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**Moving Money
Overseas and Back:**
*What Every Nonprofit
Operating Internationally
Needs to Know*

Thursday, May 18, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair of the Nonprofit Organizations
Practice, Venable LLP

Speakers

Lindsay B. Meyer, Esq.

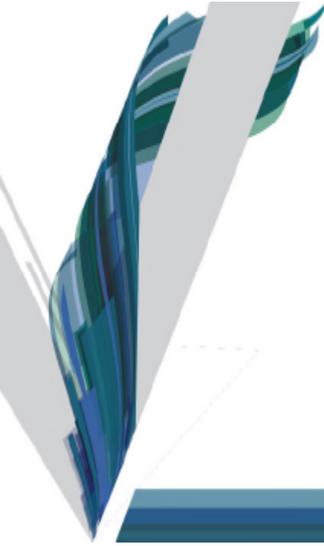
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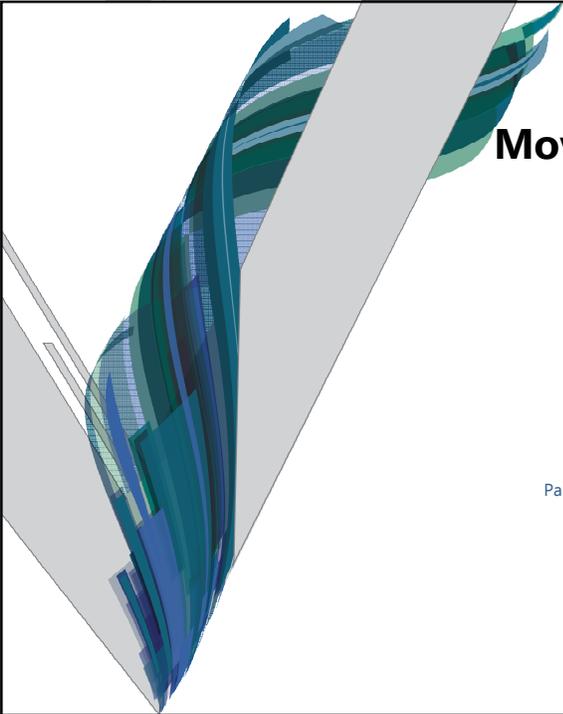
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Presentation



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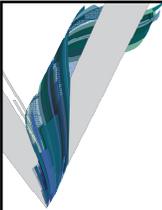
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International Issues



Road Map: Non-Tax Tips and Traps Involving the Cross-Border Movement of Money

- **Form of Entity:** Your type of operation overseas may dictate money transfer issues
- **Foreign Jurisdictions:** Identifying and understanding unforeseen restrictions on your money flow internationally
- **Corruption Risks:** Understanding your obligations under U.S. anti-corruption laws
- **Other U.S. Law Considerations:** Restrictions on certain cross-border transactions of goods, services, and technology
- **Enhancing Compliance:** Essential considerations and provisions for protecting your interests
- **Real-Life Examples:** You can't make this stuff up!

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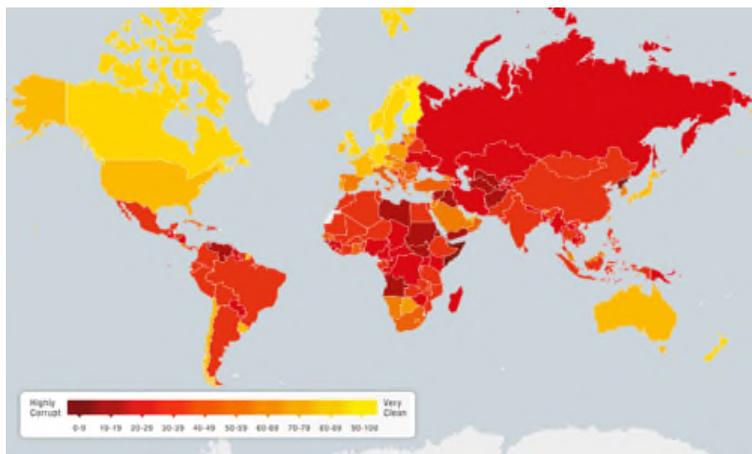
Your Form of Entity/Operation Overseas?

- What are your overseas activities?
- Overseas activities and goals?
 - Long-term/short-term?
 - Partner required or independent presence?
 - A local bank account: Required or advisable?
 - Activities?
 - Education; sales; events; membership dues; distribution of materials; certification
 - Typically, an evolving foreign presence
- Answers may impact considerations regarding the movement of funds for your overseas operations

Organizational Options

- Specific/isolated event vs. 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 U.S. nonprofit
 - Establish an “in-country branch”
 - Establish a nonprofit entity under local law
- Generally, the more established the operations are, the greater the potential restrictions
- Key: How to transfer \$\$ to support the activities?

In the World of Corruption, Not All Countries Are Equal: “Heat Map”



Source: <http://www.transparency.org/cpi2015#map-container>



U.S. Foreign Corrupt Practices Act (FCPA)

- U.S. law enacted by Congress in 1977 to address rampant bribery of foreign government officials
 - Now, a global trend!
- Anti-Bribery Provisions (also SEC Records Provisions):
 - Prohibit 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



Understanding the FCPA (aka the “Follow the Money” Act)

- Applicability of the FCPA:
 - Current “red flag” countries
 - Nonprofits *not* exempt
 - Who is a “foreign government official”?
 - “Agency” relationship with partners abroad → U.S.-based nonprofit can be held liable for the acts of partners abroad under FCPA
 - Watch out for the provision of “samples” or other incentives
- Other national and international anti-bribery laws
 - Local laws (China, Brazil, Germany, Italy, etc.)
 - UK Bribery Act (includes commercial bribery)
 - OECD (international recognition and implementation)



Other U.S. Law Considerations

- Accurate recording and reporting:
 - Accurate books and records a must – no “slush” funds
 - Strict reporting requirements for multiple government agencies
- Anti-money laundering (AML) concerns:
 - U.S. Department of Treasury reporting requirements
 - “Know your customer” considerations
- Anti-boycott reporting (e.g., “Don’t use Bank X”):
 - U.S. Department of Commerce (even if boycott is not followed)
 - IRS reporting requirements
- Reporting to U.S. Customs and Border Protection:
 - How are your overseas programs funded?
 - Paying or receiving payment for services?
 - Returning to the U.S. with more than \$10,000 in cash or equivalent for convenience?
 - Members carrying cash?
 - Don’t “evade” by splitting payments
 - Report upon arrival to avoid False Statement claim



Even More U.S. Law Considerations

- U.S. economic sanctions (OFAC)
 - U.S. 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; Sudan; N. Korea
 - Other “targeted” sanctions (e.g., Russia)
 - Comprehensive sanctions prohibit most transactions with entities, persons, or government entities in those countries
 - “Targeted” sanctions: new approach; SDN listings (incl. banks)
 - “Informational materials” exemption
 - Transactional prohibitions, including payments and remittances
- U.S. export controls and economic sanctions
 - Controls on “exports” or releases of U.S.-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; fair payment?)



