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Desk Review

Peru¹: 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

The Peruvian government has enacted the Law Creating the Peru Financial Intelligence Unit (Law 27693)² and its implementing regulation (Supreme Decree 020-2017-JUS)³ as part of a set of AML/ATF rules and regulations. This body of law includes Legislative Decree 1249, which requires NPOs to report suspicious transactions and/or record transactions according to a threshold set by the Superintendency of Banking, Insurance, and Private Pension Fund Managers (SBS).⁴ Under this decree, the Financial Intelligence Unit (FIU) *has the power to request additional information to*

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 United States' government.

² Regulation implementing Law 27693, the Law Creating the Peru Financial Intelligence Unit. http://www.sbs.gob.pe/Portals/5/jer/NORM_GEN_LAFT/DSN-020-2017-JUS.pdf.

³ Supreme Decree 020-2017-JUS http://www.sbs.gob.pe/Portals/5/jer/NORM_GEN_LAFT/DSN-020-2017-JUS.pdf.

⁴ Legislative Decree 1249, which sets forth measures to enhance the prevention, detection, and sanctioning of money laundering and terrorism. Article 3.2(2). <http://busquedas.elperuano.pe/normaslegales/decreto-legislativo-que-dicta-medidas-para-fortalecer-la-pre-decreto-legislativo-n-1249-1458017-1/>.



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verify that NPOs, as regulated entities, are in compliance with their obligations under the law.⁵ The sanctions set out in Legislative Decree 1249 do not provide for a system of appropriately differentiated penalties for different types of non-compliance offenses.⁶ The penalty for the crime of terrorist financing is a minimum of 25 and a maximum of 35 years in prison.⁷ Legislative Decree 1352 (Legislative Decree Expanding the Administrative Liability of Legal Persons) provides that a legal entity responsible for the crimes of terrorist financing and money laundering shall be subject to the following measures, among others: (a) suspension of corporate activities for a period of six months to two years; (b) a temporary or permanent ban on conducting activities of the same nature as the activity in the course of which the crime was committed, abetted, or covered up; and (c) dissolution.⁸

Peru was evaluated by GAFILAT—of which it is a founding member—in 2003, 2005, and 2008. Based on its deficient ratings in the 2008 GAFILAT evaluation, Peru established “enhanced monitoring,” which lasted through 2015. In October 2017, the FATF began a fourth round of mutual evaluations, which will continue through early 2018. In recent years, the Peru FIU stepped onto the international stage by chairing the Egmont Group, which comprises more than 150 FIUs from different jurisdictions around the world, for the 2015-2017 period.

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...”⁹ The 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.”¹⁰

⁵ See Regulation implementing Law 27693, Article 29, and Supreme Decree 018-2006-JUS, Article 4.

⁶ SBS Resolution 5167-2016 establishes a system of penalties of varying severity for different types of violations, but it applies only to legal entities that operate casino games and/or slot machines.

⁷ The determination of the maximum penalty depends on whether the perpetrator offers or grants compensation for the commission of a terrorist act or is a government official or public servant. See Article 4-A of Legislative Decree 1249.

⁸ Legislative Decree 1352—Legislative Decree Expanding the Administrative Liability of Legal Persons. Article 5. <http://busquedas.elperuano.pe/normaslegales/decreto-legislativo-que-amplia-la-responsabilidad-administrativa-decreto-legislativo-n-1352-1471551-4/>.

⁹ 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. Peru ratified the ICCPR in 1978 and the American Convention that same year.

¹⁰ 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>.



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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.¹¹ 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.¹² 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.¹³

Supreme Decree 020-2017-JUS, which sets forth the regulation implementing Law 27693, is problematic in view of the international standards regarding freedom of association. The more restrictive provisions for NPOs include the following:

- a. The Decree makes it mandatory to implement the Money Laundering and Terrorist Financing Prevention System (SPLAFT), which is burdensome to do, and which could limit NPOs' ability to operate.

Pursuant to the Law, NPOs that receive grants are responsible for implementing the SPLAFT, which must be applied by its employees and executives. To implement the SPLAFT, NPOs must:

- Designate a compliance officer to work on a “non-exclusive” basis, and prevent, detect, and report suspicious transactions to the Peru FIU. The officer’s responsibilities include (Article 16):
 - Proposing strategies for the reporting entity to prevent and manage money-laundering and terrorist financing (ML/TF) risk, as well as monitoring SPLAFT implementation;
 - Taking the steps necessary to train the individuals in the reporting entity’s organizational structure, based on their roles;
 - Evaluating transactions and report those identified as suspicious to the Peru FIU on behalf of the reporting entity;
 - Preparing and sending the necessary reports regarding the status of the ML/TF prevention system and compliance therewith and verifying that SPLAFT-related documents are being properly kept and safeguarded;

¹¹ Ibid., ¶ 163.

