Seeking a Safe Harbor

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Here's how some foundations are using technology to facilitate compliance with the USA PATRIOT Act and Executive Order intended to disrupt the support of terrorism.

BY MARTIN B. SCHNEIDERMAN

In the wake of the September 11, 2001, terrorist attacks, grantmakers are now being asked for a substantially higher level of due diligence regarding grantees than ever before. The good news is that providers of computer-based products and services are being responsive and beginning to offer grantmakers some practical and cost-effective solutions.

Background

Just days after the attacks, President Bush issued Executive Order 13224, blocking the assets of persons designated as supporters of terrorism. The Executive Order also barred U.S. nationals from engaging in any transactions with anyone named therein, with anyone subsequently designated as a supporter of terrorism by the Secretary of State or the Secretary of the Treasury, and, most broadly, with other unnamed individuals who provide assistance to or are "otherwise associated with" listed persons. The ban on financial transactions includes charitable contributions.

About a month later, Congress enacted the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). The PATRIOT Act strengthened and enhanced existing civil and criminal penalties for those who commit acts of terrorism or who support terrorism. The act also included new requirements for financial institutions to check their customers and report suspicious activities to the government.

Although U.S. philanthropic organizations are not governed by the act's requirements with respect to financial institutions, they are subject to Executive Order 13224 and could, in extreme cases, face the stiffer criminal penalties adopted by the PATRIOT Act. These risks are not academic. Shortly after September 11, 2001, the government froze the assets of three U.S. public charities, designating them as supporters of terrorism. In February 2004, the government blocked the assets of a fourth U.S. public charity, pending an investigation into alleged terrorist ties.

The Treasury Department's Office of Foreign Assets Control (OFAC) has compiled the Specially Designated Nationals (SDN) list, which includes all persons who have been named in the Executive Order or who have been desig-

This article is intended to give a general overview for information purposes only. It should not be relied upon as legal advice for any specific situation.

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nated by the Secretary of the Treasury or Secretary of State as terrorists or supporters of terrorism. Because the Executive Order bars transactions with persons on the list, funders must decide whether their circumstances require them to check their grantee organizations—and individuals associated with grantees—against the SDN list. Because the Executive Order also prohibits transactions with persons who may be aiding others on the list, funders also must decide whether they should check lists maintained by other U.S. government agencies, the European Union, the United Nations and other countries.

In November 2002, the U.S. Department of the Treasury published "Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices for U.S.-Based Charities." Although the Guidelines are voluntary, the document remains the only guidance issued by the Treasury Department concerning how U.S. charities should conduct their operations to avoid becoming the target of an asset blockage because they have been determined to support terrorism. The Guidelines set an extremely high bar for U.S. funders, suggesting the collection of very detailed information about grantees and their associated persons—down to the subcontractor level—and verification of this information against multiple government published interdiction lists.

Grantmakers are seeking a "safe harbor"—clearly defined written guidelines that describe exactly what they need to do to be in compliance with counter-terrorism measures. But neither the Internal Revenue Service (IRS) nor the Treasury Department has provided this or is expected to do so. There is no equivalent to the IRS Cumulative List of Organizations (IRS Publication 78) that can be used as a definitive source of information.

William P. Fuller, president of the Asia Foundation, and Barnett F. Baron, executive vice president, described the challenges their foundation and many others are facing in their *Christian Science Monitor* article, "How war on terror hits charity":

> The voluntary guidelines contain too many vague and undefined terms that leave grantmakers vulnerable to legal action. In addition to mandatory checks of the names of all prospective grantees against published lists of terrorist organizations, the guidelines prohibit foundations from funding organizations that may 'deal with' named terrorist organizations, organizations that may be 'otherwise associated with' terrorists, or anyone who 'is or has been implicated in any questionable activity.' These terms are open to interpretation. (July 29, 2003; www.csmonitor.com/2003/0729/p11s01-coop.html)

Council on Foundations' Response

In June 2003, the Council on Foundations presented its members' concerns to the Treasury Department's General Counsel, which concluded:

> We believe that only a minute fraction of all foreign grants might be considered at risk of being diverted to support terrorism. The net effect of the Guidelines, as written, is to discourage the making of all international grants and grants to domestic organizations with foreign activities or interests, particularly in parts of the world where it may be difficult or impossible to obtain all of the information . . . and in cases where the administrative costs of attempting to comply would be quite high. Ironically, this comes at a time when the need for international humanitarian assistance is at an unprecedented level. To our knowledge, no other developed country has put forward similar guidelines for the making of international grants, putting U.S. grantmakers at a disadvantage in attempting to work with fellow grantmakers from other countries in moving forward to meet critical needs. Accordingly, we request that the Treasury Department withdraw the Guidelines and reissue them after an opportunity to consider these and other comments.

