



COUNCIL *on* FOUNDATIONS

Cross-Border Philanthropy

Regulations and Current Challenges

Members Webinar

March 12, 2015

Cross-Border Philanthropy Webinar

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Regulations and Current Challenges

Members Webinar

March 12, 2015

Webinar Agenda

- Introductions and Welcome
- US Regulations on Cross-Border Philanthropy
- Global Regulations on Cross-Border Philanthropy
- The Financial Action Task Force

*We will take time to answer participant questions after each speaker.



Marc Owens

Partner
Caplin and Drysdale



Doug Rutzen

President and
CEO
International
Center for Non-
Profit Law



Kay Guinane

Director
Charity & Security
Network



Moderator
Will Heaton

Vice President of
Member Relations
Council on
Foundations



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US Regulations on Cross-Border Philanthropy

Marc Owens

Caplin and Drysdale



U.S. Grantmakers and International Philanthropy

- Long History – old or older than the US tax code
 - Treasury/IRS position: charity is charity wherever it occurs geographically
 - Tax rules support international grantmaking
 - US grantmakers serve vital role
-



U.S. Regulatory Superstructure

- Treasury/IRS
 - Treasury/OFAC (Office of Foreign Assets Control)
 - State Department/Agency for International Development (USAID)
 - Commerce/Bureau of Industry and Security (BIS)
 - FATF (Financial Action Task Force)
-



Treasury/IRS and International Grantmaking

- Public Charities: “Control & Discretion”
 - Private Foundations: IRC 4945
 - Expenditure Responsibility (ER) vs. Equivalency Determination (ED) and grants
 - ED Repositories, e.g. NGO Source
 - Employee Expense Recordkeeping
-



Other Tax-Related Issues

- FBAR (Foreign Bank Account Report)
 - Form 990/990-PF Reporting
 - Reporting of Foreign Organization Relationships
-



Treasury/OFAC and International Grantmaking

- “Listed Countries”/Licensing
 - Anti-Terrorist Focus
 - Rules v. Best Practices
 - First Generation Best Practices/COF Working Group
 - “Listed” Persons (SDN List)
-



Other Anti-Terrorist Prohibitions

- State Department Terrorist Exclusion List
 - Commerce Dept. Bureau of Industry and Security
 - Entities List (import/export)
-



IRS Enforcement – Reading the Tea Leaves

- Historic efforts
 - Applications: OFAC Compliance
 - Examinations: Enforcement of OFAC Rules by IRS
 - Dec. 2014 GAO Report: EO to focus on “Overseas Activities”
-



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Global Regulations on Cross-Border Philanthropy

Doug Rutzen
International Center
for Non-Profit Law



Presentation Outline

- **Categories of Constraint**
 - Data
 - Justifications
-



Examples of Countries Requiring Prior Approval of Foreign Contributions

- Egypt
- Algeria
- Bahrain
- Jordan
- Bangladesh
- Nepal
- Azerbaijan
- Belarus
- Turkmenistan
- Uzbekistan
- Eritrea



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Egypt: NGO prison sentences send chill through civil society

June 5, 2013



Prior Approval of Organizations

- India
- Pakistan
- Sri Lanka





Caps on Foreign Funding

Ethiopia -10% cap on foreign funding if charity pursues:

- **Equality** of nations, nationalities, peoples, gender, and religion
 - Rights of **children and the disabled**
 - **Conflict resolution** or reconciliation
 - Human and **democratic rights**
 - Efficiency of the **justice** and law enforcement services
-



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THE PEOPLE

Kenya: State moves to cut NGOs foreign cash

November 4, 2013



If the bill were to pass, 20 million Kenyans stand to lose access to basic health care.



