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Post-September 11 Fortified Anti-Terrorism Measures Compel Heightened Due Diligence

Nina J. Crimm*

Introduction

On October 19, 2004, two national news stories captured the behavior required today of donors, domestic publicly-supported charities, and private foundations seeking to promote and financially support legitimate international charitable activities. First was an address by Secretary of Treasury John Snow in which he cautioned donors: "[w]hen you open your hearts to charity during Ramadan, we encourage you to educate yourself on the activities of charities to which you donate, to help ensure that your generosity is not exploited for nefarious purposes."[1] Second was a New York Times report on the Ford Foundation's and the Rockefeller Foundation's due diligence efforts to prevent their grants from inadvertently underwriting terrorism.[2] Each foundation requires grantees to sign a pre-funding agreement letter containing the following or similar language: "[b]y signing this grant letter, you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any state, nor will it make subgrants to any entity that engages in these activities."[3]

Due diligence—the central theme of the two news stories—has long been a prerequisite for smart charitable contributions and domestic and international grant-making. Until the horrific events of September 11,

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1. *See Statement by Secretary Snow on Charitable Giving During Ramadan,* 2004 States News Service, (Oct. 19, 2004), *available at* 2004 WL 2342634 (statement of U.S. Treasury Secretary John Snow on the commencement of Ramadan, a month of worship, contemplation, prayer, fasting, and charitable giving by Muslims practicing the Five Pillars of the Islam faith).

2. Stephanie Strom, *A.C.L.U. Rejects Foundation Grants Over Terror Language,* N.Y. TIMES, Oct. 19, 2004, at A17.

3. *See id.* (excerpt from Ford Foundation letter).

the role of due diligence largely was a function of good governance and business practices and of federal tax rules. Its importance has heightened since that day, and its purpose has expanded.

Motivated partially by the revelation of terrorists' and terrorist organizations' reprehensible use of domestic and foreign charities as conduits to finance their unlawful activities,[4] after September 11 President George W. Bush announced his intent to mount a governmental financial war against terrorism.[5] To enhance the government's ability to undertake the task, President Bush and Congress strengthened the post-September 11 legal framework. The resulting legal fortification mainly included new legislation that expanded presidential powers and that added, as well as amended, federal civil and criminal anti-terrorism laws. These strengthened anti-terrorism statutes are aimed at individuals and entities, including domestic publicly-supported charities and private foundations, that financially, or otherwise, assist, support, or sponsor terrorists and terrorist organizations. To avoid accusations of transgression and their ruinous effects, heightened due diligence is an absolute necessity.

This short paper aims simply to present several of the most salient anti-terrorism measures, focusing on federal civil and criminal laws, but also noting an important federal tax statute that compel enhanced due diligence by donors, domestic publicly-supported charities, and private foundations.

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4. *See Cutting Off Flow of Funds to Terrorists: Hearing on H.R. 3004 Before the House Comm. On Fin. Servs.*, 107th Cong. (2001) (testimony of Jimmy Gurule, Undersecretary for Enforcement, Dep't of the Treasury) *available at* http://www.treas.gov/press/releases/po650.htm (last visited Mar. 16, 2004); *Hearing to Examine the Ideological Structure of Wahhabism, An Extreme and Violent Form of Islam, and It's Potential for Political and Social Influence in the United States, Before the Senate Judiciary Comm., Subcomm. On Terrorism, Technology and Homeland Security*, 108th Cong. (2003) (testimony of David Aufhauser, General Counsel, Dep't of the Treasury), *available at* http://www.treas.gov/press/releases/js507.html (last visited Mar. 16, 2004); Dennis M. Lormel, Chief, Financial Crimes Section, Federal Bureau of Investigation, *in* TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 227, 236 (Yonah Alexander & Donald J. Musch eds., 2002).

5. *See* President's Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, in 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001).

I. The Post-September 11 Fortified Legal Landscape—Federal Anti-Terrorism Measures

A. General Background

Soon after September 11, 2001, to fortify anti-terrorism measures, Congress enacted new legislation, the first of which was the USA Patriot Act.[6] That Act enlarged presidential powers, strengthened numerous previously existing federal criminal and civil non-tax statutes, including 18 U.S.C. § 2339A and 18 U.S.C. § 2339B,[7] expanded the list of predicate offenses under the Racketeer Influenced and Corrupt Organizations Act (RICO) to include 18 U.S.C. §§ 2339A and 2339B,[8] added 18 U.S.C. § 2339B as a predicate offense to the money laundering statutes,[9] and enhanced the Secretary of Treasury's power to adopt regulations and due diligence guidelines for fighting money laundering. Six months later, Congress enacted the Suppression of the Financing of Terrorism Convention Implementation Act of 2002 (SFTCIA).[10] With the SFTCIA's statutory addition of 18 U.S.C. §2339C, the financial counterterrorism tools expanded to reach fundraising and other financial transactions that further terrorists and their activities. SFTCIA also augmented the predicate offenses under RICO to include 18 U.S.C. § 2339C,[11] and it fortified the wire tap and money laundering statutes.[12]

