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ICNL
INTERNATIONAL CENTER
FOR NOT-FOR-PROFIT LAW

THE FINANCIAL ACTION TASK FORCE

A TOOLKIT FOR KENYAN NON-PROFIT ORGANIZATIONS

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Published in November 2021 by PROTECT and the International Center for Not-for-Profit Law (ICNL). For more information please visit: www.icnl.org.

FOREWORD

The Kenyan government has made a concerted effort to combat money laundering and the financing of terrorism: Kenya is party to treaties governing the issue such as the 2000 United Nations (UN) Convention against Transnational Organized Crime (Palermo Convention) and is a member of international bodies governing money laundering and terrorist financing, such as the Financial Action Task Force (FATF) and its regional FATF-style body, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). Kenya has also adopted several domestic legal provisions criminalizing money laundering and terrorist financing, including under its Proceeds of Crime and Anti-Money Laundering Act and Penal Code, among others.

Many Kenyan non-profit organizations (NPOs) have run into operational barriers arising from measures to combat money laundering and financing of terrorism, such as restrictions on cross-border transactions and difficulties opening bank accounts. This toolkit aims to introduce Kenyan NPOs to FATF, which sets international standards on anti-money laundering and countering the financing of terrorism (AML/CFT), including those measures that affect NPOs and their work. The toolkit provides background on FATF and shares guidance on how NPOs can engage the FATF system to encourage their government to ensure that their AML/CFT measures protect and promote an enabling environment for NPOs.

What is FATF and how does it affect non-profit organizations (NPOs)?

The **Financial Action Task Force (FATF)** is an inter-governmental organization that aims to promote the enforcement of legal and regulatory measures against money laundering and terrorist financing. FATF has issued 40 recommendations to its more than 190 member countries; access to certain international financial markets is conditional on compliance with these recommendations. Recommendation 8 pertains to NPOs.

Recommendation 8 requires countries to:

1. Review the adequacy of laws and regulations that relate to NPOs which the country has identified as being vulnerable to terrorist financing abuse and;
2. Apply focused and proportionate measures, in line with a **risk-based approach,** to those NPOs.

Not all NPOs will fall under the FATF definition, and not all NPOs that fall under the FATF definition should be identified as at high risk of terrorist financing abuse. Governments should identify specific subsets of organizations that are most vulnerable to abuse and implement a targeted approach, conducting outreach and exercising oversight to protect these organizations, without unduly disrupting NPO activities.

How does FATF define an NPO?

For FATF, an NPO refers to:

- A legal entity or organization
- that primarily engages in raising or disbursing funds
- for charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works."

What are the "unintended consequences" of the FATF process on NPOs?

Governments sometimes disrupt legitimate NPO activities through the misapplication of Recommendation 8. Many governments fail to undertake a risk assessment to identify the types of NPOs that are at risk of money-laundering and terrorist financing. Rather, these governments subject the entire non-profit sector to highly burdensome and invasive AML/CFT measures, such as requiring NPOs to obtain government approval for foreign funding or requiring all foreign funds to be transferred through a central bank. These measures, when applied broadly to the entire NPO sector, present barriers to legitimate NPOs' operations and access to funding. Some specific examples include:

- Governments 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.

- Governments 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.

What is a risk-based approach?

A risk-based approach requires countries to apply "focused and proportionate measures" to organizations based on their assessed level of risk. It cautions against imposing blanket restrictions on the non-profit sector and instructs that governments must justify any regulations based on evidence of existing risk.

What steps should countries take to comply with Recommendation 8?

Countries should:

1. conduct a risk assessment of the NPO sector that identifies risk of terrorist abuse;
2. review existing laws, regulations, and self-regulatory programs to see if they address identified risks;
3. where gaps are found, develop risk mitigation measures that are proportionate to risk and do not restrict the operation of legitimate NPOs;
4. create a result that is consistent with obligations under international human rights and humanitarian law.

Throughout all steps, governments should conduct outreach with NPOs and involve them in the process.

What does a risk assessment look like?

There is no set format or methodology for a risk assessment. However, a risk assessment reviewing the NPO sector's organizational and sectoral vulnerabilities to terrorist financing abuse should include analysis of several factors:

- Types of organizations and their purposes, types and locations of organization activities;
- Donor bases, values of assets in the sector, methods of payment, the amount of cash transactions in the sector;
- Domestic and international intelligence on terrorist financing activity in the jurisdiction;
- Inputs from civil society representatives;
- The adequacy of laws and regulations to protect NPOs from terrorist financing.

The goal of Recommendation 8 is to protect NPOs from terrorist financing abuse, not to limit legitimate NPO activities due to perceived vulnerabilities with a lack of evidence. As such, any risk-based approach should balance all the above factors in its assessment.

