

BANK DE-RISKING FRUSTRATES HUMANITARIAN AID FOR COUNTRIES IN NEED

*By Terrance S. Carter, Nancy E. Claridge and Sean S. Carter**

A. INTRODUCTION

DENIAL OF financial services to non-profit organizations and charities to avoid the potential risk of terrorist financing or money laundering has an adverse impact on human rights, according to a recent report by a New York University legal clinic in Paris. [“Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective”](#)¹ was published by the NYU Paris EU Public Interest Clinic in cooperation with Human Security Collective, ABN AMRO and Dentons Netherlands, on June 1, 2021. The 27-page report offers new data and insight into the human rights consequences of the banking practice of de-risking non-profit organizations (“NPOs”), which includes charitable and not-for-profit organizations (the “Report”). At the same time, the Financial Action Task Force (“FATF”) has also recognized that financial institutions engaging in “de-risking” may have an adverse impact on charities and not-for-profits, and has launched a project to study, in part, de-risking and the undue-targeting of NPOs.² This *Alert* provides a brief summary of the Report and discusses the impact of de-risking on the charitable and not-for-profit sector.

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¹ NYU Paris EU Public Interest Clinic, *Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective* (1 June 2021) [“Report”] online: <https://www.hscollective.org/assets/Uploads/NYU-HSC-Report_FINAL.pdf>.

² FATF, “Mitigating the Unintended Consequences of the FATF Standards” [FATF, “Mitigating”], online: <<https://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html>>.

B. THE REPORT ON DE-RISKING

THE REPORT ADOPTS the definition of de-risking from the Financial Action Task Force (“FATF”) as “the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk in line with FATF’s risk-based approach.”³ The Report also states the U.S. government’s definition of de-risking as “instances in which a financial institution seeks to avoid perceived regulatory risk by indiscriminately terminating, restricting, or denying services to broad classes of clients, without case-by-case analysis or consideration of mitigation options.”

NPOs often operate in parts of the world where people are in need of aid, but which banks classify as “high-risk”. While procedures may be similar for other corporate clients, the Report notes that NPOs may more often be affected by de-risking, facing disproportionately burdensome due diligence requests when trying to open a bank account, especially where a very small NPO may not have the necessary resources to comply or “where this is intended to discourage the prospective client.”⁴ Once a bank account is open, NPOs may struggle with delayed or blocked transfers of funds without adequate explanation, account freezes, restricted access to services, and inconsistent due diligence requirements. Banks may also close accounts without explanation or the opportunity to file a complaint, or return scheduled donations where the NPO has already spent money in reliance on an expected transfer. These actions by financial institutions frustrate the work of NPOs, such as by reducing their ability to raise funds, reducing humanitarian aid that may delay life-saving assistance to conflict-affected areas, and have a “chilling effect on freedom of association and, consequently, other human rights.”⁵

In its overview of de-risking, the Report explores the root causes: complex and multilayered regulation; the absence of an NPO’s “right” to a bank account; a lack of knowledge and capacity at the bank and at the NPO; and deliberate misinformation campaigns. NPOs have human rights, according to the Report, including the right to freedom of association and the right to non-discrimination. The Report cites key principles of the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) and calls on states to “actively work to mitigate de-risking at the systemic level.”⁶ Using the “operational principles” of the UNGPs as a guide, the Report describes practical actions banks can take to manage the perceived

³ Report, *supra* note 1 at 7.

⁴ *Ibid* at 8.

⁵ *Ibid* at 14.

⁶ *Ibid* at 18.

risks of terrorist financing and money laundering, while mitigating the adverse human rights impact of de-risking:

- Embedding de-risking in human rights policy and due diligence processes
- Stakeholder engagement
- Alignment with compliance policies and guidance documentation
- Internal learning and cross-functional co-operation
- External communication and capacity building
- Fee differentiation and service models
- Improving access to effective remedies

Although the Report does not directly address the effect of de-risking on Canadian not-for-profits or registered charities, it provides a helpful summary of issues for Canadian banks and the CRA to consider when working with the charitable sector.

C. THE IMPACT OF DE-RISKING ON THE SECTOR

IN ADDITION TO the Report, it is worth to note the FATF’s recognition of the impact of financial institutions engaging in “de-risking” on charities and not-for-profits operating in conflict and high-risk zones. In this regard, the FATF has launched a project “to study and mitigate the unintended consequences resulting from the incorrect implementation of the FATF Standards”, which includes examining de-risking and the “undue-targeting of NPOs” as two of the four main areas of focus.⁷ This project, which was launched in February 2021, is currently under way. While a final report has not yet been issued, the FATF has turned to identifying possible options to mitigate the unintended consequences of de-risking.⁸

Since the institution of the current regime of anti-terror and anti-money laundering laws internationally over the past 20 years, the most that charities and not-for-profits can do when operating to provide life-supporting programs to those people in high-risk and conflict zones is limit risk by way of proactive legal due diligence procedures.

⁷ FATF “Mitigating”, *supra* note 2.

⁸ FATF, “Outcomes FATF Plenary, 20-25 June 2021” online: <<https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-june-2021.html>>.

But for many, the nature of their work and programs means that they cannot practically eliminate risk given the international legal regime. The FATF is recognizing the fuller reality of charities and not-for-profits that operate in high-risk zones. These organizations already are shouldering substantive risk that could threaten their very existence, despite the best proactive compliance measures, and also face a frequent inability to obtain basic financial services because of an un-nuanced system of “de-risking” by financial institutions.

Financial institutions will hopefully take note of the impact that de-risking has on the charitable and not-for-profit sector, and incorporate these complexities into their analysis when considering de-risking charities and not-for-profits. This is particularly important, as many organizations operating in high-risk and conflict zones do so where even nation-states are sometimes hesitant to become involved, in order to provide opportunities for many of the world’s most vulnerable people to receive vital, life-sustaining programs.

D. CONCLUSION

PERHAPS THE UNDERLYING and unstated issue is that the more practical and achievable solution is to nuance and amend the underlying international legal regime to take into account the real-world impact on charities and not-for-profits that are operating in high-risk areas. This may be a more effective policy recommendation, especially for a multilateral policy-making institution where the members are nations, rather than hoping that mainly for-profit financial institutions take on additional risk ultimately by servicing charities and not-for-profits with an inability to ensure the absence of substantive liability in their operations.