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Desk Review

Mexico¹: FATF-inspired laws that regulate NPOs and Procedures related to FATF evaluations and NPOs

This short desk review is one of five such reviews performed in the context of a regional research program led by the International Center for Not-for-Profit Law (ICNL). Their purpose is to provide non-profit organizations (NPOs) and interested parties in the civil, government, academic, private, and other sectors with relevant data and analyses about anti-money laundering and counter terrorist-financing (AML/CTF) legal standards inspired by both the Financial Action Task Force (FATF) and the Financial Action Task Force of Latin America (GAFILAT), and about FATF evaluations related to those standards. ICNL hopes that these desk reviews will inform dialogues about the degree to which the laws and procedures in each country conform with both the right to freedom of association and FATF standards related to NPOs, as set forth in FATF's recently amended Recommendation 8 and its Interpretive Note (IN).

Introduction

In September 2012, the Government of Mexico passed the Federal Law for the Prevention and Identification of Operations with Illicit Proceeds; and, in August 2013, the Law's respective Regulation was published.² This Law was drafted to comply with FATF recommendations in connection with the fight against terrorism and money laundering.³ The Law aims to establish measures to prevent, identify, and investigate operations that involve proceeds from organized crime. Such measures apply to a list of financial transactions considered to be “vulnerable activities,” including the receipt

¹ This research was made possible thanks to the generous support of the American people through the United States Agency for International Development (USAID). ICNL is responsible for the content of this research, which does not necessarily reflect the viewpoint of USAID or the Government of the United States.

² Federal Law for the Prevention and Identification of Operations with Illicit Proceeds.
<http://www.pld.hacienda.gob.mx/work/models/PLD/documentos/lfpiorpi.pdf>.

³ México: Ley anti lavado cumple con GAFI [Mexico: Anti-Money Laundering Law complies with FATF]. October 2012. <http://www.antilavadodenedinero.com/antilavadodenedinero-noticias-articulo.php?id=5327&title=mexico-ley-antilavado-cumple-con-gafi>.



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of donations by not-for-profit organizations and companies.⁴ The General Rules⁵ set forth the minimum procedures and measures that persons (entities or individuals) who engage in vulnerable activities must implement in order to prevent and detect acts or operations involving transactions with proceeds derived from illicit sources. The most problematic provisions for the NPO sector include the requirement for personal and company data to fully identify their donors, e.g., stock ownership and structure, as well as documents that would make it possible to fully identify respective shareholders or partners. In June 2014, the Secretariat of Finance and Public Credit published amendments to the General Rules, and, among the changes, the most significant for the NPO sector was the elimination of the requirement for foreign donor companies to provide information about their ownership structures or the personal data of their shareholders and directors. The General Rules also included a new, simplified list of data requirements with respect to donations made by international cooperation agencies and embassies. While these changes do, to a certain degree, benefit NPOs, other provisions in this legislation continue to be problematic for the sector.

Mexico is one of the GAFILAT members with dual FATF-GAFILAT membership, and hence its mutual evaluations are conducted and adopted jointly by both bodies. Following the third round of mutual evaluations in 2008, an “Enhanced Follow-up” process was established owing to low compliance levels; this process was extended through February 2014. In October 2017, Mexico concluded the mutual evaluation process conducted by FATF and the final report was presented and submitted for discussion at the Joint FATF-GAFILAT Plenary held in Buenos Aires from 29 October to 3 November 2017. A published version of the mutual evaluation report was to be available in January 2018.

Analysis of AML/CTF legislation from the point of view of freedom of association

The right to freedom of association is a fundamental human right. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) expressly protects this right, as it states that “[e]veryone shall have the right to freedom of association with others [...] No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society...”⁶ The

⁴ Ibid. See Article 17(XIII).

⁵ The General Rules, published in Agreement 02-2013 in August 2013, also set forth the terms and modalities according to which such persons are to submit to authorities the notices referred to in Article 17 of the Federal Law and 22 of the Regulation.

http://www.pld.hacienda.gob.mx/work/models/PLD/documentos/acuerdo022013_reglacaractergral.pdf.

⁶ Similarly, Article 16 of the American Convention on Human Rights (“the American Convention”) protects the right of association. The only acceptable restrictions to freedom of association are substantially identical to those provided for in the ICCPR. Mexico ratified the ICCPR and the American Convention in 1981.



