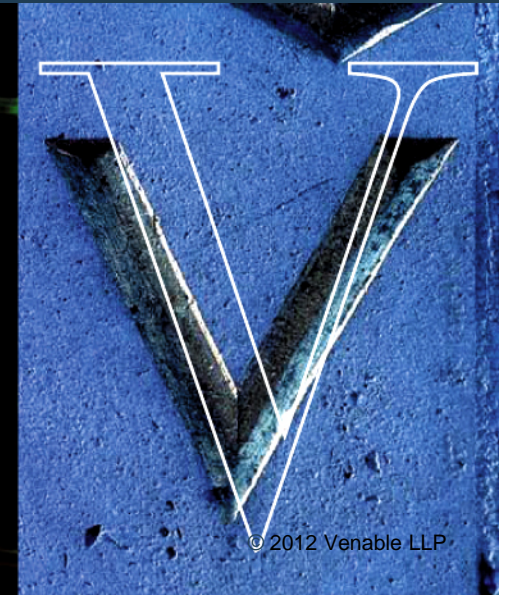


# Overseas Operations: What Every Nonprofit Should Know Before Crossing U.S. Borders

February 22, 2012  
12:30 – 2:00 pm EST

Moderator:  
Jeffrey S. Tenenbaum, Esq.

Panelists:  
Lindsay B. Meyer, Esq.  
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# Upcoming Venable Nonprofit Legal Seminars/Webinars

3/21/12, 12:30-2 pm ET

'Big Brother' in the Office: Helping Nonprofits Manage Employee Privacy in the Modern Workplace

4/12/12, 12:30-2 pm ET

Nonprofit Lobbying and Political Activities: Rules of the Road

4/20/12, 4-6 pm ET (seminar and cocktail reception) Good Counsel: Meeting the Legal Needs of Nonprofits

5/17/12, 12:30-2 pm ET

Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls

6/13/12, 12:30-2 pm ET

Ten Best Practices for Protecting Your Nonprofit's Intellectual Property

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## Roadmap: **Destination: Successful and Compliant International Operations**

- § **Form of Entity:** What type of operation best meets your goals in expanding internationally?
- § **Phased Approach:** Considerations in entering foreign market
- § **Foreign Jurisdictions:** What makes sense for your operations?
- § **Contracts:** Essential provisions for protecting your interests
- § **Tax and Accounting Issues**
- § **In-country Employment Issues**
- § **How best to protect your Intellectual Property**
- § **Compliance:** US Anti-Corruption laws & US Export Controls and Economic Sanctions

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## Form of Entity or Operation

### § Questions to ask?

- What is your goal in the foreign jurisdiction?
- Long term/Short term?
  - Host of a one-time event
  - Establish a presence
- Partner or independent?
- Activities? Education; Sales; Events; Membership Dues; Distribution of Materials

§ Based on the answers to these questions, nonprofits should consider what type of organization or entity to establish abroad, if any.

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# Organizational Options

## § Specific/Isolated Event v. Ongoing Presence

- Host a one-time conference
- Use of Association Management Company or “Trade Fair Organizer”
- Affiliation with a similarly-situated association (i.e., a local entity)
- Joint Venture
- Local office of a US nonprofit
- Establish an “In-country Branch”
- Establish a nonprofit entity under local law



# Organizational Options (cont'd.)

**Least Control**      **Least Risk**

## Considerations:

§ Host Conference w/o Contracting w/ Local Entity

1

§ Association Management Companies:

- Careful Agreement Review: know what you are contracting to
- Revenue-producing event?
- Logistics
- Specific Registration Requirements? Bank accounts (e.g.)

2

§ Affiliation with Similarly-Situated Entity

- Due Diligence re: Organization/Association
- Agreement Negotiations
- Under local laws, are you “doing business”?
- Use of IP

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# Organizational Options

## Considerations (cont'd):

### § Joint Venture

- Due Diligence re: Organization/Association
- Agreement Negotiations
- Under local laws, are you “doing business”?
- Use of IP
- Compliance with FCPA and other national anti-bribery legislation

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### § In-Country Branch v. Independently Incorporated Affiliate

- “Doing business” under local laws
- Local Employment and Tax Considerations
- Variation in nonprofit treatment under local law
- “Tax Exempt” Registration Requirements
- Foreign recordation of IP recommended

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**Greatest Control**      **Greatest Risk**

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## Choices: What Geographic Location Makes the Most Sense for your Nonprofit?

### § Factors to Consider in Choosing a Locale:

- One-time event or establishing a presence?  
*Always the threshold question.*
- Are there onerous “registration” requirements to start “doing business”?
- Is it difficult, time-consuming or expensive to set up a tax-exempt entity?
- Does the United States maintain a Tax Treaty with that country?





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## Choices: What Geographic Location Makes the Most Sense for your Nonprofit? (cont'd.)

### § Factors to Consider in Choosing a Locale:

- Are there US export controls or economic sanctions that prohibit certain transactions by US persons in the country or with “nationals” of the country?
- Is the country high on Transparency International’s “Corruption Index”?
- Under the US National Export Initiative are there US Government incentives to encourage businesses to expand to the country? (e.g., Green technology, Energy projects, etc.)