Foreign Law Considerations

- Know the restrictions!
 - Any foreign controls on currency flow?
 - License required?
 - Prohibitions on hard currency movement?
 - Limitations on remittances or banking?
 - Practical challenges in collection of dues/revenue or repatriation of funds to U.S. nonprofit?
- Understand foreign investment concerns:
 - Any restrictions by local law on foreign investment in that country?
 - Consistent with national public policy priorities?
 - Target of any nationalistic policy controls?
 - New era of protectionism and its possible impact abroad



Your Compliance Considerations

- Essential provisions for protecting your interests:
 - Regulatory vs. contractual considerations
 - Compliance with U.S. *and* local laws/regulations
 - Careful review of any agreement between your U.S.-based nonprofit and any foreign person/entity is key
- A few “sticky” provisions for agreements:
 - Dispute resolution: forum, place, and type (e.g., mediation, arbitration, litigation)
 - Compliance with laws (anti-corruption, export controls/sanctions, anti-boycott, AML, etc.)
 - Governing law: *excluding a “conflicts of law provision”*
 - Agency vs. “independent contractor”
 - IP: firm IP, TM, and copyright language
 - Termination provisions (*always in writing*)
 - NB: always a country- and fact-specific analysis
 - Local counsel advice and privilege considerations



Examples: You Can't Make This Stuff Up!

- Requests to “over-invoice” or double invoice
 - Requests for more than materials or services provided
 - Double invoice at different levels
 - Evasion of local tax obligations
 - Avoid restrictions on export of currency
 - Aiding and abetting the actions!
- Requests to pay outside of foreign country
 - Requests to pay into third-country bank account
 - Payments to other person or entity (including a “middleman”)
 - Risks: See above!
- Avoid the “cash mule”: Warnings to your team
 - Follow the money: educate, train, and audit!
 - Get guidance from counsel:
 - To disclose or not to disclose?



Tax Issues



Cross-Border Payments Subject to Withholding Tax

- General rules:
 - Certain types of cross-border payments by U.S. nonprofit organizations are subject to withholding tax
 - All cross-border payments by U.S. nonprofit organizations are subject to IRS documentation requirements
- Types of payments:
 - Portfolio income (i.e., interest, dividends, rents, and royalties)
 - Effectively connected U.S. trade or business income
 - Real estate dispositions and FIRPTA
 - Compensation for personal/professional services
 - Gifts and grants



Cross-Border Payments Subject to Withholding Tax

- Standard/statutory U.S. withholding tax rate is 30% for dividends, interest, and royalties applicable to nonprofit organizations
- Tax rate may be reduced pursuant to relevant tax treaties

Treaty Partner	Dividends	Interest	Royalties
China	10%	10%	10%
Germany	0/5/10%	0%	0%
Ireland	5/10%	0%	0%
United Kingdom	0/5/10%	0%	0%



Cross-Border Payments Subject to Withholding Tax

- Tax treaties:
 - U.S. tax treaty network beneficial to nonprofit organizations
- Limitations:
 - Qualification for treaty benefits
 - Limitation of benefits/savings clause
 - Treaty shopping limitations
 - Tax credit considerations



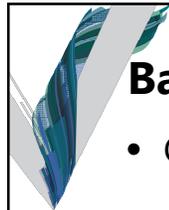
Cross-Border Payments Subject to Withholding Tax

- Tax treaty and withholding tax compliance applicable to U.S. nonprofit organizations:
 - Form requirements:
 - W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, W-8IMY
 - Form 8233, Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual
 - Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons
 - Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding
 - Form 8804, Annual Return for Partnership Withholding Tax (Section 1446)
 - Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax
 - Form 8813, Partnership Withholding Tax Payment Voucher (Section 1446)



Bank Accounts

- Foreign bank accounts created to facilitate cross-border payments
- Anti-money laundering (AML) regulations applicable to financial institutions
- Know your customer (KYC) requirements for identifying and verifying client identity:
 - Identity documents (passports, address verification, etc.)
 - Professional references
 - Transactional profile (investments, sources of wealth, etc.)



Bank Accounts

- Common reporting standard (CRS)
 - Automatic exchange of information regarding resident account holders' assets and income
 - Identity information (name, address, taxpayer identification number)
 - Account information (number, balance, FMV)
 - Developed by OECD to combat tax evasion
 - Endorsed in 2014 and 2015 by all EU countries, China, Hong Kong, Russia, and 100+ other countries
 - Reporting begins in 2017 (in particular, for the EU) and 2018
 - Notably, the U.S. has not signed this agreement, on the basis that it already implements the FATCA system



Employment

- Secondment arrangements:
 - Example: U.S. nonprofit organization would like to employ in-country manager
 - Issue: In-country manager would like to retain certain U.S. benefits (retirement plan, medical benefits, etc.)
 - Solution: In-country manager is employed by U.S. nonprofit organization, which enters into secondment arrangement with non-U.S. organization for a defined period of time
 - Tax treatment
 - Employee is subject to foreign and local individual taxes
 - Foreign tax credit regime
 - Potential tax equalization payment for non-creditable foreign taxes
 - Subject to both foreign country and U.S. employment laws
 - Isolates legal and tax liability



Global Employment Entity for Nonprofit Organization

- Employment LLC
 - Example: U.S. nonprofit organization wants to employ Canadian individual
 - Issue: U.S. nonprofit organization does not want to create permanent establishment (PE) in Canada (and therefore be subject to local Canadian taxes and tax filing/reporting requirements)
 - Solution: U.S. nonprofit organization forms a single-member U.S. LLC that (1) employs the Canadian individual and (2) executes intercompany service arrangement with the U.S. corporation for a small margin
 - Tax treatment
 - Only U.S. LLC profit (i.e., small margin) potentially subject to Canadian tax if there is a PE in Canada
 - Canadian taxing authorities do not look through to the U.S. corporate parent