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Inter-American Commission on Human Rights (IACHR) has explained that “the principle of legality also requires restrictions to be formulated previously, in an express, accurate, and restrictive manner to afford legal certainty to individuals.”⁷ While States are free to regulate NPO registration, oversight, and control, the right to associate freely without interference requires that States ensure that those legal requirements not impede, delay, or curtail either the creation or the functioning of such organizations.⁸ One of the duties of States stemming from freedom of association is to refrain from restricting the means of financing human rights organizations. States should allow and facilitate human rights organizations’ access to foreign funds in the context of international cooperation.⁹ Similarly, penalties should be strictly proportionate to the legitimate aim pursued. Forced dissolution procedures should only be undertaken when there is a clear and imminent danger resulting in a flagrant violation of national law and used only when lesser measures would be insufficient.¹⁰

The Federal Law for the Prevention and Identification of Operations with Illicit Proceeds is problematic in the context of international standards regarding freedom of association. Provisions that have a negative impact on NPOs include:

- a. The Law sets forth legal requirements to report on the source of donations received that could limit NPOs’ operations.

Article 17(XIII) of the Law requires NPOs to notify the Secretariat of Finance and Public Credit about donations received that are equivalent to 3,210 times the current minimum wage¹¹ in Mexico City, which comes to approximately US\$13,000.¹² The information must be submitted to the Secretariat “[...] *at the latest, by the 17th of the month immediately following [...]*” (Article 23). Pursuant to the General Rules, NPOs are required to request and turn over information about their donors (foreign and domestic) to the corresponding authority that includes not only documentation proving personal identities, but also information related to the existence of their businesses. The information required applies to both individuals and entities (companies or foundations). The Law provides for a total of 16 categories and approximately 43 sub-categories of data requirements that NPOs must not only request, but also verify and safeguard; this is a burdensome requirement for NPOs that

⁷ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*; ¶ 165 (2011; “the Second Report”, available at <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>).

⁸ *Ibid.*, ¶ 163.

⁹ *Ibid.*, ¶ 179.

¹⁰ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, ¶ 75, A-HRC-20-27 (May 21, 2012) [hereinafter, the “Report of the Special Rapporteur of May 2012” http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf].

¹¹ Secretariat of Finance and Public Credit. Identification and Notification Thresholds. <https://sppld.sat.gob.mx/pld/interiores/umbrales.html>.

¹² Exchange rate in November 2017. <https://www.oanda.com/currency/converter/>.



receive funds from donors affected by this provision.¹³ The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association warns against frequent, burdensome, and bureaucratic reporting requirements, which can eventually unduly obstruct the legitimate work carried out by associations.¹⁴

- b. The Law establishes costly penalties for minor offenses that can disrupt or discourage NPOs' legitimate charitable activities.

Failure to notify the Financial Intelligence Unit (FIU) about donations exceeding US\$13,000 is punishable with a fine on those who failed to provide the notification; fines range between US\$43,000 and US\$280,000, or between 10% and 100% of the value of the act or operation.¹⁵ The Law does not provide for a lower penalty for late notification. Accordingly, NPOs that fail to provide notification in the period established by the Law (within the first 15 days of the subsequent month) could be slapped with a fine that would far exceed the amount of the donation. While compliance with the deadlines set forth in the Law ought to be encouraged, the provision fails to consider the possibility of technical errors that may not have been made in bad faith or situations of *force majeure*, such as natural disasters. These provisions are not consistent with the standard that penalties should be strictly proportional to their legitimate aims.¹⁶

Analysis of AML/CTF laws from the point of view of FATF standards

FATF is an inter-governmental body whose objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing, and other threats related to the integrity of the international financial system.¹⁷ To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. GAFILAT is a regional group¹⁸ that belongs to FATF's network. FATF's recommendations have undergone important revisions since 2014.¹⁹ In 2016, FATF revised Recommendation

¹³ See Annexes 1, 2, 3, and 6 of the General Rules.

http://www.pld.hacienda.gob.mx/work/models/PLD/documentos/acuerdo022013_reglacaractergral.pdf.

¹⁴ Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 38. A/HRC/23/39 (24 April 2013) (hereinafter, *Report of the Special Rapporteur of April 2013*, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf). See also, *Second Report*, ¶ 163.

¹⁵ Article 54(III) of the Federal Law for the Prevention and Identification of Operations with Illicit Proceeds.

¹⁶ Report of the Special Rapporteur of May 2012.

