

WORLDWIDE IMPLICATIONS OF AMERICA'S EMERGING POLICIES CONCERNING NGOS, NON- PROFITS AND CHARITIES

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A. INTRODUCTION

Charities that operate internationally face a complex and often confusing set of circumstances in terms of compliance with domestic and international laws. This situation has only been compounded since the fall of 2001 and the variety of anti-terrorism legislation that has subsequently been instituted. Much of this legislation has focused significantly on money laundering and terrorist financing, much of which impacts the operations of charities and non-profit organizations.

Canada Revenue Agency (CRA) has recently published "Charities in the International Context"¹ to assist in determining the responsibilities of charities that operate internationally. By publishing this document CRA has taken an important step in publicly acknowledging that charities need to be aware of both international anti-terrorism initiatives and those in other key jurisdictions such as the United States and the United Kingdom. This article discusses the emerging reality for charities, non-profits and NGOs internationally in light of important developments in the United States.

¹ Canada Revenue Agency, "Charities in the International Context," available at <http://www.cra-arc.gc.ca/tax/charities/international-e.html>.

B. US TREASURY DEPARTMENT'S "ANTI-TERRORISM FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. BASED CHARITIES"

The effort to quell terrorist financing and money laundering has been identified by the United States as the second phase in its 'war on terrorism.'² The U.S. Treasury Department which spearheads a significant portion of anti-terrorist financing and money laundering initiatives in the United States, issued "Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S. Based Charities"³ in 2002. These guidelines call for changes to how charities manage their operations, especially those that operate internationally, including "rigorous, self-imposed financial oversight; high levels of disclosure and transparency."

Additionally, they advocate significant new due diligence practices for charities such as recommending that charities obtain the name, nationality, place of birth, and other personal data of all key staff from potential grantee organizations. This information is to be checked against a variety of lists of known or suspected terrorists issued by different agencies of the United States (including the Treasury Department's own list), the United Nations and the European Union. It is further recommended that organizations obtain "certification" from grantees that they do not "employ or deal with" anyone on these lists.

Whether or not these guidelines will continue to be recommendations or become enforced remains to be seen.

At the very least, the guidelines are an important example of emerging international standards of due diligence practices for charities. For example, the Financial Action Task Force's (FATF) has published the "International Best Practices for Combating the Abuse of Non-Profit Organizations."⁴ The FATF is a multi-lateral policy making institution that broadened its mandate from money laundering to include terrorist financing since 2002. The FATF is the central international financial multi-lateral policy making institution whose members include Canada, United States and the United Kingdom, among others. Each member country is obligated to implement in their own jurisdiction the policies that the organization formulates.

² Kenneth W. Dam - Deputy Secretary of the Treasury, "The Financial Front of the War on Terrorism: The Next Phase," delivered to the Council on Foreign Relations New York, New York. June 8, 2002. Available at <http://www.treas.gov/press/releases/po3163.htm>.

³ Available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf>.

It is through the FATF that the countries leading the ‘war on terror’ actively promote international regulations and standards mirroring those that they have instituted domestically. For example, the United States has characterized its participation in the FATF as being key to “globalize steps that have already been taken in United States.”⁵

The United States’ intention to have its national anti-terrorism standards and mechanisms implemented internationally is also evident in its policy document entitled “2003 National Money Laundering Strategy” (the “2003 Strategy”).⁶ Outlined in this policy document is a strategy that amounts to the ‘internationalizing’ of its domestic laws and regulations concerning terrorist financing and money laundering. Also, it specifically identifies charities as a potential conduit for terrorist financing and outlines the steps the United States is taking to combat this. The ‘Six Key Objectives’ of the 2003 Strategy include “establishing and promoting international standards to be adopted by countries” and “ensuring that countries throughout the world consistently implement these international standards.” The 2003 Strategy points out that the United States has worked multilaterally through the FATF to “prioritize” these issues in the international arena.

Concerning domestic charities, the 2003 Strategy proposes increased scrutiny of domestic charities by various agencies of the United States but also the close monitoring of the operations of charities based in other countries, especially those that operate in “conflict zones.” Considering that U.S. laws and regulations concerning terrorist financing and charities has been ‘internationalized’ and that even non-U.S. based charities operating around the world are under ever growing surveillance and scrutiny, it is essential that charities and non-profits globally become aware of these developments. That these types of developments are relevant to Canadian charities is not only speculation. CRA has specifically referenced the United States, including their “Best Practices” guidelines, in its recent publication “Charities in the International Context.”

⁴ Financial Action Task Force, “International Best Practices for Combating the Abuse of Non-Profit Organizations,” available at http://www1.oecd.org/fatf/pdf/SR8-NPO_en.pdf.

⁵ Stefan Armbruster “Freezing Terror Funds: A Tricky Business” *BBC News Online*, 19 October 2001.

⁶ Department of the Treasury, “2003 Money Laundering Strategy” available at <http://www.treas.gov/offices/enforcement/publications/ml2003.pdf>.

C. RECALIBRATION OF USAID AND NGO WATCH

Aside from charities and non-profits being under ever growing surveillance and pressure to comply with emerging international due diligence practices, organizations that receive funding and grants from the U.S. government are also facing an important policy shift. At the 2003 annual forum of the organization InterAction, a coalition of U.S. based aid organizations, Andrew Natsios, the administrator of the United States Agency for International Development (USAID), informed representatives from various non-governmental organizations (NGOs) of a “new world” that they are to adapt to.⁷ This “new world” is essentially the recalibration of U.S. foreign assistance with the aim of aggressively protecting U.S. national security and foreign policy goals.