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6. Pub. L. No. 95-223, §101, 91 Stat. 1625 (1977), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, Pub. L. No. 107-56, Title I, § 106, 115 Stat. 272 (Oct. 26, 2001) (hereinafter USA Patriot Act) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2004)).

7. USA Patriot Act, *supra* note 6, §§ 805-813.

8. *Id.* at § 813.

9. *Id.* at § 805(b).

10. Pub. L. No. 107-197, 116 Stat. 721 (2002) (implementing a United Nations convention signed by the United States in 2000).

11. *Id.* at § 301.

12. *Id.* at §§ 201-204, (adding 18 U.S.C. § 2339C (2002) and amending 18 U.S.C. §§ 2339A, 2339B (2001), 2332b(g)(5) (2002), and 1961(1)(B) (2003)); *see* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A LEGISLATIVE PROPOSAL TO IMPLEMENT THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS AND THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, H.R. DOC. NO. 107-139 (2001).

B. USA Patriot Act—Executive Order 13,224 and Expansion of 18 U.S.C. § 2339A and 18 U.S.C. § 2339B

1. International Emergency and Economic Powers Act and Executive Order 13,224

Of great import to the nation, the USA Patriot Act enlarged presidential powers contained in the International Emergency and Economic Powers Act (IEEPA)[13] "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[14] Specifically, the USA Patriot Act amended § 1702(a)(1) of IEEPA to empower the President and his delegates[15] to (1) assist the U.S. government in identifying, investigating, disrupting, and dismantling nontraditional structures, such as domestic § 501(c)(3) organizations, used by terrorists' supporters to raise, collect, and distribute funds; (2) broaden the government's authority to regulate and freeze any property or interest in property subject to U.S. jurisdiction; and (3) confiscate and dispose of any property or interest in property that is within the jurisdiction of the U.S. and that belongs to any foreign individual, foreign entity, or foreign country determined to have planned, authorized, aided, or engaged in an attack on the U.S.[16]

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13. Trading With the Enemy Act Amendments, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2004)).

14. 50 U.S.C. §§ 1701-1702 (2004).

15. 3 U.S.C. § 301 permits the President to delegate these powers to other individuals, among whom are the Secretary of the Treasury, the Secretary of State, and the Attorney General. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1247 (1996). Also, 8 U.S.C. § 1189 specifically permits the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General to designate an organization meeting stated criteria as a "foreign terrorist organization" (FTO) after having first notified Congress of the Secretary of State's intention to make such a designation. 8 U.S.C. § 1189 (2004); *see also* 18 U.S.C. § 2339B (2001). Afterwards, the Secretary of the Treasury can require U.S. financial institutions to block all financial transactions of assets they possess or control with respect to the designated terrorist organization. 8 U.S.C. § 1189(a)(1)-(2)(A), (4) (2004).

16. 50 U.S.C. § 1702(a)(1)(A)-(C) (2005), amended by Pub. L. No. 107-56, § 106(1), *supra* note 6. That statute now provides (post-September 11 additions italicized):

(a)(1) At the times and to the extent specified in section 202 [50 U.S.C.S. § 1701], of this title the President may, . . .

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

In Executive Order 13,224, President George W. Bush invoked the above powers and delegations.[17] He prohibited U.S. individuals and entities from engaging in economic transactions or dealings with blocked property or interests in property, including the "making or receiving of any contribution of funds, goods, or services to or for the benefit of . . . [designated] persons," including foreign terrorist organizations and specially designated (domestic and foreign individuals and entities) global terrorists (SDGTs).[18] President Bush barred U.S. persons from attempting to evade, avoid, or violate the prohibited transactions[19] and he authorized the Secretary of Treasury to adopt regulations to employ the delegated powers and to govern the prohibited actions and transactions.[20] Finally, concerned about persons avoiding law enforcers and about the portability and transferability of assets, President Bush eliminated the prior notice requirement for designating SDGTs and for blocking assets.[21]

Beginning immediately, notable anti-terrorism actions resulted from

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(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, *by any person, or with respect to any property, subject to the jurisdiction of the United States*;

(B) investigate, block *during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any *interest by any person, or with respect to any property, subject to the jurisdiction of the United States*; and

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

17. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

18. *Id.* at § 2(a), 66 Fed. Reg. at 49,081.