Where can NPOs find resources, data, and allies to contribute to a country's NPO sector risk assessment or shadow risk assessment?

Within the government:

- Financial Reporting Centre or other agency designated to lead implementation of AML/CTF norms and procedures
- Any ministry with authority to regulate the civil sector
- The Central Bank

Outside of government:

- Domestic and international experts on FATF issues (e.g. The Global NPO Coalition on FATF; Global Expert Hub on AML/CTF)
- Academic centers
- Financial institutions
- Donors

CASE STUDY: KENYA

Kenya's next scheduled on-site visit by FATF evaluators is set to take place in November 2021. It is important for NPOs to prepare for the evaluation and decide on their strategy to advocate for NPO interests as a sector. Kenya's government has shown little interest in collaborating with NPOs in the risk assessment phase. As a result, NPOs are conducting their own sectoral risk assessment that they plan to submit to the government and to the evaluators for consideration. Organizations might deliver notes to the FATF Board summarizing the AML/CFT challenges in the sector and could consider requesting a meeting or channel of communication with evaluators during their visit. When meeting with FATF evaluators, NPO representatives should be prepared to explain the situation of the sector and the challenges faced by organizations legally and practically.

How can NPOs engage in the FATF mutual evaluation process?

WHAT is mutual evaluation?

Mutual evaluations assess FATF members' compliance with the FATF Recommendations, considering two components of a country's system: **effectiveness** and **technical compliance**. **Effectiveness** measures how well a country's system is preventing criminal abuse of the financial system in accordance with FATF standards. **Technical compliance** analyzes a country's legal framework on combatting money laundering and the financing of terrorism and proliferation. The Mutual Evaluation Report provides an in-depth description and analysis of a country's system for preventing money laundering and terrorist financing abuse. It also provides focused recommendations to the country to strengthen its system.

WHO conducts the mutual evaluation?

The FATF President appoints the mutual evaluation team from a pool of trained evaluators based on their expertise and linguistic background. FATF evaluators usually come from countries belonging to the same FATF-style regional body. In the case of Kenya, this is the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

HOW OFTEN does assessment take place?

Each assessment cycle takes about 14 to 18 months, and countries are evaluated every 10 years.

WHAT is the follow-up process after the evaluation is conducted?

Countries are required to address the shortcomings identified in the report. All countries are subject to post-assessment monitoring. This can include anything from regular updates on improvements for countries that are already largely compliant and committed to addressing the remaining few shortcomings, to issuing public warnings and requiring reporting on a strict timeline and further investigations for countries that make insufficient progress on or reject addressing key deficiencies.

The chart below illustrates the timeline for a typical FATF mutual evaluation.

