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Muslim-Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund?

Nina J. Crimm*

INTRODUCTION

Islam and Judaism share numerous common beliefs and traditions. Like Judaism, some Islamic traditions and rituals can be traced to the Hebrew prophet Abraham (Ibrahim).¹ The Torah and the Qur'an both honor Abraham (Ibrahim) for his devotion and willingness to submit to, and sacrifice for, God.² One such shared form of religious sacrifice and spiritual tradition is obligatory charitable giving. Religious laws obligate Jews to give tzedakah.³ One of the five pillars of Islam is the imperative of

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1. See Mona Siddiqui, *Ibrahim—The Muslim View of Abraham*, BBC, <http://www.bbc.co.uk/religion/religions/islam/history/ibrahim.shtml> (last visited Sept. 13, 2007).

2. See *id.*

3. The word "tzedakah" is derived from the Hebrew word "tzedek," which means "righteousness, justice, fairness." Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). Perhaps the most important obligation Judaism imposes on the Jewish people is to perform deeds of justice. *Id.* The Torah commands: "Tzedek, tzedek, you shall pursue." Deuteronomy 16:20, *quoted in* Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). The Talmud instructs: "Tzedakah is equal to all the other commandments combined." TALMUD, Bava Batra 9b, *quoted in* Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). The Torah provides that Jews tithe ten % of their earnings to the poor

zakat.⁴

Both Islam and Judaism also have been the inspiration for long-standing intellectual heritages. Each religion claims learned and esteemed philosophers who have attempted to unite religion, knowledge, and faith.⁵ The most influential Jewish philosopher of the Middle Ages was Moses Maimonides.⁶ Among the themes on which he expressed profound sentiments was the giving of charity. He articulated eight degrees of worthiness in unselfish charitable giving, the second highest degree of which is giving to an unknown recipient who does not know the benefactor's identity.⁷ The value of this proposition has long been debated in religious and non-religious fora, but since 9/11 such discussions have adopted a more

every third year and annually give an additional percentage of their income. Deuteronomy 26:12.

4. See BBC, Religion & Ethics - Five Pillars of Islam, <http://www.bbc.co.uk/religion/religions/islam/practices/fivepillars.shtml> (last visited Feb. 28, 2008). The other four pillars, or tenets, of Islam are shahadah (reciting the basic statement of the Islamic faith), salat (performing the ritual prayer five times daily), sawm (fasting during daylight during the holy month of Ramadan), and hajj (making pilgrimage to Mecca). See *id.* These pillars are considered compulsory and not merely voluntary acts. See *id.* Indeed, the word "Islam" is Arabic for "submission," and the pillars are submissions to the deity, Allah. See James D. Davis, *Five Pillars Are Key to Keeping Faith: Responsibility, Prayer, Charity and Forgiveness Are Among Elements of Islam*, SUN SENTINEL (Ft. Lauderdale), Sept. 24, 2006, at 1J. The term "zakat" has its roots in the Arab word for "purification." See Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1.

5. See, e.g., Muslim Philosophy, The Philosophers, <http://www.muslimphilosophy.com/#people> (last visited Feb. 28, 2008); Ibrahim Bayyumi Madkour, *The Study of Islamic Philosophy*, AL TAWHID (1983), available at <http://www.al-islam.org/al-tawhid/study-philosophy.htm> (last visited Feb. 28, 2008); Radical Academy, Jewish Philosophy, <http://www.radicalacademy.com/adiphiljewishindex.htm> (last visited Feb. 28, 2008).

6. See MileChai.com, Judaism, <http://www.milechai.com/judaism/rambam.html> (last visited Feb. 28, 2008). Reflecting the Jewish sentiment that the greatness of Maimonides was like that of Moses, Maimonides' grave is inscribed with "From Moses to Moses, there were none like Moses." See Ilil Arbel, *From Moses to Moses There Were None Like Moses: Prophecy of Maimonides' Birth*, ENCYCLOPEDIA MYTHICA, <http://www.pantheon.org/areas/featured/maimonides/mm-1.html> (last viewed Feb. 28, 2008).

7. See C.G. MONTEFIORE & H. LOEWE, A RABBINIC ANTHOLOGY 670 n.30 (1974); JACOB S. MINKIN, THE WORLD OF MOSES MAIMONIDES WITH SELECTIONS FROM HIS WRITINGS 370 (1957). Maimonides articulated the highest degree of almsgiving as helping a hurt fellow Jew by giving him a gift or loan, entering into a partnership with him, or finding work for him so that he can be self-dependent. See *id.* at 369.

anxious tenor. Maimonides, however, actually accompanied his first opinion with a less remembered and less frequently discussed comment: "Related to this [second highest] degree is the giving to the [public] alms-chest. One should not give to the alms-chest unless he knows that the officer in charge is reliable, wise, [scrupulous] and a capable administrator."⁸

Since September 11, 2001, Maimonides' wisdom rings particularly true, especially for Muslim-Americans who seek to fulfill their Quranic duty of charitable giving. In the post-9/11 national security oriented environment, many Muslim-Americans face the dilemma of how to satisfy their zakat obligation. Muslims' stake in satisfying their duty of zakat cannot be overstated. They consider zakat a form of spiritual self purification and growth achievable by annually tithing at least 2.5% of their wealth to the needy.⁹ There is no substitute for zakat,¹⁰ and practicing zakat is essential for one's prayers to be accepted by Allah.¹¹

The Islamic holy month of Ramadan, which in the 2007 calendar year began on September 13, is an especially important time for Muslim charitable giving. Muslims believe that they gain greater heavenly rewards for zakat contributed during Ramadan,¹² so many who have not fulfilled their zakat duty completely during the year will give the balance during Ramadan.¹³ Moreover, during Ramadan, a time when Muslims

8. MINKIN, *supra* note 7, at 370.

9. See Davis, *supra* note 4; 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 (2004) [hereinafter Crimm, *High Alert*]. Shia Muslims are obligated to tithe twenty percent of their income beyond living expenses. See KHALIL JASSEM, ISLAMIC PERSPECTIVE ON CHARITY 19 (2006).

10. See JASSEM, *supra* note 9, at 78–79.

11. See Alex Cohen, *Day to Day Show: Muslims Concerned About Donations*, Interview of Imam Sayed Moustafa Al-Qazwini (Nat'l Pub. Radio broadcast July 26, 2007) [hereinafter *Interview of Imam Sayed Moustafa Al-Qazwini*].

12. See Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving with Caution*, L.A. TIMES, Nov. 6, 2004, at B2 (stating that "the blessings of all donations [during Ramadan] are multiplied 70 times in the book of God").

13. Robert King, *Beneficence Built on Faith; Hoosiers Bestow the Bulk of Giving on Churches, Religious Charities*, THE INDIANAPOLIS STAR, Nov. 21, 2004, at 1A. One report states that humanitarian charities can collect 40%-50% of annual donations during Ramadan. JASSEM, *supra* note 9, at 27.

fast during daylight,¹⁴ they usually monetarily fulfill their additional special benevolent obligation, zakat al-fitr. Zakat al-fitr is the duty of every Muslim, whether rich or poor, to feed a needy family during the three days of Eid, a celebration that marks the end of, and immediately follows, Ramadan.¹⁵

The Qur'an enumerates seven categories of people religiously sanctified and thus entitled to receive zakat: the poor, the deprived, the destitute, the homeless, the sick, the wayfarer, and others who are in need of help.¹⁶ There is widespread belief among Muslims that, according to the prophet Muhammad, the world's neediest Muslims, rather than persons of non-Islamic faiths, must be the recipients of obligatory zakat contributions.¹⁷ Potential Muslim recipients around the world have immeasurable stakes in receiving Muslim-Americans' zakat; without those donations they might suffer innumerable spiritual and physical deprivations, some life threatening.

In addition to zakat, many Muslims give sadaqah to aid the poor, to assist the incapacitated, to support social services, and to help other worthy recipients and causes.¹⁸ Sadaqah is voluntary and, in accordance with the Qur'an, should be given discreetly.¹⁹

14. BBC, Religion & Ethics—Five Pillars of Islam, *supra* note 4.

15. JASSEMM, *supra* note 9, at 81; Aziz Junejo, *Eid al Fitr Celebrates End of Ramadan Fasting, Gift of Self-Control*, SEATTLE TIMES, Oct. 29, 2005, at B5; Watanabe, *supra* note 12, at B2 (stating that failure to pay zakat al-fitr means to many Muslims that "their spiritual benefits gained from fasting and praying [during Ramadan] will be forfeited.").

16. See *Interview of Imam Sayed Moustafa Al-Qazwini*, *supra* note 11; MacFarquhar, *supra* note 4. Islam teaches that these seven categories of qualified recipients actually have a right or an entitlement to receive zakat. See JASSEMM, *supra* note 9, at 77.

17. See Damien Henderson, *Shaking the Pillars of Islam*, HERALD (Glasgow), Dec. 7, 2004, at 12. Many Muslims believe that Muslims need not be the recipients of non-obligatory charitable giving, known as sadaqah. *Id.*; Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origin, Impact, and Limitations of the Waqf System*, 25 LAW & SOC'Y REV. 841, 859 (2001) (stating that freed slaves could be waqf beneficiaries); see also Kathryn A. Ruff, *Scared To Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 472 (2005).

18. See Imam Ghazaali, *Sadaqah—Giving in Charity*, <http://www.uwt.org/Sadaqah.asp> (last visited Feb. 29, 2008); Azim Nanji, *Charitable Giving in Islam*, 5 ALLIANCE 1 (2000), available at <http://www.islam.co.za/awqafsa/sorce/library/Article%209.htm> (last viewed Jan. 2, 2008).

19. See Nanji, *supra* note 18. The belief that sadaqah should be given

For these reasons, it is considered true charity,²⁰ and its monetary value eludes calculation.²¹ Nonetheless, Muslim teachings, traditions, and culture, which regard the importance of sadaqah as “[o]n every bone of the fingers charity is incumbent every day,”²² suggest its possible magnitude.