Other Considerations for Nonprofit Organizations

- Implementation of intercompany arrangements to facilitate the movement of cash (including intercompany debt, etc.)
- Legal and regulatory restrictions applicable to the movement of cash
- Foreign exchange issues (including recognition of gain/loss, hedging transactions, etc.)
- Cash movements/legal movements



International Grantmaking by Nonprofits



Expenditure Responsibility

- Due diligence procedure to ensure that international grant is used for specific approved purposes
- Provides a framework for responsible grantmaking
- *Required* for:
 - Section 501(c)(3) private foundations (unless relying on “equivalency determination”)
 - Donor advised funds



Expenditure Responsibility – Components

- Limited pre-grant inquiry regarding the proposed grantee
- Award the grant subject to a written grant agreement
- Reporting mechanism to monitor actual use of grant funds and progress toward meeting the stated goal or purpose of the grant



Step 1: Limited Pre-Grant Inquiry

- Give assurance that the grantee is able to – and will – use the grant for the stated purpose
- Obtain sufficient information regarding the identity, history, experience, and operations of the grantee and its professional staff
- Calibrate the pre-grant inquiry to match the nature of the contemplated grant
- Prior experience with a grantee can reduce or effectively eliminate the need for a pre-grant inquiry



Step 2: Written Grant Agreement

- Specify the *purpose* of the grant
- All purposes of the grant should be consistent with the tax-exempt status and purposes of the *grantor*
- Grantee commits to:
 - Repay amounts not used for the agreed-upon purposes
 - Comply with reporting obligations
 - Maintain adequate records and make relevant information available to the grantor
 - Not use grant funds for specific prohibited purposes



Step 2: Written Grant Agreement (con't)

- Special provisions for a grant agreement governing an international *program-related investment*:
 - Repayment of misused funds can be subject to limitations of law governing distributions to equity holders
 - Annual reporting should be “of the type ordinarily required by commercial investors under similar circumstances” and include a statement that the recipient has complied with the investment terms
 - Maintain books and records so as to provide information ordinarily required by commercial investors under similar circumstances



Step 3: Grantee Reporting

- Account for the use of funds
- Demonstrate compliance with grant terms
- Illustrate progress toward achieving the grant objective
- Annual reports to be provided with a “reasonable time” after the close of any grantee fiscal year in which grant funds are received or used
- Also provide a final report when the grant is completed



IRS Reporting

- For those organizations that are *required* to exercise expenditure responsibility, the grantor is required to annually report to the IRS (via the annual Form 990-series information return) regarding its active expenditure responsibility grants
- For an organization that is not required to exercise expenditure responsibility, there is no specific IRS reporting requirement
- **Note:** In general, if a nonprofit undertakes a new substantial activity, it should inform the IRS via Form 990



Additional Considerations for Grant Agreements

- Multilingual document? (Ensure reliable translation)
- Details regarding compliance with local law
- Dispute resolution mechanism
- Choice of law
- Appropriate representations and warranties
- Wiring instructions or other details regarding transfer of funds
- Termination
- Anything you feel is important or helpful!



Questions?

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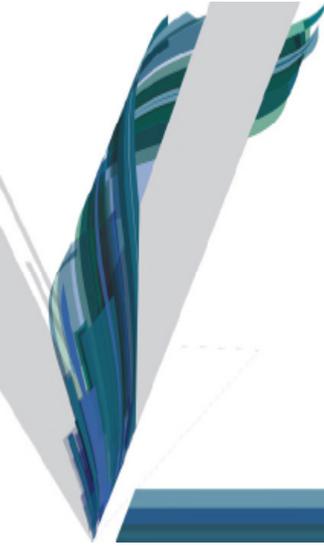
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B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last five years (2012-16). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

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American Society of Anesthesiologists
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America's Health Insurance Plans
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Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
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Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
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Goodwill Industries International
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Homeownership Preservation Foundation
Hugh Jackman Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of Management Accountants
International Association of Fire Chiefs
International Rescue Committee

International Sleep Products Association
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The Leukemia & Lymphoma Society
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National Retail Federation
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The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
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Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-16

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-17

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and

Corporate Counsel, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

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Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

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Recipient, The Center for Association Leadership Chairman's Award, 2004

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PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 1,000 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times*, *Politico*, *Bloomberg Business*, *Bloomberg BNA*, *EO Tax Journal*, and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.



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COURT ADMISSIONS

U.S. Court of Appeals for the D.C.
 Circuit
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Lindsay Meyer heads the International Trade Practice, where, for nearly thirty years she has assisted companies, from start-ups to multinational operations – to efficiently import and export under U.S. laws and regulations. Ms. Meyer is President of the Venable Foundation. As a licensed U.S. Customs broker, Ms. Meyer has a detailed knowledge of and extensive experience with the regulations of the U.S. Bureau of Customs and Border Protection. She is also co-chair of Venable's FCPA and Anticorruption Practice.

Extensive Trade, Customs and Export Control Experience. Ms. Meyer concentrates on all aspects of International Trade and Customs matters. She regularly advises companies on their compliance with import and export control laws and regulations, and appears before numerous regulatory authorities such as the U.S. Customs and Border Protection (CBP), International Trade Commission (ITC), Commerce Department's Bureau of Industry and Security (BIS), State Department's Directorate of Defense Trade Controls (DDTC), Treasury Department's Office of Foreign Assets Control (OFAC), and the Committee on Foreign Investment in the United States (CFIUS).

Ms. Meyer has extensive experience counseling companies on compliance with export controls regulated by BIS, DDTC, and OFAC and actively assists companies in their registration and license authorization needs for exports, re-exports and deemed exports. She guides companies through internal Export Control Assessments, helps develop tailored compliance policies and procedures, and performs training on export laws and regulations affecting a company. Additionally, Ms. Meyer has successfully defended exporters facing civil and criminal investigations for alleged violations of U.S. export control laws and embargoes.

Concerning import transactions, Ms. Meyer routinely represents companies during U.S. Customs Focused Assessments, NAFTA Audits, C-TPAT and ISA Programs, and defends clients during detentions, forfeitures, seizures, civil and criminal investigations, and other Customs-related matters. She regularly provides strategic customs and trade counseling to Fortune 100 clients by conducting Pre-Assessment Compliance Reviews including corporate-wide, multi-location assessments and training programs, and by representing companies before CBP, such as in Customs protests and Buy American Act rulings, and on appeal to the U.S. Court of International Trade and U.S. Court of Appeals for the Federal Circuit.

For many years, Ms. Meyer has also successfully represented companies in trade remedy actions alleging infringement of intellectual property rights, as well as antidumping duty and safeguard investigations and reviews before the U.S. Department of Commerce, International Trade Commission, and on appeal.

