

BRIEFER

Understanding and Responding to Government Over-Regulation based on Money Laundering and Terrorist Financing Restrictions¹

What is the Financial Action Task Force?

The Financial Action Task Force (FATF) is the intergovernmental money laundering and terrorist financing (ML/TF) watchdog. It sets international standards that aim to prevent ML/TF and has developed 40 [Recommendations](#) or FATF Standards to measure technical compliance, and 11 Immediate Outcomes, to assess effectiveness of government measures to combat ML/TF.

FATF monitors countries to ensure they implement the FATF Standards fully and effectively and holds to account countries that do not comply. Mutual evaluations are carried out through FATF-style regional bodies such as the East and Southern Africa Anti-Money Laundering Group ([ESAAMLG](#)) and the Inter-Governmental Action Group Against Money Laundering in West Africa ([GIABA](#)).

Why does FATF matter?

In a number of countries on the continent, non-profit organizations (NPOs) are facing over-regulation that governments justify on the basis of addressing ML/TF threats. Governments often state that their actions are necessary to comply with the standards required by FATF. The problem has manifested in several ways:

¹ © reserved, ICNL, 2021. We acknowledge use of information provided by the European Center for Not-for-Profit Law in their 2021 publication “*Impact of anti-money laundering and countering terrorism financing measures on non-profit organizations in the Eastern Partnership region.*” accessible at <https://ecnl.org/sites/default/files/2021-07/EaP%20AML%20CT%2002072021.pdf>.

- Governments are increasingly introducing new laws or seeking to amend existing laws and policies that tighten regulation of the non-profit sector. In the past two years alone, governments have introduced or are contemplating FATF-inspired NPO-legislation in **Ghana, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe**.
- Some governments are misusing or selectively applying anti-money laundering and countering the financing of terrorism (AML/CFT) laws to clamp down on the existence and activities of NPOs – often those involved in election-related and human rights activities, and those working against corruption.
- Governments are implementing additional burdensome requirements (often related to financial reporting and disclosures, and scrutiny of activities) on the entire non-profit sector, rather than using targeted measures against high-risk organizations. This has been documented most recently in **Tanzania, Uganda and Zimbabwe**.

All these trends are the “unintended consequences” of the FATF process. They often arise when a country is facing a FATF [mutual evaluation](#), or where FATF has placed a particular country under [increased monitoring](#). Countries currently facing increased monitoring include **Botswana, Burkina Faso, Mauritius, Senegal, South Sudan, Uganda and Zimbabwe**.

What is the FATF standard for NPO regulation?

Recommendation 8 and Immediate Outcome 10 are the standards for NPO regulation.

In terms of Recommendation 8, governments are required to “...*review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse...*”

In terms of Immediate Outcome 10.2, governments are required to show that they have “...*implemented a targeted approach, conducted outreach, and exercised oversight in dealing with NPOs that are at risk from the threat of terrorist abuse.*”

In order to assess whether a government is positively complying with its obligations, the following questions must be asked and answered in the affirmative:

1. Has the government utilized a **risk-based approach**? Has it identified, assessed, and understood the money laundering and terrorist financing risks

for the country, and taken action... aimed at ensuring the risks are mitigated effectively?

2. Has the government implemented a **targeted approach**, conducted outreach, and exercised oversight in dealing with NPOs that are at risk from the threat of terrorist abuse **without disrupting legitimate NPO activities**?
3. Has the government implemented the measures in a manner which **respects the country's international human right obligations**?
4. Has the government encouraged and undertaken **outreach and educational programs** to raise and deepen awareness among NPOs?

What kind of regulation is NOT in line with FATF standards?

The FATF Interpretive Note to Recommendation 8 on NPOs stresses that

*"[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities. ... Actions taken for this purpose should, to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity."*²

Moreover, United Nations (UN) experts agree that states must not abuse the necessity of combating terrorism by resorting to measures that unnecessarily restrict human rights. The law must provide clear safeguards to prevent abuse (of the limitations) and, if abuses do occur, to ensure that remedies are provided.³

Examples of regulation that is a misuse or abuse of FATF standards are:

BARRIERS TO THE FORMATION OF NPOS:

Overly complicated registration procedures, arbitrary denial of registration, annual registration, and/or a ban on registration.