19. *Id.* at § 2(c), 66 Fed. Reg. at 49,081.

20. *Id.*

21. *Id.* at § 10, 66 Fed. Reg. at 49,081.

implementation of these enhanced powers. President Bush and his delegates compiled lists of individuals and entities designated as SDGTs. The lists eventually included the domestic § 501(c)(3) organizations known as the Global Relief Foundation, Inc. (Global Relief), the Holy Land Foundation for Relief and Development (Holy Land), and the Benevolence International Foundation, Inc. (Benevolence International). Moreover, through concerted efforts of the Department of Treasury's Office of Foreign Assets Control (OFAC), the Department of Justice, and other agencies, the U.S. government temporarily froze significant assets of Global Relief, Holy Land, Benevolence International, and other SDGTs, making them unavailable for the support of terrorism.[22]

2. 18 U.S.C. §§ 2339A and 2339B

Although Congress enacted 18 U.S.C. § 2339A in 1994 to criminalize the direct or indirect provision of financial or other material support or resources by any person "knowing or intending" their use for terrorist activities,[23] the USA Patriot Act enhanced this provision. It expanded the breadth of the "material support or resources" definition,[24] which appears now to contemplate grants, microfinance assistance, and many types of technical assistance. The USA Patriot Act also extended

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22. The U.S. government has frozen large amounts of assets worldwide and within the United States. *See* Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1373 (2004).

23. 18 U.S.C. § 2339A criminalizes the provision of material support to terrorists:

> (a) Offense. Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of . . . [multiple listed sections, including § 2332b which covers acts of terrorism that transcend national boundaries]. . . of this title, . . . or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .
>
> (b) Definition. As used in this section, (1) the term "material support or resources" means ... 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 (2002).

24. USA Patriot Act, *supra* note 6, at § 811(f).

the maximum prison sentence imposed on any person who commits an offense under § 2339A.[25]

The USA Patriot Act also strengthened 18 U.S.C. § 2339B,[26] which is applicable to anyone who financially supports or provides other assistance to a "foreign terrorist organization" (FTO).[27] The statute imposes harsh criminal sanctions on anyone, including a financial contributor who "knowingly"[28] provides, or attempts or conspires to provide, "material support or resources,"[29] including grants, microfinance assistance, and many types of technical assistance, to a designated FTO.

The constitutionality of the scienter requirement of 18 U.S.C. § 2339B has been challenged multiple times, resulting in differing judicial positions. The Ninth Circuit and Fourth Circuit Courts of Appeals held that the *mens rea* required for a conviction under the statute is defendant's knowledge of either (1) the organization's underlying designation as a FTO, or (2) the FTO's unlawful activities that caused its designation (even if unaware of the FTO's designation).[30] By contrast, a

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25. *Id.* at § 810(c).

26. The statute was enacted originally as part of Pub. L. No. 104-132, § 301, 110 Stat. 1214, 1247 (1996).

27. The term "terrorist organization" is defined as "an organization designated as a terrorist organization under 8 U.S.C. § 1189." 18 U.S.C. § 2339B(g)(6). A "foreign terrorist organization" means an "organization designated or re-designated as a foreign terrorist organization" by executive order, or "with respect to which the Secretary of State has notified Congress of the intention to designate as a foreign terrorist organization under 8 U.S.C. § 1189(a)." Foreign Terrorist Organization, 31 C.F.R. § 597.309 (2004). Pursuant to 8 U.S.C. § 1189(a), the organization must satisfy three statutory criteria: (1) it must be foreign, (2) it must engage in terrorist activity or terrorism, and (3) that activity must threaten the security of U.S. nationals or the national security of the U.S. 8 U.S.C. § 1189(a)(1) (2000 & Supp. 2004).

28. According to the legislative history, the current requisite statutory intent of "knowledge" necessary for conviction was intended to include actual knowledge and situations in which a person "should have known." In drafting the USA Patriot Act, Representative George W. Gekas (R.-Pa.) addressed the level of intent required under 18 U.S.C. § 2339B in questions to Attorney General Ashcroft. Mr. Ashcroft indicated that "we think the standards should be actual knowledge or should have known. That's a pretty high standard, but we don't want people to be responsible if they actually thought they were giving—appropriately thought they were giving to a charity." *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the House Comm. on the Judiciary*, 107th Cong. 1st Sess. (2001) (testimony of John Ashcroft, Attorney General), *available at* http://commdocs.house.gov/committees/judiciary/hju75288.000/hju75288_0f.htm (last visited May 18, 2005).