Ms. Meyer also advises clients on international transactional matters, where she counsels on strategic sourcing, targeted acquisitions Helms-Burton analysis, CFIUS investigations and FOCI reviews; sales and distribution arrangements in the U.S. and abroad; the use of foreign agents, affiliated offices, joint ventures and teaming

Federal Circuit
U.S. Court of International Trade

EDUCATION

J.D., George Washington University
Law School, 1987

B.S., *cum laude*, University of
Connecticut, 1983

Beta Gamma Sigma

National Business Honor Society

Dean's List

Academic Honors Program

Diplôme d'Études Françaises,
Université de Rouen, Rouen,
France, 1982

MEMBERSHIPS

Virginia Bar Association

District of Columbia Bar
Association

LANGUAGES

French

agreements; as well as compliance with antiboycott restrictions and anti-bribery laws, such as the U.S. Foreign Corrupt Practices Act (FCPA).

One of the distinctive advantages Ms. Meyer offers is her position as a licensed U.S. Customs broker. Another advantage she offers clients stems from her well-established relationships with counsel around the globe with whom she works on a regular basis. Ms. Meyer brings to her practice extensive years of experience in a multitude of trade matters and the ability to develop innovative solutions to complex legal issues.

REPRESENTATIVE CLIENTS

Ms. Meyer's clients include multinational manufacturers and service providers in the food, beverage, agricultural, seafood, high technology, chemical, petrochemical, oil services, pharmaceutical, automotive, avionic, space control equipment, steel, food, retail industries, as well as not-for-profit and charitable organizations.

SIGNIFICANT MATTERS

Significant recent matters have included counseling to and representation on behalf of several multinational companies before the U.S. and other Customs Services; conducting pre-audit assessments of import and export operations and procedures; developing and conducting compliance programs including corporate-wide, multi-location assessment and training programs; and general counseling on strategic sourcing methodologies. She regularly advised companies in the formation of foreign subsidiaries and representative offices; and conducting trade activities overseas. Other recent matters have included the successful defense of antidumping duty investigations and reviews before the U.S. Department of Commerce and International Trade Commission often resulting in findings of zero or minimal duties.

HONORS

Recognized in *Chambers Global*, International Trade: Customs, 2016 - 2017

Recognized in *Chambers USA* (Band 3), International Trade: Customs, National, 2012 - 2016

Recognized in *Washington DC Super Lawyers*, 2016 - 2017

ACTIVITIES

Ms. Meyer is active in business and trade associations related to her profession. She served four terms as Chair of the International Trade and Customs Committee for the American Bar Association's Section of Administrative Law and Regulatory Practice, is a member of the American Association of Exporters and Importers, and is serving in her second term on the Maryland-Washington District Export Council under the appointment of the Secretary of the U.S. Department of Commerce.

PUBLICATIONS

- May 2, 2017, The UK Criminal Finances Act: Freezing Suspiciously Obtained Property to Fight Global Corruption, FCPA and Anti-Corruption News E-lert
- April 3, 2017, A Look into Trump's New Executive Orders on Trade, International Trade Alert
- October 19, 2016, Top Five Takeaways: Wassenaar Arrangement Updates to Commerce's Encryption-Related Export Controls, International Trade Alert
- September 8, 2016, There's a New Sheriff in Town for AD and CVD Orders, *Law360*
- August 2016, Do You Import Goods Subject to AD and CVD Orders?, International Trade Alert
- June 30, 2016, Making the New Miscellaneous Tariff Bill ("MTB") Process Work for You, International Trade Alert
- June 24, 2016, The UK Referendum: What Will Be the Impact on U.S. Businesses?, International Trade Alert
- June 17, 2016, Receive a BIS-Issued Subpoena and Wonder What It's All About?,

International Trade Alert

- May 9, 2016, Chinese Government Passes Landmark Law Tightening Controls on Nonprofits
- April 1, 2016, CFIUS 2014 Annual Report: Telling Trends for Your Next Cross-Border M&A Deal Involving a U.S.-Based Target, International Trade Alert
- March 17, 2016, Ahead of White House Visit, BIS and OFAC Ease More Sanctions, International Trade Alert
- February 3, 2016, Predicting Winners and Losers in a Post-TPP Economy, International Trade Alert
- January 27, 2016, U.S. Lifts Certain Sanctions on Iran, Implementing Historic Nuclear Deal: What is the Impact for U.S. and Non-U.S. Persons?, International Trade Alert
- December 10, 2015, Advertising Law News & Analysis - December 10, 2015, Advertising Alert, International Trade Alert
- September 29, 2015, The Obama Administration Continues to Expand Opportunities in Cuba, International Trade Alert
- May 7, 2015, Importers Take Note: GSP Renewal on the Horizon; Are You Eligible for Refunds?, International Trade Alert
- May 1, 2015, FMC Requests Comments on Proposal to Modify Confidential Contracting Rules, International Trade Alert
- April 20, 2015, Closing the 100-mile Gap: Delisting Would Bring the U.S. Closer to Liberalizing Trade and Investment with Cuba, International Trade Alert
- April 10, 2015, White House Opens New Front to Combat Cyber Attacks, Cybersecurity Alert , International Trade Alert
- March 12, 2015, Belated Sanctions against Security Officials in Venezuela, International Trade Alert
- January 21, 2015, U.S. Business Looks to Cuba under New Obama Rules, International Trade Alert
- January 2015, New Sanctions Imposed on North Korea Following Cyber Attack, Client Alerts
- January 7, 2015, Cross-Border Money Transfers: Key Requirements Every U.S.-Based Nonprofit Needs to Know
- December 19, 2014, Advertising Law News & Analysis - December 19, 2014, Advertising Alert
- December 2014, Russian Roulette: Congress Gives President Discretion to Impose New Sanctions Against Russia, International Trade Alert
- December 17, 2014, Obama Announces Sea Change for Cuba Relations, Trade, and Travel Policy, International Trade Alert
- October, 2014, Decoding Export Controls: Does the Latest BIS Settlement Signal a Trend in Increased Enforcement Actions Involving Encryption?, International Trade Alert
- September 22, 2014, Cross-Border Money Transfers: Key Requirements and Pitfalls Every U.S.-Based Nonprofit Needs to Know
- September, 2014, Global Entry: One Year After Expansion – Is the Program Right for Me?, International Trade Alert
- July 25, 2014, CBP May Be Signaling Renewed Interest In 1st-Sale Rule, *Law360*
- July 18, 2014, Is CBP Signaling a Renewed Enforcement Interest in the First Sale Rule?, International Trade Alert
- March 2014, FCPA Snapshot – 2013, FCPA and Anti-Corruption News E-Alert
- February 20, 2014, Conducting Operations Overseas: What Every Nonprofit Should Know
- February 2014, BIS Proposes First Rewrite of Routed Export Rules in Over a Decade, International Trade Alert
- February 2014, Iran Sanctions Deal Does Not Alleviate Current U.S. Economic Sanctions: "Iran Is Not Open for Business", International Trade Alert

