

How to Anticipate and Respond to Unfounded Arguments About Non-Profit Organizations and FATF Standards:

Thirteen Examples of Arguments and Counter-Arguments

“Non-profit organizations are “particularly vulnerable” to terrorist financing abuse and should be subjected to stricter controls in conformity with FATF standards”



This research was made possible by the generous support of the people of the United States through the United States Agency for International Development (USAID). The contents of this research is the responsibility of the International Center for Not-for-Profit Law (ICNL) and does not necessarily reflect the points of view of either USAID or the government of the United States.

NOTE ON THE USE OF THESE ARGUMENTS:

Financial Action Task Force (FATF) standards that apply to non-profit organizations (NPOs) are generally little known or understood, both by the NPO sector itself and by government agency officials charged with enforcing them. Therefore, it can be a great challenge to identify when anti-money laundering and counter-terrorist financing (AML/CTF) standards are improperly interpreted and implemented, resulting in excessive regulation of the NPO sector. This lack of understanding of the true scope of FATF standards prevents NPOs from being able to respond to erroneous or imprecise interpretations of those standards with evidence-based arguments.

In effect, the arguments pertaining to FATF standards that are often advanced by government technical officials, consultants, and trainers as grounds for excessive regulation of the NPO sector are frequently based on erroneous interpretations of those very standards. Our goal in presenting these counter-arguments is to provide a tool that will help NPOs confront excessive regulations with arguments based on correct representations of FATF standards. The country examples mentioned in the counter-arguments are shared for illustrative purposes; to the extent possible, NPOs should use data and examples relevant to their own countries.

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

"We didn't want to impose new legislation, but the FATF made us do it."

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

The Financial Action Task Force (FATF) is an inter-governmental body whose objectives are to set standards and promote effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other threats related to the integrity of the international financial system. To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. FATF Recommendation 8 requires that countries review the adequacy of laws and regulations that relate to non-profit organizations (NPOs) which might be abused for terrorist financing.

With regard to NPOs, FATF recommends that States first identify a subset of NPOs that is vulnerable to terrorist financing abuse. Next, countries should review the adequacy of existing laws and regulations pertaining to that subset.¹ FATF considers that in some cases, existing regulations are sufficient to deal with the actual risk of terrorist financing through NPOs, and no regulatory change is necessary.² Only when a State determines that existing laws and regulations are not enough to protect those NPOs identified as vulnerable, based on an assessment of risks, is a State required to impose new legal measures. Those measures, however, must be focused and proportionate to the risks identified.³ Any measures taken by countries to protect NPOs from abuse for terrorist financing must not interrupt or discourage legitimate charitable activities.⁴

1 Recommendation 8 and its Interpretive Note (IN) are available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

2 See IN ¶ 6.b.

3 See Ibid., ¶6.b.

4 See Ibid., ¶ 4 (d).

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

"NPOs are particularly vulnerable to terrorist financing abuse."⁵

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

FATF rejected this position in 2016; nevertheless, many representatives of States, NPOs, and financial institutions continue to use it as a reference point. Indeed, advocacy by NPOs organized worldwide convinced FATF that no evidence exists to determine that the NPO sector is "particularly vulnerable," and that standards based on this premise were inhibiting the full exercise of fundamental human rights such as freedom of association.⁶ It is possible that many people continue to repeat this mistaken understanding of the standard because the Financial Action Task Force's regional body for Latin America, GAFILAT, took roughly two years to update its website to reflect FATF standards as amended in 2016, and, therefore, the new standard was not within easy access of Spanish-speaking stakeholders. All references to Recommendation 8 and its Interpretive Note were taken from non-official translations available at the time of original publication of this document.

