

Author Spotlight: Kay Guinane on US Financial Transaction Laws

Host: Ted Hart

Guest: Kay Guinane – Charity and Security Network

Announcer: Welcome to the CAF America Radio Network, a production of the Charities Aid Foundation of America. As the leader in global giving CAF America offers more than 20 years of experience and expertise to corporations, foundations, and individuals who wish to give international aid and with enhanced due diligence in the United States.

Through its industry-leading grants management programs and philanthropic advisory services, CAF America helps donors amplify their impact. This show is dedicated to these donors and the charities they support. CAF America is uniquely positioned to serve as the bridge between these important partners and transforms vision into meaningful action.

Guests on the CAF America radio network are leaders in their field, who share tips for success and stories that inspire. Our host is Ted Hart, the CEO of the Charities Aid Foundation of America. This is a live call-in show. Add your voice by calling 914-338-0855. After the show, you can find all of our podcasts at cafamerica.org. Don't forget to dial, 914-338-0855.

Now, welcome the host of the CAF America radio network, Ted Hart.

Ted Hart: Welcome to this latest edition of the CAF America Radio Network. It is my pleasure to welcome here to our show Kay Guinane, director at the Charity and Security Network. She's going to be discussing CAF America's new book, *Cross-Border Giving*. That book, it was just released in June of this year. We're very proud of this book.

In particular, Kay co-authored chapter eight with Nancy Herzog, and that is the chapter entitled, *US Financial Transaction Laws and Their Impact on International Grantmaking*. Welcome here to the CAF America Radio Network Kay Guinane, how are you?

Kay Guinane: I'm fine. Thank you very much for having me.

Ted: It's a pleasure to have you here. Before we focus on the book and this is a really terrific and very important chapter that you co-authored, would you please share with our listeners a bit about your professional background and the work that you do?

Kay: I'd be happy to. I'm an attorney, and throughout my career I have focused on legal advice and representation of not-for-profit organizations, first representing local community, organizations with their tax-exempt status and incorporation and those kinds of issues, but also getting involved and representing them in policy issues of concern to them.

After 20 years of doing that at Kentucky, I came to DC. In the year 2001 when 9/11 happened, I was working for a government watchdog organization, director of the nonprofit speech rights department where we monitored federal government actions that would affect the right of each expression association and assembly for nonprofit organizations.

The Patriot Act, which was passed very hastily after the 9/11 attacks, included a number of provisions that were very broad and had the potential to be very damaging to nonprofit operations, particularly any kind of cross-border programming or grantmaking. We saw, over the next period of time,

implementation of these laws that was indeed there a problematic and in some instances has been found to be unconstitutional.

In 2008, I helped launch the Charity & Security Network as an effort across different subsectors of nonprofits to address these issues and try to proactively get the US government to adopt a more positive policy and create a more enabling environment for civil society, including those doing cross-border activities and grantmaking.

That was the purpose of the Charity & Security Network. It's been nearly 10 years we've been in operation; have had success, some not. I think a core strategy of bringing together peace-builders, grant-makers, humanitarian, development organizations, civil liberties, faith-based, other nonprofits together to share information, share strategy, and work towards a more positive policy has overall had a positive effect. We were very happy to have the opportunity to continue this book and talk about the specific laws and policies that affect cross-border giving.

Ted: I wanted to ask you, what were your thoughts when you first learned that CAF America was going to attempt to put this comprehensive book together on cross-border giving?

Kay: It sounded overwhelming to me because it's such an enormous and complex topic, but I was able to take on the chapter with the help of Nancy Herzog from the National Endowment for Democracy, as co-author. When I saw the final book, I was very pleased to see how it provided a lot of incentive information in a very readable and easy to use format.

Although the topic may seem overwhelming at times, I think this is a good job of making it a spectacle and making it clear this work can and needs to be done; it's important.

Ted: Well, thank you. Of course, we reached out to experts like yourself in bringing together this book on all aspects of cross-border giving. In specific, your chapter covered three very specific and distinct areas related to the topic area of financial transaction laws and their impact on international grantmaking. Can you share with us the framework of your chapter and what guided the information that you shared?

Kay: I'd be happy to. The first part, we set out a policy and political environment in which these laws exist and functions because that speaks quite a bit to how they're interpreted because they're very vague, their interpretation is important. What the enforcement policy has been and how that has evolved over time.

The second part focuses on nuts and bolts of the major laws that impact cross-border transactions or grant-makers and nonprofit organizations. The third part is how to operate carefully and legally in this arena.

Ted: Of course, all three parts really are important for anyone who's going to be a true practitioner in cross-border giving, whether that's a foundation, corporation, individual, anyone who wants to do good and be philanthropic around the world outside of the borders of the United States.

I'd like to back up from those three principles, if I might, because in your chapter you actually start out by putting forward a risk-based approach to these topics. What does it mean to have a risk-based approach?