SPEAKING ENGAGEMENTS

- May 18, 2017, Moving Money Overseas and Back: What Every Nonprofit Operating Internationally Needs to Know
- January 23, 2017, "FCPA and Anti-Corruption: Tips and Traps to Maximize Compliance in an Era of Increased Enforcement"
- September 27, 2016 - September 28, 2016, "US And EU Iran Sanctions: How to Maximize from the Lifting of Sanctions Whilst Avoiding Related Pitfalls" at the 6th Annual C5 European Export Controls Conference Panel
- March 29, 2016, "FTA Updates, including TPP, TTIP" at the American Petroleum Institute's 2016 International Trade and Customs Conference
- March 4, 2016, Dow Jones Webinar: Navigating the Complexity of the Changes to the Iran Sanctions
- January 7, 2015, Cross-Border Money Transfers: Key Requirements Every U.S.-Based Nonprofit Needs to Know
- November 13, 2014, "Ukraine-Related Sanctions: Complex, Costly...and Challenging" Webinar
- September 23, 2014, "Cross-Border Money Transfers: Key Requirements and Pitfalls Every U.S.-Based Nonprofit Needs to Know" Webcast for the Association of Corporate Counsel
- July 15, 2014 - July 16, 2014, Life Sciences Forum on Distributor Audits: "Monitor Internal Processes to Increase Visibility of Distributor Activities, Identify and Assess Risk and Accomplish Operational Integrity"
- April 10, 2014, Government Contracts Symposium
- March 31, 2014, "U.S. Export Controls: Understanding Your Obligations: Practical Tips and Traps" at the American Petroleum Institute's International Trade and Customs Conference
- February 20, 2014, Association of Corporate Counsel Webcast: "Conducting Operations Overseas: What Every Nonprofit Should Know"
- June 18, 2013, "Integration of Tax, Regulation and Global Trade: 'Getting Whipsawed'" at AAEL's 92nd Annual Conference & Expo
- June 13, 2013, "Global Trade: Import/Export Compliance 101" for WESFACCA Chapter
- June 12, 2013, "Year-In-Review: What Triggers Detention and Seizures, and New Approaches to Addressing Counterfeiting Risks, Trademark Protection and Grey Market Goods" at the 8th Annual Import Compliance & Enforcement Conference
- May 15, 2013, "Overseas Operations: What Every Nonprofit Should Know Before Leaving Home" at the 2013 ASAE Association International Conference
- May 14, 2013, As Nonprofits Expand Their Global Reach, a Special Focus on Tax, Trademarks and the Foreign Corrupt Practices Act
- April 17, 2013, Government Contracts Symposium
- February 25, 2013, Are You Compliant With the New Iran Reporting Requirements on Sanctions?
- January 24, 2013, Are You Ready for the February 6th Deadline to Comply with the New Iran Reporting Requirements?
- June 22, 2012, "Managing Focused Assessments from A to Z: A Practical Guide on How to Prepare, Respond and Make It through the Entire Process," ACI National Forum on Import Compliance and Enforcement
- May 6, 2012, Law Enforcement and the Chinese American Event
- February 29, 2012, "Managing Risk in International Operations and Meetings" at Meetings Beyond Borders
- February 22, 2012, Overseas Operations: What Every Nonprofit Should Know Before Crossing U.S. Borders
- November 8, 2011, Legal Quick Hit: "Considering Operations Overseas?: What Every Nonprofit Should Know Before Crossing U.S. Borders" for the Association of Corporate Counsel's Nonprofit Organizations Committee

- November 3, 2011, "Moving Beyond the Basics" at I.E. Canada's Annual Export Conference
- October 21, 2011, "Opportunities and Challenges in Implementing an International Business Strategy"
- October 11, 2011, "International Collaborations: Negotiations and Compliance" for NCURA TV
- July 14, 2011, Impact of the U.K. Bribery Act on U.S.-Based Businesses
- February 25, 2011, "FDA Food Safety Modernization Act: What you should know about its impact on imported foods," hosted by Venable
- June 25, 2010, "Corruption - The New Global Landscape" Breakfast Seminar at Venable LLP
- June 10, 2010, "Corruption - The New Global Landscape" Breakfast Seminar at Field Fisher Waterhouse LLP
- April 9, 2010, Foreign Corrupt Practices Act (FCPA) Assessing Risk and Maintaining Compliance Webcast
- February 2010, Western Canada 7th Annual Conference - Customs and Trade
- December 12, 2008, Breakfast Round Table Discussion: Anticipating The Year of Change and the Impact of New Legislative and Regulatory Initiatives on Business
- September 26, 2007, Venable to Host "Investing in India" Breakfast Seminar
- July 18, 2004 - July 20, 2004, Toy Industry Association's 2004 Multi-Discipline Conference
- March 4, 2003, The FDA's New Bioterrorism Regulations on Food, Beverage and Related Sectors
- "Section 337: Unfair Practices in Import Trade into the United States" to the China Chamber of Commerce for Machinery and Electronics at the Guangzhou Trade Fair



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AREAS OF PRACTICE

Tax and Wealth Planning
Business Transactions Tax
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BAR ADMISSIONS

California
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EDUCATION

J.D., Boston College Law School,
2003
B.A., University of California at
Berkeley, 1999

LANGUAGES

German
Italian
French

Friedemann Thomma is a partner in Venable's Tax and Wealth Planning Group who focuses his practice on corporate international tax planning and U.S. taxation of foreign operations. He has managed large-scale global structuring projects, including the design, implementation, and post-implementation phases, for companies in various industries and jurisdictions. Mr. Thomma has also served as the primary contact for multinational corporate clients, working closely with in-house tax, legal, treasury, and accounting departments to implement international legal and tax restructuring projects and post-M&A-integration projects. His clients include publicly traded multinational corporations in the high-tech sector, start-up companies, mid-market companies, high-end consumer manufacturing corporations, and high net worth individuals.