Read the full comments at www.cof.org/files/Documents/Legal/Treasury_Comments_06.03.pdf.

During the past six months, I've met with Rob Buchanan, the director of international programs at the Council on Foundations, conducted interviews and sent questionnaires to hundreds of grantmakers, the major providers of grants management software and services, the major providers of employee giving services and contacted the vendors of USA PATRIOT Act compliance verification services. Here's what I've learned.

Some Frequently Asked Questions

Does the Executive Order apply to both U.S. and non-U.S. based nonprofits?
The Executive Order applies to all "U.S. persons." This includes all institutions

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organized under U.S. law, as well as their overseas offices, and any foreign institution that has a U.S. office.

Are grantmakers aware of Executive Order 13224? Most grantmakers are not aware of the Executive Order and its implications. Those who know more—corporate grantmakers and foundations that support international nonprofits—are concerned about the viability of their philanthropic programs.

What is OFAC? The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers and those engaged in activities related to the proliferation of weapons of mass destruction. OFAC issues lists (www.ofacsearch.com) of Blocked Persons or Specially Designated Nationals (SDN). The current list comprises 146 pages, printed in small type. However, much of the length is due to the use of multiple aliases for individuals and organizations.

How many U.S.-based nonprofits have been identified as supporting terrorist organizations? Three. Benevolence International Foundation, Inc., the Holy Land Foundation for Relief and Development, and the Global Relief Foundation, Inc. In February 2004, the government acted to block the assets of the Al-Haramain Islamic Foundation, in Ashland, OR, pending an investigation into possible terrorist ties.

If a nonprofit were listed in IRS Publication 78 as a charitable organization, then wouldn't the charity be OFAC compliant, too? Not necessarily.

Although the law now automatically suspends the tax-exempt status of a U.S. charity designated as a terrorist organization, it may take some time for this information to appear in Publication 78. GuideStar is a better source, because it posts this information online immediately: www.guidestar.org.

Do I have to check the lists? There is no simple answer to this question. Funders should assess the likelihood that their grantees may be listed or have ties to listed individuals or organizations, bearing in mind that reasonable due diligence checks are far more likely than list checking to detect and prevent a diversion of funds, whether for terrorism or simply for personal gain. Funders may reach different conclusions on list checking—a corporate grantmaker processing a high volume of employee matching gifts in many countries may make one decision, while a foundation making a smaller number of grants with a high level of due diligence may reach another. Funders should also consider alternative funding, such as U.S. public charities that have retooled their due diligence to incorporate Executive Order compliance or working with another funder more experienced with grantees in a particular country.

What if I only make grants to U.S. public charities? As evidenced by the presence of four U.S. public charities on the SDN list, domestic as well as international grantmakers must take steps to avoid inadvertently funneling support to terrorist organizations. At a minimum, domestic grantmakers should check GuideStar, as well as the official IRS list, if they are unfamiliar with a prospective grantee.

What lists should we consider checking? In addition to the Treasury Department's SDN list, additional lists of organizations and individuals are also available. Some grantmakers using automated online verification services also are checking against these lists, including: OFAC Blocked Countries, Bureau of Industry and Security (Export/Import sanctioned entities), Canadian Consolidated List (from the Office of the Superintendent of Financial Institutions), FBI Lists, Non-Cooperative Countries and Territories, European Union Terrorism List, Interpol Most Wanted, United Nations Consolidated List and the World Bank Debarred Parties List.

How can we check organizations and grantee personnel against these extensive lists? Compliance checking is very difficult and time-consuming. The lists are lengthy and updated regularly. Many names on the OFAC and other interdiction lists are very common names throughout the world. The lists contain a mixture of organization names, maritime vessels, individuals and aliases. Names can take multiple forms and may need to be translated into English. Checking these lists is sure to generate false positives, which must be addressed carefully to prevent offending grantseekers or grantees.

Grantmakers whom I've interviewed point out that some nonprofits may be understandably concerned that the collection of personal information could result in identity theft or that personal information might be passed on to the U.S. government's Homeland Security Agency in error.