Kay: A risk-based approach, it means that you don't take a one-size-fits-all text box approach to regulation or to due diligence in good governance, that you identify risk or terrorist financing, or money-laundering, a potential risk option in your financial transactions. That's whether or not your measures are adequate to address those risks, and where you find gaps or areas that need to be strengthened, you adopt risk mitigation measures that will be effective for your organization and will be proportionate to the risk not overreact, and will not unduly disrupt your activities. That's risk-based approach essentially is. It has been endorsed by the Financial Action Task Force which adopted it as a major recommendation in 2012. The Financial Action Task Force is a consortium of 35 member states, including the United States, that work together to develop standards and recommendations for country laws, prevent money laundering and terrorist financing. They go around and evaluate nearly every country in the world. Over 180 countries are evaluated on how well their laws and the implementation of those laws conform to the FATF standards.

There is a standard on non-profit organizations is included and is adopt risk-based approach. Risk-based approach applies to all entities including financial institutions that are so crucial grant-makers who move money to their grantees. It is something that both governments and banks and grant-makers and charities need to keep in mind and are approach take. It looks at specific risks and how to best mitigate those risks.

Ted: I was just going to share with you an example and ask you to let me know if I'm going down the right path. Here at CAF America, as we remind our donors, getting money out of the US in a regulatory compliant way is really only half the story, in particular when you talk about cross-border giving. The other half of the story is getting the money into the country where the charity that you're looking to support is housed.

Let me give you an example. In 2010 the Parliament of India set forth the Foreign Contributions Regulation Act or the FCRA. In that, I guess from a- if we're looking at the policy side of this, was to regulate and accept the utilization of foreign contributions into India. In putting together the law, they laid out that charities who were going to receive money from outside of India had to be registered with the government and had to have a specific type of bank account, an FCRA-approved account to accept those funds. The legal framework then comes into play.

The practical side, and this is where I wanted to sort of- the risk-based approach and then the practical approach, comes into play when CAF America grants directly to charities in India almost every week. What we were learning is that some charities as we would validate that they were approved for FCRA, but what we learned is that perhaps their banking information had not been properly registered with the government, or had changed their banking information and had not updated their registration. As we wire money into that charity account for the grant it wouldn't get to the charity, or the wire transfer organization would receive the money back because it would be rejected.

One of the practical applications that we've put in place is that we actually contact a charity ahead of time letting them know the specifics and the details of the grant that is coming to them so that they can double check the registration of the FCRA account so that we don't run into these kinds of problems. It's a double check on the FCRA registration as well.

Would you say that's sort of an overall application of your chapter looking at understanding the policy, understanding the law that comes from that, and then a practical application taking into account the risk that the charity might not receive the money?

Kay: That is a good example of practical adaptations to the kinds of measures and regulations that financial institutions are responding to. Generally, they are responding to government laws or new rules or even informal policies and pressures. To understand what the banks are coping with and what is required of the banks as well as those required of non-profit, neighborhood authorities will anticipate what might go wrong and then take measures as you described to help avoid that.

These published last year that basically they are more than two-thirds of the US non-profit organizations operating internationally are having problems with their bank accounts. The biggest problem is timely transfers. Transfers are delayed or denied, and often over confusion about information. Banks generally don't make a lot of money from non-profits, and they may decide this is too much, the information isn't updated or if it's too much information press to review, just going to bounce the trans back. The kind of measure you're talking about is very helpful.

Ted: It's a practical application of best practices to make sure that the grant is made. That's part of the understanding, as you point out, the financial transaction laws, but also what's the impact of that because some of the-- Sometimes those impacts are not necessarily understood or appreciated at the time that they're put in place.

There's a lot of de-risking, and I think you were alluding to that when you talked about the banking- the banks themselves in terms of how much effort do they want to put into even understanding the complexity or the issues around moving money for charities. If they're looking to de-risk their work, how has that whole avenue of thinking on the part of banks negatively affected charities around the world? Could you share with us how our need to interact with banks and their desire to not have risk could come into conflict?

Kay: It is a major problem for charities around the world. Our study focused on US organizations. A recent study this year focused on UK organizations found that 80% of those operating internationally were having some kind of problems. There's another study from Duke law school that focused on the receiving end for women's grassroots organizations in a variety of countries who are trying to receive grants and showing all the problems they're having with banks.

What it really comes down to is the combination of sanctions, prohibitions, and the prohibition on material in support of terrorism are being enforced against banks in ways that have [inaudible 00:18:00] some really enormous times over the last two years. That has made banks very risk-averse. Those banks [inaudible 00:18:12] the same prohibitions on foreign transactions with sanction entities or people and criminalizing vision of material support.

They feel that the regulatory agencies haven't given them clear enough guidance, and they're feeling informal pressures in some cases from regulators, not bank parties who feel that they're under the myth the charities are high-risk customers. That has really affected their behavior.

Ted: Part of that sort of myth that you just mentioned was born out of FCRA or a FATF report, was it not?

Kay: The myth that non-profits are high-risk, in my experience, came through the George W. Bush administration after 9/11 where the Treasury Department started enforcing antiterrorism finance laws in a very targeted way using PATRIOT Act powers. I don't think they understood the charities sector well enough to understand the good governance and due diligence that we do.

They came out with some problematic guidelines for how charities should operate, while they shut down and closed the assets of nine charities and made general statements that charities are a significant force of terrorist financing even though there's absolutely no evidence to back that up.