FATF has also rejected "one-size-fits-all" regulatory measures that indistinctly treat the entire NPO sector as vulnerable, recognizing that "not all NPOs are inherently high risk *and some may represent little or no risk at all.*"⁷ Any argument that the NPO sector is particularly vulnerable or that treats the entire sector in a uniform manner – as many statements below do – does not conform to FATF's recommendation to adopt the risk-based approach implicit in all 40 FATF Recommendations. It is important to bear in mind that the risk-based approach means that countries must first assess and determine risk, and, on that basis, impose any measures should existing measures be insufficient to address the risks.⁸

5 The FATF Recommendations. February 2012. http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

6 Global NPO Coalition on FATF. *Recommendation 8 & NPO Response*. <http://fatfplatform.org/special-recommendation-8/>

7 See IN ¶ 8.5.

8 See *Ibid.*, ¶ 4. (c).

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

“Governments need to supervise the entire NPO sector; or, at least, the majority of it, in order to “fish out” those NPOs that might be abused.”

“NPOs might be abused by terrorist organizations without realizing it; or, there may be terrorist organizations disguised as NPOs.”

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

This argument is the exact opposite of the risk-based approach required by FATF. AML/CTF regulations impose an additional administrative burden and put more pressure on the limited resources of government agencies responsible for their implementation. Instead of a focused approach that maximizes the use of resources to oversee NPOs that are actually at risk of being abused for terrorist financing, governments adopt an excessively wide and inefficient approach to “supervise” the entire non-profit organization sector.⁹

Public officials from several Latin American countries charged with implementing laws, regulations, and other AML/CTF measures recognized in interviews with ICNL that they do not have any evidence whatsoever that such cases take place in their countries. For example, one public official said, “We have told [FATF] evaluators that we have looked for risk situations but have found none, and that is why we do not have a risk baseline.”

Lacking evidence of any cases of NPOs having been abused for terrorist financing – the purpose of FATF’s Recommendation 8 – some experts refer to a few emblematic cases of NPO abuse, such as the case of the Instituto Noos in Spain or fraudulent contracts between NPOs and the Brazilian Ministry of Sports, in order to show that NPOs are indeed vulnerable.¹⁰ In those cases, access to sources of power in the government was the key to evading oversight controls and measures. That type of access is practically nonexistent for the vast majority of NPOs. These examples do not demonstrate that NPOs as a sector are susceptible to being abused for the crimes referenced in the FATF standards. Also, no evidence has been produced to date that demonstrates that the NPO sector is more likely to be abused for this type of crimes than the private sector (corporations).

9 Asia/Pacific Group on Money Laundering (APG). *Anti-money laundering and counter-terrorist financing measures*. Bangladesh. Mutual Evaluation Report. October 2016. Page 129. <http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsr/APG-MER-Bangladesh-2016.pdf>

10 Organizaciones Sin Fines de Lucro en esquemas de lavado y evasión fiscal (Non-profit organizations are involved in money laundering and tax evasion schemes). http://www.lavadolodinero.com/varios/editorial/Presentacion_ONG_2013.pdf (in Spanish)

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

"In our country (in Latin America) terrorism is not frequent. Money laundering is our main concern and, therefore, AML/CTF standards must be enforced on those NPOs at risk."

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

Public officials from several Latin American countries charged with implementing laws, regulations, and other AML/CTF measures recognized in interviews with ICNL that money laundering is their major concern. However, with regard to NPOs, Recommendation 8 refers only to terrorist financing. Moreover, anti-money laundering (AML) measures are part of other Recommendations (Recommendations 10, 11, 20, 22, and 23), which are specifically linked to other entities, such as financial institutions, money transfer services, casinos, real estate brokers, businesses that work with gemstones and precious metals, attorneys, notaries, accountants, etc. NPOs are not included, and there is no concrete evidence that the NPO sector is more vulnerable to AML offenses than other sectors. The obligations applied to those other sectors are not applicable to NPOs, since they are designed for for-profit professional entities (for example, most measures refer to "clients"). For these reasons, it is not necessary to enforce AML measures on the entire NPO sector, since doing so would clearly exceed the stipulations of Recommendation 8.¹¹

¹¹ The FATF Recommendations. February 2012. Updated October 2016. http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

“NPOs are not accountable to anyone and nobody knows what they do.”