How can technology assist by automating compliance checking? The ven-

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dors of commercial grants management software and employee giving services are now linking their systems to online databases and commercial verification services to improve accuracy and speed and reduce costs to grantmakers. (See chart below and on page 39.)

How long does it take to check organization and contact names? Using a computer-based automated compliance checking system, a list of 2,500 organizations and individuals can be checked against 18 interdiction lists in less than one minute. Staff will then need to review the hits, conduct research to determine which ones are "false positives" and log the results.

How many organizations and contacts are typically identified as hits when checked against multiple lists? The frequency of hits varies, depending on the names and the countries in which the nonprofit organizations are located. In most cases, about two to three percent of names checked are hits. Once false

positives are entered on an accept list (a list of approved people or organizations), this number probably will go down.

Are there alternatives to checking the lists? Alternatives include using the services of one of the U.S. public charities that does extensive international grantmaking and has retooled its due diligence processes to include anti-terrorism compliance processes. Funders new to a particular country or region may find that they benefit from working with an experienced funder, who is already familiar with the country's non-governmental organizations.

Grantmaker To-do List

Grantmakers should consider doing the following right now:

1. Consult with competent legal counsel.

2. Conduct a risk assessment, document the process, determine your tolerance for risk and take appropriate actions. (See the Council's comments

to the Treasury Department in the Resources section on page 41 for some suggestions.)

3. Determine what level of compliance checking you will require for U.S. and non-U.S. grants and whether those levels will change based on grants size.

4. Decide which lists your organizations will use (see 1–3 above to determine this), what information you'll need to check and how frequently you'll need to do so.

5. Consider integrating USA PATRIOT Act compliance software with your grants management software and process.

6. Train primary and backup staff to use the system.

7. Revise your workflow, operational procedures and documentation as required.

8. Ensure that interdiction lists you use are always kept up-to-date.

9. Stay abreast of new regulations, interpretations and case law.

Major Grants Management Software/Service Provider Solutions

Vendor	Organization Checking	Contact Checking	Compliance Checking Capability
Arlington Group www.arlgroup.com	Yes	No	Easygrants has built-in OFAC organization checking, automatic detection of OFAC updates, e-mail notification to foundation staff of OFAC updates and automatic or manual OFAC table refresh.
Bromelkamp www.bromelkamp.com	Yes	No	Built-in link to GuideStar EZ Basic and optional Charity Check information services for OFAC. GuideStar provides clients a 90-day free trial and discount ($450 vs. $750) for Charity Check.
Foundation Source® www.foundationsource.org	Yes	No	Currently doing organization checking using Bridger Insight. Contact checking planned for 2Q 2004.
MicroEdge www.microedge.com	Yes	Yes	Built-in link to GuideStar EZ Basic and Charity Check. Provides custom reports designed to export data compatible with third-party compliance vendor solutions. Established strategic partnerships with vendors to offer discounts to clients.
NPO Solutions www.nposolutions.com	Yes	Yes	Provides custom data exports compatible with third-party compliance vendor solutions. Established strategic partnerships with vendors to offer discounts to clients. (A MicroEdge subsidiary)

Source: Vendor reports of their system capabilities as of March 1, 2004. CyberGrants was invited and chose not to report.

Major Employee Giving Provider Solutions

Vendor	Organization Checking	Contact Checking	Compliance Checking Capability
4Charity www.4charity.com	Yes	Yes	Checking of organization and primary contact (one individual) information at no additional charge for clients using Bridger. Additional services on request.
AmeriGives www.amerigives.com	Yes	Yes	Organization checking using the OFAC list, downloaded monthly. Contact checking is an optional fee-based service.
CreateHope www.createhope.org	Yes	Yes	Risk Management Solution gathers data (on executives, board members, affiliate organizations, international projects and banking institutions) and certifications directly from nonprofits to help identify potential risks. Information is imported into a web-based system and processed through varying levels of risk review, using 250 watch lists and media sources. Basic and optional fee-based services.
JK Group www.easymatch.com	Yes	Yes	Checking of organization and primary contact (one individual) information for clients using Bridger. Optional enhanced fee-based services: • Solicit up-to-date contact information for officers and board members. • Certify that recipient organizations' records are available on demand and adhere to accepted financial and record-keeping practices. • Assure grant funds were utilized as expected (expenditure responsibility) for domestic and international grants.