29. 18 U.S.C. § 2339B(a)(1) (2004). The definition of "material support or resources" is the same as for 18 U.S.C. § 2339A. 18 U.S.C. § 2339(g)(4) (2004).

30. United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (majority adopted 9th

federal district court in Florida interpreted the necessary *mens rea* for conviction to additionally require defendant's specific intent to provide material support to further the FTO's illegal activities.[31] Congress proposed, as part of the Tools to Fight Terrorism Act of 2004 (TFTA), to adopt the approach of the Fourth and Ninth Circuits, thus clearly giving the anti-terrorism statute a broad reach.[32]

Section 2339B further specifically targets any "financial institution" that becomes aware that it possesses or controls funds in which a FTO or its agent has an interest. It requires such a financial institution to retain possession or control over such funds and to report the holdings to the Secretary of the Treasury.[33] To date, although the definition of "financial institution" has been interpreted to include primarily traditional entities, such as banks, it is possible to stretch the interpretation to include § 501(c)(3) organizations in their capacities as collectors and disseminators of cash donations.[34] Pursuant to the statute, noncompliance by a

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Circuit standard of Humanitarian Law Project v. Reno, 205 F.3d 1130, 11341137-38 (9th Cir. 2000); dissent would adopt *mens rea* requirement of United States v. Al-Arian, 308 F. Supp. 2d 1322, 1338-40 (M.D. Fla. 2004)); Humanitarian Law Project v. United States, 352 F.3d 382 (9th Cir. 2003).

31. United States v. Al-Arian, 308 F. Supp. 2d 1322, 1338-40 (M.D. Fla. 2004).

32. The bill does not propose language to require *mens rea* of specific intent to provide material support to further the organization's illegal activities. S. 2679, 108th Cong. (2004), *available at* LEXIS, LEXSEE 108 S. 2679, Congress provides:

> (B) Knowledge requirement. A person cannot violate this paragraph unless the person has knowledge that the organization referred to in subparagraph (A)—
> (i) is a terrorist organization;
> (ii) has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)); or
> (iii) has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)).

33. 18 U.S.C. § 2339B(a)(2) (2004).

34. During hearings before the Senate Judiciary Committee, the Committee was urged to consider whether charities should be treated as "financial institutions" for purposes of the Bank Secrecy Act. *Terrorism Financing: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Jonathan Winer, Council on Foreign Relations), *available at* LEXIS, Federal News Service file. The definition of "financial institution" for purposes of 18 U.S.C. § 2339(a)(2) is contained in 31 U.S.C. § 5312(a)(2) and includes traditional banking-type institutions and some less traditional entities, such as casinos. 18 U.S.C. § 2339B(g)(2) (2004). The catchall subparagraph (Z) of 31 U.S.C. § 5312(a)(2) provides that a "financial institution," includes "any other business designated by the Secretary [of the Treasury] whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters." 31 U.S.C. § 5312(a)(2)(Z), added by the Bank Secrecy Act. Thus far, regulations issued by

financial institution triggers a civil penalty of the greater of either $50,000 per violation or twice the amount of funds at issue.[35]

C. Suppression of the Financing of Terrorism Convention Implementation Act Added 18 U.S.C. § 2339C

To address entities considered nontraditional channels for funding terrorists, in 2002 Congress added 18 U.S.C. 2339C as part of the SFTCIA. That statute targets domestically formed entities, including § 501(c)(3) organizations (as well as entities formed abroad but located in the U.S.) and the individuals who manage or control those entities. The statute contains multiple offenses.

Subsection (a) provides that anyone commits an offense by unlawfully and "willfully"[36] directly or indirectly raising, collecting, or providing funds, or conspiring to do so, with the intention that such funds will be used in full or in part to carry out (1) a terrorist act in the U.S., or (2) an act intended to cause death or serious bodily injury to a non-combatant in order to intimidate a population or to compel a government or an international organization to undertake or abstain from any action.[37]