Prior to 9/11, Muslim-Americans often transmitted their philanthropy by private channels or informal means, such as hawalas,²³ and sometimes through U.S.-based Islamic charities and mosques. Since 9/11, Muslim-Americans have been reluctant to make contributions through those intermediaries for fear that they might be subjected to surveillance, or, even worse, harassed, implicated, arrested, or prosecuted because of links to charities that the U.S. government currently deems, or in the future may consider, illegal providers of “material support” to terrorists and terrorist organizations.²⁴ Therefore, the ability to direct zakat—to

anonymously and without publicity parallels Maimonides’ opinion that unselfish, anonymous charitable giving to an unknown recipient signifies true charitable intentions. See *supra* note 7 and accompanying text.

20. See *id.*

21. Sadaqah includes pecuniary as well as non-monetary charity, such as performing good deeds. See Ghazaali, *supra* note 18. Thus, just as a voluntary donation of currency to a needy individual or institution is sadaqah, so too is a visit to a sick person, physical assistance given a frail individual, or recitation of a prayer for a dying person. See *id.*

22. MULANA MUHAMMAD ALI, A MANUAL OF HADITH ch. 16, available at <http://aaail.org/text/had/manhad/manhad.shtml> (last visited Jan. 2, 2008).

23. See Raja Kamal & Rosanne Model, *The Need for Smart Muslim Charities*, CHI. TRIB., Dec. 2, 2004, at C31. The hawala system is an informal paperless networked transfer money system (“hawala” means “trust”) used by Muslims throughout the world, including the United States. Alan Lambert, *Underground Banking and Financing of Terrorism, in Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT’L L. 3, 9, 14-15 (2002). A party pays cash to another person who immediately or later advances the equivalent funds to, or on behalf of, another designated party for a specified use abroad. *Id.* at 14-15. Thus, no official bank records are maintained, and the funds cannot be tracked by governmental authorities. *Id.* Some Muslim-Americans have thought that cash is harder to trace and thus more difficult to be tied to allegedly lending material support to a terrorist organization. Kim Vo, *Season of Charity: A Time of Scrutiny for U.S. Muslims*, SAN JOSE MERCURY NEWS (CA), Oct. 13, 2007, at 1B.

24. See, e.g., Greg Krupa, *Muslims Seek “Safe” Charities for Giving*, DETROIT NEWS, Oct. 5, 2007, at 1A; Audrey Hudson, *CAIR Concedes Membership Down; Blames U.S. for Linking It to Charity on Trial for Terrorist Ties*, WASH. TIMES, Aug. 22, 2007, at A1; MacFarquhar, *supra* note 4; Alan Cooperman, *Muslim Charities Say Fear Is Dammng Flow of Money*, WASH. POST, Aug. 9, 2006, at A3; *Talk of the Nation: Arab Americans*

whom and by what means they choose—can protect Muslim-Americans against not only religious deprivations and spiritual disgraces but also long-term or permanent stains on their personal and business reputations, and even criminal prosecution.²⁵

This paper addresses the existing inhospitable philanthropic environment for Muslim-Americans. Part I reviews relevant demographic information on Muslim-Americans. It shows that Muslim-Americans' financial resources for, and interest in, diaspora philanthropy certainly support an exploration of possible devices to help them accomplish their charitable giving obligations and goals. Part II focuses on reasons for Muslim-Americans' fears of charitable giving through existing channels. It briefly discusses legislation, regulatory projects, and governmental agencies' post-9/11 initiatives aimed at combating terrorism. It concludes that Muslim-Americans' fears of being linked to terrorists and terrorist activities when engaging in charitable giving are not unfounded. Part III addresses the chilled philanthropic climate by suggesting that it might be moderated through the creation of a centralized terror-free donor advised fund (DAF) aimed specifically at enabling Muslim-Americans to direct their zakat and voluntary contributions to needy Muslims in a few targeted regions and communities abroad. This part presents the essential

Hesitant to Donate to Lebanese Charities (Nat'l Pub. Radio broadcast Aug. 9, 2006); Caroline Preston, *Donations Trickle in to Charities Providing Middle East Aid*, CHRON. PHILANTHROPY, July 27, 2006, available at <http://philanthropy.com/free/update/2006/07/2006072701.htm>; Alex Cohen, *Marketplace: Giving to Muslim Charities* (Minn. Pub. Radio broadcast Oct. 4, 2005); Crimm, *High Alert*, *supra* note 9, at 1349 n.16 (listing numerous 2001-2004 news articles reporting donors' fears).

Since 9/11, Muslim-Americans have been encouraged to give not only voluntary contributions but also their obligatory zakat domestically rather than overseas. See Jane Lampman, *U.S. Muslims in a Quandary over Charities*, CHRISTIAN SCI. MONITOR, Nov. 17, 2004, at 11. Some Muslim-Americans have followed this suggested approach. See *id.*; see also Laurie Goodstein, *Since 9/11, Muslims Look Closer to Home*, N.Y. TIMES, Nov. 15, 2004, at F1. This does not resolve, however, the tension most feel as a result of the Islamic beliefs that Muslims must give zakat to the neediest, with priority to Muslims, and that these people reside in developing and underdeveloped countries abroad. See *supra* note 17 and accompanying text.

25. See Crimm, *High Alert*, *supra* note 9, at 1349. With readily available internet archives, accusations against individuals, whether true or not, can permanently sully reputations. These harmful stains become non-removable because internet searches can produce recent and age-old, long-buried information that may be accurate, wrong, incomplete, or outdated.

requirements for a “terror-free” DAF, including two checklists. Part III also sets forth a brief commentary on the financial feasibility of the proposed endeavor. The Conclusion suggests that the benefits of a terror-free DAF would inure not only to Muslim-Americans and the neediest Muslims abroad, but also to the American public.

I. DEMOGRAPHICS OF MUSLIM-AMERICANS

A definitive population count of Muslim-Americans has proved elusive, but estimates currently range from 2.35 million to seven million.²⁶ Nonetheless, a 2007 task force report for the Chicago Council on Global Affairs portrays the Muslim-American population as growing in number and diversity, representing many “ethnic, linguistic, ideological, social, economic, and religious groups.”²⁷ According to a 2007 survey by The Pew Research Center, 65% of Muslim-Americans are first generation immigrants to the United States, and another 7% are individuals whose parents are first generation immigrants.²⁸ Thus, fully 72% of Muslim-Americans are “foreign-born or have roots abroad.”²⁹ Nonetheless, The Pew Research Center found that Muslim-

26. See THE CHICAGO COUNCIL ON GLOBAL AFFAIRS, TASK FORCE SERIES, STRENGTHENING AMERICA: THE CIVIC AND POLITICAL INTEGRATION OF MUSLIM AMERICANS 23 (2007) [hereinafter STRENGTHENING AMERICA], available at http://www.thechicagocouncil.org/taskforce_details.php?taskforce_id=8; PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 10 (2007) [hereinafter PEW RESEARCH CENTER, MUSLIM AMERICANS], available at <http://people-press.org/reports/display.php3?ReportID=329>. One reason for the difficulty in accurately estimating the number of Muslim-Americans is that neither the Census Bureau nor the U.S. Citizenship and Immigration Services collects information on religious affiliation. STRENGTHENING AMERICA, *supra*, at 26. Another reason is that studies have relied on telephone calls to households that have landline service. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra*, at 26. There has been no way to include in the studies those households that have no telephone service or only cell phone service, which includes an estimated 13.5% of the public. *Id.* Finally, language skills of Muslims have proved challenging for researchers. See *id.* at 12–13. The 2.35 million estimate is that of the Pew Research Center. *Id.* at 10. The 7 million estimate is the result of a 2001 survey by the Hartford Institute for Religious Research. See *id.* at 13.

27. STRENGTHENING AMERICA, *supra* note 26, at 23.

28. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15.

29. *Id.* at 10.

Americans are "highly assimilated into American Society."³⁰

Most foreign-born Muslim-Americans have arrived in the United States since the beginning of the 1990s. Thirty-three percent immigrated to the United States in the 1990s, while 28% came in the current millennium.³¹ Twenty-three percent of foreign-born Muslim-Americans arrived in the 1980s and only 16% came earlier.³² Most settled in large metropolitan areas, with the largest concentrations living in Los Angeles, New York, Detroit, Washington, D.C. and Chicago.³³

According to The Pew Research Center survey, these immigrants are ethnically diverse. They are from at least sixty-eight different countries, with more than 37% arriving from the "Arab region" and a large proportion from South Asia.³⁴ Reflective of this profile, the largest percentage of foreign-born Muslim-Americans who emigrated from one country came from Iran (12%) and Pakistan (12%).³⁵ Thirty-two percent arrived from Bangladesh (5%), Bosnia and Herzegovina (4%), India (7%), Iraq (4%), Lebanon (6%), and Yemen (6%) combined.³⁶

The educations and household incomes of foreign-born and native-born Muslim-Americans are comparable to those of the U.S. population as a whole.³⁷ Approximately 10% of Muslim-Americans have attended graduate schools, and 14% have earned college degrees.³⁸ Forty-one percent of Muslim-Americans report

30. *Id.* at Report Summary.

31. *Id.* at 15.

32. *Id.*

33. LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH, UNIV. AT ALBANY, TOTAL MUSLIM POPULATION: METROPOLITAN REGIONS (2000), available at <http://mumford.albany.edu/census/data.html>.

34. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15. The Arab region is based on a UNDP classification, which defines the region as including twenty-two Middle Eastern and North African countries. *Id.* The United States Department of State also has published demographic information on Muslim-Americans, with estimates fairly similar to those of the Pew Research Center survey. U.S. Department of State, Varieties of Worship, <http://usinfo.state.gov/products/pubs/muslimlife/demograp.htm> (last visited Sept. 5, 2007). By comparison, the Council on American-Islamic Relations (CAIR) estimates that 29% of Muslim-Americans immigrants are from Arab states. CAIR, U.S. Immigrants from Muslim Populated Regions, <http://www.cair.com/asp/populationstats.asp> (last visited Feb. 29, 2008).

35. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15.

36. *Id.*

37. *Id.* at 18.

38. *Id.*

household incomes of at least \$50,000, and the percentages making \$25,000 and \$75,000 annually are approximately proportional to the same percentages for the U.S. population as a whole.³⁹ Nearly mirroring the sentiment of the general populace, almost one-half of Muslim-Americans perceive their personal financial situations to be good or excellent despite the fact that a lower percentage reports full-time employment than the general U.S. population.⁴⁰

Like Americans of other religious beliefs, Muslim-Americans' religious devotion to Islam ranges from "very orthodox to moderate to secular."⁴¹ The largest portion of Muslim-Americans, about half, identify themselves as Sunni, the largest Muslim tradition worldwide.⁴² Only 16% identify with Shia Islam, the second largest Muslim tradition across the world.⁴³ Twenty-two percent report they are Muslim without identifying a particular sect with which they are affiliated.⁴⁴

Muslim-Americans regard the role of Islam in their lives as significant. Eighty-six percent of all Muslim-Americans regard the Qur'an as the word of Allah, and 50% consider that the Qur'an must be read "literally, word for word."⁴⁵ At least 90% report that religion is either a "very important" part of their lives (72%) or a "somewhat important" part of their lives (18%).⁴⁶ Nearly one-quarter have a high religious commitment.⁴⁷ Not surprisingly,

39. *Id.* Sixteen percent of Muslim-Americans indicate household incomes of at least \$100,000; 10% report incomes of between \$75,000 and \$99,999; 15% specified incomes of between \$50,000 and \$69,999. *Id.* Fifty-nine percent of Muslim-Americans report household incomes of less than \$50,000. *Id.* Muslim-Americans from South Asia, especially India and Pakistan, tend to have a higher socio-economic profile, and perhaps are more "privileged," than other Muslim-Americans. See ADIL NAJAM, *PORTRAIT OF A GIVING COMMUNITY: PHILANTHROPY BY THE PAKISTANI-AMERICAN DIASPORA* 32-34 (2006); Karen Leonard, *American Muslims, Before and After September 11, 2001*, 35 EC. & POL. WEEKLY 2293, 2293 (2002).

40. PEW RESEARCH CENTER, *MUSLIM AMERICANS*, *supra* note 26, at 18-19.

41. STRENGTHENING AMERICA, *supra* note 26, at 23.

42. PEW RESEARCH CENTER, *MUSLIM AMERICANS*, *supra* note 26, at 21.

43. *Id.* These Shia are expected to tithe more zakat than Sunnis. See *supra* note 9.

44. PEW RESEARCH CENTER, *MUSLIM AMERICANS*, *supra* note 26, at 23.

45. *Id.*

46. *Id.* at 24.

47. *Id.* at 25. This includes attendance at mosque at least weekly and praying all five salahs daily. *Id.*

76% consider their duty of zakat "very important."⁴⁸ Nonetheless, many Muslim-Americans, slightly more than three-quarters, are concerned about the rise of Islamic extremism worldwide and disapprove of terrorists and their tactics.⁴⁹

From these demographics alone, it certainly is predictable that Muslim-Americans worry about how to fulfill their zakat and zakat al-fitr obligations, as well as how to give sadaqah. It is impossible to estimate the monetary value of sadaqah donated and zakat required of, and given by,⁵⁰ Muslim-Americans. Despite the lack of actual data, anecdotal evidence suggests that the greatest portion of donated funds before 9/11 may have been directed overseas.⁵¹ This pattern would be consistent with the widespread belief that zakat must go to the neediest Muslims across the world.⁵² Moreover, nearly 40% of Muslim-Americans emigrated from abroad only during the past two decades.⁵³ Many of the immigrants are educated, a significant proportion of these consider themselves financially secure, and most are quite religious.⁵⁴ They have special desires to satisfy their obligatory and voluntary philanthropy by sending money to help individuals in their countries of origin, many of which are war-torn, impoverished, and perceived as home to the neediest Muslims.⁵⁵

48. *Id.*

49. *Id.* at 49.

50. One researcher suggests that "if each of America's estimated six million Muslims were to donate at the rate of the average American, their total giving would exceed \$5.3 billion annually." JASSEMM, *supra* note 9, at 25. It is impossible, however, to determine whether American-Muslims donate at the average rate of all Americans, or to rely upon a population estimate of six million American-Muslims. See *supra* note 26 and accompanying text (indicating that population estimates range between 2.35 million and seven million).

51. See Goodstein, *supra* note 24, at F1. But see JASSEMM, *supra* note 9, at 31 (stating that at their peak before 9/11, Muslim-American charities annually directed less than \$23 million overseas, representing a small portion of Muslim-American donations).

52. See *supra* note 17 and accompanying text.

53. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 1.

54. *Id.* at 2, 18-26.

55. See, e.g., Lampman, *supra* note 24, at 11; Goodstein, *supra* note 24, at F1; see Ruff, *supra* note 17, at 471. One researcher suggests that often diaspora donors prefer to give to needy individuals rather than to causes because of a low level of trust of government and institutions, including nonprofits. Adil Najam, *Diaspora Philanthropy to Asia* 119, 142-43, in BARBARA J. MERZ, ET AL., DIASPORAS AND DEVELOPMENT (2007).

As a result of their post-9/11 heightened awareness of the operations of terrorists and terrorist organizations, these foreign-born Muslim-Americans have become increasingly hesitant to undertake diaspora philanthropy.⁵⁶ Likewise, native-born Muslim-Americans have become wary of directing their sadaqah, zakat, and zakat al-fitr contributions abroad to help cure Muslims' deprivations, even deprivations that may give rise to or exacerbate terrorism, such as poverty.⁵⁷ Consequently, many of these well-intentioned people cautiously have sought legitimate, safe, and accessible channels for their charitable giving. Some have turned to wiring money to people or villages through relatives,⁵⁸ others have searched for more formal channels but have encountered significant frustrations and challenges.⁵⁹

II. CONCERNS OF MUSLIM-AMERICANS ARE NOT UNFOUNDED

Keen on preventing further acts of terrorism after 9/11, the U.S. government expanded the scope and reach of legislation, regulatory projects, administrative enforcement initiatives, civil and criminal sanctions, and diplomatic efforts aimed at enhancing national security. These laws and programs have tremendously affected all Americans, but perhaps their greatest impacts have been on Muslim-Americans.

In response to the 9/11 attacks, on September 23, 2001, President George W. Bush issued an Executive Order⁶⁰ in which he declared a national emergency to deal with the threat of future

56. See *supra* note 24 and accompanying text.

57. See Lampman, *supra* note 24, at 11; Goodstein, *supra* note 24. See also *supra* note 24 (commenting on the tension in giving domestically rather than abroad).

58. See Tom Pope, *Charity as a Duty*, NONPROFIT TIMES, Sept. 1, 2006, at 1(5).

59. See *supra* note 24 and accompanying text. Some Muslim-Americans have transmitted funds to zakat committees in the Middle East, but this approach is dangerous. Despite the U.S. government indirectly having transmitted humanitarian financial aid to Palestinian occupied territories in the Middle East through zakat committees, it alleges that such committees have ties to terrorist organizations, including Hamas. See MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007, at A14.

60. Exec. Order No. 13,224, § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001). For further discussion of Executive Order 13,224 and the authorizations it conferred, see Crimm, *High Alert*, *supra* note 9, at 1364-94.

terrorism. Although the sources of the financial resources of the 9/11 attackers were not then known,⁶¹ he surmised that they were expansive and included individuals, nongovernmental organizations (NGOs) and other entities.⁶² He provided for the application of future financial sanctions because he considered “dual organizations”⁶³—those having both military and charity operations—and other NGOs to be attractive targets for terrorists’ exploitation, and subsequently capable of funding terrorists.⁶⁴ The perceived susceptibility of charities results from their (1) public aura of trustworthiness combined with unwitting donors, (2) engagement in some legitimate charitable activities, (3) potential access to considerable financial resources, (4) cash-intensiveness, (5) possible global presence, (6) limited governmental oversight, especially abroad, and (7) typically one-directional transferal of donations and other funds.⁶⁵ Thus, pursuant to presidential powers under the International Emergency and Economic Powers Act, President Bush froze assets of individuals and groups on an annexed list of designated foreign

61. The 9/11 Commission Report, issued in 2004, reported that investigations revealed that al Qaeda primarily financed the attacks through funds raised by individuals and charitable organizations in Saudi Arabia and other Gulf nations. THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 172 (2004).

62. 66 Fed. Reg. at 49,079.

63. Such “dual organizations” include the well-established groups of Hamas and Hezbollah. Dual organizations can operate hospitals, schools, and religious institutions, and can provide public services and relief, but can also be fertile grounds to recruit extremists for terrorist activities. See *Violent Islamist Extremism, Government Efforts to Defeat It: Hearing of the S. Homeland Security Comm.* (May 10, 2007) [hereinafter *Testimony of Chip Poncy*] (testimony of Chip Poncy, Director of Strategic Policy, Treasury Department’s Office of Terrorist Financing and Financial Crimes), available at Federal News Service, LEXIS.

64. Press Release, Office of the Press Secretary, President Freezes Terrorists’ Assets (Sept. 24, 2001), available at <http://whitehouse.gov/news/releases/2001/09/20010924-4.html>; *Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism: Message from the President of the United States*, 147 CONG. REC. H5964 (Sept. 24, 2001).