Mr. Thomma began his legal career at an international law firm, advising domestic and foreign investment funds and investors on matters related to inbound and outbound tax, partnership tax, real estate tax, and executive compensation. His clients included private equity funds, hedge funds, real estate funds, distressed debt funds, U.S. taxable and tax-exempt investors, and foreign investors.

SIGNIFICANT MATTERS

- Advised Dechra Veterinary Products on international tax issues in an exclusive licensing deal with Kane Biotech Inc.
- Represented publicly-traded entertainment company in China in various commercial M&A transactions as well as international tax strategies to effectively manage tax rates globally.
- Represented a Hong Kong based pet products company, R2P Pet, in a multi-jurisdictional management buyout transaction involving Hong Kong, the United States, Canada and the Cayman Islands.
- Advised on the tax structuring aspects of a financing to fund the international expansion of FreedomPop.
- Represented Guthy-Renker in the pre-disposition reorganization and sale of a majority interest of its worldwide Proactiv business, the world's leading non-prescription acne brand to Nestlé Skin Health.
- Represented a global automobile manufacturer in a Series A investment in a Silicon Valley based technology company that is developing proprietary software that enables automobiles to detect objects and their distance away from a car by interpreting inputs from various sensors.
- Represented Reichle & De-Massari Holding (R&M), a Swiss provider of communication cabling systems in acquiring their first US company, REALM Communications Group, a bay area fiber optic specialist.

- Assisted TF Bank in pursuing a distribution in re Arcapita Bank B.S.C. et al in Bankruptcy Court for the Southern District of New York and with providing court mandated information in order for the distribution to be processed.

ACTIVITIES

Prior to beginning his legal career, Mr. Thomma spent four years in Germany as part of a piano making and design apprenticeship. He also spent time in Italy and Switzerland building and assembling grand pianos, teaching manufacturing skills, implementing design techniques, and running an independent piano business. Mr. Thomma also served in the Swiss military.

SPEAKING ENGAGEMENTS

- May 18, 2017, Moving Money Overseas and Back: What Every Nonprofit Operating Internationally Needs to Know
- March 23, 2017, "Financial Impact After the U.S. Presidential Election" hosted by the Swiss American Chamber of Commerce
- January 23, 2017, "IP Tax Planning for Outbound Transactions and IP Monetization" at the USC Gould School of Law 2017 Tax Institute



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AREAS OF PRACTICE

Tax and Wealth Planning
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Tax-Exempt Organizations
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Nonprofit Organizations

BAR ADMISSIONS

Maryland

EDUCATION

J.D., *cum laude*, New York
University School of Law, 2005
B.A., *summa cum laude*, Yeshiva
University, 1998

MEMBERSHIPS

American Bar Association
Maryland State Bar Association

LANGUAGES

Hebrew

Yosef Ziffer is a partner in Venable's Tax and Wealth Planning Group. He focuses his practice on the full array of tax, corporate, and strategic needs of tax-exempt organizations, including public charities, private foundations, hospitals, private schools, and trade associations. Additionally, Mr. Ziffer works with individuals and business entities on various tax planning matters, including transfers of business interests, estate planning, and tax audits.

As part of his work with tax-exempt organizations, Mr. Ziffer often helps clients adapt to recent changes in the law. By way of example, Mr. Ziffer has counseled clients on compliance with new rules regarding donor advised funds and supporting organizations under the Pension Protection Act of 2006; the application of new standards for the management of endowments under the Uniform Prudent Management of Institutional Funds Act (UPMIFA); and the impact and effect of new Treasury Regulations regarding measures of public support for charities.

SIGNIFICANT MATTERS

Some of Mr. Ziffer's significant recent client-matters include the following:

Tax-Exempt Organizations

- Preparation of an Internal Revenue Service private letter ruling request for a prominent charity undertaking a major reorganization.
- Formation of a medical research organization affiliated with a major local hospital.
- Consolidation of two related foundations into a single, integrated public charity.
- Formation of a new "Friends Of" organization to support an overseas charitable institution.
- Negotiation of a gift agreement pertaining to a substantial gift of stock.
- Procurement of tax-exempt status for numerous newly-formed public charities and private foundations.

General Tax-Planning

- Organization of comprehensive estate-freeze plans for local entrepreneurs and high-net-worth individuals.

Tax Audits

- Defending against various IRS audits pertaining to charitable donations, conservation easements, capital gains issues, and executive compensation matters.

ACTIVITIES

Mr. Ziffer is a member of the American Bar Association and the Maryland State Bar Association. He is also a participant in the Young Leadership Council of THE ASSOCIATED: Jewish Community Federation of Baltimore, Inc.

PUBLICATIONS

- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies
- November/December 2013, Tools for Bypassing IRS Delays in EO Applications
- July 2013, Lessons from the IRS Nonprofit College and University Compliance Project: Final Report Offers a Wealth of Information for All Tax-Exempt Organizations (article – long version)
- July 12, 2013, U.S. Senate Finance Committee Report Highlights Potential Tax Reforms for Tax-Exempt Organizations
- May 2013, IRS Releases Final Report on Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (article – short version)
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations

SPEAKING ENGAGEMENTS

- May 18, 2017, Moving Money Overseas and Back: What Every Nonprofit Operating Internationally Needs to Know
- May 12, 2016, "Targeting (and Receiving!) Charitable Contributions – Strategic Considerations for Your Organization" for the New York State Association of Independent Schools (NYSAIS)
- October 21, 2015, "Revitalizing Our Cities – How Foundations and Grantmakers Can Invest in a Better Economic Future" hosted by Venable and the Forum of Regional Associations of Grantmakers
- April 21, 2015, "The Secret Power Behind Gifts of Real Estate" for the Associated's Planned Giving Round Table Young Professionals
- May 9, 2014, 2014 Advanced Estate Planning Institute
- April 30, 2014, "Restricted Gifts and Gift Acceptance Policies" at the Not for Profit Summit hosted by SunTrust and SC&H Group
- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies
- February 8, 2011, Legal Quick Hit: "International Grantmaking: Avoid Legal Pitfalls When Doing Good Overseas" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- June 24, 2009, Partnership for Excellence in Jewish Education
- February 10, 2009, Legal Quick Hit: Lobbying Tax Rules for 501(c)(3) Organizations - A Refresher



Additional Information

ARTICLES

May 9, 2016

CHINESE GOVERNMENT PASSES LANDMARK LAW TIGHTENING CONTROLS ON NONPROFITS

On April 28, 2016, China's national legislature passed a sweeping, controversial new law regulating the activities of foreign (non-Chinese) nonprofit, nongovernmental organizations' (NGOs) activities in China. The "[*Law on the Management of Foreign Nongovernmental Organization Activities inside Mainland China*](#)" (the Law) is set to be effective January 1, 2017 and, as enacted and understood, would impose significant administrative burdens and numerous restrictions on the activities of most US- and non-Chinese-based NGOs currently operating in China and those seeking to conduct activities in China.