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

NPOs with State recognition produce reports as required by existing law. For example, NPOs submit periodic reports to tax authorities, to the ministry in charge of registering and overseeing NPOs, to entities that provide public funding to NPOs, etc. In Mexico, for example, NPOs assert that they are obligated to submit nine types of reports to different public agencies, all containing similar information but in different formats. This demonstrates not only the high amounts of the information submitted to the State by NPOs, but also the heavy related administrative burden on the sector. NPOs are also accountable to their donors through financial and programmatic reports, and to their members in the form of reports and assemblies. In some countries, NPOs have adopted self-regulation systems or codes of conduct that have been recognized by GAFILAT evaluators as evidence of the low risk represented by the NPO sector.¹²

In addition, the former Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association noted that several States [...] enforce audit and reporting regimes for associations that are more complex, costly or intrusive than for businesses [...].¹³ The Special Rapporteur has also stated that [a]ny entity may potentially violate tax laws or engage in financial crime. There is no evidence that either sector poses more risk in this regard.¹⁴

12 Alianza ONG. *Califican ONG como sector de bajo riesgo para financiamiento del terrorismo* (NGO's are deemed low risk of terrorist financing). January 2018. <http://alianzaong.org.do/2018/01/califican-ong-sector-riesgo-financiamiento-del-terrorismo/> (in Spanish)

13 Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, ¶ 54. A/70/266 (4 August 2015), available at http://freeassembly.net/wp-content/uploads/2015/09/A_70_266_ENG.pdf.

14 See Ibid., ¶ 52.

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

"NPOs do not have any internal controls. They are often managed by a single person."¹⁵

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

In Latin America, the standards used to regulate NPOs with legal personality require particular levels of internal governance and accounting practice. For example, NPO by-laws must establish rules of governance and administrative controls, among others. In practice, however, government officials commonly have little knowledge of the NPO sector or the standards regulating it, which generates confusion and suspicion about the nature of the NPO activities, their internal governance systems, the environments in which they operate, or the negative impact of implementation of AML/CTF laws on NPOs. For example, some organizations provide education, health, or welfare services to communities that are very far away from urban areas and where the State is not present. Institutional or formal financial services may not exist in such communities, which forces NPOs to carry out informal commercial transactions. Dialogue could clarify many inaccurate perceptions about NPO activities.

15 Organizaciones Sin Fines de Lucro en esquemas de lavado y evasión fiscal (*Non-profit organizations are involved in money laundering and tax evasion schemes*).
http://www.lavadodinero.com/varios/editorial/Presentacion_ONG_2013.pdf (in Spanish).

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

“More stringent regulations and greater oversight controls help reduce the risk that NPOs will be used by terrorist organizations.”

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

Greater controls or more stringent regulations (for example, an increase in the information required by public agencies and financial institutions, suspensions or cancellation of legal personality due to technicalities, etc.) have not proven effective and can be counterproductive. Onerous requirements and disproportionate penalties imposed by the State not only limit the enjoyment of freedom of association in a manner that is not in conformity with State obligations, but also motivate some NPOs to operate informally, which could reduce their public accountability and increase risks.

When financial institutions implement AML/CTF regulations in a way that makes it difficult for NPOs to open bank accounts, the organizations are forced to operate outside of the formal financial system, such as carrying out cash transactions. In this manner, controls that hinder NPO operations actually contribute to increasing informal financial transactions and do not achieve their goal of reducing risk.

“FATF standards are minimum standards, and States may impose greater controls if they wish.”

FATF has highlighted that any controls imposed by a State must be implemented in conformity with the Charter of the United Nations and international human rights law.¹⁶ This means that if a State imposes controls beyond the minimum standards, it must ensure that the measures are consistent with State obligations under international human rights instruments that guarantee the right to freedom of association. FATF has also stated that AML/CTF measures should not impede the legitimate charitable activities of NPOs and that any action undertaken by the State should, to the extent possible, “minimize negative impact on innocent and legitimate beneficiaries of charitable activity” carried out by NPOs.¹⁷

16 See IN ¶ 2.

17 See *Ibid.*, ¶ 4. (e).

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

“FATF does not require that risk be determined in a participatory or public process. That is left to our discretion.”

