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## Desk Review

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# Panama: FATF-inspired Legislation Regulating 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).*

## Background Information

The government of Panama created a new national AML/CTF legal framework by passing Law 23 on April 27, 2015<sup>2</sup> and its implementing regulation, Decree No. 363, on August 13, 2015.<sup>3</sup> Panama raised its profile within GAFILAT in 2016 when Humberto Brid, the Director of Financial Analysis of the Republic of Panama, was elected vice-president of GAFILAT; this means that Panama will hold the presidency pro-tempore of that regional organization during 2018.<sup>4</sup> In anticipation of its GAFILAT Mutual Evaluation in 2017, Panama took several measures to strengthen its AML/CTF controls

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<sup>1</sup> This research was made possible by the generous support of the people of the United States through the United States Agency for International Development (USAID). The contents of this research is the responsibility of the International Center for Not-for-Profit Law (ICNL) and does not necessarily reflect the points of view of either USAID or the government of the United States.

<sup>2</sup> [http://www.uaf.gob.pa/tmp/file/51/LEY\\_23.pdf](http://www.uaf.gob.pa/tmp/file/51/LEY_23.pdf) (in Spanish).

<sup>3</sup> [http://www.uaf.gob.pa/tmp/file/85/DECRETO\\_EJECUTIVO\\_363\\_DE\\_13\\_DE\\_AGOSTO\\_DE\\_2015.pdf](http://www.uaf.gob.pa/tmp/file/85/DECRETO_EJECUTIVO_363_DE_13_DE_AGOSTO_DE_2015.pdf) (in Spanish).

<sup>4</sup> [http://www.uaf.gob.pa/tmp/file/184/Boletin\\_9\\_\(pl\).pdf](http://www.uaf.gob.pa/tmp/file/184/Boletin_9_(pl).pdf) (in Spanish) and/or <https://www.gafilat.org/index.php/es/espanol/19-noticias/33-principales-conclusiones-del-xxxiv-pleno-de-representantes> (in Spanish).



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and in 2016 it performed the first *National Evaluation of Money Laundering Risks and Terrorist Financing in Panama*,<sup>5</sup> and prepared a *National Strategy*<sup>6</sup> to implement new standards and procedures.

With regard to NPOs, the Panamanian government issued Executive Decree No. 62<sup>7</sup> on March 30, 2017, repealing and replacing several previous executive decrees which previously comprised the legal framework that regulated NPOs. Executive Decree No. 62 creates a system of “permanent control” over NPOs under the authority of the Ministry of the Interior’s Department of Oversight, Follow-up, and Evaluation (“the Ministry”).<sup>8</sup> Executive Decree No. 62 imposes a regime of virtually unlimited control over the functioning and funding of all associations and non-profit, private-interest foundations with legal personality recognized by the Ministry. Executive Decree No. 62 provides for a single mandatory annual report, with minimal content requirements, but only for organizations that either receive public funding or may receive tax-deductible donations. Actual NPO oversight would be performed in an ad-hoc manner based on provisions that authorize public officials to request, order, and examine any and all documents from any NPO as those officials, in their sole discretion, deem convenient and necessary. Public officials would have the power to provisionally suspend the legal personality of an NPO for any action or activity contrary to the Decree, including instances of minor, correctable non-compliance, such as a delay in notifying a change of address. The authorities would have the power to suspend an NPO for an indefinite period of time, without needing to state the grounds for such decision.

## 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...”<sup>9</sup> The Inter-American Commission on Human Rights (IACHR) has explained that “the principle of legality also requires restrictions to be formulated previously, in an*

<sup>5</sup> <http://www.uaf.gob.pa/tmp/file/215/Estrategia Nacional de Riesgo de la Republica de Panama.pdf> (in Spanish).

<sup>6</sup> <http://www.uaf.gob.pa/tmp/file/199/Evaluacion de Riesgo Panama.pdf> (in Spanish).

<sup>7</sup> Executive Decree Number 62, “That regulates associations and non-profit private interest foundations whose legal personality is recognized by the Ministry of the Interior, and issues other provisions” <http://www.uaf.gob.pa/tmp/file/200/DECRETO 62.pdf> (in Spanish).