¹⁷ FATF, *Who we are*, available at <http://www.fatf-gafi.org/about/whoweare/>.

¹⁸ GAFILAT, *La función* (our role), available at <http://www.gafilat.org/content/quienes/> (In Spanish).

¹⁹ See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8) [2015]. Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> (English).



8²⁰ and it's IN regarding NPOs, eliminating the statement that NPOs “are particularly vulnerable” to terrorist abuse and inserting new language urging States to apply a risk-based approach²¹ and to respect their obligations under international human rights law.²² According to the reformulated IN, countries must use the risk assessment process to identify a subset of NPOs at risk and then take actions or measures that are effective, appropriate, and proportionate to the risk.²³ Finally, the IN establishes that measures taken must not interrupt or discourage the legitimate charitable activities of NPOs.²⁴

- a. Neither the Law nor its Regulation identify a specific subset of at-risk NPOs, and therefore the oversight measures apply to the entire sector.

None of the relevant AML/CFT-related legislation subject to this desk review refers to the identification of a subset of NPOs at risk of terrorist financing abuse. The General Rules establish the following definition:

“Article 2 [...] *Not-for-profit companies and associations* will be understood, in singular or plural, as: the associations referred to in section I of Title Eleven of the Federal Civil Code; as well as civil society organizations or groups that, having been legally chartered, engage in any of the activities referred to in Article 5 of the Federal Law to Promote Activities Carried Out by Civil Society Organizations, are not-for-profit, and do not engage in political party, political-electoral or religious canvassing; religious groups, associations, and churches governed by the Law on Religious Associations and Public Worship; national political parties or domestic political groups established in accordance with the Federal Code of Electoral Institutions and Procedures, as well as political parties created in Mexico’s states under the states’ own laws; professional associations legally constituted under Article 5 of the Constitution’s Regulatory Law in connection with the exercise of professions in the Federal District; and workers unions or employers regulated by the Federal Labor Law; [...]”

The legal framework does not provide for a risk-based approach to identify the subset of NPOs at risk of being abused, nor, consequently, appropriate measures to be applied

²⁰ Recommendation 8 requires that countries “review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse”.

Recommendation 8 and its IN can be found at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

²¹ European Center for Not-for-Profit Law (ECNL). *A String of Successes in Changing Global Counter-Terrorism Policies that Impact Civic Space*. Available at: <http://www.icnl.org/research/resources/counterterrorism/ECNL-Briefer-Change-of-the-Global-CT-Policies-that-Impact-Civic-Space-July-2016.pdf>.

²² See IN, ¶ 2.

²³ Ibid., ¶ 5.

²⁴ Ibid., ¶ 4.



to the sector. It would therefore be difficult to determine whether oversight measures are proportional based on the standards of Recommendation 8.²⁵

- b. The penalties provided under the Law can disrupt or discourage NPOs' legitimate charitable activities.

As explained in the section above, the Law does not provide for lower penalties in cases, for example, of late notification or involuntary technical errors, or situations of *force majeure*, such as natural disasters. Hence, it cannot be said that the penalties that may be imposed for late notification are proportional to their aim;²⁶ to the contrary, they may discourage NPOs' legitimate activities.²⁷

Analysis of FATF evaluation and follow-up processes and NPO engagement

Recommendation 8 requires that countries “review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse.”²⁸ This evaluation of the NPO sector to identify the NPO subset vulnerable to terrorist financing abuse must be, in turn, covered in the country’s Mutual Evaluation performed by FATF/GAFILAT evaluators.²⁹ The IN for Recommendation 8 establishes that “developing cooperative relationships among the public and private sectors and with NPOs is critical to understanding NPOs’ risks and risk mitigation strategies, raising awareness, increasing effectiveness and fostering capabilities to combat terrorist financing abuse within NPOs.”³⁰ In addition to outreach and educational programs,³¹ countries “should work with NPOs to develop and refine best practices to address terrorist financing risks and vulnerabilities and thus protect them from terrorist financing abuse.”³² Dialogue between the government and NPOs can be encouraged: during the NPO sector risk assessment; while developing and implementing measures to mitigate risk and related guidelines; during a FATF country mutual evaluation; and whenever related issues arise.³³

²⁵ See IN, ¶4(c).

²⁶ See Report of the Special Rapporteur of May 2012, ¶ 75.

²⁷ See IN, ¶ 6(b).

