

VENABLE

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

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Venable LLP, Washington, DC

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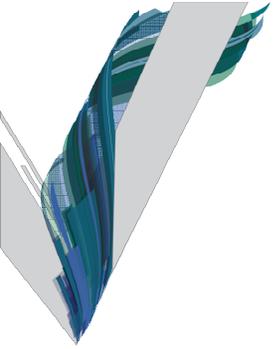
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- **June 13, 2017:** [An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit](#)



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!



Your Form of Entity/Operation Overseas?

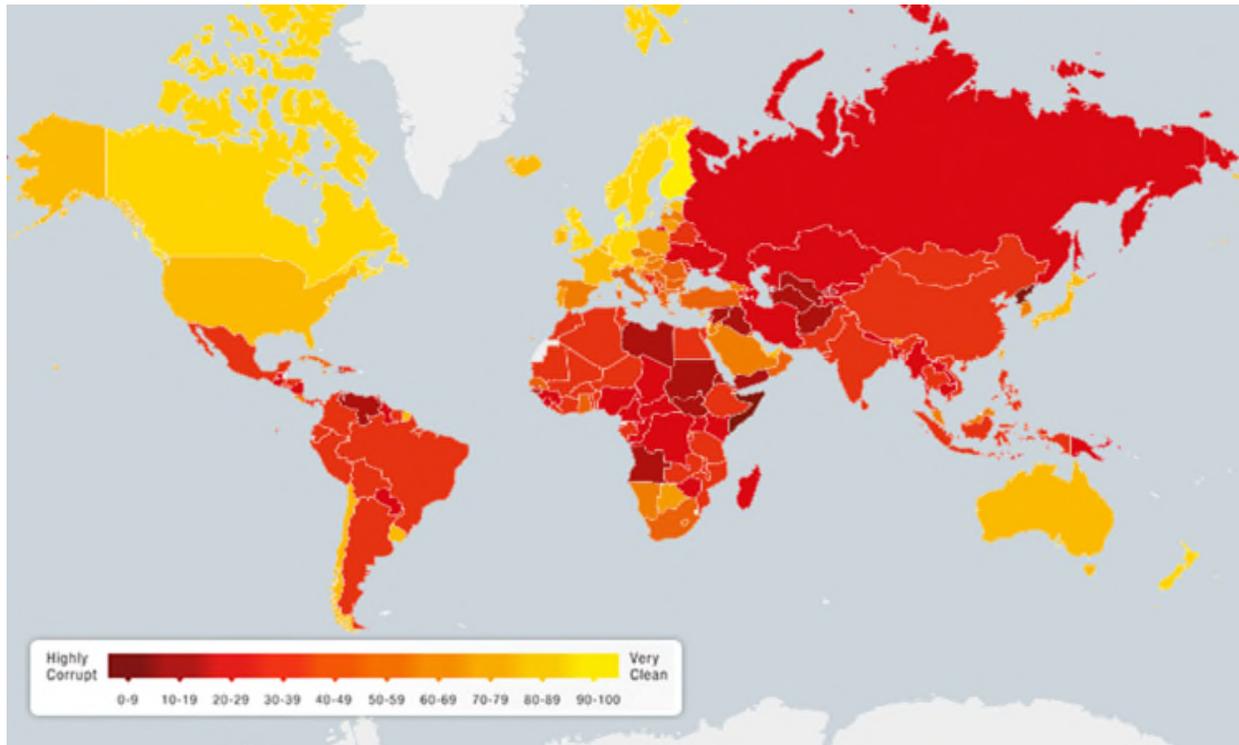
- What are your overseas activities?
- Overseas activities and goals?
 - Long-term/short-term?
 - Partner required or independent presence?
 - A local bank account: Required or advisable?
 - Activities?
 - Education; sales; events; membership dues; distribution of materials; certification
 - Typically, 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"

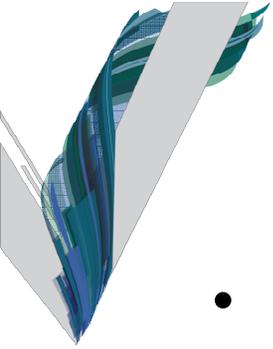


Source: <http://www.transparency.org/cpi2015#map-container>



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



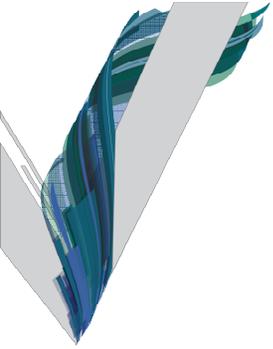
Your Compliance Considerations

- 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



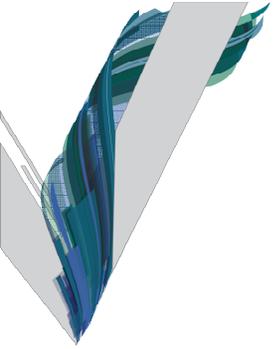
Global Employment Entity for Nonprofit Organization

- 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



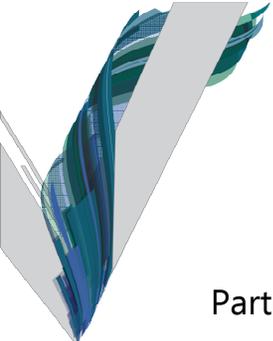
IRS Reporting

- 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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