<sup>8</sup> <http://www.mingob.gob.pa/direccion-de-asuntos-juridicos-y-tramites-legales/> (in Spanish).

<sup>9</sup> 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. Panama ratified the ICCPR in 1977 and the American Convention in 1978.



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*express, accurate, and restrictive manner to afford legal certainty to individuals.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>*

Executive Decree No. 62 is problematic under international standards of freedom of association. Among its most restrictive provisions are the following:

- a. Decree No. 62 establishes a “permanent oversight” regime over NPOs, with ambiguous and disproportionate requirements that grant authorities discretionary power to review NPOs’ documents, operations, and funding.

Decree No. 62 charges the Ministry with permanent oversight, monitoring, and evaluation of the operation of all NPOs (Article 27) on the basis of an undefined risk analysis (Article 29.2). Among the Ministry’s roles is “to guarantee the appropriate performance of the activities, goals, and objectives for which [NPOs] were incorporated; that is, their non-profit nature” (Article 30.2). In order to fulfill this role, the Ministry has the authority to:

- Request the minutes, up-to-date registries of members, and the accounting books “at any time” (Article 17);
- Demand “all documents that may be convenient and necessary” (Article 31.1); and
- Request that officials, representatives, or heads of organizations submit reports “that may be necessary” (Article 31.3).

The Decree requires that NPOs authorized to receive either tax deductible donations or public funds for the performance of projects and NPOs authorized to transfer funds abroad submit a report to the Ministry covering the organization’s previous year of operations and including information about their domicile, current board of directors,

<sup>10</sup> 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>).

<sup>11</sup> *Ibid.*, ¶ 163.

<sup>12</sup> *Ibid.*, ¶ 179.

<sup>13</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, ¶ 75, A-HRC-20-27 (May 12, 2012) [hereinafter, the “Report of the Special Rapporteur of May 2012”] [http://freemassembly.net/wp-content/uploads/2013/10/A-HRC-20-27\\_en-annual-report-May-2012.pdf](http://freemassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf).



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and financial balance (without explaining the required contents of the balance sheet). (Article 40)

These provisions authorize the State to demand, at any time and without limitation, any document that has to do with the functioning or funding of an NPO. Decree No. 62 does not mention any prior notification guarantees nor any other form of protection of NPO rights. The Decree simply requires that NPOs authorized to receive tax-deductible donations, receive public funds, or transfer funds abroad submit a report once a year, and this form only requires minimal, basic information about the organization and a financial balance sheet with undefined contents. Thus, instead of obligating NPOs to submit periodic reports with pre-established, reasonable content that would enable public officials to perform appropriate general oversight, the Decree requires that all NPOs remain permanently on alert for unpredictable demands for any piece of information, without being able to efficiently prepare the information or protect its own interests. It would be difficult to determine that these requirements “were formulated previously, in an express, accurate, and restrictive [defined] manner.”<sup>14</sup> At a practical level, without a specific system stipulating the contents of the documents that must be produced and when they must be submitted, neither NPOs nor Ministry officials will be certain of their obligations. This will create inefficiencies on both sides and impede, delay, and limit the functioning of NPOs.<sup>15</sup>

- b. Decree No. 62 creates a set of penalties for ambiguous and disproportionate violations, without clear rights to due process.

At its own discretion, the Ministry can temporarily suspend the legal personality of an NPO if the latter “fails to provide information about a change in domicile, the current board of directors, or financial balance” if it is obligated to provide such data; if it pursues activities contrary to its non-profit nature; or perform actions or develops activities in violation of the Decree. Suspension shall remain in force “until corrective measures are taken and any observations are complied with” or for thirty days.

(Article 31.4) Decree No. 62 also provides for non-provisional suspension “on an order from an appropriate authority,” but does not state the grounds for such suspension.

(Article 31.5) If an NPO commits a violation that is grounds for suspension, the Ministry shall decree the suspension administratively, by means of a resolution.

(Article 31) While an NPO “is being monitored and overseen... no amendments may be made to any documents previously approved by the Ministry of the Interior until the process is closed.” (Article 36)

In contrast to the standards presented above, Decree No. 62 authorizes temporary suspension for literally any action not in conformity with the Decree, including

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<sup>14</sup> See *Second Report*, ¶ 165.