²⁸ See The FATF Recommendations. Recommendation 8. Pag. 11, available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

²⁹ See Procedures for the FATF Fourth Round of AML/CTF Mutual Evaluations, ¶ 4, available at: <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>.

³⁰ See IN, ¶ 4 (f).

³¹ Ibid., ¶ 6 (a) (ii).

³² Ibid., ¶ 6 (a) (iii).

³³ See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8), ¶ 27.



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- a. Did the State identify a subset of NPOs vulnerable to terrorist financing abuse and conduct a review of laws and regulations regarding this subset of NPOs? If so, did the NPO sector participate in this review?

At the time of this desk review, no evidence was found that the State had identified a subset of NPOs vulnerable to terrorist financing abuse. The first National Risk Assessment, conducted in 2016,³⁴ concluded that the potential for abuse or use of NPOs to facilitate terrorist financing is a *low-level vulnerability*. The following was among the Assessment’s conclusions: “thus far, no risk factor has been identified within the not-for-profit organization sector.” At the same time, the conclusions emphasize that ongoing monitoring of NPOs is vitally important “for identifying risk characteristics and profiles.” The methodology used to carry out the National Risk Assessment makes reference to including the private sector but offers no details about the participants or the tools used to obtain their input. The report does not mention the participation of the NPO sector in the exercise, and it is therefore impossible to determine whether the State incorporated inputs from the organizations in accordance with the IN.³⁵

- b. Is there dialogue between NPOs and State agencies to conduct follow-up on the findings of the NPO-sector risk assessment?

This desk review found no evidence of dialogue between NPOs and government authorities. If some level of dialogue did exist, newspaper articles and other online documents reviewed have not provided information thereon.

- c. Has the State facilitated the NPO sector’s participation in the FATF mutual evaluation?

The FATF website³⁶ indicates that the outcomes of the 2017 mutual evaluation of Mexico were to be published in January 2018. This desk review found no evidence regarding the NPO sector’s participation in the FATF mutual evaluation.

- d. Has the State facilitated post-evaluation dialogue, including NPO follow-up on the findings of the FATF evaluation report?

In March 2017, the Tax Administration Service (SAT) issued a press release indicating that “The FATF evaluation found that a number of not-for-profit organizations constitute a vulnerable sector [...]. Based thereon, the SAT initiated a program to review civil society organizations to ensure they are not being used improperly by

³⁴ First National Risk Assessment of Money Laundering and Terrorist Financing in Mexico. Page 25. <http://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr.pdf>.

³⁵ See IN, ¶ 6(a)(iii).

³⁶ The results of the 2017 mutual evaluation were discussed during the FATF/GAFILAT plenary session on 1-3 November 2017. The notes from that meeting are available at the following link: http://www.fatf-gafi.org/countries/a-c/austria/documents/outcomes-plenary-november-2017.html#MEXICO_PORTUGAL.



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criminal organizations.”³⁷ During this desk review, no evidence was found of any level of involvement by NPOs in the design and execution of the review program.

Conclusion

As the main conclusions of this desk review, we can highlight the following:

- The oversight measures and reporting requirements examined in this desk review do not meet the standards of Recommendation 8 and it’s IN with respect to the implementation of measures that have a risk-based approach and that ensure that the sector can continue to pursue its legitimate activities.³⁸
- The AML/CFT measures taken by Mexico are restricting the right to freedom of association. They are not being implemented in a manner that respects the country’s obligations in accordance with international human rights laws, as urged by the FATF in the IN to Recommendation 8.
- Bearing in mind that the mutual evaluation is set to conclude, this would be a good time to open up an informed dialogue between government authorities and NPOs in an effort to identify the subsector of NPOs that might be at risk and thereby meet the standards of Recommendation 8 and its IN.
- The review process being carried out by the SAT could benefit from informed dialogues and consultations with the NPO sector to review and adjust oversight measures so that they meet Recommendation 8’s standard.

It is our hope that this short desk review about FATF laws and procedures will be useful. Throughout the course of this project, ICNL will prepare other reports and research tools concerning AML/CTF and FATF issues for all five countries under study. For more information, please contact cguadamuz@icnl.org or jnieva@icnl.org.

³⁷El SAT inicia revisiones en materia de lavado de dinero [The SAT is beginning to conduct reviews on money laundering].

http://www.sat.gob.mx/sala_prensa/comunicados_nacionales/2017/marzo/Documents/com2017_027.pdf.

³⁸ See IN, ¶ 4(a).