Treasury's Office of Foreign Assets Control (OFAC) that interpret the definition of "financial institution" focus exclusively on more traditional notions of the term and have not interpreted it to include § 501(c)(3) organizations, in their capacities as collectors and disseminators of cash donations. Treasury regulation 31 C.F.R. § 103.11(n) rather narrowly defines the term "financial institution" to include a bank, broker, money services business, telegraph company, casino, card club, or person subject to a state or federal bank supervisory authority. That regulation defines the term "bank" to include rather traditional concepts of a bank, such as a commercial bank or trust company, a savings and loan association, a foreign bank, etc. Similarly, the current OFAC regulations essentially mirror the statutory language that lists the more traditional types of financial institutions, and they do not elucidate what is meant by such other businesses designated by the Secretary of the Treasury. 31 C.F.R. Ch. V, Pt. 594, § 594.314 (July 1, 2004 ed.) (defining "U.S. financial institution"); 31 C.F.R. ch. V, pt. 597, § 597.307 (July 1, 2004 ed.) (defining "financial institution").

35. 18 U.S.C. § 2339B(b) (2004).

36. The term "willfully" means "voluntary or intentional." House Judiciary Comm., H.R. REP. NO. 107-307, (2001), *available at* LEXIS, LEXSEE 107 H.R. 307.

37. 18 U.S.C. § 2339C(a)(1), (2) (2004). Subsection (a) of the statute implements International Convention for the Suppression of the Financing of Terrorism (ICFST) Article 2, paragraphs 1 and 3-5. United Nations General Assembly, International Convention for the Suppression of Financing of Terrorism, 39 I.L.M. 270 (2000), *available at* http://www.un.org. H.R. REP. NO. 107-307, *supra* note 36.

Any violator of subsection (a) can be fined, imprisoned for up to 20 years, or both. 18 U.S.C. § 2339C(a). In addition to the penalties specified in 18 U.S.C. § 2339C(d), violation of § 2339C is grounds for the government to subject assets to civil forfeiture under 18 U.S.C. § 981. H.R. REP. NO. 107-307 (2002).

To account for the fungible nature of cash, the provision states unequivocally that "for an act to constitute an offense . . . it shall not be necessary that the [provision or collection of the] funds were actually used to carry out a predicate act."[38] Thus, violation of subsection (a) does not require actual use of the funds to carry out the predicate act.

Subsection (c) of the statute establishes a separate and harshly punishable[39] offense aimed largely at the accumulation of liquid assets that support terrorism. It applies to any individual or entity located in the United States and any U.S. national or domestically formed legal entity, including a § 501(c)(3) organization, that "knowingly" conceals or disguises the nature, location, source, ownership, or control of material support, resources, or funds and that knows or intends the material support, resources, or funds to be provided in violation of either 18 U.S.C. § 2339B or § 2339C(a).

Additionally, subsection (f) imposes a civil penalty of at least $10,000 on any foreign entity located in the United States and on any domestically formed entity, including a § 501(c)(3) organization, if an individual responsible for the control or management, in that representative capacity, "committed an offense" within subsection (a) of the statute.[40] The potential for violation of, and punishment under, subsection (f) is considerable because, according to the legislative history, the responsible person, such as an officer, board member, or administrator, need not actually be convicted of the offense in order for the government to impose the civil penalty against the legal entity.[41]

Subsection (b) establishes the jurisdiction of the U.S. with respect to perpetrators of offenses in subsection (a), whether the perpetrators are located in the U.S. or abroad. *Id.* This subsection is consistent with the obligations that the U.S. has under the ICFST, but in certain instances goes beyond those obligations. *See* H.R. REP. No. 107-307, *supra* note 36, at 13. Similarly, the statute's jurisdictional requirements expand upon the international nexus intended by the ICFST. *Id.* Thus, the statute provides jurisdiction for an offense committed on board a U.S. aircraft or vessel and for an offense directed toward, or resulting in, a predicate act committed to compel the United States to act in a certain manner. 18 U.S.C. § 2339C(b)(3)-(5) (2004).

38. 18 U.S.C. § 2339C(a)(3) (2004).

39. An offense under subsection (c) is punishable by fine, imprisonment of up to 10 years, or both. 18 U.S.C. § 2339C(d)(2) (2004).

40. According to the House Judiciary Committee report, in determining the amount of the penalty, "the court should consider the legal entity's net worth, the volume of business it transacts, its ability to pay the amount of the transaction involved in the Subsection 2339C(a) offense, and the nature of the predicate act." H.R REP. No. 107-307, *supra* note 36, at 13.

41. *See id.* The House Report comments: "[t]here does not have to be a conviction of such person under Subsection 2339C(a) to impose the civil penalty against the legal

18 U.S.C. § 2339C is a potentially powerful governmental weapon against the financial war on terrorism. Whether the statute is merely "preventative medicine" or, instead, an invaluable prosecutorial tool is yet to be determined. To date there are no reported indictments or penalties assessed against individuals or organizations targeted by the statute.