SEVERE INTERNAL GOVERNANCE REQUIREMENTS:

Provisions that interfere with the freedom of founders and members to regulate the organization's internal governance, especially in the case of organizations that receive foreign funding.

ONEROUS / REDUNDANT REPORTING REQUIREMENTS:

Burdensome reporting requirements for NPOs and high penalties for non-compliance, especially if the state does not impose similar reporting requirements on all businesses in the territory. These may include requirements for: special staff

² FATF Best Practice, Combating the Abuse of Non-Profit Organisations (Recommendation 8), para. 3(c).

³ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/61/267, "Protection of human rights and fundamental freedoms while countering terrorism," (2007) at para. 11.

responsible for AML/CFT compliance; detailed activity reporting and assessment of work; compulsory annual auditing; all NPOs to complete a detailed annual reporting form; all foreign-funded NPOs to have a blanket obligation to declare all foreign contributions and get their accounts annually audited by a registered chartered accounting firm.

RESTRICTIONS ON ACCESS TO FUNDING:

Requirements for all NPOs to obtain authorization to receive foreign funds or carry out activities with foreign support; limitations on all NPOs from receiving or disbursing payments beyond very low thresholds; and/or requirements for all NPOs to register with the government office and obtain prior approval for the receipt of foreign funding for any voluntary activity on a project-by-project basis.

BROAD DISCRETION TO SEIZE NPO ASSETS:

Legislation that provides overly broad discretion to seize the property of NPOs without a prior court order, if it has been wrongly labeled as terrorist.

ABUSE OF STATE INVESTIGATIVE POWERS RELATED TO THE ASSESSING OF AML/CFT RISK:

Government investigations of NPOs for AML/CFT purposes without clear risk criteria or without a legal basis or reason; or requests to freeze an NPO's bank accounts under very vague AML/CFT suspicions. For example, authorities froze the bank accounts of #EndSARS campaigners in **Nigeria** on suspicion of terrorism financing; of a key human rights organization in **Tanzania** for allegedly engaging in "suspicious transactions;" and in **Uganda** for two local civil society coalitions that were leading election observation activities on charges of financing terrorism. **Ugandan** authorities also arrested a prominent human rights lawyer on money laundering charges. The prosecution continues.

FORCED DISSOLUTION OR SUSPENSION OF NPOS:

Legislation that proposes to facilitate easier suspension and dissolution of NPOs without full judicial safeguards as a response to AML/CFT concerns.

How can NPOs respond to government over-regulation?

ENGAGEMENT WITH FATF AND ITS REGIONAL BODIES

- In February 2021, FATF started an [initiative to study the unintended consequences](#) of the misapplication of the FATF standards, specifically on NPOs, and to begin identifying possible further mitigation options. NPOs may

send information relevant to the study to psc@fatf-gafi.org. The four main focus areas of the study are:

- (i) De-risking, or the loss or limitation of access to financial services. This practice has affected NPOs, money value transfer service providers, and correspondent banking relationships, in particular;
 - (ii) Financial exclusion, a phenomenon whereby individuals are excluded from the formal financial system and denied access to basic financial services;
 - (iii) Undue targeting of NPOs through non-implementation of the FATF's risk-based approach; and
 - (iv) The curtailment of human rights (with a focus on due process and procedural rights) stemming from the misuse of the FATF Standards or AML/CFT assessment processes to enact, justify, or implement laws, which may violate rights such as due process or the right to a fair trial.
- Information can also be sent to ESAAMLG or GIABA.
 - NPOs can also use the [communication channel](#) set up by FATF during the mutual evaluation process.

APPROACHING REGIONAL AND INTERNATIONAL HUMAN RIGHTS SPECIAL MECHANISMS

NPOs may report government over-regulation and rights abuses to:

- The African Commission on Human and Peoples' Rights – through the [Special Rapporteur](#) on Human Rights Defenders and Focal Point on Reprisals in Africa, and the Special Rapporteur's [Support Group](#) for the promotion and effective implementation of the Guidelines on Freedom of Association and Assembly in Africa.
- The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while [countering terrorism](#); and the UN Special Rapporteur on the rights to freedom of [peaceful assembly and of association](#).

For further information, technical assistance and support, reach out to us at africa@icnl.org.