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Russia's Putin signs NGO "foreign agents" law

July 21, 2012





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Kyrgyzstan Debates Russian-Style “Foreign Agents” Law

December 1, 2014





THE ECONOMIC TIMES

India: Get MHA nod for fund transfer from Greenpeace International, nine others: RBI

January 15, 2015



Banking Policy Division
Secret Circular – FCRA, 2010

Annex

Foreign Donor Agencies placed in Prior Permission Category

Sl No.	Name of the Donor Agency
1.	Danish International Development Agency (DANIDA)
2.	Danish Institute of Human Rights (DIHR)
3.	Catholic Organization for Relief and Development Aid (CORDAID)
4.	Dan Church Aid (DCA)
5.	Mercy Corps, USA
6.	Inter Church Peace Council _ Pax Christi (IKV- PC) , Netherlands
7.	HIVOS, Netherlands
8.	ICCO Streegische Samenwerking (ICCO), Netherlands
9.	Green Peace International
10.	Climate Work Foundation (CWF), US



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CNN World

Human rights activist convicted of tax evasion in Belarus

November 25, 2011





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the**guardian**

Nigeria arrests dozens as anti-gay law comes into force

January 14, 2014

Legislation outlaws same-sex marriages with 14-year jail penalty and up to 10 years for membership of gay rights organisations.



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Eritrea





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Foreign non-government groups in China fear clampdown under new law

March 9, 2015





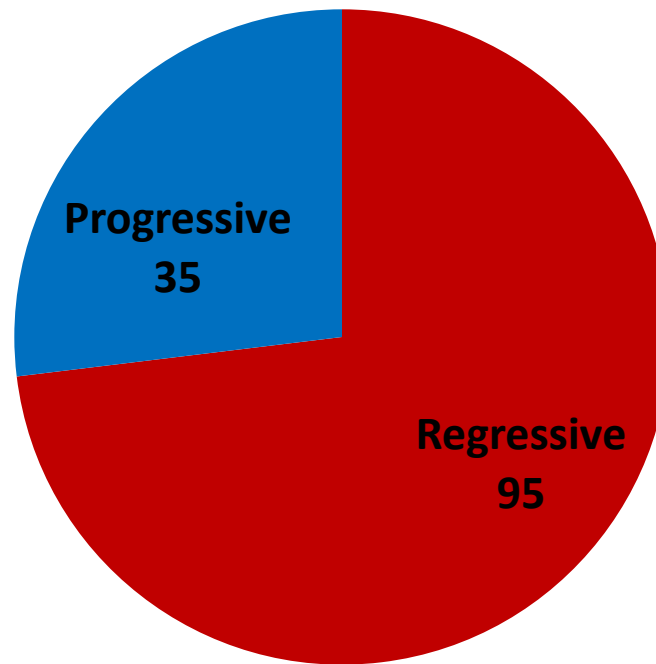
Presentation Outline

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-



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Legal Initiatives Affecting the Freedom of Association Since 2012





Presentation Outline

- Categories of Constraint
 - Data
 - **Justifications**
-

Aid Effectiveness



*“Aid effectiveness can only be enhanced if the ownership of aid funded projects lies with the recipient government.” Accordingly **all foreign philanthropy must be routed through the government.***

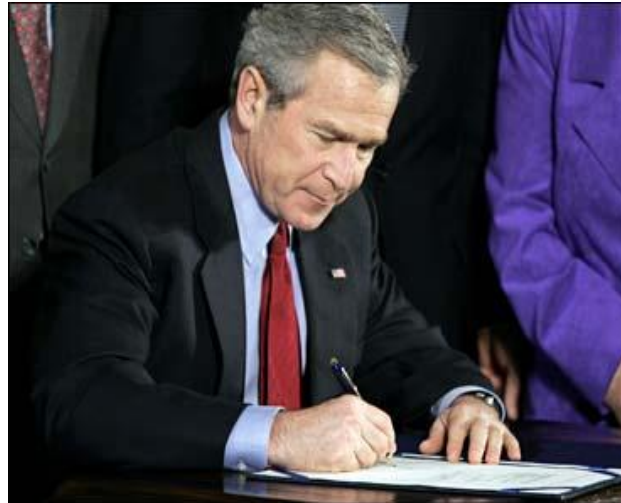
Foreign Interference

- “We’re not dealing with civil society members but paid political activists who are trying to help foreign interests here....”