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

It is true that States have discretion in determining how to conduct NPO risk assessments. However, FATF has recommended that, since not all NPOs are inherently at risk, and some may pose little to no risk, countries must make use of all sources of relevant information to identify that NPO subset which is at risk of terrorist financing abuse.¹⁸ For the purposes of identifying that subset, FATF has recommended that States launch programs for outreach to NPOs and raise awareness about NPO vulnerability and risks and the measures NPOs can take to protect themselves from abuse.¹⁹ The most recent country evaluations performed by FATF have considered whether governments have conducted outreach activities with NPOs, and whether NPOs have been involved in discussions about potential risks or have participated in education programs as discussed here. Several countries have received lower Recommendation 8 compliance ratings because they did not approach the NPO sector.²⁰

18 See *Ibid.*, ¶ 5.

19 See *Ibid.*, ¶ 6. (ii).

20 FATF. Mutual Evaluations. [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate))

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

“The State did take the opinions of NPOs in consideration when carrying out the NPO sector risk assessment.” [But the NPOs consulted are not representative or are all affiliated with a given political party, or the State convened the sector to participate in training workshops rather than dialogues on how to determine NPO sector risks.]”

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

FATF recommends that States work in collaboration with NPOs, NPO networks, NPO self-regulatory organizations, and donor organizations as a good practice to comply with States’ obligation to reach out to the NPO sector.²¹ However, surveys conducted by ICNL among NPO leaders with knowledge of AML/CTF and FATF standards, revealed that very few NPOs have participated in State-organized meetings for the purpose of conducting an NPO sector risk assessment.

21 Best Practices on Combating the Abuse of Non-Profit Organisations. ¶25. <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/bpp-combating-abuse-npo.html>

ARGUMENTS USED TO JUSTIFY EXCESSIVE AML/CTF REGULATION OF NPOS

COUNTER-ARGUMENTS BASED ON CURRENT FATF STANDARDS AND INTERNATIONAL GOOD PRACTICES

“The Ministry would like to consult the NPO sector and involve it in risk assessment and policymaking, but there are limits to our staff availability.”

True risk-based AML/CTF standards and policies would prevent oversight agencies from having to devote a disproportionate amount of time to those NPOs that represent little or no risk. Reducing the reporting burdens and other controls on NPOs that are not at risk of terrorist financing abuse would free public officials to address oversight in a more rational manner. More efficient oversight could leave more resources and staff available to consult with the NPO sector in order to clarify the subset of NPOs at risk. In this way, the State could better meet the FATF standards on the effectiveness of measures, including sustained outreach to the NPO sector.²²

“Banks must perform surveillance on NPO financial transactions because they entail high risk.”

Senior Financial Intelligence Unit (FIU) officials have recognized that controls imposed by financial institutions have been based on an excessive perception of NPO sector risk. According to a former Director of Legal Affairs of an FIU interviewed by ICNL, “In my opinion, the AML/CTF standards in force make normal NPO functioning difficult [...] During the last few years, we’ve seen how banks have overreacted to their own obligations as regulated entities and requested excessive information and documentation from NPO regarding the origin and destination of operational funds [...].” Santiago Otamendi, president of FATF, has recognized that both NPOs and their beneficiaries have been hurt as a result of bank practices to avoid risk in transactions involving NPOs.²³ Such practices force NPOs to find informal channels to perform financial transactions, which increases the risk that AML/CTF standards are meant to reduce and runs counter to the country’s own interest. FATF identifies as a good practice State collaboration with the financial sector to foster mutual understanding on the correct implementation of risk-based policies. Through dialogue with NPOs,²⁴ States and the financial sector should identify effective risk-mitigating measures that are acceptable to all parties.

22 See IN ¶ 4. (c) y ¶16.

23 A Plus. *Keeping it clean*. February 2018. <https://aplusmag.goodbarber.com/home-order/c/O/i/20307420/keeping-it-clean>.

24 Best Practices on Combating the Abuse of Non-Profit Organisations. ¶71.