organizations along with websites featuring terrorist lists and a template for compliance will follow. Please note that the guidance contained herein is provided with the understanding that the area of law is still unsettled and that the specific requirements imposed have not been clearly defined.

If you have any questions, please contact Celeste Bondon at extension 418 or Patti Turner at extension 866.