One of the important things the non-profit sector has achieved since then is to debunk this myth and to change that attitude, and best reflected Financial Action Task Force recommendation on nonprofit pretty much written by US Treasury in 2002 has said charities are particularly vulnerable to terrorist views. The lack of evidence supported over time and advocacy by civil society globally led FATF to revise its standard in 2016 and take out that language and call heuristic approach that is proportionate and does not unruly disrupt the activities of nonprofit organizations. The government and the banks-

Ted: That's right, now that -- [crosstalk]

Kay: -have not caught up to that view, and many regulations and regulators still reflect the old view that charities that are high risk.

Ted: That was FATF recommendation eight that did a great deal of damage for about four years. As you said, some governments and some banks still hold onto that because, in some instances, they like the ability to unduly stifle the activities of nonprofits under the guise of removing the threats of terrorist financing.

Kay, we're going to take just a very quick break. When we come back, often funders who grant internationally are not only concerned with complying with IRS requirements, but your chapter describes a slew of other laws that affect funders. I want to talk about that when we come right back after this break.

Announcer: Remember, our podcast and archives are always available 24 hours a day at cafamerica.org. If you're listening today, our phone lines are open. Call in and ask a question by dialing 914-338-0855. Now, back to the CAF America Radio Network and our host Ted Hart.

Ted: We're back here live with Kay Guinane, the director at the Charity and Security Network. Also, very importantly for us, co-author of chapter eight of the brand new book, *Cross-Border Giving*. Kay, can you explain why international funders need to be aware of US financial transaction laws?

Kay: Certainly. As I said a little earlier, these laws are applicable to all US entities and persons subject to that, not just charities. There are general laws meant to stop terrorist financing and money laundering, and have been enforced in a somewhat 'don't ask don't tell' way under the Obama administration because the laws are very strict. There's no requirement that anyone intend to support terrorism through a transaction with a prohibited entity or by providing some material support. Only that you know that that entity is one of a US terrorist list.

Because the threshold is very strict, the government has taken a very flexible approach for enforcement telling us they are not targeting legitimate organizations, they are not targeting humanitarian work, but the potential for enforcement, it's always there if something goes wrong. The goal is to have due diligence measures in place that are reasonable and proportionate and prevent things from going wrong, but always with the understanding that in the complex environments in which charities work, you can't always guarantee that some inadvertent assistance or resource may through our transaction may go through that would be problematic.

I think that zero tolerance approach has been rejected by the public statements by the Treasury Department. I want to, in that context, before speaking about what's prohibited to help understand what flexibility organizations should have in mind when they're dealing with how this applies to their operations.

Ted: Well, that brings us back to the risk-based approach; what is proportional and what actions should be taken to attempt to ensure that funds are going to legitimate charitable purposes.

Kay: That's right. We are working very hard to get the risk-based approach reflected in US law; not just imprison policy but in the letter of the laws. That is one of our primary goals. that applies to the criminal prohibition of materials supporting terrorism. If there's no intent tendered and there's no humanitarian exemption. I think there is exempt- is medicine and religious materials. This is organizations on the department of state-foreign terrorist organization list. Violations are pro-offenses can be 20 years or more in jail, that's fine, so that chances are very, very slim.

It includes not just tangible financial assistance, but also each in the form of any technical advice and assistance of personnel or services. After the Supreme Court decision in 2010 in the humanitarian law project case, a prohibition has applied to some peace-building activities. It may involve direct transactions as interval bias obtaining or support, listed entity work with them in a peace process. It has had the effect of inhibiting that work substantially.

The other area of law is sanctions. We all see about sanctions in the news and North Korea, with Korea and places like that. Sanctions are imposed through executive order when the president determines there's a threat to national security. There are many executive orders that finances countries to non-state armed groups to companies and to individuals. All of these different lists are centralized at Treasury what they call the especially designated national list which is searchable. That is the list of entities and people that grantmakers wants to check to make sure that you're not having transactions with those entities.

Ted: You have to have strong enough provisions in place. You cannot hide behind willful blindness on things that you should know or rightfully should have access to. Kay, we've got less than three minutes left. I told you this time would go by fast with such an important topic. I want to make sure that our listeners know that they can find your website at charityandsecurity.org.

Kay Guinane, thank you for being my guest here today. Before we leave, could you just share with us why you feel that anyone involved in international grant-making would want to have and should have a copy of this book?

Kay: I think it's important to have because of the practical application tips that it involves. It explains why certain measures need to be taken, how the environment works, what the law is, but it also very importantly explains a ways that grant-makers can operate so that they're not discouraged or dissuaded from doing this work.

Ted: Would you say maybe what sets this book apart is exactly where your chapter brought us, and that is tying to gather the legal aspects with policy but also providing practical ways to be in compliance?

Kay: Yes. the most important point is you can be in compliance and you can do this work, and people should not turn away from international programming and grant-making out of fear of these laws.

Ted: Well, thank you Kay Guinane, director at the Charity And Security Network for being our guest here today on the CAF America Radio Network.

Kay: Thank you for having me.

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