In April of 2004, Mr. Natsios expanded by explaining that the “war on terror has led to the broadening of USAID’s mandate... thrusting the Agency into situations that go beyond its traditional role of humanitarian and development assistance.” Mr. Natsios made it clear that if a humanitarian organization receives funding from the U.S. government and is operating overseas, it is to understand that that organization is “an arm of the U.S. government.”⁸ Importantly, this policy potentially applies to all organizations that receive grants from the U.S. government, not just those organizations that have been directly contracted to carry out humanitarian operations abroad and regardless of the size of the grant. There has been significant concern surrounding this policy shift in the NGO community, particularly in relation to their ability to freely and impartially carry out humanitarian aid operations and to voice dissent concerning U.S. national security and foreign policy issues.

A shift towards a new role for NGOs that receive grants from the U.S. government perhaps relates to a broader initiative of reforming the non-profit sector. NGO Watch, and its website www.ngowatch.org, is an initiative launched in early 2004 by the American Enterprise Institute for Public Policy (AEI) and the Federalist Society for Law and Public Policy Studies, two of the most influential and well-funded think tanks serving the current American administration. The stated purpose of launching the website was “in an effort to

⁷ Naom Klien, “Bush to NGOs: Watch Your Mouths” *The Globe and Mail*. June 20, 2003. A15.

⁸ Traci Hukill, “USAID Chief outlines Change in Strategy Since 2001 Terrorist Attacks” *UN Wire*. June 2, 2003.

bring clarity and accountability to the burgeoning world of NGO's," citing particular concern that many NGOs "have strayed beyond their mandates and assumed quasi-governmental roles."

To mark the site's launch, the AEI held a conference entitled "NGOs: The Growing Power of an Unelected Few." A central focus of these initiatives was "to expose funding, operations and agendas of international NGO's and particularly their alleged efforts to constrain U.S. freedom of action in international affairs and influence the behaviour of corporations abroad."⁹ It is important to note that several of the NGOs listed on the website have head offices in, or are primarily based out of, other countries, including Canada. While NGO Watch does not represent an official policy stance of the United States, it may assist in contextualizing the current policies and procedures that are being considered.

D. CANADA REVENUE AGENCY – CHARITIES IN THE INTERNATIONAL CONTEXT

Canada, as a member of the FATF, and because of its strong ties to the United States, must pay close attention to the policies of its neighbor. CRA recognizes that charities operating abroad face a complex set of circumstances and recently published "Charities in the International Context," which attempts to identify what the relevant Canadian laws and regulations are, and highlight international initiatives that charities should be aware of. CRA advises that "registered charities are encouraged to review the best practices that international agencies and foreign governments have put forward."

In terms of the recommendations and best practices of international agencies, CRA specifically points out the FATF's "8 Special Recommendations on Terrorist Financing (2001),"¹⁰ and "Combating the Abuse of Non-Profit Organization: International Best Practices," stating that these provide "useful guidance, especially on internal governance practices."¹¹ In relation to the recommendations and policies of foreign governments, CRA refers Canadian charities to the U.S. Treasury Department's "Anti-terrorist Financing Guidelines:

⁹ Jim Lobe, "US Conservatives Take Aim at NGOs" *OneWorld U.S.* June 12 2003, available at <http://www.commondreams.org/headlines03/0612-09.htm>.

¹⁰ Financial Action Task Force, "8 Special Recommendations on Terrorist Financing 2001," available at http://www1.oecd.org/fatf/SRecsTF_en.htm.

¹¹ For a discussion of the FATF publication "Combating the Abuse of Non-Profit Organization: International Best Practices," refer to *Anti-terrorism and Charity Law Alert No.3* available at www.antiterrorismlaw.ca.

Voluntary Best Practices for U.S. Based Charities” discussed above. Interestingly, CRA also recognizes that the U.S. is in the midst of reforming the requirements for “international grant-making and other international activities,” which may well include reference to the policies of USAID and the broader policy shift concerning NGOs.

Additionally, CRA refers Canadian charities to the Charity Commission for England and Wales’ “Operational Guidance: Charities and Terrorism” for another example of policies and recommendations of foreign governments. Through these recommendations, CRA is underscoring the importance of Canadian charities being aware of the complexities that come with operating internationally and educating themselves with regards to anti-terrorism initiatives of international bodies and relevant foreign governments engaged in the ‘war on terror.’¹²

¹² For a further discussion of the Charity Commission for England and Wales’ anti-terrorism initiatives, refer to *Anti-terrorism and Charity Law Alert No.2* available at www.antiterrorismlaw.ca.

E. CONCLUSION

Charities, NGOs, and non-profits have been identified as a “crucial weak point” in anti-money laundering and terrorist financing initiatives of the international community. It is increasingly important for all charities, particularly those operating internationally, to be aware of both national and international legislative developments in this regard worldwide. These initiatives have brought about a ‘new day’ for charities, in which national boundaries may not limit the scope of supranational initiatives and legislation of other states. Increasing levels of information sharing between states, and heightened surveillance of the operations of charities working internationally, are already concrete realities for charities.

The United States is heavily involved in setting global standards in relation to the ‘war on terror,’ as the prominent player in intergovernmental organizations that develop policy concerning anti-terrorism measures. As a result, it is imperative for charities, NGOs, and non-profit organizations globally, not only those that work directly with organizations in the United States or receive funding from the U.S. government, to be aware of developments in the United States on this front.



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