65. See *Islamic Extremism: Hearing Before the Committee on S. Homeland Security and Governmental Affairs* (May 10, 2007) [hereinafter *Statement of Chip Poncy*] (statement of Chip Poncy, Director of Strategic Policy, Treasury Department’s Office of Terrorist Financing and Financial Crimes), available at CQ Congressional Testimony, LEXIS.

persons,⁶⁶ persons acting on behalf of those on the list, and persons who have committed, or are significant risks for committing, terrorist acts.⁶⁷ The entire annexed list contained the names of twenty-seven Muslim and Arab persons, known as specially designated global terrorists (SDGTs) and specially designated nationals (SDNs), twelve individuals and fifteen groups, including three NGOs.⁶⁸ Moreover, the Executive Order authorized government officials to identify more SDNs and SDGTs and to freeze the assets of any foreign or domestic person associated with SDNs and SDGTs or “determined to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of” terrorism.⁶⁹

Congress quickly followed by enacting the USA Patriot Act (Act) on October 26, 2001, to enlarge the president’s authority and the ability of government agencies to engage in an unconventional “war on terrorism.”⁷⁰ The Act permits the government to monitor, identify, investigate, regulate, disrupt, and dismantle not only terrorist operatives and their operations, but also their supporters.⁷¹ It enables the government to freeze and confiscate assets it perceives as destined to support terrorism.⁷² Individuals, as well as traditional and nontraditional structures, such as § 501(c)(3) charitable organizations, are subject to these laws, which provide civil and criminal sanctions.⁷³ Although later questioned by scholars and courts,⁷⁴ Congress purportedly intended to protect innocent, well-intentioned donors by predicating an individual

66. The term “person” includes individuals, groups, and entities.

67. Exec. Order No. 13,224, § 1, 66 Fed. Reg. at 49,079.

68. Annex, 66 Fed. Reg. at 49,083.

69. Exec. Order No. 13,224, § 1, 66 Fed. Reg. at 49,079.

70. Uniting and Strengthening America by Proving Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, Title I, § 106, 115 Stat. 272 (2001).

71. 50 U.S.C. §1702(a)(1) (2007), as amended by the USA Patriot Act. The USA Patriot Act expanded the authority of the President under the International Emergency and Economic Powers Act to regulate and impose sanctions with respect to a wide range of transactions.

72. *Id.*

73. For a broader discussion of the various laws, penalties, and their applications see Crimm, *High Alert*, *supra* note 9, at 1354-1437.

74. See, e.g., Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 61-71 (2005); Crimm, *High Alert*, *supra* note 9, at 1410-14.

donor's violation of the laws upon actual or constructive knowledge⁷⁵ that the funds might be used for the support of terrorism, but without requiring a specific evil intent to facilitate terrorism.⁷⁶ Since 2001, Congress has extended antiterrorism laws,⁷⁷ some aimed directly at financing,⁷⁸ and government agencies have expanded their programs and initiatives to combat terrorism.⁷⁹

By September 11, 2007, implementation of counterterrorism plans by the Department of Treasury and other agencies had produced notable impacts. The government had designated forty-five Islamic-related charitable organizations, all of which have engaged in some charitable services or financial assistance to the needy, as proscribed SDNs or SDGTs.⁸⁰ Of these, eight currently have or formerly had offices in the United States.⁸¹ Additionally, the government had designated eight entities as potential fundraising front organizations.⁸² As part of its enforcement efforts, the government had seized and frozen the assets of several designated charitable organizations,⁸³ suspended the tax-exempt

75. 18 U.S.C. § 2339B requires "knowledge" for violation, but legislative history reveals the government standard of "knowledge" as including actual knowledge or situations in which a person "should have known." *Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary* 107th Cong. 3-12 (2001) (statement of John Ashcroft, Att'y Gen. of the United States), available at <http://www.house.gov/judiciary>.

76. Courts and scholars have suggested that a specific intent requirement for violation of the laws could permit persons to avoid liability. See Chesney, *supra* note 74, at 12-18, 61-71; Crimm, *High Alert*, *supra* note 9, at 1410-14.

77. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (Mar. 9, 2006).

78. *Id.* §§ 401-410.

79. See, e.g., *Testimony of Chip Poncy*, *supra* note 63.

80. U.S. Department of the Treasury, Protecting Charitable Organizations, <http://www.treas.gov/offices/enforcement/key-issues/protecting/fto.shtml> (last visited Sept. 19, 2007). Some are considered al-Queda related; a few are listed as Hamas-related; several are designated as Hezbollah-related; and one is listed as Palestinian Islamic Jihad-related. *Id.* See *Statement of Chip Poncy*, *supra* note 65.

81. U.S. Department of the Treasury, Protecting Charitable Organizations, <http://www.treas.gov/offices/enforcement/key-issues/protecting/fto.shtml>.

82. *Id.*

83. In July 2007, the government designated Goodwill Charitable Organizations as an SDN and froze its assets, asserting that the organization

status of some Muslim-American charities without providing these entities any opportunity for prior challenge,⁸⁴ caused a number of Muslim-American nonprofit organizations to close,⁸⁵ prosecuted a few charities,⁸⁶ and in a federal district court case named as unindicted co-conspirators more than three hundred Muslim organizations not on the government's SDN and SDGT lists.⁸⁷

In this same six-year period after 9/11, the U.S. government placed thousands of individuals, most with Muslim names, on its lists of SDNs and SDGTs.⁸⁸

was a fundraising arm for the Martyrs Foundation, which allegedly funnels money to Hezbollah, Hamas, and the Palestinian Islamic Jihad. See Paul Egan, *Feds Raid Charity Suspected of Aiding Hezbollah*, DETROIT NEWS, July 25, 2007, online edition, available at LEXIS; Suzanne Perry, *Federal Authorities Raid Two Mich. Muslim Charities*, CHRON. PHILANTHROPY, Aug. 9, 2007, at 26. Prior to July 2007, the government froze assets of numerous other Muslim nonprofits. See, e.g., *U.S. Freezes Assets of Hezbollah Unit, Donations to Militant Group Banned*, WASH. POST, Aug. 30, 2006, at A13.

84. See *IRS Suspends Tax-Exempt Status of Michigan Charity for Terrorist Activities*, DAILY TAX REP., July 31, 2007. 26 U.S.C. § 501(p), added by the Military Tax Family Relief Act of 2003, permits the I.R.S. to suspend the tax-exempt status of designated terrorist organizations. Pub. L. No. 108-121, § 108, 117 Stat. 1335, 1339 (2003). Suspension of tax-exempt status does not preclude the entity from continuing operations. For further discussion of this statute, see Crimm, *High Alert*, *supra* note 9, at 1424-26.

85. See Robert Barnes, *Case Against Islamic Charity Opens; Now-Shuttered Organization Funneled Money to Militants, Prosecutors Say*, WASH. POST, July 25, 2007, at A6; Muslim Public Affairs Council, Muslim Groups Form National Council of American Muslim Non-Profits (Mar. 30, 2005), <http://www.mpac.org/article.php?id=74> (commenting that as of 2005, the government had shut down twenty-five Muslim-American nonprofit organizations).

86. Most recently, the trial of the Holy Land Foundation for Relief and Development, accused of indirectly aiding Hamas by sending millions of dollars to zakat committees—none of which has been placed on our government's lists of SDNs and SDGTs—opened in Texas on July 16, 2007. See Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007, at A14; Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 18, 2007, at A20; Jack Douglas, Jr., *Scrutinized for Years, Foundation Faces Trial*, FORT WORTH STAR-TELEGRAPH, July 15, 2007, available at LEXIS.

87. See Neil MacFarquhar, *Muslim Groups Oppose a List of Co-Conspirators*, N.Y. TIMES, Aug. 16, 2007, at A18 (reporting that the Department of Justice named as co-conspirators in the Texas trial of Holy Land Foundation for Relief and Development foreign and U.S.-based organizations, including the Council on American-Islamic Relations, Islamic Society of North America, and the North American Islamic Trust).

88. U.S. Department of the Treasury, Specially Designated Nationals

The Department of Justice tried and won cases against Muslim individuals in federal courts for material support of terrorism and other related terrorism charges.⁸⁹ In some early cases, court decisions left the impression that, despite the requisite “should have known” statutory intent,⁹⁰ even innocent donors can be prosecuted for supporting terrorism.⁹¹ Moreover, the government subjected mosques to surveillance, wiretapped phones, fingerprinted and registered more than eighty thousand Arab and non-national residents, identified eight thousand for questioning, and arrested or detained approximately five thousand.⁹²

The Federal Bureau of Investigation (“F.B.I.”) and Treasury Inspector General for Tax Administration added to uncertainties in the philanthropic environment. The F.B.I. contributed to the attitude that Middle Easterners and South Asians, some of whom are Muslims, are a population without certain legal rights and protections. It issued well over one hundred thousand secret warrantless demands, known as national security letters, to financial institutions, telecommunications companies, and other businesses to obtain data on unknowing targeted individuals,

List (SDN), <http://www.treas.gov/offices/enforcement/ofac/sdn/> (last visited Sept. 19, 2007). The Terrorist Screening Center, a multi-agency organization administered by the F.B.I., compiles a terrorist watchlist by consolidating domestic and international terrorist information from various governmental sources, including border patrols, visa reviewers, and other front-line law enforcement authorities. AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, AUDIT REPORT 07-41 1, iii (Sept. 2007). Presumably the compilation of more than 700,000 names, which a recent audit by the Office of the Inspector General of the Department of Justice reveals is faulty, contains many who are non-Muslim. *See id.* at xxi; Philip Shenon, *Inspection Notes Errors in Terror List*, N.Y. TIMES, Sept. 7, 2007, at A24.

89. *See* Bob Fernandez, *31 Wins, 6 Losses & 1 Tie*, A.B.A. J., Sept. 2007, at 24. In the trial of Holy Land Foundation for Relief and Development, five men are accused of illegally sending millions of dollars to Hamas through the organization, and those five defendants argue that they only wished to ease the deprivations of children and families in their Middle East homeland. *See* Jason Trahan, *Holy Land Case Starts with Focus on Intent: Dallas Lawyers Insist 5 Strived To Ease Suffering; Prosecutors Say Goal Was To Fund Terror*, DALLAS MORNING NEWS, July 25, 2007, at B1.

90. *See supra* note 75 and accompanying text.

91. *See, e.g.*, Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133–35 (9th Cir. 2000), *aff'd in part and rev'd in part* Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003).