Source: Vendor reports of their system capabilities as of March 1, 2004. KindMark was invited and chose not to report.

10. Work with philanthropic colleagues to set standards.

11. Tell providers of your grants management, employee giving and compliance verification products and services what you need to streamline operations and reduce costs.

Should I stop making grants abroad? This is the last thing you should do. Peace, freedom, democracy, poverty alleviation, economic opportunity and human rights are the best antidotes to terrorism. Grants that support the achievement of such goals are the country's best protection from future attacks by terrorists.

Products and Services

In the rapidly evolving area of counter-terrorism compliance, vendors are learning along with everyone else.

What are commercial vendors of grants management software and ser-

vices doing? Almost all major vendors of commercial grants management software are now providing a way for grant-makers to check organization names (but not individuals) against the OFAC list.

Arlington Group's Easygrants software provides built-in checking for OFAC listed organizations. Bromelkamp's Pearl and MicroEdge's GIFTS software link to GuideStar with a single keystroke. If users have entered the nonprofit's EIN number, GuideStar automatically launches in a separate browser window, displaying the selected nonprofit's information page.

To date, MicroEdge and NPO Solutions are the only vendors that have developed a data export link to multiple commercial compliance services supporting a wide range of interdiction lists. That feature makes it easier for grantmakers to run automated checks of organizations and individuals on

demand—*before* making grants.

What are providers of workplace giving services doing to verify nonprofit compliance? All of the major vendors of workplace giving services have been responsive to the expressed needs of their corporate clients and currently include OFAC organization name checking as an integral part of their standard services.

What services does GuideStar provide? Since September 2001, GuideStar (www.guidestar.org) has been checking and identifying IRS designated 501(c)(3)s that are also on the OFAC list. This service is free, but only permits checking one organization at a time. There's currently no checking of individuals or additional interdiction lists. GuideStar reports that their site is updated within 24 hours of OFAC list changes.

What products and services are

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Case Study: Boeing

Carol Cella, global liaison for Community and Education Relations at Boeing (www.boeing.com), reports that 2003 was the company's first year of a formal global contributions program. The launch of this program was delayed until a comprehensive USA PATRIOT Act compliance checking process was in place. Boeing's staff consulted its own legal and contracts departments, as well as other grantmakers.

"Before September 11th, we had a fully automated, paperless operation," says Cella. "However, with the PATRIOT Act compliance requirements and technology limitations outside the United States, this just isn't possible anymore. We now find ourselves collecting and storing more paper. It's a step backwards."

She continues, "We use CyberGrants to manage our grants. It provides built-in OFAC list checking but only for the organization's name. Boeing requires much more than that. We selected Bridger World Tracker running on a local PC to supplement CyberGrants, because it includes a combined list; is easy to keep up-to-date (updates are typically provided a few times a week); is very fast to search; provides the level of accountability we require; and is very cost-effective. To use the two systems, we need to do manual copy and paste from CyberGrants and then create a separate text file before we can check our organizations and contacts using Bridger. We'd really like a more fully integrated system."

The process seems to be working well. According to Cella, "We've only had one organization name show up as a false positive—it was a vessel name that was part of a university name. Out of 374 names checked using Bridger, we've found six false positives. Most were caused by an alias in the system for 'The Doctor.'"

In closing, Cella points out, "Many of our grants are outside of the U.S. and they require more steps in the vetting process. But all of the organizations and names that have shown up during our verification checks have been U.S.-based 501(c)(3)s. This is clearly a U.S. grantmaking concern as well."

available from commercial compliance verification services? Compliance checking requires perfect execution of a boring and repetitive task—the kind of task that a computer does well and people do poorly. Many commercial compliance verification services are now available to automate the process of checking organizations and individuals. Most vendors of those services offer reduced prices for grantmakers. Some also offer discounts to users of selected grants management software products.

Here's what to look for when selecting one of those services:

■ Breadth and choice of verification lists

■ Accurate, easy-to-use and powerful search/matching tools

■ Automatic updating of lists

■ Interface with your grants management system (the more seamless the better) with the ability to check immediately

Case Study: Charles Stewart Mott Foundation

In the past two years, the Charles Stewart Mott Foundation (www.mott.org) has begun to implement systems and operational procedures to comply with the requirements of the USA PATRIOT Act. Mott's grantmaking focus is in the U.S., Central and Eastern Europe, Russia and South Africa.

