

# Cross-Border Money Transfers: Key Requirements and Pitfalls Every U.S.-Based Nonprofit Needs to Know

September 23, 2014

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# Topics for Today

- 1. Understanding Foreign Exchange Controls**
- 2. Risks Associated with Cash Transactions**
- 3. OFAC's Sanctions and Embargo Prohibitions**
- 4. Recent Russian Sanctions**
- 5. Taxation of Foreign Operations – Tax Issues**
- 6. Taxation of Foreign Operations – Information Reporting Issues**
- 7. Taxation of Foreign Operations – Transfer Pricing Issues**
- 8. Questions**

# Understanding Foreign Exchange Controls

## International Considerations for Your Nonprofit Organization

# Foreign Exchange Controls: Practical Thoughts and Considerations

- Scrutiny on foreign funding of U.S.-based nonprofits
  - Difficulties with transparency and accountability
  - Concerns over money laundering and post-9/11 financial flows
  - China, India, Russia...under the microscope
- Requirements for domestic entities receiving funding from abroad
  - Reporting required under local law or lose right to receive foreign funds
    - India's Foreign Contribution Regulation Act

# Foreign Exchange Controls: More Practical Thoughts and Considerations

- Banking controls and accountability
  - Challenges to having non-residents as signatories on local currency bank account
  - Controls over disbursements and “slush” funds
  - Transparency for FCPA and anti-corruption compliance?
    - Case examples

# What Risks Are Associated with Cash Transactions?

Understanding and Minimizing Those Risks

# Cash Transaction Risks and Procedures

- Accountability: Locally and to U.S. “HQ” organization
- Implementing a standard global policy that meets local requirements
  - Implementation, train and audit
- FCPA and anti-corruption risks follow you overseas
  - Oversight and control: Important concepts
  - Successor liability: Acquiring a problem
  - Nonprofits are not exempt!
  - Recent enforcement efforts

# OFAC's Sanctions and Embargo Prohibitions

Understanding How They Affect Your Activities



# OFAC's Sanctions and Embargo Programs

- Office of Foreign Assets Control (OFAC)
  - Know the scope of jurisdiction
    - U.S. persons/entities – how to define?
    - What activities are covered?
    - Keep current, not static!
  - License authorization required for certain activities
    - U.S. nonprofits making payments to persons/entities in foreign countries subject to sanctions
    - Exporting/re-exporting items for humanitarian aid or support
    - Corresponding jurisdiction by State and Commerce Depts., under U.S. export controls

# Recent Russian Sanctions

## The Very Latest Squeeze

# Recent Sanctions against Russia

- Complex set of Orders, Directives and General Licenses: Sectoral Sanctions Identifications (SSI)
  - Directive 1: Financial Services – New debt (30 days) & equity
  - Directive 2: Energy Sector – New debt (90 days)
  - Directive 3: Defense & Material Sector – New debt (30 days)
  - Directive 4: Energy Sector – Oil production (directly or indirectly)
  - For prohibited activities of SSI named persons, n.b. SDNs too
  - All now include prohibitions for evasion and conspiracy
- Two General Licenses
  - Gen. Lic. 1A for derivatives prohibited by Dir. 1, 2 and 3
  - Gen. Lic. 2 authorizing certain activities prohibited by Dir. 4

# More on Recent Sanctions against Russia

- Practical interpretations
  - Not blocking actions
  - Extend to “rollover” of existing debt?
  - Reporting any phase-out activity
  - Entities owned 50% or more by SSI persons/entities?
  - What is the scope of Directive 4’s “prohibited services?”
- Don’t forget new BIS restrictions involving Russia
  - Additions to the Entity List
  - New restrictions on military end uses and end-users

# Taxation of Foreign Operations

## Tax Issues

# Taxation of Foreign Operations

- U.S. tax issues
  - Foreign operations of a U.S. nonprofit should continue to be exempt from U.S. tax if the activities are consistent with the tax-exempt purpose
  - UBTI rules still apply to foreign branches of U.S. nonprofits
  - Subject to U.S. information reporting requirements in addition to Form 990 reporting requirements

# Taxation of Foreign Operations

- Foreign tax issues
  - Qualification as a nonprofit for U.S. tax purposes may not be respected by the foreign country
  - May need different or additional registrations to comply with applicable foreign law requirements
  - Need to consider VAT and GST tax implications as well as possible income tax implications of proposed activities

# Taxation of Foreign Operations

## Information Reporting Issues



## U.S. Compliance

- The U.S. imposes significant information reporting requirements on U.S. taxpayers with overseas operations
- Those requirements apply to nonprofits just as they do to for-profit entities
- The IRS and the Department of Justice are very focused on international information reporting, even by nonprofits

## U.S. Compliance

- FINCen Form 114 (FBAR)
  - Filed if a person has signature authority over, or a financial interest in, one or more foreign financial accounts with a total aggregate balance of more than \$10,000
  - Must be filed, even if the person does not have an actual financial interest in the account(s)
  - For these purposes, the term “person” includes individuals and nonprofits
  - Due electronically by June 30 of each year; a U.S. Treasury Department form, not an IRS tax form

## U.S. Compliance

- Form 114 (FBAR) (cont'd.)
  - Considered to have a financial interest if the U.S. person owns more than 50% of the equity or other interests in a foreign entity
  - Foreign financial accounts include foreign bank accounts, securities brokerage accounts, mutual funds, hedge funds, private equity funds, and certain insurance contracts
  - Penalty of \$10,000 for each unreported foreign financial account; six year statute of limitations

## U.S. Compliance

- Forms 926/5471
  - Filed if the U.S. nonprofit owns at least 10% of the stock of the foreign entity
  - Form 926 is filed for the taxable year the foreign entity is formed
  - Form 5471 is an annual information reporting form used to report the operations of the foreign entity (includes a balance sheet, income statement, and other information)
  - Filed with Form 990

## U.S. Compliance

- Form 8938
  - A new IRS tax form that became applicable starting with the 2011 tax year
  - At the moment, only applicable to individuals and not nonprofit entities
  - Report specifies foreign financial assets
    - Includes many assets reported on Form 90-22.1, but also includes stock of foreign entities and a broader range of foreign financial accounts
  - Not filed with Form 990 until the regulations change

# U.S. Compliance

- Other forms
  - Form 8865: Filed to report investments in foreign partnerships
  - Form 8621: Filed to report investments in foreign passive investment companies

# Taxation of Foreign Operations

## Transfer Pricing Issues

# Transfer Pricing

- U.S. entities are required to deal with their affiliates at arm's length under Section 482 of the U.S. Internal Revenue Code
  - Similar arm's length requirements apply in most foreign countries
  - OECD versus BRIC approaches
  - Services, financing transactions, licenses of intellectual property, etc.



# Questions?

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