92. STRENGTHENING AMERICA, *supra* note 26, at 28.

some of whom are likely Muslims, and networks of people with whom the targets purportedly had connections.⁹³ The Treasury Inspector General for Tax Administration discredited the completeness of the government's official master list of terrorists. During summer 2007, he released a report that indicated the processes for compiling the government's list of terrorists are deficient, and likely fail to identify all persons and groups whose names should be on the list.⁹⁴ This revelation further stimulated fears of donors and charitable organizations that, even if they consulted the list, they nevertheless might direct funds to persons who support terrorist activities. The resulting recommendations of the Treasury Inspector General suggested that the government considerably ramp up its efforts. This suggestion led to greater insecurity among donors unsure of what steps the government might take next.⁹⁵

These government actions have received substantial media coverage, which both Muslim and non-Muslim Americans have followed closely. The series of acts has been a strategically powerful means of repeatedly alarming many people, perhaps with escalating effect. While initial governmental measures created a significantly chilled philanthropic climate for well-intentioned Americans, especially Muslim-Americans, the unfriendliness of the environment seemed to increase as the government disclosed new actions and recommendations for

93. Editorial, *The Wrong Balance on Civil Liberties*, N.Y. Times, Sept. 16, 2007, § 4, at 9 (indicating contents of a March 2007 report from the Department of Justice). See Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. TIMES, Sept. 9, 2007, at A1 (commenting on the scope of the people impacted by the data mining resulting from issuance of national security letters); Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1 (stating that according to a Department of Justice study, the Federal Bureau of Investigation (F.B.I.) issued more than 9,000 national security letters in 2005 alone). On September 6, 2007, Judge Victor Marrero declared unconstitutional revisions enacted in 2006 to the USA Patriot Act that expanded the F.B.I.'s power to use national security letters and the 1986 law that authorized the F.B.I. to issue the exigent letters without a warrant. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

94. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, SCREENING TAX-EXEMPT ORGANIZATIONS' FILING INFORMATION PROVIDES MINIMAL ASSURANCE THAT POTENTIAL TERRORIST-RELATED ACTIVITIES ARE IDENTIFIED, May 21, 2007, available at <http://www.tigta.gov>.

95. *Id.*

changes. This climate of fear begs for us to explore whether there might be a feasible means of resolving the Muslim-Americans' poignant charitable giving dilemma.

III. CAN THE CHILL BE MODERATED, AND IF SO, HOW?

The U.S. government recently signaled some attempt to reverse the inhospitable philanthropic environment. It created and implemented various educational and community outreach programs targeted to Muslim-Americans, including initiatives aimed directly at assisting charitable organizations.⁹⁶ But those projects have received limited widespread press. In response to a request by Muslim-American charities,⁹⁷ the Department of Treasury since 2002 has issued two iterations of "Anti-Terrorist Financing Guidelines"⁹⁸ ("Guidelines") to assist U.S.-based charities in avoiding ties to terrorist organizations and "abuse" or "exploitation"⁹⁹ by terrorists. The Guidelines present broad

96. See *Testimony of Chip Poncy*, *supra* note 63 (outreach programs include discussions of the government's counterterrorism policies, development of relationships with communities to develop guidance on means to promote charitable giving, and discussions with the nonprofit sector about developing mechanisms for delivering aid to places of need).

97. Press Release, U.S. Department of the Treasury, PO-30607: Response to Inquiries from Arab American and American Muslim Communities for Guidance on Charitable Best Practices (Nov. 7, 2002), <http://www.treas.gov/press/releases/po3607.htm>.

98. The Department of Treasury released its first version in November 2002. U.S. DEPT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002). Thereafter, it requested comments from the charitable sector, responded, and revised the Guidelines, and finally released a revised third version on September 29, 2006. U.S. DEPT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), *available at* http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines_charities.pdf; see U.S. Department of the Treasury, Treasury Updates Anti-Terrorist Financing Guidelines for Charitable Sector, <http://www.treas.gov/press/releases/hp122.htm> (last visited Feb. 29, 2008).

99. The term exploitation is seen to include the employment of "charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and activities." ANNEX TO GUIDELINES, U.S. DEPT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), *available at* http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf. Examples given involve such "dual" militaristic and humanitarian organizations as Hezbollah, Hamas and others. *Id.*

governing, fiscal, and programmatic principles aimed at enhancing charities' accountability and transparency. Although supportive of those goals, commentators in the nonprofit sector, practitioners, and academics have criticized the Guidelines as excessively burdensome and beyond the abilities of most charities, inappropriately discouraging of international charitable activities by U.S.-based nonprofits, unlikely to have a preventive impact on terrorist financing, taking an untenable one-size fits all approach in several important areas, suggesting principles irrelevant to the goal of preventing diversion of funds to terrorists, overlapping in certain respects with existing state and federal regulation of charities, and failing to assure protection against potential liability even when followed.¹⁰⁰ In March 2007, the Department of Treasury's Office of Foreign Assets Control (OFAC) released a "Risk Matrix for the Charitable Sector" (Matrix) based largely on the Guidelines. The Matrix attempts to help charities identify and categorize hazard susceptibilities connected with their processes of collecting and disbursing funds, including disbursement to high-risk areas abroad. OFAC intends that the Matrix assist charities in formulating risk-based approaches, compliant with U.S. laws and the Guidelines, for tackling their vulnerabilities to possible exploitation or abuse by terrorists.¹⁰¹ The Matrix may prove somewhat helpful to charities, but it neither guarantees protection against terrorist abuse of charitable organizations¹⁰² nor shields against criminal or civil liability for

100. See, e.g., Press Release, OMB Watch, Treasury Releases Third Version of Anti-Terrorist Financing Guidelines, <http://www.ombwatch.org/article/articleview/3614/1/84/?TopicID=2> (commenting that the fundamental problems in the Guidelines' first version remain in the third version); Barnett F. Baron, *The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, But They Have Had a Chilling Impact on U.S.-Based Muslim Charities*, 25 PACE L. REV. 308-10 (2004) (criticizing the first iteration of the Guidelines); Crimm, *High Alert*, *supra* note 9, at 1440-47 (commenting on criticisms of the first version of the Guidelines).

101. U.S. Department of the Treasury, Office of Foreign Assets Control, Risk Matrix for the Charitable Sector, www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

102. See Naomi Munk & Suzanne E. Coffman, *Blocking Terrorist Funding: Treasury's Risk Matrix for the Charitable Sector*, Aug. 2007, <http://www.guidestar.org/DisplayArticle.do?articleId=1153>. The process utilized by OFAC in producing the Risk Matrix has been criticized for failing to solicit input from the nonprofit sector. See Kay Guinane, *Treasury Posts Risk Matrix for Charities, Meant To Help Avoid Financing Terrorism*, April 10,

violation of any law or regulation.¹⁰³

The nonprofit sector, including nonprofit organizations specifically aimed at Muslim-Americans, has offered some limited ideas intended to improve the charitable giving climate. Muslim Advocates, a Muslim advocacy organization in the U.S., drafted guidance aimed at assisting Muslim-American donors in selecting reputable and effective charitable organizations that can direct donations to intended charitable causes.¹⁰⁴ The proffered suggestions highlight considerations to which donors should be attentive, but they are quite general and cannot give donors real comfort that ultimately their contributions will be protected from ties to terrorism. The National Council of American-Muslim Nonprofits, an umbrella organization, announced in 2005 that it would create guidelines to assist charities to protect against terrorist exploitation,¹⁰⁵ but they have not been produced. To date, Muslim-American charities have been unable to coordinate efforts to enable Muslim-Americans to give money lawfully to an acceptable menu of legitimate projects abroad.¹⁰⁶ Although Muslim-Americans and others have suggested that the Department of Treasury develop a "white list" of acceptable Muslim charities in compliance with its Guidelines,¹⁰⁷ the government has not done so.

Thus far, there is no safe and accessible giving vehicle that assures Muslim-Americans protections against surveillance, harassment, arrest, or prosecution by the government. Although some states have adopted terror-free investment policies to ensure

2007, <http://www.ombwatch.org/article/blogs/entry/3138/36>.

103. U.S. Department of the Treasury, Office of Foreign Assets Control, Risk Matrix for the Charitable Sector, at n. 3, www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

104. Muslim Advocates, Guidance on Charitable Giving for Muslim American Donors, www.muslimadvocates.org/docs/Donor-Guidance101106.pdf.

105. Cohen, *supra* note 24.

106. One newspaper account suggests that the failure to orchestrate such a project is the result of isolated Muslim charities that do not have sophisticated management expertise and the fear of foreign governments and policymakers in empowering civil society through legislation or policymaking that could assist organized philanthropy. Kamal & Model, *supra* note 23. Additionally, it appears that there is not a profusion of domestic Islamic "friends of" charities, which would permit donor contributions to be redirected to specific projects abroad that the domestic "friends of" charities support.

107. See, e.g., Ruff, *supra* note 17, at 499.

that they do not invest tax dollars in a manner that could aid terrorism,¹⁰⁸ there is currently no terror-free channel constructed specifically for, and aimed at facilitating, Muslim-Americans in directing their charity discreetly to needy Muslims in specific regions and communities abroad.

Crafting such a mechanism could go a long way to moderating the current frosty charitable giving climate for Muslim-Americans. To ensure Muslim-Americans a safe mechanism for giving and directing zakat contributions to the neediest Muslims abroad, a terror-free donor advised fund (DAF) could be developed specifically for Muslim-Americans, as explained below. At least initially, it might be wise to create one centralized, but accessible, terror-free DAF, and, depending on its success, others could follow.