"We believe that it's very important to 'know your grantee' and our staff members make regular site visits to our grantees," said Mary Gailbreath, manager of grants administration. "We believe that these visits, along with our list checking and other due diligence procedures, put us at a relatively low risk of a USA PATRIOT Act violation."

As required by Executive Order 13224 and the USA PATRIOT Act, Mott checks the federal government's published anti-terrorism lists. Staff exports organization names and contacts from Mott's GIFTS database and checks them against the anti-terrorism lists by using commercial compliance checking software, according to Gailbreath.

She added, "We've changed our standard commitment letter that we send to grantees to add specific provisions prohibiting violence and terrorist activities."

Gailbreath also noted that Mott has advised its grantees involved in re-granting activities about the counter-terrorism requirements and is developing a set of materials for those grantees.

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before making payments
- Capability to accept false positives
- Reporting
- Audit trail
- Processing speed
- Variable checking threshold
- Financially strong company with a focus on and expertise in compliance
- Service level agreement with guarantees that all lists are maintained up-to-date
- Security of your data (especially important for web-based systems)
- Cost.

Particular Concerns of Corporate Grantmakers

Corporate compliance and legal departments have been grappling with the business implications of counter-terrorism regulations and guidelines, but are now turning their attention to their impact on grantmaking operations. Many corporate grantmakers I spoke with expressed concern that even if they invest heavily in verification checking and do the best job they can of vetting nonprofits they could still inadvertently make a gift to an organization that is somehow affiliated to a terrorist and find their company's name in newspaper headlines. "The damage to our company's reputation would be terrible," said one corporate grantmaker.

Some corporate grantmakers are feeling particularly vulnerable for two reasons. Through their employee giving programs (pledges and matching gifts) they are making high volumes of relatively small donations to thousands of different organizations nationwide,

some with international programs. The cost of thoroughly vetting each organization by gathering and checking organization and individual contact information for all officers and board members is high and often exceeds the amount of the grant.

Another concern is the lack of control of and risk associated with donations being made by local business units to nonprofits in their communities. To reduce these risks, some companies are considering either not starting, eliminating or reducing the size of their international grant programs.

Grants Managers Network Survey Results

In February and March 2004, the Grants Managers Network affinity group of the Council on Foundations conducted an online survey of the philanthropic community to learn about current due diligence and USA PATRIOT Act practices and trends. A cross section of 157 grantmaking organizations participated in the survey.

Twenty eight percent of the 138 organizations that answered the question "Does your organization conduct USA PATRIOT verification of grantees?" reported that they are now doing some form of compliance checks. **FN&C**

Martin B. Schneiderman is president of Information Age Associates, Inc. (www.iaa.com), *a firm specializing in the design, management and support of information systems for grantmakers and nonprofits. He can be reached at* mbs@iaa.com.

Resources

USA PATRIOT Act (HR 3162)
www.epic.org/privacy/terrorism/hr3162.pdf

U.S. Department of the Treasury "Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices for U.S.-Based Charities"
www.treasury.gov/press/releases/docs/tocc.pdf

Treasury Department's Office of Foreign Assets Control
www.treas.gov/offices/eotffc/ofac/

COF Comments on Treasury Anti-Terrorist Financing Guidelines (June 2003)
www.cof.org/files/Documents/Legal/Treasury_Comments_06.03.pdf

COF Comments to the IRS on International Grantmaking (August 2003)
www.cof.org/Content/General/Display.cfm?contentID=791

The Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know
www.cof.org/files/Documents/Publications/2004/CounterTerrorismHandbook.pdf

United States International Grantmaking online resource concerning Anti-Terrorism Legislation & U.S. Treasury Guidelines
www.usig.org/treasuryregs.asp

Comments to the IRS on International Grantmaking, members of the Committee on Exempt Organizations, American Bar Association's Section of Taxation (July 2003)
www.abanet.org/tax/pubpolicy/2003/030714exo.pdf

Electronic Privacy Information Center USA PATRIOT Act Online Resource and Archive
www.epic.org/privacy/terrorism/usapatriot

Other Compliance Verification Services
OFACWatchDog™ (Attus) www.attustech.com
Bridger Insight (Bridger Systems)
www.ofaccompliance.com
OFACSearch (The Oasis Group)
www.ofacsearch.com