<sup>15</sup> See *Ibid*, ¶ 163.



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instances of correctable, minor non-compliance such as delays in administrative notifications. The Decree does not even mention any grounds for non-provisional suspension, and, therefore, it is not possible to assess whether this grave limitation to freedom of association is reserved for the most severe violations. This lack of proportionality in the penalties provided for in the law specifically applicable to Panamanian NPOs compares unfavorably with the provisions in the general Panamanian AML/CTF standard. That law provides for a set of proportionate penalties that consider the seriousness of a violation, the threat or magnitude of any damages, the losses and damages caused to third parties, any indications of criminal intent, and the violator’s recidivism.<sup>16</sup> (Article 22) Significantly, Decree No. 62 does not refer to any standard of proof applicable to suspensions nor to the right of the affected NPO to due process. An NPO could find itself under forced suspension for an indefinite period without the opportunity to make any modifications that would solve the problem or preserve the NPO’s sustainability. Considering that the Ministry is charged with permanent oversight of all NPOs in an ad-hoc manner and without the benefit of periodic, substantive NPO reports, it would be challenging for the Ministry’s professional staff to resolve suspensions in an expedient manner. For these reasons, the free association rights of suspended NPOs could be disproportionately limited without any apparent recourse to an independent and impartial court. Such circumstances would not be in conformity with the international law on freedom of association.<sup>17</sup>

- c. Decree No. 62’s procedures for granting legal personality are onerous, without any effective limits on their scope or duration or guarantees of due process.

The procedures to request legal personality as an NPO include the following steps and characteristics:

- Requests must be delivered to the Ministry by an attorney (Article 4);
- Requests are subject to a “consultation process with the appropriate [government] institutions, according to [the] objectives pursued [by the NPO];”
- Once an NPO is registered as a legal person, it must register in a second registry, the “Activity Registry.” (Article 14)

Decree No. 62 creates a tight schedule of fixed deadlines for requests for legal personality. If the Ministry returns a request with observations, then an NPO has sixty calendar days from the date of notice to submit any corrections. If the NPO’s changes do not satisfy the Ministry, then the NPO may receive one non-renewable extra period of fifteen days to submit further corrections. Once this period concludes, the Ministry

<sup>16</sup> Executive Decree Number 363, Article 22 <http://www.uaf.gob.pa/tmp/file/85/DECRETO EJECUTIVO 363 DE 13 DE AGOSTO DE 2015.pdf>.

<sup>17</sup> See the *Report of the Special Rapporteur of May 2012*, ¶ 75.



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has 30 days to issue a resolution either granting or denying the request. (Article 9) Incompliance with deadlines results in a denial of the request. (Article 10) Following notification of a determination, an NPO has five working days to file an appeal. (Article 11) An NPO whose request has been denied may re-submit the request only once. (Article 12)

The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has presented good practices order to ensure that legal requirements do not impede, delay, or limit the creation of NPOs, including “procedures which are simple, non-onerous or even free of charge (e.g. Bulgaria) and expeditious (e.g. Japan where registration applications may be directly filled in online).”<sup>18</sup> Decree No. 62 retains several procedures in the prior legal framework that Panamanian experts have identified as causing high costs and delays in discretionary reviews of requests for legal personality submitted by NPOs, such as the requirement that an attorney represents the NPO throughout the request procedure, required registration in multiple registries, and mandatory consultation with another State institution that operates in the same field of activities as the NPO.<sup>19</sup> Decree No. 62 does not establish any criteria for this consultation, leaving its scope, format, and timing within the absolute discretion of the State agency concerned.

As for the application process schedule, the State extended the period for responding to initial agency observations to sixty days. The limitation that new corrections by applicants may only be made within fifteen days and the fact that a denied request may only be re-submitted once are especially meaningful when one considers that Decree No. 62 establishes ambiguous requirements,<sup>20</sup> and the fact that the Ministry could return the same request a second time with observations that are completely different from the original feedback. In contrast, Decree No. 62 does not set any limit to how long the Ministry may take to return observations or a determination about an application. Finally, an NPO whose request is denied has only five days to file an appeal, but Decree No. 62 does not indicate whether this appeal would be submitted to a different or independent authority, or before the same official who denied the request in the first place. Such centralized procedures, with the mandatory representation of an attorney, without deadlines for responses by the Ministry but

<sup>18</sup> See *ibid*, ¶ 57.