A DAF is essentially a low cost, flexible alternative to a private foundation. A DAF operates as a charitable giving vehicle by enabling donors to contribute cash or assets to an intermediary entity, known as a sponsoring organization,¹⁰⁹ which redistributes the donors' contributions, without divulging the donors' identities, to qualified targeted recipients.¹¹⁰ The ultimate qualified

108. For example, Ohio and Missouri have such a terror-free investment policy. See Richard Cordray, Ohio Treasurer of State, Terror-Free Investment Policy (Apr. 18, 2007), <http://www.tos.ohio.gov/content/view/285/39/>; Press Release, Richard Cordray, Ohio Treasurer of State, Treasurer Cordray Announces New Terror-Free Investment Policy for State Treasury (Apr. 18, 2007), <http://www.tos.ohio.gov/content/view/286/41/>; *Hearing Before the H. Comm. on Foreign Affairs' Subcomm. on Terrorism, Nonproliferation, and Trade and the H. Comm. on Financial Services' Subcomm. on Domestic and International Monetary Policy, Trade and Technology* (Apr. 18, 2007) (statement of Sarah Steelman, Missouri State Treasurer), <http://foreignaffairs.house.gov/110/ste041807.htm>; Sarah Steelman, *Terror-Free Investing*, WALL ST. J., Dec. 14, 2006, at A21.

109. The sponsoring organization is essentially a nongovernmental entity, other than a private foundation, that would be treated as a tax-exempt religious, charitable, or educational organization under Internal Revenue Code § 501(c)(3). 26 U.S.C. § 4966(d)(1)(A)–(C) (2007). Interestingly, the sponsoring organization can be either a domestic or foreign entity. 26 U.S.C. § 4966(d)(1)(A).

110. More technically under U.S. tax laws, a DAF is a pool of donated assets with three features. First, the assets contributed by the donor are owned and controlled by a sponsoring organization. *Id.* § 4966(d)(2)(A) (2007).

Second, the DAF is composed of separate accounts identified by reference to a donor's completed contributions but with respect to which the donor or

recipients are generally organizations, either domestic or foreign, that must use the contributions for charitable purposes. The sponsoring organization is an intermediary for the specific purposes of receiving contributions, taking nonbinding advice from donors of preferred recipients for their donations,¹¹¹ investing and managing contributed funds,¹¹² and undertaking all of the necessary legal, accounting, and philanthropic functions to ensure that assets reach their intended recipients. Because the Internal Revenue Service considers these sponsoring organizations to be public charities, donors are entitled to charitable contribution deductions for their gifted assets, and their contributions can accrete in value without further taxation.¹¹³

the donor's appointee retains the privilege of providing nonbinding advice to the sponsoring organization of preferred organization-beneficiaries able to utilize the funds consistent with the donor's intended charitable purposes. *Id.* § 4966(d)(2)(A), as added by the Pension Protection Act of 2006, Pub. L. No. 109-280. To avoid excise taxes, distributions generally must be made to a qualified organization (1) that meets the requirements of 26 U.S.C. § 170(b)(1)(A), (2) that satisfies the conditions of 26 U.S.C. § 170(c)(2)(B), or (3) for which the sponsoring organization fulfills the expenditure responsibility requirements of 26 U.S.C. § 4945(h). *Id.* § 4966(c)(1)–(2). Basically, such recipient cannot be a natural person, and unless it is a domestic entity that qualifies for tax-exempt status as a § 501(c)(3), the sponsoring organization is obligated to undertake certain due diligence of the nongovernmental foreign organization-recipient. *Id.* § 4966(c)(1)(A), (c)(1)(B)(ii) referring to the expenditure responsibility rule of 26 U.S.C. § 4945(h). 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 and Their Donors*, 23 VA. TAX REV. 1, 72-86 (2003) [hereinafter Crimm, *Through a Post-September 11 Looking Glass*] (discussing the expenditure responsibility rule of 26 U.S.C. § 4945(h). For a discussion of the expenditure responsibility rule, see *infra* note 130 and accompanying text.

Third, the assets are not distributable to a single organization or governmental entity. *Id.* § 4966(d)(2)(B)(i) (2007).

111. Research has shown that diaspora donors like “hands on” involvement in their philanthropic endeavors. See Najam, *supra* note 55, at 125. The advisory role that a donor to a DAF could exercise might serve to advance this aspiration.

112. A donor can plan to have the funds managed as either an endowment, which is invested to permit the funds' growth and to enable them to be distributed annually in perpetuity, or a non-endowment, which is invested to permit sufficient growth for annual distributions to occur over a short or long period. See Elfrena Foord, *Philanthropy 101: Donor Advised Funds*, J. FIN. PLAN., Nov. 2003, available at http://www.fpanet.org/journal/articles/2003_Issues/jfp1103-art8.cfm.

113. Because the DAF is tax-exempt under § 501(c)(3), the income

There are considerable expenses associated with creating and maintaining DAFs.¹¹⁴ Because of the risks associated with giving abroad and the protective due diligence that would be needed on an ongoing basis, a DAF that could serve as a vehicle for diaspora philanthropy would be more costly than one targeted only for domestic giving.¹¹⁵ Donors today initially can contribute relatively low sums and thereafter can add reasonable donations to DAF accounts where the ultimate recipients are located in this country.¹¹⁶ Whether low contributions to a terror-free DAF targeted abroad would be feasible is beyond the scope of this article. The lower the initial and subsequent contribution thresholds and the ease by which Muslim-Americans can donate to a targeted terror-free DAF—perhaps by payroll deductions¹¹⁷—

generated by its gifted holdings is not subjected to income taxation.

114. These expenses can include annual administrative, investment and management fees. Typically a sponsoring organization charges between .45% to 2.75% in fees for a \$100,000 account and less if the account is worth more. See Foord, *supra* note 112.

115. Discussions with several DAF administrators and private foundation officials revealed that actual costs would be quite high, but exact amounts are impossible to calculate because they depend on many variables.

116. Donor advised funds (DAFs) traditionally have been viewed as financially advantageous alternatives to private foundations. Because DAFs are less expensive to establish and maintain than private foundations, the initial funding of their donors' accounts can be significantly lower. A number of "commercial" DAFs, created by commercial financial businesses, as well as some community foundations and educational institutions that have formed charitable corporations for the principal purpose of offering DAFs, have been successful in establishing low expense DAFs. See, e.g., Fidelity Charitable Gift Fund, <http://www.charitablegift.org>. Some commercial DAFs require only an initial contribution of \$5,000. Fidelity Charitable Gift Fund, The Gift Account Minimums and Fees, <http://www.charitablegift.org/charity-giving-programs/daf/fees.shtml> (last visited Feb. 29, 2008). Additionally, because the Internal Revenue Service has treated DAFs as charities, they have offered donors higher charitable contribution deductions than those available to donors of private foundations. 26 U.S.C. § 170 (2007). The Internal Revenue Service currently is studying whether, as a result of the advisory privilege that a donor can retain, the donor advised fund vehicle should continue to qualify for the currently available income, gift, and estate tax charitable contribution deductions, and if so, the appropriate level for the deductions. See Notice 2007-21, 2007-9 I.R.B. 611. It also is studying whether, like private foundations, donor advised funds should be required to distribute a specified amount for charitable purposes. See *id.*

117. See Noelle Barton & Peter Parepento, *A Surge in Assets; Donor-Advised Funds Are Growing Exponentially*, CHRON. PHILANTHROPY, <http://philanthropy.com/premium/articles/v19/i14/14000701.htm> (referring to

the greater the potential to attract more Muslim-Americans to use such DAF as their charitable giving vehicle of choice.

From a funding perspective, forming one centralized terror-free DAF could be a financially viable endeavor. All Muslims have zakat obligations to tithe at a minimum 2.5% of their incomes and other wealth; many also contribute financial aid as sadaqah.¹¹⁸ Between 2.35 and seven million Muslims live in the U.S., 41% of whom live in households with incomes exceeding \$50,000.¹¹⁹ As touched on briefly above, financial feasibility will also depend on the cost effectiveness of the DAF. From the perspective of limiting costs by targeting localities of collective interest to Muslim-Americans to receive redistributions, there are high degrees of concentration of Muslim-Americans who emigrated from the Arab region (37%) and from south Asia, with large proportions from specific countries, such as Iran and Pakistan. Consequently, even if only a portion of all Muslim-Americans contribute to one centralized terror-free DAF, demographics appear to support its creation and potential sustainability, especially if donors' contributions are aggregated in one DAF account for redistribution to a highly limited number of foreign recipients.¹²⁰

DAFs characteristically have the potential not only to distribute funds to qualified recipients but also to invest the accounts' corpus to produce income.¹²¹ Under Islamic law,

DAFs established by the Renaissance Charitable Foundation for three companies).

118. See *supra* notes 18-22 and accompanying text.

119. See *supra* notes 26, 39 and accompanying text.

120. See *infra* note 123 (discussing author's telephone conversation with Drew Hastings on this matter and explaining DAFs) and *supra* notes 109-17 and accompanying text (explaining the structure of DAFs).

Currently there are several U.S.-based Pakistani-American charities connected to specific projects in Pakistan. See, e.g., SOS-Children's Village USA, Inc., <http://www.sos-childrensvillages.org> (providing youth homes, schools, medical centers, and vocational centers) (last visited Feb. 29, 2008); The Human Development Foundation of North America, Project Pakistan, <http://www.yespakistan.com/hdf/whatwedo/projectpakistan-exsummary.asp> (establishing human development initiatives in Pakistan's underprivileged communities) (last visited Feb. 29, 2008). The Muslim Pakistani-American population may not be as underserved as other Muslim-Americans in having a safe means for their charitable giving.

121. See *supra* note 112 (explaining DAFs that operate as endowments and those that operate as non-endowments).

however, giving or receiving interest is prohibited.¹²² Thus, even though the donated funds would be owned by the sponsoring organization, Muslim-American donors would likely want to honor the restriction. Muslim recipients also might not want to receive money derived as interest. Therefore, to accommodate this Muslim belief, the DAF funds simply would need to be devoted to accreting investments, such as stock, that do not produce interest, a manageable hurdle.

There appear to be more significant challenges, however, to the establishment of a terror-free DAF. First, a sponsoring organization would need to be formed. This task should not be underestimated. The risks related to investment, administration, and management responsibilities are enormous. Those who undertake the necessary due diligence for the DAF, described below, cannot fully protect themselves from civil or criminal liability.