D. Expansion of Predicate Offenses for RICO and Money Laundering Statutes

The USA Patriot Act and the SFTCIA strengthened RICO and the federal money laundering statutes. RICO predicate offenses currently include the offenses of 18 U.S.C. §§ 2339A, 2339B, and 2339C.[42] The federal money laundering statutes currently specify 18 U.S.C. §§ 2339A and 2339B as predicate offenses.[43] RICO predicate offenses, including 18 U.S.C. § 2339C, now actually serve as money laundering predicate offenses.[44]

The government has energetically employed the RICO and money laundering laws in its financial counter-terrorism war. One prominently reported example is the government's pursuit of the SAAR Foundation, part of a Virginia network of § 501(c)(3) organizations ostensibly formed to spread belief in the Islamic religion and to undertake charitable work.[45] The government charged SAAR with laundering $1.8 billion in charitable donations received in 1998, some purportedly from the Saudi Arabian royal family, for the purpose of financing terrorist groups, including Hamas and al Qaeda.[46]

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entity." *Id.*

42. The USA Patriot Act added 18 U.S.C. §§ 2339A and 2339B as RICO predicate offenses. Pub. L. No. 107-56, Title I, § 813, 115 Stat. 272 (2001). SFTCIA added 18 U.S.C. § 2339C as a RICO predicate offense. Pub. L. No. 107-197, 115 Stat. 272 (2001).

43. In 1996, 18 U.S.C. § 2339A became a predicate offense to the federal money laundering statute, 18 U.S.C. § 1956. Pub. L. No. 104-132, 110 Stat. 1301 (1996). The USA Patriot Act added 18 U.S.C. § 2339B as a predicate offense to the federal money laundering statute. Pub. L. No. 107-56, *supra* note 6, at § 805(b).

44. 18 U.S.C. § 1956(c)(7)(A) (2004); 18 U.S.C. § 1961(1)(G) (2004); 18 U.S.C. § 2332b(g)(5)(B) (2004). The Tools to Fight Terrorism Act of 2004 clearly and directly designates 18 U.S.C. § 2339C as a money laundering predicate offense. S. 2679, 108th Cong., § 501(b) (2004).

45. *See* Douglas Farah & John Mintz, *U.S. Trails Va. Muslim Money, Ties,* WASH. POST, Oct. 7, 2002, at A1.

46. *See id.*; Douglas Farah & John Mintz, *Fighting Terror Funds and Fundamentalism/Virginia; Funding Inquiry Targets Muslim Group*, WASH. POST, Oct. 13, 2002, at A30.

E. Suspension of Designated Organization's § 501(c)(3) Tax-Exempt Status

In addition to the criminal statutes of Title 18, in November 2003 Congress enacted a new federal tax statute, 26 U.S.C. § 501(p),[47] which the Department of Treasury promoted as much needed for a more comprehensive approach to combating terrorism. The statute remedies the prior inability of the Internal Revenue Service (I.R.S.) to deny eligibility for tax-exempt status to, or to suspend without prior organizational challenge the existing tax exemption of, a designated SDGT, a designated FTO, or an organization identified as a supporter of terrorism.[48] Now, once a domestic or foreign § 501(c)(3) organization is accused of, and hence identified as, supporting terrorism, I.R.S. can suspend its tax-exempt status. The tax statute does not prevent the organization from continuing its operations, including the receipt of funding, during the suspension period; however, any donation is ineligible for a charitable contribution deduction.[49] Since the enactment of 26 U.S.C. § 501(p), the I.R.S. strategically has suspended the tax-exempt status of several § 501(c)(3) organizations, including Global

47. Pub. L. No. 108-121, 117 Stat. 1335 (2003).

48. 26 U.S.C. § 501(p)(4) (2004). 26 U.S.C. § 501(p)(2) describes a terrorist organization that has been designated or otherwise identified as:

> Terrorist Organizations—An organization is described in this paragraph if such organization is designated or otherwise individually identified—
>
> (A) under section 212(a)(3)(B)(vi)(II) or 219 of the Immigration and Nationality Act as a terrorist organization or foreign terrorist organization,
>
> (B) in or pursuant to an Executive order which is related to terrorism and issued under the authority of the International Emergency Economic Powers Act or section 5 of the United Nations Participation Act of 1945 for the purpose of imposing on such organization an economic or other sanction, or
>
> (C) in or pursuant to an Executive order issued under the authority of any Federal law if—
>
> (i) the organization is designated or otherwise individually identified in or pursuant to such Executive order as supporting or engaging in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or supporting terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989); and
>
> (ii) such Executive order refers to this subsection.