Foreign NGOs around the world have been following China's draft legislation of the Law for a year. While the final law is narrower in scope than a [*prior draft released last year*](#), implementation and enforcement of various provisions remains uncertain and are likely to be subject to administrative discretion. Of importance to any foreign NGO looking to conduct activities in China are the following elements of the Law: new State control and supervisory powers; complex registration and reporting requirements (including audited financial reports and plans on planned activities); and new restrictions on engaging in certain activities, such as recruiting, maintaining multiple offices, and funding political activities. Compliance with these requirements will require nonprofits that operate in China to make significant and, in some cases, challenging modifications to their governance and operational structures.

As adopted, the Law contains general and vague terms, resulting in national enforcement officials retaining discretion over its implementation. Before the Law takes effect, foreign NGOs should familiarize themselves with the Law, assess their current or planned activities in China, and determine whether further legal guidance may be necessary to ensure continued success of their operations under China's complex bureaucratic system.

Applicability and Scope of Permissible Activities and Operations

The Law broadly applies to any foreign NGO seeking to carry out activities within mainland China. The stated purpose of the Law is to "regulate and guide activities conducted by foreign NGOs within mainland China, safeguard their lawful rights and interests, and promote exchanges and cooperation."

- **NGOs Are Broadly Defined.** The Law defines "foreign NGO" as any "not-for-profit, non-governmental social organizations lawfully established outside mainland China." Mainland China does not include Hong Kong, Macau, or Taiwan.
- **Potential Exemption for Certain Academic and Research Organizations.** Additionally, the Law specifies that certain academic and research exchange programs working with Chinese counterpart institutions will follow existing regulations rather than the Law, but the identification of these exempt institutions remains unclear and will require further clarification from Chinese authorities.
- **Limited Scope of Authorized Activities.** Be aware—the Law requires NGOs to limit their activities to certain "approved" topical areas that are "beneficial to the development of the social welfare in fields such as economics, education, science, culture, health, sports, and environmental protection, and for areas such as poverty relief and disaster relief."
- **Prohibited Activities.** Unless special permission is granted, the Law generally prohibits foreign NGOs from recruiting members in China or establishing chapters, regions, or affiliates from within mainland China. Foreign NGOs also are prohibited from "engaging in or funding for-profit activities or political activities," and "illegally engaging in or funding religious activities" within mainland China.

Establishing Legal Domicile and Presence

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The Law tightens supervisory requirements for conducting business in China on a temporary or permanent basis.

- **Documentation and Multiple Approvals.** To complete the registration process, foreign NGOs must satisfy numerous approval and documentation requirements.
- **Registration Requirements.** Consistent with current time-consuming hurdles to entering the Chinese market, any foreign NGO conducting activities in China must either obtain approval to establish a permanent representative office (RO) or carry out temporary activities under the supervision of a (local) government-affiliated sponsor for up to one year.
- **Penalties for Failing to Register.** Foreign NGOs that have not properly registered or secured a host organization cannot conduct activities within China, and are subject to fines and detention.
- **Police Control and Oversight.** Notably, in contrast to prior practice, the Law shifts authority to register and supervise foreign NGOs from the Ministry of Civil Affairs to the national Ministry of Public Security.

Operational Requirements

The Law imposes exacting, administratively burdensome operational requirements and requires the disclosure of sensitive personal and business information to the Chinese government.

- **No Branch Offices.** The Law specifies that foreign NGOs may have only a RO in China unless a special exception is granted. This is similar to current practice and would require foreign NGOs that already have branch-type offices in China to shut them down.
- **Restrictions and Qualifications of Foreign Officers and Staff.** The Law caps the number of employees that may work in a RO to four individuals. Each RO may have one chief representative and up to three other representatives as required for operations. Further, the Law contains hiring restrictions and qualifications on who may serve as a Foreign NGO's representative.
- **Stringent Financial Controls.** The Law contains provisions which further specify and build on pre-existing restrictions regarding the source of funds used by foreign NGOs, maintenance of funds using Chinese bank accounts, and expatriation of such funds.
- **Activity and Financial Reporting.** The Law imposes onerous reporting and auditing requirements. Foreign NGOs must submit annual reports to police authorities detailing sources of financing, spending activities, and changes in personnel for each RO in the past year.
- **Future Planning Reporting.** The Law also requires foreign NGOs to submit in writing all "planned activities" for the coming year to Chinese government sponsors and the Ministry of Public Security.
- **Audit Requirement by Chinese Firm.** Foreign NGOs must publicly disclose their financial records and have the financial records audited by certified Chinese accounting firms.

Enforcement Authorities

As currently understood, the Law provides that Foreign NGOs will be subject to control and oversight by various governmental authorities. However, primary enforcement authority has been shifted to police authorities, who appear to have been granted increased supervisory control over Foreign NGOs. Obviously, this is a notable development for any foreign NGO.

- **Broad Supervisory Powers.** As drafted, the Law appears to grant broad discretionary powers for police to question and detain NGO workers, monitor their finances, regulate their work, shut down offices, and seize their property.
- **Vaguely Defined Offenses.** The Law generally prohibits Foreign NGOs from carrying out activities that harm China's national unity, security, or ethnic unity or endanger its national interests. It also criminalizes "inciting resistance to the implementation of laws," as well as "creating rumors" or publicizing information that damages state security or national interests. These terms are not defined and invite the possibility of selective enforcement.
- **Proceed with Caution.** Numerous critics have stated that the Law was adopted to preempt potential political threats against the ruling Communist Party as part of a broader crackdown on organizations promoting the growth of China's civil society. Regardless of the political undertones, now that the Law has been enacted, it is essential for foreign NGOs to be cautious about operations in China. This is true whether or not your NGO is involved in what may be considered politically sensitive activities because, until implemented, it is not clear what the breadth of the Law's interpretation by Chinese

authorities will be.

* * * * *

Although details on implementation of the Law have not yet been published, additional guidance from Chinese officials is reportedly forthcoming. In reviewing your "checklist" of considerations for new or continued activity in China, even if a one-time event, it is essential to ensure that you understand if and how the Law will affect your operations. NGOs should reexamine risks and take precautions regarding establishing a presence in China, partnering with existing organizations, moving funds in furtherance of the NGO's purpose, and any employees of the NGO operating in China from a legal, insurance and security risk perspective.