There are several possible methods for forming a sponsoring organization. A commercial financial institution could form a charitable corporation to serve as the sponsoring organization.¹²³ This might be the most plausible approach because several for-profit financial institutions now offer DAFs and have experience in their operation.¹²⁴ Such an arrangement would not preclude advice and input from Muslim-American and secular nonprofits. Moreover, as discussed below, there are considerable costs associated with due diligence efforts that will be required of the

122. See Sheryl Jean, *Beliefs and Banking*, USINFO, <http://usinfo.state.gov/products/pubs/muslimlife/bank.htm>.

123. Such commercial for-profit financial entities include The Vanguard Group (Vanguard Charitable Endowment Fund), Fidelity Investments (Fidelity Charitable Gift Fund), Charles Schwab (Schwab Fund for Charitable Giving), and T. Rowe Price (T. Rowe Price Program for Charitable Giving) all of which have a number of years of experience in developing DAFs. A nonprofit organization with some experience as a sponsoring organization for grant making overseas is the National Philanthropic Trust (NPT). It has established DAFs for giving to select foreign organizations in several countries, such as India, Turkey, Israel, and Japan. Telephone interview with Drew Hastings, V.P., NPT (Oct. 4, 2007) [hereinafter Telephone Conversation]. To do so, it was required to undertake the necessary due diligence to ensure that the redistributed funds would not support terrorists or terrorist organizations. *Id.*; see also National Philanthropic Trust, <http://www.nptrust.org>.

124. See *supra* note 123.

sponsoring organization, and a commercial financial institution might be capable of the greatest efficiency, have the expertise in place, and have the deepest pockets.

Although Muslim-Americans appear hesitant to give charity through Muslim-American nonprofit organizations,¹²⁵ another possible arrangement is the creation of a sponsoring organization by an alliance of Muslim-American and highly respected secular U.S.-based nonprofit organizations.¹²⁶ An alternative but perhaps less viable approach in the current environment would be the formation of a sponsoring organization by a publicly respected Muslim-American umbrella organization or other large nonprofit that has the broad trust, and represents the interests, of many Muslim-American nonprofit entities and the Muslim-American population.¹²⁷ Finally, although also not entirely viable, a coalition of nonprofit Muslim-American organizations, including community foundations and highly respected nonprofits, might form a sponsoring organization. With respect to any of these three possible alternative arrangements, the management and administrative, operational, and technical support could be outsourced to an experienced third-party nonprofit or for-profit administrator.¹²⁸

The ability of a sponsoring organization to design a DAF that

125. See *supra* notes 56-57 and accompanying text. If Muslim-Americans were inclined to contribute humanitarian aid to needy areas in homelands through non-Muslim U.S.-based charities, established vehicles do exist. For example, the American Red Cross has affiliates in many countries, including regions from which many Muslim-Americans emigrated.

126. For example, United Way and Grantmakers Without Borders might be explored as possible secular U.S.-based nonprofits. Some possibilities of Muslim-American nonprofits for exploration might include the National Council of American Muslim Non-Profits, Islamic Circle of North America, Islamic Society of North America, Islamic Relief-USA, Council of Islamic Organizations of Greater Chicago, and the Muslim Public Affairs Council.

127. See *id.* (suggesting some potential Muslim-American nonprofit organizations).

128. See, e.g., Rockefeller Philanthropy Advisors (<http://www.rockpa.org/services/donor-advised-funds/>) and NPT (<http://www.nptrust.org>). Both organizations are nonprofit. See Telephone Conversation, *supra* note 123. NPT has limited experience as a third-party administrator for DAFs established for charitable giving to select foreign organizations abroad. *Id.* NPT's role has included the due diligence necessary to ensure that redistributions are protected from supporting terrorists and terrorist organizations. *Id.* A for-profit entity, Microedge (<http://www.microedge.com>), is also a third-party administrator.

would qualify as terror-free is likely the most momentous hurdle. Because a purpose of creating such a DAF is to enable charitable contributions to fund legitimate charitable projects targeting the neediest Muslims abroad, appropriate foreign nongovernmental organizations (FNOs) must be recipients for, and re-distributors of, the DAF's distributions.¹²⁹ Advice and suggestions from Muslim-American and secular domestic private foundations and charities, as well as knowledgeable Muslim-Americans and other Americans who have worked or are working overseas, might help to solve this problem. Identifying suitable FNOs may not be an easy task, and the sponsoring organization's chore of performing adequate due diligence will be the most difficult and crucial challenge.

There are two components of due diligence currently necessary. The first is compliance with the federal tax rule of expenditure responsibility,¹³⁰ which is required if, as is most likely, the FNO is not recognized by the Internal Revenue Service (IRS) as a public charity under U.S. tax laws.¹³¹ The expenditure

129. Alternatively, the DAF could distribute funds to a domestic "friends of" organization, determined by the I.R.S. as a qualified charity under 26 U.S.C. § 501(c)(3), which would redistribute the money to a foreign organization that it supports. That chain would not remove or avoid the due diligence requirements from the organizational chain because the domestic "friends of" organization would be responsible under I.R.S. pronouncements. See Rev. Rul. 56-304, 1956-2 C.B. 306; Rev. Rul. 68-489, 1968-2 C.B. 210; Rev. Rul. 71-460, 1971-2 C.B. 231; I.R.S. Announcement 2003-29, 2003-1 C.B. 928. See also Marcus S. Owens, *Legal Framework of International Philanthropy: The Potential for Change*, 25 PACE L. REV. 193, 197-200 (2005).

130. 26 U.S.C. § 4945(h) (2007); Treas. Reg. § 53.4945-6 (2007). For a discussion of the expenditure responsibility requirements, see Crimm, *Through a Post-September 11 Looking Glass*, *supra* note 110, at 81-86 (discussing the expenditure responsibility requirements in the context of private foundations).

131. 26 U.S.C. § 4966(c)(1)(B)(ii) (2007). Failure to comply with the expenditure responsibility rule would subject the sponsoring organization and fund manager to excise taxes. *Id.* § 4966(a)(1)-(2) (2007).

The foreign nongovernmental organization (FNO) can obtain a determination letter from the I.R.S. stating that it qualifies as a public charity under I.R.C. §§ 501(c)(3) and 509(a)(1), (a)(2), or (a)(3). Treas. Reg. § 53.4945-5(a)(3) (2007); I.R.C. § 508(a), (b); Treas. Reg. § 1.508-1 (2007). Few such non-governmental foreign organizations obtain such determination letters because the process of acquiring, as well as the requirements for maintaining, § 501(c)(3) status is time-consuming, costly, and administratively burdensome. See EXEMPT ORGANIZATIONS COMMITTEE, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION, [DRAFT] REPORT OF TASK

responsibility rule predates 9/11,¹³² and it is not specifically an antiterrorism measure. Its application was extended to DAFs in 2006.¹³³ The focus of the expenditure responsibility requirement is to determine whether each FNO is capable of utilizing the funds in a manner consistent with the charitable purposes for which the funds were intended, and whether the FNO does so in fact.¹³⁴ The expenditure responsibility rule mainly requires extensive paperwork documenting due diligence both before and after the DAF makes distributions to an FNO; this requirement prevents misuse of funds and promotes good business practices.¹³⁵ Basically the sponsoring organization would need to comply with the following checklist:¹³⁶

- The sponsoring organization must undertake a pre-distribution inquiry to determine that the FNO is capable of fulfilling the distribution's charitable purposes through the use of the funds.¹³⁷
- The sponsoring organization must enter into a pre-

FORCE ON REVISION AND SIMPLIFICATION OF RULES APPLICABLE TO PRIVATE FOUNDATIONS ("GALLAGHER-FERGUSON WHITE PAPER"), *reprinted in* 36 EXEMPT ORG. TAX REV. 262, 271-72 (May 2002).

An alternative to obtaining an I.R.S. determination letter is for the sponsoring organization to make a "good faith determination" that the foreign organization is equivalent to a § 501(c)(3) public charity. Treas. Reg. § 53.4942(a)-(3)(a)(6) (2007). This process is costly and can be administratively burdensome. See Crimm, *Through a Post-September 11 Looking Glass*, *supra*, note 110, at 75-81.

132. It was originally enacted as part of the Tax Reform Act of 1969, Pub. L. No. 91-172 (1969) and applied only to private foundations.

133. 26 U.S.C. § 4966(c)(1)(ii), added by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 1231 (2006).

134. See Crimm, *Through a Post-September 11 Looking Glass*, *supra* note 110, at 83.

135. See *id.* at 82-87.

136. Treasury regulations §§ 53.4945-5(b), -5(c), -5(d), -6(c) provide the specific expenditure responsibility requirements for private foundations. The checklist here is adapted for purposes of a sponsoring organization of a DAF.

137. The scope of the inquiry should depend on the size of the distributions, the purpose of the distributions, the distribution period, and prior experience with the FNO. Regardless, the inquiry should: (1) identify the FNO and its managers; (2) determine the history of the FNO and the experience of its management; and (3) focus on knowledge that the sponsoring organization possesses or can readily obtain from available information concerning the FNO's activities, practices, and management.

distribution written agreement with the FNO.¹³⁸

- The FNO should separate the funds according to the charitable purposes for which they were given, and must repay any portion not appropriately used.
- The sponsoring organization must obtain within a reasonable period annual reports from the FNO on how the FNO used the distributed funds.¹³⁹
- The sponsoring organization must determine that the FNO maintains adequate books and records and reviews those books and records as appropriate.
- During the taxable year in which the FNO gives distributions subject to the expenditure responsibility rule, the sponsoring organization must notify the I.R.S. of these distributions.