49. 26 U.S.C. § 501(p)(4) (2004). The practical effect likely is to shut the spigots of funding.

Relief,[50] Holy Land,[51] Benevolence International,[52] the Rabbi Meir Kahana Memorial Fund,[53] the Islamic African Relief Agency – USA,[54] and Al Haramain Islamic Foundation, Inc.[55]

II. Legal Landscape Compels Due Diligence to Support Compliance with the Post-September 11 Fortified Anti-Terrorism Measures

The above legal platform is not the full slate of substantive and procedural weapons that the government can utilize in combating the financial war on terrorism.[56] Nonetheless, these potent anti-terrorism measures alone, and certainly in combination with notions of good business practice, of good governance, and of compliance with federal tax rules, should compel heightened due diligence by each party in the charitable contribution - fundraising - grantmaking/microfinance assistance/technical assistance chain.

Charges of providing financial or other material support for terrorism, conspiracy, or money laundering and successful prosecution for such criminal acts are worlds apart. Nonetheless, mere accusations can have devastating effects to which rational persons wish to be immune. To guard against the potential of such criminal accusations, as well as to protect against ineligibility for the charitable contribution deduction, a well-intentioned donor should become as thoroughly educated as possible about a recipient § 501(c)(3) organization, its activities, its grant-making processes, and if possible, its grantees. A donor's due diligence inquiry should extend well beyond, and should not rely merely upon, a donee organization's own statements.

Likewise, a board member, officer, or other manager of a domestic

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50. I.R.S. Announcement 2003-74, I.R.B. 2003-48 (Dec. 1, 2003).

51. *Id.*

52. *Id.*

53. I.R.S. Announcement 2004-56, I.R.B. 2004-28 (July 12, 2004).

54. I.R.S. Announcement 2004-87, I.R.B. 2004-45 (Nov. 8, 2004).

55. I.R.S. Announcement 2004-74, I.R.B. 2004-40 (Oct. 4, 2004).

56. One post-September 11 procedural tool is 18 U.S.C. § 981, which expands the government's forfeiture authority. Among the relevant transactions that permit the government to exercise its forfeiture authority are: (1) property or traceable proceeds derived from a violation or attempted violation of 18 U.S.C. § 2339C by entities through their unlawful and willful provision or collection of funds to carry out terrorist activities (18 U.S.C. § 981(a)(1)(H)); (2) assets used in planning, perpetrating, supporting, conducting, concealing, or committing an act of domestic or international terrorism against the U.S., citizens or residents of the U.S., or their property (18 U.S.C. § 981(a)(1)(G)); (3) a transaction or attempted transaction in violation of money laundering under 18 U.S.C. § 1956 (and 18 U.S.C. § 981(a)(1)(A)).

publicly-supported charity or private foundation should undertake comprehensive due diligence to personally guard against criminal charges and to protect the organization against charges under the anti-terrorism measures. Such due diligence processes should focus on dimensions both internal and external to the public charity or private foundation. Exercising extensive external due diligence beyond the mere representations of domestic and foreign recipients of technical and financial aid must be sufficient in nature and level to guard against personal accusations of knowingly providing material support or resources to terrorists and terrorist groups. Implementation and utilization of intra-organizational due diligence procedures and transparent disclosures among board members, officers, and other managers should safeguard against severe outcomes to the § 501(c)(3) organization, such as a tarnished reputation or the imposition of economic sanctions of 18 U.S.C. § 2339C(f). Thus, all board members, officers, and managers should make it their business to intelligently monitor the actions of one another, to closely supervise the activities of the organization, and to carefully investigate the fiscal history, activities, and personnel of U.S.-based and foreign-based grantees/recipients.