¹² Ibid., ¶ 179.

¹³ 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://freemasssembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf].



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- Serving as point of contact between the reporting entity and the oversight agency and SBS via the Peru FIU and responding to information requests from the competent authorities;
- Providing information regarding changes and additions to the list of high-risk and non-cooperative countries published by the FATF.
- Other responsibilities as set forth by the Law, the Regulation, and sector regulations, as applicable.
- Identify their donors, regardless of each client's particular characteristics or how frequent their transactions. NPOs must develop policies and procedures to enable compliance with this requirement (Article 19).
- Record: (i) individual transactions made by their clients in amounts equal to or greater than US\$10,000.00 or the equivalent in local or other currency, where applicable; and (ii) multiple transactions conducted with one or multiple offices of the reporting entity during a calendar month, by or for the benefit of the same person, totaling US\$50,000.00 or more (Article 24).
- Record identifying data of the persons involved in a transaction (grant) as originators, executors and/or beneficiaries. "In the case of individuals, the following shall be recorded: full name, identity document type and number, nationality if foreign, address, profession or occupation, civil status and name of spouse or partner, if any, and power of attorney information. In the case of legal entities: business name, Single Taxpayer Registration number or equivalent, National Superintendency of Public Registries (SUNARP) Registration Certificate number, address for tax and legal purposes, and name of the legal representative, regarding whom the data required for individuals must be documented." (Article 24(5))
- Draw up and apply a manual that lays out the policies, mechanisms, and procedures for ML/TF prevention and detection. The manual must cover: (i) general aspects of the ML/TF prevention system; (ii) roles and responsibilities of the reporting entity's employees, executives, managers, and the compliance officer; (iii) procedures for recording, filing, maintaining, and transmitting records, reports, and other information or SPLAFT documentation; and (iv) references to domestic law and international standards for ML/TF prevention, among other elements required by sector regulations (Article 26).

The administrative burden of implementing the SPLAFT according to the terms described above could limit the ability of NPOs to carry out their missions. At a practical level, meeting the above obligations could result in serious obstacles for a small organization with limited resources, which, for example, would have to hire new staff to perform the role of compliance officer. The requirement to design a manual specifically for compliance with AML/CFT measures could also result in significant



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costs for small and medium-sized NPOs. It would therefore be difficult to find the legal requirements described above consistent with the standard that the State should not limit NPOs' ability to operate.¹⁴

- b. The Decree does not set out criteria regarding the type of information that the FIU can request from NPOs, nor does it set out specific timeframes for delivering that information, which could delay or limit NPOs' operations.

Under Supreme Decree 020-2017-JUS, NPOs must respond *promptly* to information requests made by the FIU in the performance of its duties, including requests for access to any records or databases it has (Article 4). Additionally, NPOs are compelled to respond to FIU information requests or requests for additional information *in the timeframe given* (Article 29(1)). The provision does not identify the type of information that the FIU can request from the NPO or the timeframe in which it must be furnished. Based on this provision, the FIU can, at its discretion, request any document relating to an NPO's operations and financing, and give a deadline that may not allow enough time for the NPO to prepare and deliver the requested information, and it may do so as many times as it sees fit. The NPO would have to neglect its charitable activities in order to respond to the FIU information requests. This provision is inconsistent with the standard requiring restrictions to be formulated previously, in an express, accurate, and restrictive manner.¹⁵ Similarly, the above legal requirements could limit the functioning of these organizations¹⁶ and unduly obstruct their legitimate work.¹⁷

- c. Supreme Decree 020-2017-JUS does not define suspicious transactions, leaving ambiguity as to when NPOs should report them.