<sup>19</sup> See Alianza Ciudadana Pro Justicia, *Entorno legal y situación de las OSC en Panamá: Informe de país 2015*, available at [http://www.incl.org/programas/lac/PDF/PANAMA/INFORME\\_FINAL\\_PANAMA.pdf](http://www.incl.org/programas/lac/PDF/PANAMA/INFORME_FINAL_PANAMA.pdf).

<sup>20</sup> For example, the name of an NPO must not lead to “confusion about [the NPO’s] nature and purposes” (Article 7.1), and the by-laws must specify the procedure for affiliation “ensuring respect for human rights and the fundamental guarantees enshrined in the Political Constitution of the Republic [of Panama]” (Article 7.8). These provisions could interfere with the free selection of a name by the members of an NPO (for example, the “Bright Star Association”, which could be deemed confusing as to the NPO’s nature and purposes), or establishment of different membership categories, for example, giving preferential status to the residents of a given municipality, or by creating associations that are open only to members of one gender.



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with a rigid calendar for those who make a request, can hardly be considered simple, non-onerous, or expeditious.<sup>21</sup>

- d. Executive Decree No. 363 includes provisions that, in practice, could interfere with the ability of NPOs to receive and use funds.

Executive Decree No. 363 sets due diligence standards for financially obligated subjects, such as banks serving NPOs, which forces these banks to determine the identities of the final beneficiaries of any financial transaction. In the case of NPOs, when it is not possible to determine who the final beneficiary will be the financial institution must obtain signed minutes, certificates, or affidavits containing statements about final beneficiaries. (Article 8) The Decree allows for simplified due diligence measures, including a reduced standards of document review, reduced frequency of client identity confirmations, and reduced oversight of business operations. (Article 10)

An examination of how these provisions are implemented in practice by State organs and financial institutions is outside the scope of this desk review. However, we must highlight that in several countries, AML/CTF oversight has led financial institutions to deny NPOs' requests to open bank accounts, to freeze transactions, to refuse to transfer donations from abroad, and to take other measures in order to reduce their own exposure to risk (these practices are known as "bank de-risking"). If Executive Decree No. 363 is being implemented by the State in such a way that it encourages such harmful practices, then Panama may not comply with its obligation to facilitate NPO rights to request, receive, and use funding from licit sources.<sup>22</sup>

## 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.<sup>23</sup> To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. GAFILAT is a regional group<sup>24</sup> that belongs to FATF's network. FATF's recommendations have undergone important revisions since 2014.<sup>25</sup> In 2016, FATF revised Recommendation*

<sup>21</sup> See the *Report of the Special Rapporteur of May 2012*, ¶ 57.

<sup>22</sup> See *Second Report*, ¶ 165.

<sup>23</sup> FATF, *Who we are*, available at <http://www.fatf-gafi.org/about/whoweare/>.

<sup>24</sup> GAFILAT, *La función (our role)*, available at <http://www.gafilat.org/content/quienes/> (In Spanish).

<sup>25</sup> 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>.



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*8<sup>26</sup> 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 approach<sup>27</sup> and to respect their obligations under international human rights law.<sup>28</sup> 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.<sup>29</sup> Finally, the IN establishes that measures taken must not interrupt or discourage the legitimate charitable activities of NPOs.<sup>30</sup>*

- a. Executive Decree No. 62 does not identify a specific subset of at risk NPOs, but rather applies the same standards to all NPOs with legal personality recognized by the Ministry.