Conclusion

Due diligence is a fundamental and vital prerequisite to all charitable giving and grant-making. The perceived importance of due diligence has escalated substantially since September 11 to protect against inadvertent underwriting of terrorism. Concerns about unintentional financial and technical support for terrorists and the possibility of accusations of criminal wrongdoing under federal anti-terrorism measures lead to the inevitable question of the appropriate due diligence standard for donors, publicly-supported charities, and private foundations engaged in international activities. Long-standing federal tax rules expect responsible grant-making domestic public charities and private foundations engaged in global philanthropy to exercise due diligence in accordance with a set of criteria.[57] Fearing compliance with

57. *See* Rev. Rul. 63-252, 1963-2 C.B. 101; Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 75-65, 1975-1 C.B. 79 (setting forth criteria for public charities engaged in international charitable activities); 26 U.S.C. § 4945(d), (h) (2004) and Treas. Reg. § 53.4945-5(a)(1972) (delineating expenditure responsibility rules for private foundations engaged in global grant-making). For a further discussion of the standards, *see* Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations*

those due diligence standards as insufficient protection for purposes of the post-September 11 anti-terrorism measures, public charities requested more due diligence tools.[58] Additionally, as media coverage increased about the perverse use of domestic charities to funnel donated funds to terrorists, donors sought reliable means to become educated about potential donee organizations.

Daunting as the due diligence task appeared after the post-September 11 enhancements of the anti-terrorism measures, and may prove even now, tools have become available to assist with the due diligence endeavor. Donors and philanthropies can gain information on domestic charitable organizations through websites of state attorneys general, the U.S. government,[59] the European Union, and the United Nations, as well as through websites of such groups as the Philanthropic Research Institute's GuideStar[60] and the Better Business Bureau Wise Giving Alliance.[61] Some banks and financial institutions have reduced donors' burdens of due diligence inquiries by establishing charitable funds to receive donor contributions for projects and causes abroad and by acting as the middleman to vet and monitor the foreign recipients.[62] Some domestic charities have started donor advised funds for similar purposes.[63] A leading provider of outsourced services for private foundations now offers systems designed to incorporate full monitoring and oversight of all foundation grants for compliance with the USA Patriot Act's measures.[64] Additionally, in November 2002, the Department of Treasury issued Voluntary Best Practices Guidelines

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and Their Donors, 23 VA. TAX REV. 1 (2003).

58. Muslim-oriented charities, indicating concern that the government might block their donations in efforts to curtail funding of terrorists, requested due diligence guidelines from the government. *See* Alan Cooperman, *Stung by Accusations, America's Muslims Alter Giving*, CHI. TRIB., Dec. 11, 2002, at 37.

59. *See, e.g.*, Periodic Report on the National Emergency With Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism (Office of Foreign Assets Control's list of entities and individuals with whom U.S. persons are prohibited from engaging in business or commerce), *available at* http://www.treas.gov/offices/enforcement/ofac/presdocs/91703sdgtrept.pdf (last visited Mar. 10, 2004).

60. *See* GuideStar, Evaluating and Selecting Organizations that Match Your Giving Plan, *at* http://www.guidestar.org/learn/evaluate.jsp (last visited Mar. 9, 2004).

61. *See* BBB Wise Giving Alliance, Standards for Charity Accountability, *at* http://www.give.org/standards/index.asp (last visited Mar. 9, 2004).

62. *See* Rachel Emma Silverman, *New Funds Make It Easier to Donate Abroad*, WALL ST. J., July 6, 2004, at D1.

63. *See id.*

64. *See* Foundation Source, *at* www.foundationsource.com (last visited Feb. 10, 2005).

(VBPGs) for the express purpose of assisting U.S.-based publicly-supported charities and private foundations to avoid ties to terrorist organizations that might lead to asset freezing actions by the government.[65] Nonetheless, following these VBPGs provides limited certainty, as expressed by this specific qualifying warning:

> Compliance with these guidelines shall not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated . . . [pursuant to IEEPA and 18 U.S.C. § 2339B, etc.].[66]

In response to perceived weaknesses of the VBPGs, in October 2004, the Council on Foundations, in cooperation with more than twenty-five other organizations, released draft principles to assist in due diligence efforts of domestic publicly-supported charities and private foundations.[67]

The proliferation of these aids since September 11 attests to the heightened importance of the responsibility of due diligence, to the necessity for effective means for restricting the risks of funding and assisting terrorism, and to the need for minimizing the possibility of violating laws, including federal anti-terrorism measures. Although the tools to assist with due diligence have expanded during the last two years, none provides absolute security for those individuals and entities intent on supporting legitimate international charitable causes and activities. Caution suggests that the broader and deeper the due diligence exercised, the more likely a donor, domestic publicly-supported charity, or private foundation is to avoid the devastating effects of accusations of transgression of the federal anti-terrorism measures.

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65. U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. BASED CHARITIES (2002), *available at* http://www.treas.gov/press/releases/docs/tocc.pdf.

66. *Id.* at 2.

67. *Draft of Alternative to Treasury's Guidelines on Preventing Diversion of Charitable Funds to Terrorist Activities*, *available at* LEXSTAT 2004 TNT 200-36.