

Global NPO Coalition on FATF
Issues regarding Revision of Recommendation 8 and its Interpretive Note

The Global NPO Coalition on FATF is proposing additional clarifications and wording of Recommendation 8 (R8) and its interpretative Note (IN), based on the draft IN shared by the FATF in April 2016. In reviewing the draft document we considered the FATF stated priority to align both documents with the results of the Typologies Report (2014) and the recently updated Best Practices Paper (2015). Our comments address: the need to further emphasize the focus on the subset of NPOs that are intended to be addressed by R8, to remove harmful requests that impede nonprofit activities as well as to strengthen the requirements for the risk-based, proportionate and targeted approach.

Key issues to be addressed in R8 original text and the latest draft IN:

1. Recommendation 8 should be revised to remove harmful language of "particularly vulnerable" and reflect risk based, proportionate and targeted approach;
2. Newly proposed IN banking-type *Know Your beneficiaries, associate NPOs and donors* due diligence requirement should be removed, as it is contrary to international humanitarian law and leads to overregulation and barriers to funding;
3. Throughout IN, and especially in Section 5 and 6, the terminology should be clarified to refer to the subset of NPOs found to be at risk, not all (or any) NPOs;
4. Reference to IN on state obligations towards international human rights law and international humanitarian law should be added;
5. IN Section 6 b (i-vii) should be removed, as it comprises a checklist of supervision and monitoring and is not consistent with risk-based approach;
6. Mention the role that NPOs can play in combatting terrorism.

Finally, we call on FATF to ensure that all documents are made public for wider consultation and do not limit them to selected groups or participants of its consultation meetings. This approach of transparent and inclusive consultation process is in line with good participation practices of other inter-governmental organizations. This has been reinforced by the Special Rapporteur on the rights to freedom of assembly and of association who, in his reports (*see A/69/365*) has stated that NPOs should be given the same access, input and power to multilaterals as the private for-profit sector. We request that FATF shares for wide consultation the revised IN after this meeting, that will incorporate input from the participations, as well as the draft R8 prior its submission for discussion at the June plenary.

Elaboration of points that need to be addressed and proposed wording for clarification:

1. **Recommendation 8**
 - We propose to delete words "*particularly vulnerable*".
 - Instead of current wording, state that NPOs "*may (in specific situations) be vulnerable, and countries should address identified risks with a proportionate and targeted approach. This includes NPOs that are subject to abuse....*"

2. Draft Revised Interpretive Note

NPOs appreciate FATF's input process and response to our input in the draft revision. There are numerous places in the draft where the IN has been substantially improved. However, additional concerns and inadequate or contradictory wording remains. These should be amended in order to align with the results of the Typologies Report and the recently updated Best Practices Paper.

Specific comments on the draft revision:

- The IN should include the reference to the obligation of states to ensure that any regulation of NPOs is consistent with their **obligations under international human rights law and international humanitarian law**.
- There should be **clear warnings against over-regulation** as contrary to the risk based approach, similar to what was elaborated in the Best Practice Paper.
- There should be mention of the role that NPOs can play in combatting terrorism
- The definition of NPOs inherently excludes sham/front organizations. The **IN should address the issue of sham/front organizations**, clearly stating these are not NPOs.

Comments on specific sections:

- Section 4 has a punitive tone. It **should acknowledge the contribution NPO work makes to human security and the dangers and challenges faced when working in insecure environments**.
- Section 4(d) references to transparency are **inconsistent with the risk based approach, as they propose which types of measures should be undertaken**, without taking into account the national risk assessment results and national context for risk mitigation measures.
- Section 4 could include a provision **calling for protection for whistleblowers and NPOs** that self-disclose problems when they are discovered.
- Section 4(e): The **last sentence undoes the protection of legitimate nonprofits** stated in the previous sentence and should be removed.
- Section 5: This removes the previous definition of a subset of NPOs considered to be most in need to risk mitigation measures. It leads to the problem that the **term NPO is used to refer to different sets of organizations, creating confusion that could result in improper implementation of R8 and overregulation**. Section 5 terminology should therefore be **clarified to reflect the intention of the IN as referred only to the groups found to be at risk**. (see also comment on section 6 below).
- Section 5: The role of **self-regulatory bodies in mitigating risk** should be taken into account. Where such bodies do not exist countries could encourage their formation.
- While FATF states the definition of NPOs "does not refer to the entire universe of NPOs, in Section 6 it uses the **term "NPOs" interchangeably to refer to both groups within its "functional definition" and the subset of groups found to be at risk based on a risk analysis**. This creates confusion and opens the door to over-regulation. **Section 6 terminology should**

therefore be clarified to reflect the intention of the IN as referred only to the groups found to be at risk.

- Section 6: The lead paragraph implies that 100% prevention of terrorist abuse must be achieved, but in practical terms it may not always be possible for any sector. **Such references should be replaced by “mitigating the risk” for terrorist financing abuse.**
- Section 6(a)(iv): This part should go further and state that **countries should take affirmative steps to ensure that NPOs have access to regulated financial channels** for their operations.
- Section 6 entire section (b) (i-vii) “illustrating” a targeted and risk based supervision or monitoring **should be removed, as it comprises a checklist of supervision and monitoring measures/standards**, whereas it should be up to the country to develop a specific mitigation measure **to an identified risk in the specific country context**. In addition, it reads like these measures must be applies to all NPOs, not just those found to be at risk. This creates confusion that can lead to over-regulation.

If section 6 (b) i-vii is nonetheless kept, below are some specific concerns:

- Section 6(b)(ii): requiring all NPOs to be licensed or registered raises **problems for freedom of association and assembly in practice as NPOs are particularly overregulated on that request. It is contrary to the international standards and inconsistent with jurisdictions in specific countries** where registration is not mandatory as such, or is mandatory only above certain threshold.
- Section 6(b)(iv): Expectations of NPOs' ability to "*fully*" report and account for expenditure and retain records should acknowledge that **there are a myriad of reasons as to why legitimate NPOs providing legitimate services and support to vulnerable communities might not be able to provide "full" documented audit trails of expenditure**. While all parties ought to commit to maximizing accountability, NPOs doing important community work sometimes operate in an environment of imperfect information and communications. In extreme situations, evidence of partners and communities **receiving external aid or support might jeopardize the lives of intermediaries, partners and community representatives**. Therefore Section 6(b)(iv) should **reflect that in specific extreme cases, reference to "all" funds and "fully" accounted for cannot be achieved**.
- Section 6(b)(v): It is **inappropriate to apply a banking-type Know Your Customer rule for individual program beneficiaries. International humanitarian law requires that aid be given on the basis of need alone**. In addition, this requirement can **seriously impede delivery of aid and development work, leading to inability to conduct important activities and programs**. In a world where there are more displaced people than any time since WWII it is unnecessary and unfeasible to conduct extensive background checks on each individual. In addition it may be difficult or in certain circumstances impossible for NPOs to identify all beneficiaries. Even more, this may lead to overregulation and barriers to funding especially from foreign donors.
- Section 6(b)(v): **IN should not dictate a particular method of due diligence for local partner organizations or other “associate NPOs.”** The context, including the location, type of program, experience and other factors, should dictate what is appropriate. This would be a good place to refer to self-regulatory standards that are designed for the NPO context.