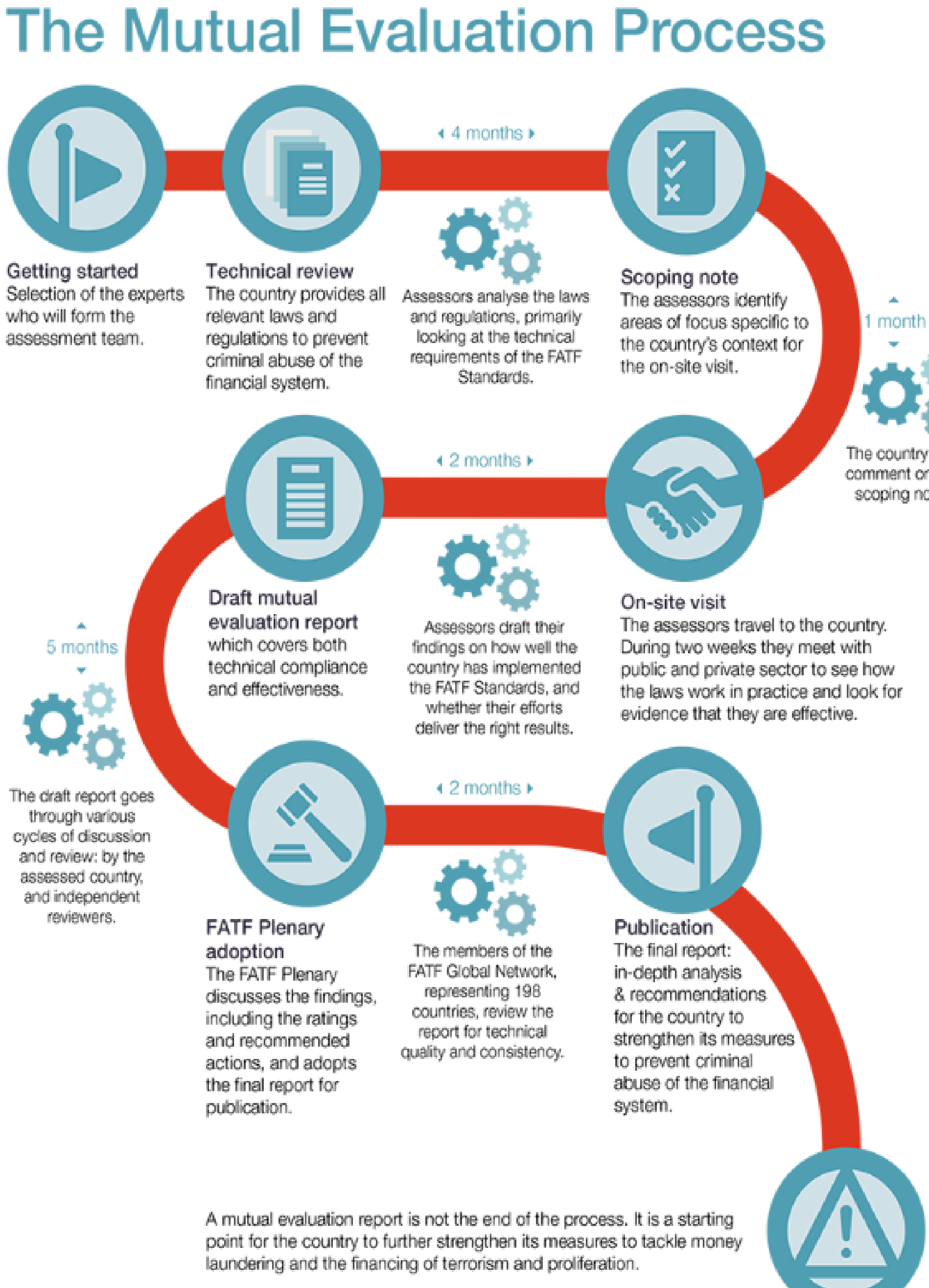

Image source: https://www.fatf-gafi.org/publications/mutualevaluations/more/more-about-mutual-evaluations.html?hf=10&b=0&s=desc(fatf_releasedate)

WHEN and HOW can NPOs engage in the mutual evaluation process?

NPOs can engage before the Mutual Evaluation in processes such as conducting a risk assessment and providing preparatory information to the evaluators, during the Mutual Evaluation through meeting with the evaluators to discuss the issues faced by NPOs, and after the Mutual Evaluation by monitoring the implementation of the follow-up compliance suggestions provided to the government. The table below provides ideas for engagement throughout the process, taking into account the varying positions of national governments regarding NPO participation.

Government position on collaborating with NPO sector to implement FATF standards	BEFORE THE MUTUAL EVALUATION		DURING THE MUTUAL EVALUATION	AFTER THE MUTUAL EVALUATION	
	If the government HAS NOT conducted a risk assessment	If the government HAS conducted a risk assessment		FATF finds that country is "mostly compliant" with FATF Recommendations	FATF gives country poor ratings or finds that country is only partially compliant with at least 8 of 40 Recommendations
Government is open to collaborating with the NPO sector	Work with government to conduct a risk assessment.	Analyze whether the risk assessment complied with FATF standards on process and outputs. Share analysis with the government.	BEFORE the FATF evaluators visit the country: write and deliver to the government and to FATF Secretariat a short summary of all information gathered by the NPO sector, the NPO that will lead research for any missing data, what the NPO needs from the government in recognition of its collaboration DURING the FATF country visit: Maximize participation of NPO sector in FATF procedures	Find out how the country was rated on Recommendation 8. Reach out to the government to explore opportunities for collaborating on reforms. FATF follow-ups will take place infrequently (about every 3 to 5 years).	Find out how the country was rated on Recommendation 8. NPO sector should find out when FATF has planned "enhanced follow-ups" with the country, and use these follow-ups as opportunities to push the government to adopt measures that comply with Recommendation 8, especially if FATF rated the country poorly on this Recommendation.
Government shows no interest in collaborating with the NPO sector	Perform a risk assessment and deliver it to the government for consideration.	Analyze whether the risk assessment complied with FATF standards on process and outputs. Share analysis with the government.	BEFORE the FATF evaluators visit the country: write a short note summarizing the sector's analysis of the country's system on AML/CFT and deliver the note the FATF Secretariat about 6 months before the country visit DURING the FATF evaluators' country visit: request a meeting with FATF evaluators; provide trainings to organizations representing networks of NPOs; request a channel to communicate with the FATF evaluators during and after their visit to your country.	Monitor changes in policies and submit periodic updates to FATF Secretariat.	Monitor changes in policies and submit updates to FATF Secretariat in advance of the scheduled "enhanced follow-ups."
Government is hostile towards the NPO sector	Publish a shadow report with hard evidence demonstrating that the country's measures and policies are inconsistent with FATF standards and curtail the rights of NPOs and that NPOs are aware of the risks of terrorist financing and their own vulnerabilities	Analyze whether the risk assessment complied with FATF standards on process and outputs.	Before FATF country visit: • Work with the NPO sector to identify the leaders for data collection and analysis • Seek consensus within NPO sector about government hostility and compliance with FATF standards • Write a short note to FATF evaluators summarizing the situation (e.g. sharing all information NPO has gathered, the leaders for data collection, analyses of the existing legal framework) • Prepare a strategy for a public advocacy campaign to resist further restrictions, highlight cases of noncompliance with FATF standards, and mobilize allies During the country visit: • Request a meeting for evaluators and copy the government in correspondence • Hold trainings for NPO representatives on FATF standards and findings about the NPO sector • Present summary of NPO sector's findings to FATF evaluators, media, and other stakeholders • Request a channel of communication with FATF evaluators	Document and analyze noncompliance with FATF standards.	Document and analyze noncompliance with FATF standards and submit them to the FATF Secretariat in advance of the scheduled "enhanced follow-ups."