- Terrorists “oftentimes use nice-sounding, *non-governmental organizations* as fronts for their activities.... We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations.”





Financial Action Task Force (FATF)

“Terrorists and terrorist organisations exploit the NPC sector to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise support terrorist organisations and operations.”

Interpretative Note





Financial Action Task Force (FATF)

Disruption and mitigation achieved through criminal prosecution, administrative enforcement, financial penalties, etc.

Typologies report





Select ICNL Resources

- NGO Law Monitor: <http://www.icnl.org/research/monitor/>
- USIG Country Notes: <http://www.cof.org/global-grantmaking/country-notes>
- IJNL Issue on Global Philanthropy:
<http://www.icnl.org/research/journal/vol17ss1/index.htm>
- Laws from 205 countries and jurisdictions:
<http://www.icnl.org/research/library/ol/online/search/en>
- Curated materials on international funding, counter-terrorism, etc:
<http://www.icnl.org/research/resources/index.html>



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The Financial Action Task Force

The Most Powerful Agency You
Never Heard Of



Q: What is the Financial Action Task Force ([FATF](#))?

A: An intergovernmental policy making body that sets anti-terrorist financing and anti-money laundering standards that it uses to assess and rate the adequacy of laws in nearly every country in the world. The standards are set out in 40 recommendations, including **Recommendation 8 on Nonprofit Organizations**.

Q: Who are the members and how do they make decisions?

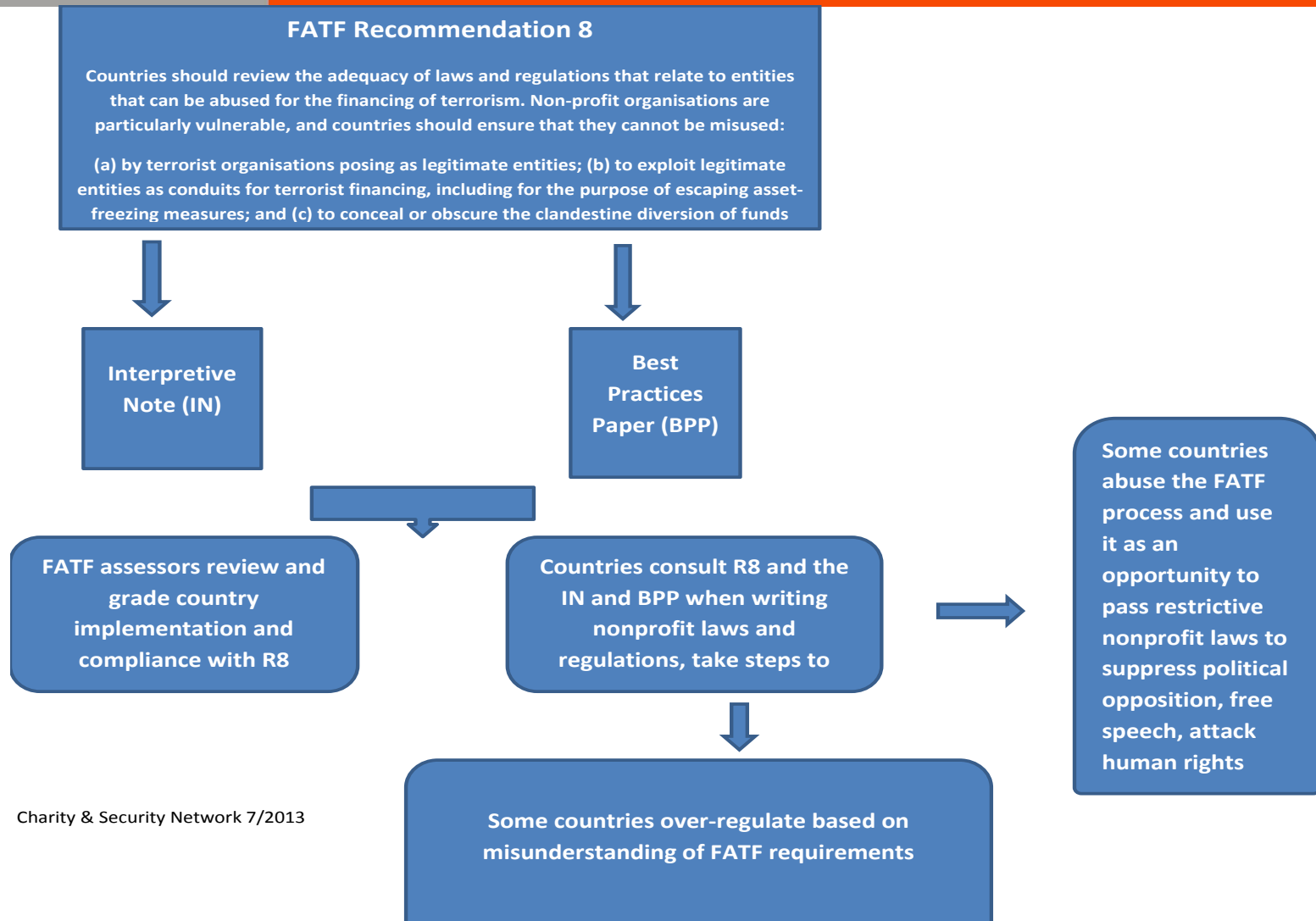
A: There are 35 member countries, including the U.S. and countries such as China, Norway, the UK and Brazil. FATF members meet in quarterly “plenaries” and make decisions by consensus.