The Decree does not provide a definition of what is to be considered a suspicious transaction, leaving NPOs to use their judgment in making a determination that could result in sanctions. Pursuant to Article 25 of the Decree, NPOs must immediately and adequately report suspicious transactions within a period not to exceed 24 hours from the time at which the transaction is considered suspicious. The timeframe for identifying a transaction as suspicious depends, according to the Decree, "on its nature and complexity," but the Decree provides no specific criteria for identification. The lack of guidance on how this provision is to be applied could result in NPOs' being found non-compliant with their obligations under the Law. It is therefore impossible to assert that these requirements are consistent with the standard that any restriction

¹⁴ See IACHR, *Second Report*, ¶ 163.

¹⁵ *Ibid.*, ¶ 165.

¹⁶ *Ibid.*, ¶ 163.

¹⁷ *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, A/HRC/23/39, ¶ 38 (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.



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of the freedom of association must be formulated previously, in an “express [...] and restrictive manner.”¹⁸

- d. Under the Decree, NPOs must refrain from carrying out actions or transactions with donors who refuse to provide the required information or documentation, which could restrict their ability to access financial resources.

According to the Decree, if an NPO is unable to meet the extensive documentation requirements relating to donor identity (in the case of individuals: full name, identity document type and number, nationality if foreign, address, profession or occupation, civil status and name of spouse or partner, if any, and power of attorney information), it must: (a) not establish a relationship; (b) not carry out the transaction; and/or (c) terminate the relationship. In practice, a donor’s refusal to furnish information would limit the ability of the NPO to access legitimate funding sources. Consequently, these provisions obstruct, instead of facilitate, NPOs’ access to domestic and foreign funds, and restrict their means of financing.¹⁹

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.²⁰ To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. GAFILAT is a regional group²¹ that belongs to FATF’s network. FATF’s recommendations have undergone important revisions since 2014.²² In 2016, FATF revised Recommendation 8²³ and its 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 approach²⁴ and to respect their obligations under international human rights law.²⁵ According to the reformulated IN, countries must use the risk assessment

¹⁸ See IACHR, *Second Report* ¶ 165.

¹⁹ See *Ibid.*, ¶ 179.

²⁰ FATF, *Who we are*, available at <http://www.fatf-gafi.org/about/whoweare/>.

²¹ GAFILAT, *La función* (our role), available at <http://www.gafilat.org/content/quienes/> (In Spanish).

²² 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).

²³ 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.

²⁴ 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>.

²⁵ See *IN*, ¶ 2.



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process to identify a subset of NPOs at risk and then take actions or measures that are effective, appropriate, and proportionate to the risk.²⁶ Finally, the IN establishes that measures taken must not interrupt or discourage the legitimate charitable activities of NPOs.²⁷

- a. Legislative Decree 1249 stipulates that oversight is to apply solely to vulnerable organizations but does not identify a specific subset of at-risk NPOs.

The Decree sets forth that in the case of not-for-profit organizations, the competent oversight agencies—the Peruvian Agency for International Cooperation (APCI), the Foundation Oversight Council (CSF), and the Peru FIU—must perform their role solely with respect to those [organizations] that are *vulnerable to money laundering and terrorist financing, as determined in the sector risk analysis* (Article 9-A(10)). Among the entities obligated to report suspicious transactions and/or record transactions according to the threshold set by the SBS, are “[n]ot-for-profit organizations that raise, transfer, and disburse funds, resources, or other assets for charitable, religious, cultural, educational, scientific, artistic, social, recreational, or humanitarian purposes or in order to carry out other types of good works” (Article 3). Since the provision does not single out a specific subset of NPOs found to be at risk, its scope encompasses the entire non-profit sector. The Decree makes no reference to the content of the risk analysis or to the application of oversight measures or sanctions based on any specific risk classification as described in Recommendation 8 and its IN.²⁸

- b. Supreme Decree 020-2017-JUS establishes oversight measures that could disrupt the legitimate activities of NPOs.

Pursuant to Supreme Decree 020-2017-JUS, NPOs are compelled to provide access to records and databases as requested by the FIU (Article 4). The Decree does not, for example, include the right of the NPO to request in writing the specific grounds for the information request, or provide for sufficient time to arrange for submission of that information. In practice, the NPO would be subject to an intrusive level of scrutiny and would be required to respond to any FIU information request at any time requested. These oversight measures are inconsistent with the standards of Recommendation 8 and its IN, according to which measures must be proportional to the risk identified, so as not to disrupt the legitimate activities of NPOs.²⁹

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

²⁶ Ibid., ¶ 5.

²⁷ Ibid., ¶ 4.

²⁸ Ibid., ¶4(a).

²⁹ Ibid., ¶4(a) and (c).