Additional Resources

2011 Mutual Evaluation Report for the Republic of Kenya and 2017 Post-Evaluation Progress Report

These are the latest mutual evaluation report and post-evaluation progress reports for Kenya. The Reports share insights about Kenya's strengths and areas for improvement related to AML/CTF and can provide a basis for NPOs to engage the government and other relevant stakeholders on AML/CTF reforms.

FATF Best Practices on Combating the Abuse of Non-Profit Organisations

This paper provides guidance on best practices for combatting the abuse of NPOs in the context of AML/CTF, including guidance for state practice and actions NPOs can undertake to protect against abuse, and specifically emphasizing the need to protect NPO access to financial services.

The Global NPO Coalition on FATF's Outreach and Engagement guidance

This page provides a brief overview of opportunities for NPOs to engage with the government and the FATF system to ensure that AML/CTF measures do not overly restrict legitimate NPO activities.

The Global NPO Coalition's Resources page

This page shares resources related to AML/CTF and NPOs, such as an article on de-risking NPOs and a report on ensuring financial access of NPOs.

Terrorist Financing Risk Assessment Guide - FATF

FATF's guide covers key considerations when determining the relevant scope of a terrorist financing risk assessment and provides examples

Mapping Tool for Anti-Money Laundering/Counter Terrorist Financing standards which affect NPOs

This tool helps stakeholders identify the laws and policies on AML/CTF that impact NPOs, so that stakeholders have a framework to analyze their compliance with FATF standards, especially Recommendation 8.

Engaging with governments on FATF: Arguments and Counterarguments

This tool gives examples of common talking points from governments on their misapplication of Recommendation 8 and provides refutations for their arguments that NPOs can use when engaging directly with officials.

Calendar for upcoming Mutual Evaluations

For the assessment teams to consider input for upcoming evaluations, the inputs should be provided to contact@fatf-gafi.org at least two months prior to the evaluators' on-site visit.

Webinar: Risk Assessments and Engagement Strategies

This webinar discusses strategies for NPO engagement in a country's risk assessment, giving different strategies based on the government's level of willingness to engage. It also provides practical examples of different approaches from Latin America, Tunisia, Kosovo, and Germany.

Webinar: The ABCs for Risk Assessment of the Nonprofit Sector in Your Country

In this webinar, experts discuss how governments are dealing with the FATF Recommendation 8 risk assessment process, how risk assessments affect NPO regulation, and how NPOs can impact the process.

Key institutions and contacts for FATF in Kenya and the region

Kenya Financial Reporting Centre – Financial Intelligence Unit for Kenya with the primary aim to "assist in the identification of crime and the combating of money laundering […] and the fight against terrorism." Contact at info@frc.go.ke.

Anti-Money Laundering Advisory Board ("AML Board")—The AML Board advises the Director of the Financial Reporter Centre on his functions and powers under Kenya's Proceeds of Crime and Anti-Money Laundering Act ("POCAMLA"). Members of the Board as dictated under the Act include a Chairperson appointed by the Minister of Finance, the Permanent Secretary in the Ministry of Finance, the Attorney General, the Governor of the Central Bank of Kenya, the Commissioner of Police, the Chairman of the Kenya Bankers' Association, the Chief Executive Officer of the Institute of Certified Public Accountants of Kenya, two private sector representatives appointed by the Ministry of Finance, the Director-General of the National Intelligence Service, the Director of the Asset Recovery Agency; and the Director-General of the Financial Reporting Centre.

Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) –

ESAAMLG is a regional body that aims to ensure adoption and compliance with the FATF recommendations and apply other measures to combat money laundering and financing of terrorism. Kenya is one of ESAAMLG's 18 Member Countries. ESAAMLG coordinates with FATF to facilitate mutual evaluations of its member states. Contact ESAAMLG's Executive Secretary (executivesec@esaamlg.org).