We will be closely monitoring the ongoing implementation of the Law in China, and will update you as developments warrant.

ARTICLES

October 29, 2014

ACTIVE OVERSEAS? WHAT EVERY NONPROFIT NEEDS TO KNOW AND DO TO MINIMIZE THE RISK OF TERRORIST FINANCING

If your nonprofit operates outside the United States, you now have additional reasons to worry about your organization being associated with – and abused by – terrorists or terrorist groups. Absent additional internal controls and heightened due diligence, your nonprofit is at risk of not only government-imposed fines and penalties, but also private sector lawsuits and damages.

From the government side, the additional pressure comes from the renewed focus the Financial Action Task Force (FATF)¹ is placing on the risk to nonprofits of terrorist abuse. Earlier this year, FATF published an extensive study listing the threats to nonprofits from terrorist entities, the drivers of the threats, and the complexities facing stakeholders (nonprofits, governments, and others). This study was a follow-up to one of FATF's original 2001 recommendations:

Nonprofit organisations are particularly vulnerable [to abuse for the financing of terrorism], and countries should ensure that they cannot be misused: (a) by terrorist organisations posing as legitimate entities; (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freeze measures; and (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.²

Why should a non-U.S., multilateral organization's study concern U.S. nonprofits? Almost every major development in U.S. anti-money laundering (AML) and counter-financing of terrorism (CFT) in the last ten years has come from FATF recommendations and studies.

The Financial Crimes Enforcement Network (FinCEN), the arm of the U.S. Treasury that oversees and enforces U.S. AML laws, recognizes FATF as "the global standard setter for combating money laundering and the financing of terrorism and proliferation."³ FATF conducts independent reviews of member countries' (including the United States') AML/CFT systems and compliance with FATF recommendations, publishing its findings in FATF public compliance reports.⁴

The most recent example of FATF's influence on U.S. law is FinCEN's "beneficial ownership" rulemaking.⁵ The rulemaking arose from FATF's *Customer Due Diligence* (CDD) recommendations, and subsequent FATF Reports, stating that a country's CDD measures must require:

Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner...For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.⁶

We can, therefore, expect that the "nonprofit organization" recommendation will be incorporated into U.S. law in the near future. This will result in additional governmental oversight and, as to potential civil liability, will place heightened standards and obligations on nonprofits to police themselves to ensure they are neither supporting nor being used by terrorist organizations.

The second factor comes from the private sector and is illustrated by the September 22, 2014, U.S. district court decision that Arab Bank Plc., by doing business with Hamas leaders, is responsible for funding terrorist acts in violation of the U.S. Anti-Terrorism Act (ATA).⁷ This is a private action brought by U.S. victims of attacks and, in some cases, their surviving relatives. The decision will be appealed and a separate trial held on damages.

The ATA gives a private right of action for treble damages to any U.S. national injured "in his or her

AUTHORS

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person, property, or business by reason of an act of international terrorism." 18 U.S.C. § 2333(a). The theory of the case is that U.S. law prohibits persons from knowingly (defined to include "being deliberately indifferent to") providing material support to a terrorist organization.

The confluence of (1) a nonprofit's current obligations under U.S. economic sanctions laws; (2) the probable increase in internal control requirements based on the FATF recommendation; and (3) the likelihood of private lawsuits based on aid provided to any designated terrorists organization, increases the threat of liability from governmental or private action. The failure of a nonprofit to meet a potentially heightened internal control standard based on the FATF recommendation and study will make it easier for a private litigant to prove liability under the ATA.

In sum, nonprofits now face higher compliance obligations with regard to U.S. economic sanctions and, similarly, higher threats of civil and criminal fines and penalties. Nonprofits cannot, however, have tunnel vision in this field. They must remain aware of developments with regard to a number of closely related laws:

- . Anti-corruption laws of (a) the United States (such as the Foreign Corrupt Practices Act [FCPA]); (b) countries in which an organization carries out charitable activities; and (c) any other country in which an organization has a presence (such as the United Kingdom, which has a relatively new, and broad, anti-bribery act).
- . Anti-money laundering and economic sanctions laws of the countries in which a nonprofit either has a presence or carries out its mission.
- . New foreign bank account reporting rules for U.S. organizations (such as the Foreign Account Tax Compliance Act [FATCA], in addition to the more familiar Foreign Bank Account Report [FBAR] rules).
- . Anti-boycott compliance and reporting requirements administered by the U.S. Departments of Commerce and Treasury.

Carrying these standards into practice requires careful thought and planning by a nonprofit. Initial mitigation steps to reduce the risk of liability include:

- . Follow the AML/CFT rules applicable to financial institutions, particularly if your nonprofit works in unsettled parts of the world that are subject to U.S. economic sanctions.
- . Know your donors and the sources of your donors' funds.
- . Know your recipients and your recipients' projects.
- . Check all funders, staff, board members, suppliers, and recipients against the U.S. Department of Treasury Office of Foreign Assets Control (OFAC) lists.
- . Install, use, and maintain strong internal controls on people, projects, and funds.

Together, these steps can go a long way to help minimize your organization's risk when carrying out its mission abroad.

[1] FATF is an inter-governmental body formed to set operational measures for combating money laundering, terrorist finance, and other threats to the international financial system. It currently is composed of 34 member states, 2 regional organizations, and a number of associates and observers from around the world. Formed in 1989, the FATF Secretariat is located at the Organization for Economic Cooperation and Development (OECD) in Paris, France. www.fatf-gafi.org

[2] FATF Report: *Risk of Terrorist Abuse in Nonprofit Organizations*, June 2014, at 1.

[3] *Customer Due Diligence Requirements for Financial Institutions*, 79 Fed. Reg. 45151 (Aug. 4, 2014) (Notice of Proposed Rulemaking) (Hereinafter, "CDD NPRM").
http://www.fincen.gov/statutes_regs/bsa/pending.html

[4] **FATF Mutual Assessments**

[5] CDD NPRM.

[6] FATF Report at 14 (emphasis supplied). See FATF Report, *Specific Risk Factors in Laundering the*

Proceeds of Corruption (June 2012); *FATF Report Laundering the Proceeds of Corruption* (July 2011)
[7] *Linde v. Arab Bank Plc*, 04-cv-02799, USDC, EDNY (Sept. 22, 2014). 18 U.S.C. § 2331 *et seq.*