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.”³⁰ 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.³¹ 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.”³² In addition to outreach and educational programs,³³ 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.”³⁴ 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.³⁵

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

The findings of the National Risk Assessment (NRA) for Peru, published in November 2016, noted that because Decree 1249 requires supervision of NPOs to be conducted “solely with respect to [organizations] that are vulnerable to money laundering and terrorist financing, as determined in the sector risk analysis,” that risk analysis needs to be performed. The assessment also mentions the need to target oversight of those regulated entities that really might be vulnerable to being used for money laundering and especially terrorist financing.³⁶ The working groups that took part in the risk assessment determined that weak regulation of NPOs and failures in the AML/CFT oversight system presented a high risk.³⁷ The NRA report makes no reference to the participation of the NPO sector in conducting the assessment. The National Policy for Countering Money Laundering and Terrorist Financing mentions that the risk

³⁰ See *The FATF Recommendations*. Recommendation 8. Pag. 11, available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

³¹ 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>.

³² See *IN*, ¶ 4 (f).

³³ *Ibid.*, ¶ 6 (a) (ii).

³⁴ *Ibid.*, ¶ 6 (a) (iii).

³⁵ See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8), ¶ 27.

³⁶ *Evaluación Nacional de Riesgos de Lavado de Activos y Financiamiento del Terrorismo* [National Money Laundering and Terrorist Financing Risk Assessment]. Republic of Peru. Executive Summary. November 2016. Inter-American Development Bank (IDB). p. 33. http://www.sbs.gob.pe/Portals/5/jer/ESTUDIO-ANALISIS-RIESGO/20170420_EVNARETER.pdf.

³⁷ *Ibid.*, p. 49.



assessment was conducted in the context of a participatory process that required several bilateral meetings with representatives of public and private entities to be arranged. It does not, however, specifically mention the participation of the NPO sector.³⁸

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

The National Policy for Countering Money Laundering and Terrorist Financing was adopted in September 2017. This national policy addresses the findings of the risk assessment, noting that “there is no risk analysis of NPOs that entail a higher risk of being used for ML/TF activities and that, as such, [should] be subject to targeted oversight.”³⁹ The policy document mentions that 34 public and private sector entities were involved in its development, but does not mention participation of the NPO sector.⁴⁰

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

In the second half of 2017 and early 2018, Peru’s ML/TF prevention system will be evaluated with regard to implementation of and compliance with the 40 recommendations issued by the FATF, as part of the Fourth Round of Mutual Evaluations of the Financial Action Task Force for Latin America (GAFILAT), a regional FATF body.⁴¹ This desk review uncovered no evidence regarding the level of participation of the NPO sector in the recently launched mutual evaluation, or any State actions to facilitate the sector’s participation in the process.⁴²

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

As explained in the previous section, the mutual evaluation process is underway. This desk review found no information on any level of dialogue with NPOs, before or during the evaluation.

Conclusion

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

- The oversight measures and reporting requirements analyzed in this desk review are inconsistent with the standards of Recommendation 8 and it’s IN in

³⁸ See IN, ¶ 4(f).

³⁹ *Evaluación Nacional de Riesgos de Lavado de Activos y Financiamiento del Terrorismo* [National Money Laundering and Terrorist Financing Risk Assessment], p.40.

⁴⁰ See IN, ¶ 4(f).

⁴¹ *Infolaft: Anticorrupción, Fraude y LA/FT. “GAFI inició evaluación mutua en Perú* [FATF starts mutual evaluation in Peru]. October 2017. <https://www.infolaft.com/gafi-inicio-evaluacion-mutua-en-peru/>.

⁴² See *Best Practices: Combatting the Abuse of Non-Profit Organizations (Recommendation 8)*, ¶ 27.



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regards to the application of measures with a risk-based approach to ensure that the sector can continue to carry out its legitimate activities.

- The AML/CFT measures taken by Peru are restricting freedom of association; they are not being implemented in a manner that fulfills the country's obligations under international human rights law, as the FATF urges in the IN to Recommendation 8.
- This desk review has found that channels of dialogue exist between the authorities and unidentified private sector representatives, but not necessarily with NPOs. The fourth round of evaluations presents an opportunity for the authorities to begin or strengthen a process of dialogue with NPOs with a view to identifying the subset of at-risk NPOS and evaluating the proportionality of the control and oversight measures set forth in the laws analyzed.

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.