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.
Carrie A. Kroll, Esq.
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
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

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.
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.)

Considerations:

- Host Conference w/o Contracting w/ Local Entity
  - Due Diligence re: Organization/Association
  - Agreement Negotiations
  - Under local laws, are you “doing business”?  
  - Use of IP

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

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

- **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
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?
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.)
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.
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)
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
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
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
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
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)
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.
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
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
Questions and Discussion

Venable LLP
575 7th St., NW
Washington, DC 20004
202.344.4000

Jeffrey S. Tenenbaum, Esq., Partner
Chair, Nonprofit Organizations Practice
jstenenbaum@Venable.com
t 202.344.8138

Lindsay B. Meyer, Esq., Partner
Chair, International Trade & Customs Group
lbmeyer@Venable.com
t 202.344.4829

Carrie A. Kroll, Esq., Associate
International Trade & Customs Group
ckroll@Venable.com
t 202.344.4574