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## Contract Issues

### § Essential provisions for protecting your interests:

- Careful review of any agreement or contract between your US-based nonprofit and a foreign entity is key

### § A few “sticky” provisions:

- Dispute Resolution: Forum, Place and Type (e.g., Mediation, Arbitration, Litigation);
- Governing Law: *excluding a “conflicts of law provision;”*
- Language;
- Agency v. “Independent Contractor;”
- IP: Firm IP and Copyright language;
- Termination Provisions (*always in writing*);
- Other: This is always a country- and fact-specific analysis.



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# Tax and Accounting Considerations

## § Issues Regarding Taxation

- International tax law questions
- Applicable tax treaty with the United States?
- IRS rules that apply to US tax-exempt, nonprofits will apply similarly to nonprofit's international activities
- Acceptable audit standards for books and records
- Some countries impose restrictions on outflows of currency (e.g., some East Asian countries)



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# Foreign Financial Account Considerations

## § Foreign Financial Accounts

- Treasury Dept. Form 90-22.1
- Filed by June 30 for prior year
- Not filed with your non-profit income tax return
- Filed if aggregate foreign financial accounts exceed \$10,000
- Includes: foreign bank accounts, securities accounts, and mutual funds.

## § Reporting requirements for investment in foreign hedge funds or private equity funds unclear

- IRS has deferred such reporting



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# Other Informational Returns Considerations

## § Other Informational Returns

- Form 926 and Form 5471 with respect to investments in foreign corporations
- Form 3520 and 3520-A with respect to foreign trusts
- Form 8865 with respect to investments in foreign partnerships
- NOT required to file new FATCA Form 8938 as that is only filed by individuals
- Form 8938 – a new form; NOT applicable to non-profits at the moment, only to individuals



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# Foreign Financial Account Penalties

## § Other Informational Returns cont'd.

- Minimum penalty of \$10,000 for failure to file the Form 90-22.1 – per account per year
- Six year statute of limitations, unlike three year tax statute of limitations
- \$10,000 per unfiled Form 5471, etc.
- 10% of assets transferred to a foreign corporation for unfiled Form 926



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# Insurance and In-Country Employment Considerations

## § Insurance Issues:

- What is the scope of your association’s coverage?
- Per event? Differentiate among events

## § In-Country Employment:

- Extent to which “employment” considerations come into play depends on type of entity or operations established
- Use of Association Management Company or in-country partnership can often mean no need for employment of persons by US-based nonprofit in overseas operations
- **What are the local laws?**
  - Acting in compliance with local laws is key.
- “Employment at Will”
- Background and Due Diligence



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# Intellectual Property and “Confidential Information”

## § Protecting your Intellectual Property:

- IP includes: Logos, Trademarks, Patents
- Depending on target country, IP rights and protection may be a high-risk issue
- Is target country signatory to any International IP Conventions?

## § Is your IP Registered and Recorded in the US?

- Consider Registration of IP (or “international” version of IP) under local laws in target country
- Differentiating between IP and “Confidential Information,” i.e., business proprietary info (also requires contractual protections)



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## US Foreign Corrupt Practices Act ("FCPA")

§ US law enacted by Congress in 1977 to bring a halt to the rampant bribery of foreign government officials.

§ **Anti-Bribery Provisions:**

- Prohibits the paying of, offering, promising to pay (or authorizing to pay or offering) money or “anything of value,”
- With corrupt intent, directly or indirectly,
- To a “foreign government official” or political party official,
- For the purpose of (i) influencing an official act or decision; (ii) causing the official to fail to perform his lawful duty; or (iii) obtaining or retaining business or to secure any improper advantage.

§ Certain limited exceptions and affirmative defenses exist.

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## US Foreign Corrupt Practices Act ("FCPA") (cont'd)

### § Applicability of the FCPA:

- Current "red flag" countries
- Nonprofits not exempt
- Who is a "foreign official"?
- "Agency" relationship with partners abroad → US-based nonprofit or association can be held liable for the acts of partners abroad under FCPA
- Provision of "samples" or other incentives

### § Other National and International Anti-Bribery Laws

- Local laws
- UK Bribery Act
- OECD

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# Other US Law Considerations

## § US Export Controls and Economic Sanctions

- Controls on “exports” or releases of US-origin goods, technology and services to certain destinations, entities and end users
- Are you exporting computers, technology or other goods in support of your overseas venture? (Materials for a trade show; hand-carry items can be subject to controls)

## § US Economic Sanctions (“OFAC”)

- US sanctions are constantly changing and may affect ability to do business in certain countries and with nationals or entities based in those countries
  - IRAN; SYRIA; CUBA; N. KOREA
  - Other “Targeted” Sanctions
- Comprehensive sanctions prohibit most transactions with entities, persons, or governmental entities in those countries
- “Targeted” Sanctions: Specially Designated Persons
- “Informational Materials” exemption
- Transactional prohibitions

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