Compliance with the expenditure responsibility rule requires

138. The written agreement must specify (1) the charitable purpose of the distributions and the FNO's agreement to repay the funds if not so utilized; (2) the FNO's agreement to provide annual reports; (3) the FNO's willingness to maintain books and records and to make them available to inspection by the domestic sponsoring organization at reasonable times; (4) the FNO's agreement to refrain from carrying on propaganda or otherwise influencing legislation, influencing the outcome of any specific public election or carrying on voter registration drives directly or indirectly, and undertaking any activity for a non-charitable purpose to the extent that such use of the funds would be considered a taxable expenditure. The agreement must prohibit the initial FNO from re-distributing the funds to another organization ("secondary FNO"), unless the secondary FNO complies with restrictions on distributions substantially equivalent to the restrictions imposed on a sponsoring organization. If the secondary distribution is to an organization that is not a public charity or treated as a public charity under I.R.C. § 501(c)(3), compliance with the expenditure responsibility requirements of I.R.C. § 4945(h) is required by the first FNO. These restrictions can be phrased in the agreement in appropriate terms under foreign law or custom, and they will ordinarily be considered sufficient if accompanied by an affidavit or opinion of counsel stating that the restrictions are substantially equivalent to restrictions that would be imposed on a sponsoring organization.

139. The reports also must indicate that the FNO complied with the terms of its agreement and show the FNO's progress toward achievement of the purpose of the distributions. A final report, similar in nature to annual reports, must be made in the year that the funds are fully and finally expended or the distributions are otherwise terminated.

ongoing effort and can be expensive; therefore, for the creation of a terror-free DAF for Muslim-Americans' gifts abroad to be sensible and warranted, the sponsoring organization will need sufficient DAF contributions.¹⁴⁰ Moreover, the rules can be administratively burdensome, and compliance is more difficult where there are no sponsoring organization employees working in the field abroad.

There may be capacity, however, to reduce some of these challenges. This could be accomplished with respect to the pre-distribution inquiry of FNOs identified by the sponsoring organization with which private foundations and charities have had dealings in the past. If those entities are willing to share their experiences and information, and if the sponsoring organization comfortably can rely on that which is shared, the sponsoring organization can more easily satisfy its expenditure responsibility duties. Further possible support for accomplishing the expenditure responsibility requirements may be forthcoming. In July 2007, Information Age Associates released a status report on the feasibility of creating a centralized repository of information on non-U.S. based NGOs.¹⁴¹ The status report indicated a high level of support among grant-makers and nonprofit organizations' leaders for the creation of such a project.¹⁴² Information from others can be helpful only if it applies to the specific FNOs identified by the DAF's sponsoring organization. This constraint may limit the usefulness of a centralized repository because Muslim-American donors may want to direct their charitable giving to regions where there has not been broad and ongoing experience with FNOs, or to FNOs without connections to traditional domestic grant-makers and charities.

140. Drew Hastings, V.P. of NPT, has suggested that for any redistributions abroad to a single FNO, the administrative, management, investment, operational, and due diligence costs likely require a minimum of \$100,000 in a DAF account. See Telephone Conversation, *supra* note 123. One DAF account can have multiple contributors, who collectively could contribute the \$100,000 aggregate amount. *Id.*

141. INFORMATION AGE ASSOCIATES, POTENTIAL OF CREATING A CENTRALIZED REPOSITORY OF INFORMATION ON NON-U.S. BASED NGOS: PROJECT STATUS REPORT (July 2007), <http://www.iaa.com/NGORepositoryFeasibilityStudyReport.html>.

142. *Id.*

Assuming that the expenditure responsibility rule is not an insurmountable impediment, the sponsoring organization also must attempt to prevent the DAF from providing inadvertent financial support to terrorists and terrorist organizations. As discussed previously, there are numerous government-recommended antiterrorist measures, several of which overlap with the expenditure responsibility requirements, that must continually inform the charitable giving and redistribution cycles. They include the following cumulative checklist:

When selecting each FNO, the sponsoring organization should:

- Collect “basic information” about each FNO.
 - Name (in language of origin and English), acronyms used, jurisdiction(s) of physical presence, historical information, governing instruments, public filings, addresses and phone numbers, statement of principal purpose, names and postal, e-mail, and URL addresses of organizations that receive funding or support from the FNO, names and addresses of subcontracting organizations, public filings or releases by the FNO, and FNO’s sources of income.
- Collect information about each FNO’s key employees, board members, and senior management at all locations.
 - Name, nationality, citizenship, country of residence, place and date of birth.
- Search publicly available information to determine whether each FNO, or one of its key employees, is suspected of activity relating to terrorism.

- OFAC Master List of SDNs¹⁴³
 - <http://www.treasury.gov/offices/enforcement/ofac/sdn/index.shtm>
- OFAC Country Sanctions Programs¹⁴⁴
 - <http://www.treasury.gov/offices/enforcement/ofac/programs/>
 - No FNO should be “otherwise subject to OFAC sanctions.”¹⁴⁵
- United Nations Terrorist List
 - <http://www.un.org/sc/committees/1267/consolist.shtml>
- European Union Terrorist List
 - http://eurlex.europa.eu/LexUriServ/site/en/oj/2005/l_314/l_31420051130en00410045.pdf
- Terror lists maintained by other countries
 - United Kingdom’s List of Proscribed Terrorist Groups
 - <http://www.homeoffice.gov.uk/security/terrorism-and->

143. This OFAC master list includes the State Department’s Foreign Terrorist List, which can be found separately at <http://www.state.gov/s/ct/rls/fs/2004/32678.htm>. This master list has been criticized as deficient. *See supra* note 88.

144. This lists countries and regions, but names of organizations previously listed in the executive orders for a country/region are now incorporated into the OFAC SDN master list.

145. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 10 (2006), *available at* http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines_charities.pdf

the-law/terrorism-
act/proscribed-groups

- Canada's Terrorist List
 - <http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp>
- Australia's List of Terrorist Organizations
 - <http://www.nationalsecurity.gov.au/> (select "Terrorist Organisations" from "Quick links" drop box).
- Russia's Terrorist List¹⁴⁶
 - <http://www.cdi.org/russia/johnson/2007-102-42.cfm>
- China's Terrorist List
 - http://english.peopledaily.com.cn/200312/15/eng20031215_130432.shtml¹⁴⁷
- South Asia Terrorism Portal¹⁴⁸
 - <http://www.satp.org/satporg.tp/satp/index.html>

146. The Russian terrorist list apparently is updated annually and authorization is required to access the updated information.

147. Although the list that appears at this web site is dated 2003, the U.S. Department of State also has no information available on its web site as to a subsequently compiled Chinese terrorist list. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2005), available at <http://www.state.gov/s/ct/rls/crt/c17689.htm>.

148. This web site is not an official government web site. It contains, however, lists for Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka, perhaps assembled by the nongovernmental organization and based on government lists.

- Saudi Arabia's Most Wanted List
 - <http://www.saudiembassy.net/Issues/Terrorism/IssuesTer.asp>

Before supplying resources to any FNO, the sponsoring organization should:

- Verify each FNO's ability to (1) accomplish the charitable purpose and (2) protect the resources from diversion.
- Obtain references on each FNO from trusted sources.
- Reduce terms of the disbursement to a written agreement.

When disbursing funds, the sponsoring organization should:

- Disburse funds in small increments as needed for specific projects or expenditures.
- Disburse funds via check or wire transfer, and by cash only if necessary.
- Maintain detailed internal records of disbursements.
- Require each FNO to use a reliable banking system or other regulated financial channels for transferring funds.

After disbursing the DAF funds to an FNO, the sponsoring organization should:

- Require periodic reports, preferably annually, from the FNO on all uses of the disbursed funds. With the periodic reports, require the FNO to provide specific documentation of the use of the funds.

- E.g., receipts, video, photographs, testimonies, and written records.
- Require the FNO to take reasonable steps to ensure that funds have neither been distributed to terrorists nor used for activities that support terrorism. The FNO should apprise the sponsoring organization of the steps taken.
- Engage in ongoing monitoring of the FNO for the term of the distributions.
- Perform regular, periodic on-site audits of the FNO to the extent permissible by personnel and other constraints.
- Correct misuse of resources quickly and terminate relationship if misuse continues.
- Make appropriate reports to the U.S. government, including, but not limited to, filings with the Internal Revenue Service.

Although this list of tasks is perhaps daunting to the point of being overwhelming, the above checklist *may* be achievable by one entity formed proactively by Muslim-Americans to serve as the sponsoring organization as their sole dedicated and centralized terror-free DAF. Additionally, if a centralized repository of information on non-U.S. based NGOs were formed, the sponsoring organization could have streamlined access to otherwise scattered information. Nonetheless, such a repository would not relieve the sponsoring organization from much of the due diligence required, such as obtaining periodic reports, checking the reliability of the reports, monitoring each FNO, undertaking audits, and making appropriate governmental filings. Therefore, targeting a very few FNOs abroad in one or two regions or communities of common interest to Muslim-Americans might be important, at least initially, to the financial viability of the project.

CONCLUSION

Unfortunately, even if well-intentioned, philanthropically

mindful Muslim-Americans created and used an appropriate terror-free DAF, there are no guarantees that these Muslim-Americans would be protected with absolute certainty against unwanted surveillance, inaccurate accusations, and worse. Nonetheless, a terror-free DAF could be strategically powerful for Muslim-Americans, inuring to their benefit in numerous ways. It could contribute to a more hospitable philanthropic environment by reducing fears of Muslim-Americans with the desire and religious obligation to help the neediest Muslims worldwide. Drawing on the thoughts of Moses Maimonides, the terror-free DAF structure would enable Muslim Americans to give to the alms-chest, knowing that the "officer in charge is reliable, wise, [scrupulous], and a capable administrator."¹⁴⁹ And, by directing charitable giving through such a reputable manager, the intended recipients—those Muslims who are most needy and who live abroad—would gain financial support.

Moreover, benefits from a terror-free DAF could inure to the general American public. Giving charity through a terror-free DAF could reduce mistrust of Muslim-Americans by non-Muslims, and thus bolster public perceptions of them. Facilitating open and legitimate charitable giving by well-intentioned Muslim-Americans could send an unambiguous message that such people are not radical extremists, they neither espouse nor support terrorism, and they desire to contribute to U.S. national security.¹⁵⁰

149. See *supra* note 8, and accompanying text.

150. According to recommendations of the Chicago Council of Global Affairs task force, expanding and recognizing Muslim-American contributions to national security could be greatly beneficial to Muslim Americans. STRENGTHENING AMERICA, *supra* note 26, at 9-11.