Q: Are FATF’s Recommendations legally binding?

A: No. FATF is not a treaty based entity and has no legal authority and no transparency requirements or public accountability mechanisms.

Q: Why are FATF country ratings important?

A: A non-compliant or partially compliant rating may weaken a country’s bond rating and ability to attract investment.



British Virgin Islands:

a nonprofit with more than three employees must appoint a Money Laundering Reporting Officer. Nonprofits with less than three employees are required to “perform the Money Laundering Reporting Officer functions” though they need not appoint a MLRO. Fines range from \$3,000-\$30,000 (including a \$5000 for “failure to maintain any records required to be maintained”).

Spain:

After recent FATF evaluation, Spain passed a new law requiring all donations over 1000 Euro to be reported to the national government

Paraguay:

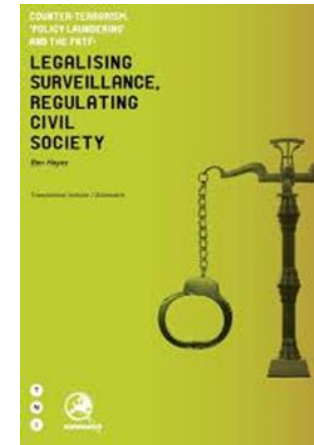
Found non-compliant with FATF standards in the response was to pass the Anti-Terrorist Law of 2010 which “did not clearly define what constitutes terrorism and included acts such as ‘dangerous interventions or obstacles on public roadways’, ‘noise pollution’ and other actions which ‘intimidate Paraguayan citizens’.” With sentences up to 15 years for some offenses, the law is widely seen as a mechanism to suppress protest and limit the capacity of nonprofits. (Statewatch report)

United States:

In a 2010 Congressional hearing on problems with anti-terrorist financing restrictions on nonprofits, Treasury Deputy A/S Daniel Glaser for Terrorist Financing says these laws are necessary because of FATF.

January 2012:

Groundbreaking report by Statewatch and the Transnational Institute examined the effects of FATF regulations in nearly 160 countries and found that FATF rules are being used by governments as an “instrument, to further cut back on the space of civil society...freedom to access and distribute financial resources for development, conflict resolution and human rights work.”