Decree No. 62 regulates NPOs: Non-profit associations and private-interest foundations with legal personality recognized by the Ministry. (Article 1) The definition of an NPO (Article 2) does not distinguish any subset of organizations at risk. The Decree is different from the draft version that was shared with Panamanian civil society in January 2017, in that the words “on the basis of a risk analysis” were added to describe the purpose and role of the Ministry’s Department of Oversight, Follow-up, and Evaluation of NPOs. (See Articles 29.1, 30.2.) However, Decree No. 62 is applied to all NPOs; it does not establish the contents of the risk analysis nor does it distinguish control measures and penalties according to any categorization of risk. Therefore, it would be difficult to determine whether oversight measures are indeed appropriate and proportionate in accordance with the standards of Recommendation 8.<sup>31</sup>

- b. Executive Decree No. 62 establishes disproportionate control measures and penalties that could interrupt or discourage the legitimate charitable activities of NPOs.

The analysis of Decree No. 62 in the prior section related to freedom of association reveals an oversight system under which all NPOs, without distinction, may be required to submit virtually any document to the Ministry at any time, for any reason whatsoever, without any safeguards such as the right to written warnings with an explanation. (See Articles 31.1, 17, and 3.13.) An NPO that is subject to such scrutiny at

<sup>26</sup> 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 Interpretive Note (IN) can be found at [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations\\_2012.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf).

<sup>27</sup> <http://www.icnl.org/research/resources/counterterrorism/ECNL-Briefer-Change-of-the-Global-CT-Policies-that-Impact-Civic-Space-July-2016.pdf>.

<sup>28</sup> See IN, ¶ 2.

<sup>29</sup> See *Ibid*, ¶ 5.

<sup>30</sup> See *Ibid*, ¶ 4.

<sup>31</sup> See IN, ¶ 5.





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unpredictable times and for any reason whatsoever without a specified justification would need to dedicate its human and material resources to managing requests for information and on-site visits, thus diverting them from their missions and planned charitable activities.

Decree No. 62 also authorizes the temporary suspension of an NPO for non-compliance with any requirement, no matter how technical or correctible the requirement may be, as well as the indefinite suspension of an NPO for grounds that are not even mentioned in the Decree. (Articles 31.4 and 31.5.) Decree No. 62 does not include any other penalties that could be enforced in a more proportionate manner based on the type of noncompliance and the interests of the State, such as warnings and fines of varying amounts.. Similarly, an NPO might be impeded from correcting the situation underlying the penalty because the law prohibits any changes to documents in a dossier while an investigation is under way. (Article 36) For an NPO, suspension during an investigation –including an investigation that does not produce any evidence of significant crimes– could cause loss of new donations, inability to access bank accounts, termination of staff due to lack of resources to pay salaries, interruption of services provided to communities, and more. Such penalties, imposed based on ambiguous and wide-reaching grounds – literally for any instance of noncompliance – by definition permit disproportionate penalties that could interrupt or discourage the legitimate charitable activities of an NPO.<sup>32</sup>

- c. Executive Decree No. 62 establishes a “permanent,” ad-hoc oversight regime for NPOs, thus constraining the Ministry’s capacity and resources to effectively deal with AML/CTF risks.

Although it was modified to incorporate the words “on the basis of a risk analysis,” Decree No. 62 does not specify what the contents of such analysis should be or provide for any risk-based, targeted measures. To the contrary, Decree No. 62 creates a permanent oversight regime for the entire universe of NPOs, to be applied in an *ad hoc* manner. (Chapter VIII) It would be difficult to prove that the Ministry has the ability, capacity, and resources to permanently supervise the entire NPO sector, and there is no mechanism established for the authorities to identify the subset of NPOs at risk for more efficient control of the sector as required by the standards of both Recommendation 8 and its IN.<sup>33</sup>

## 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*

<sup>32</sup> See *Ibid*, ¶ 4.d.

<sup>33</sup> See *IN*, ¶ 5.



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*being vulnerable to terrorist financing abuse.<sup>34</sup> This evaluation of the NPO sector to identify the NPO subset vulnerable to terrorist financing abuse must be addressed in the country's Mutual Evaluation performed by FATF/GAFILAT evaluators.<sup>35</sup> 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."<sup>36</sup> In addition to outreach and educational programs,<sup>37</sup> 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."<sup>38</sup> 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.<sup>39</sup>*

- a. Did the State identify an NPO subset that is vulnerable to terrorist financing abuse, and did the State perform a review of laws and regulations pertaining to this NPO subset? If so, was the NPO sector involved in this evaluation?

In 2017, Panama published the *Evaluación nacional de riesgos de blanqueo de capitales y financiamiento al terrorismo de Panamá* (National Evaluation of Money Laundering Risks and Terrorist Financing in Panama, or Evaluation)<sup>40</sup>, which was followed by the appropriate *Estrategia* (the Strategy).<sup>41</sup> Both documents refer to the NPO sector, but that reference does not mean that the State has identified an NPO subset vulnerable to terrorist financing abuse, as required by Recommendation 8. The following are among the major findings presented in those reports that are related to the NPO sector's risk level:

- The NPO sector may be abused, but **the risk that NPOs will be used to finance terrorism is very low, and no cases have been identified where an NPO is involved in money laundering offenses;**<sup>42</sup> and
- Private-interest foundations are more vulnerable to money laundering or terrorist financing abuse, not because of their characteristics or any evidence of having been abused, but because such legal forms are "of widespread use."<sup>43</sup>

<sup>34</sup> [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations\\_2012.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf).

<sup>35</sup> 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>.

<sup>36</sup> See IN, ¶ 4.(f).

<sup>37</sup> *Ibid.*, ¶ 6.a.ii.

<sup>38</sup> *Ibid.*, ¶ 6.a.iii.

<sup>39</sup> See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8), ¶ 27.

<sup>40</sup> <http://www.uaf.gob.pa/tmp/file/215/Estrategia Nacional de Riesgo de la Republica de Panama.pdf> (in Spanish).

<sup>41</sup> <http://www.uaf.gob.pa/tmp/file/199/Evaluacion de Riesgo Panama.pdf> (in Spanish).

<sup>42</sup> *Evaluación nacional de riesgos de blanqueo de capitales y financiamiento al terrorismo en Panamá*, p. 74 [emphasis a.

<sup>43</sup> *Ibid.*, p. 70.



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The *National Evaluation of Money Laundering Risks and Terrorist Financing in Panama* report does not mention involvement of the NPO sector in its preparation. The *Strategy* Report does identify those who participated in its preparation, and it does not list any representative of NPOs.<sup>44</sup> Therefore, this desk review cannot demonstrate that the State collaborated with the NPO sector in producing either the *Evaluation* or the *Strategy*, as required by the IN<sup>45</sup>.

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

The *National Evaluation of Money Laundering Risks and Terrorist Financing in Panama* identifies key follow-up steps: “To strengthen and develop the legal framework and resolutions and to integrate the administrative regime of NPOs into the [nation’s] preventive regime, as an infra-structural factor.” The Ministry is charged with the following functions, among others:

1. Modifying the Executive Decree that regulates non-profit associations and private-interest foundations, in order to adjust and update their structure vis-à-vis [AML/CTF] laws; and
2. Verifying sector risk factors in an internal and individualized manner<sup>46</sup>

The Ministry did take the first of these two steps when it issued Executive Decree No. 62, on March 30, 2017. The NPO sector received a draft in advance and a coalition of NPOs publicly criticized provisions of the Decree in relation to both international standards on freedom of association and Recommendation 8, highlighting several of the comments mentioned in this desk review.<sup>47</sup> The State, in turn, highlighted several modifications to the final version of Decree No. 62 which were proposed by the NPO sector, such as excluding law enforcement bodies from NPO oversight actions and extending deadlines for processing applications for legal personality and risk assessments.<sup>48</sup> This demonstrates that there was dialogue between the NPO sector and the State, and that the dialogue influenced the way the State followed up on the risk assessment.<sup>49</sup>

As to the second follow-up step identified in the *Evaluation*, the State modified the final version of Decree No. 62 by adding the words “on the basis of an analysis of risk”

<sup>44</sup> *National Strategy for Money-Laundering Risks and Terrorist Financing in Panama*, pp 61-63 (in Spanish).

<sup>45</sup> See IN, ¶ 6.a.ii, iii.

<sup>46</sup> *National Strategy for Money-Laundering Risks and Terrorist Financing in Panama*, p. 52 (in Spanish).