Summer 2012:

Transnational NPO Working Group on FATF formed.



2013:

[UN Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association](#), Maina Kiai, highlights concerns about FATF's Recommendation 8 on nonprofits, saying it “fails to provide for specific measures to protect the civil society sector from undue restrictions to their right to freedom of association...”



October 2012: FATF issues statement that “it is important that regulations and actions in this area do not harm the legitimate activities” of nonprofits.

April 2013: FATF holds first ever meeting with civil society groups in London

June 2013: FATF adopts overhaul of the general principles section of the R8 Best Practices Paper, **accepting all major NPO recommendations**



Bjorn Aamo of Norway, 2012 President of FATF



- Clear **language on the need to safeguard freedom of association and expression**, citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
- Caution that **R8 should not be misused to suppress nonprofits**;
- “**Government** oversight and the measures taken by financial institutions **should be flexible, effective and proportional to the risk of abuse.**”
- Nonprofit self-regulatory organizations can play a role in protecting the sector and **measures to strengthen self-regulation should be encouraged.**

June 2013 – June 2014: NPOs provide extensive input into update of “typologies” of terrorist abuse of NPOs.

Final report says:

- The terrorism threat to the sector remains, and the sector continues to be misused and exploited by terrorist organizations
- Non-financial abuse such as the abuse of programs, or the support for recruitment, appeared regularly
- The NPOs most at risk appear to be those engaged in ‘service’ activities and that operate in a close proximity to an active terrorist threat.
 - This can be an area of conflict where there is an active terrorist threat OR an NPO that operates domestically, but within a population that is actively targeted by a terrorist movement for support and cover.



Final Revision of Best Practices Paper for R8

- FATF meeting with civil society in Brussels March 25
- FATF requested examples of “good practices” from NPOs by April 10
- Final vote expected at June plenary

“Mutual evaluation” of U.S. compliance with FATF standards

- Scheduled to begin in the Fall of 2015, site visit winter 2016
- NPO written comments due end June 2015

December 2014 input sent to FATF and Treasury

- The BPP needs to be a guidance document for governments, not nonprofits.
- It should include a **step by step guide for governments** on how to carry out risk assessment, conduct outreach to the NPO sector, develop a proportionate, targeted approach to risk mitigation and have proportionate responses and/or sanctions.
- It should remind governments that **laws and regulations must be consistent with fundamental rights** of association, assembly and expression and respect international humanitarian law.
- It **should not recommend models or checklists of nonprofit due diligence measures** (leads to a one-size-fits-all approach) but instead focus on examples of measures that reflect good risk assessment and mitigation processes.
- Recognize the problem of shrinking NPO access to financial services** for international NPO operations.

- FATF will include a section on NPOs – this could be used as a “checklist” for imposing unnecessary regulation on the sector.
- FATF is asking NPOs for examples of “good practices”. Concerns about how these will be presented in the BPP and used by governments.
- “Self-regulation” examples could lead to legal requirements.

- Sign on letter will circulate beginning next week
- Meet with U.S. Treasury, other officials to express concerns and ask for support for NPO recommendations
- Supply “examples” that illustrate need for flexibility as opposed to one size fits all approach to due diligence

- Council on Foundations staff – Natalie Ross (Natalie.ross@cof.org) and Katherine LaBeau (Katherine.labeau@cof.org)
- Join the Transnational NPO Working Group on FATF Listserv



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Thank You for Joining Us for

Cross-Border Philanthropy:
Regulations and Current Challenges

Please join us in San Francisco to continue this conversation:

2015 ANNUAL MEETING
APRIL 26 - 28, 2015
PRECONFERENCE: APRIL 24 & 25
SAN FRANCISCO MARRIOTT MARQUIS



Learn more and register at www.cof.org or contact Natalie Ross (Natalie.ross@cof.org)