<sup>47</sup> “The Citizen Action Assembly, which brings together at least 15 organized civil society groups, pronounced its objection to a draft executive decree... In the opinion of Magaly Castillo, of Alianza Ciudadana Pro Justicia, not every NPO is at risk of being used for terrorist financing or money laundering. ‘The State must identify those subsets of civil society at greater risk and not apply uniform controls that open the door to arbitrary enforcement, as this draft law would do,’ she said.” <https://impresaprensa.com/panorama/Opinions-diversas-norma-regularia-oeneges04711029023.html>.

<sup>48</sup> See <http://www.mingob.gob.pa/mingob-emite-decreto-que-reglamenta-las-organizaciones-sin-fines-de-lucro/>.

<sup>49</sup> See *Best Practices: Combatting the Abuse of Non-Profit Organizations (Recommendation 8)*, ¶ 27.



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to describe the goal and oversight responsibilities of the Ministry's Department for Oversight, Follow-up, and Evaluation of NPOs, but it did not describe the risk analysis. (See Articles 29.1 and 30.2.) This desk review was unable to identify any evidence in publicly available information that (a) the Ministry is in fact verifying NPO risk factors "in an internal and individualized manner;" (b) there are criteria for evaluating NPO risk, or (c) that there has been any dialogue between the NPO sector and the State on these questions.<sup>50</sup>

c. Has the State facilitated NPO sector involvement in GAFILAT's Mutual Evaluation?

In May 2017, GAFILAT held its fourth round mutual evaluation of Panama, meeting with more than 160 representatives of different sectors of Panamanian society.<sup>51</sup> This desk review was unable to uncover any evidence regarding the degree of NPO sector participation in this recent mutual evaluation, nor any actions by the State to facilitate its participation.<sup>52</sup>

d. Has the State facilitated a post-evaluation dialogue which includes NPO sector follow-up on the findings of GAFILAT's Mutual Evaluation report?

The Ministry inaugurated a training program for NPOs on AML/CTF issues that started shortly before the GAFILAT evaluators arrived in Panama and that will be continue throughout 2017, with the aim of reaching 600 NPOs.<sup>53</sup> This training program could open a channel for dialogue between the NPO sector and the Ministry with regard to Decree No. 62 and its enforcement, among other issues related to AML/CTF and GAFILAT's Mutual Evaluation. This desk review did not identify the contents of the training program, however, and cannot confirm that the State is indeed using the program to exchange information with NPOs with the goal of "developing and improving best practices to address terrorist financing risks and vulnerabilities and protect [NPOs]."<sup>54</sup>

## Conclusion

We can highlight the following major conclusions from our desk review:

- Although Panama's risk assessment indicated that the risk that NPOs will be used for terrorist financing is very low and no cases have been identified where an NPO is involved in a money laundering crime, the country has a new legal framework for the entire NPO sector that curtails the right to freedom of

<sup>50</sup> See IN ¶16.a.iii.

<sup>51</sup> <http://www.mef.gob.pa/es/noticias/Paginas/CulminalavisitadeGAFILATaPanama.aspx#.WhhoUzdOnIU>.

<sup>52</sup> See IN, ¶16.a.iii.

<sup>53</sup> See <http://www.mingob.gob.pa/entidades-sin-fines-de-lucro-son-capacitadas-por-el-mingob-para-que-no-sean-utilizadas-como-instrumento-del-blanqueo-de-capitales/>.

<sup>54</sup> See IN, ¶16.a.iii.



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association instead of respecting international human rights law, as called for in the IN;

- Although Executive Decree No. 62 mentions that NPOs should be regulated based on an assessment of risks, the Decree apparently applies the same ambiguous oversight and standards and sanctions to all NPOs, and this desk review did not identify any evidence of oversight criteria that vary according to risks; and
- This desk review could not determine the depth or the content of dialogue between the State and the NPO sector, but it confirms that there definitely are channels for dialogue and training programs that could prepare NPOs to advocate for a legal framework and procedures that conform to both international freedom of association standards and Recommendation 8.

It is our hope that this brief desk review about FATF laws and procedures will be useful. In 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](mailto:cguadamuz@icnl.org) or [jnieva@icnl.org](mailto:jnieva@icnl.org).