

# **International Grant making**

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# Overview

- Structuring of grants to organizations and individuals
- Operating within different sanctions regimes and post-conflict environments
- Approaching grant making holistically

# Programmatic Context

- Role of the international donor in varying international and political contexts
- Understanding the role of governments in Foundation grant making (informing strategy and approach)
- Understanding the landscape

## TIPS FOR FUNDERS WORKING IN CONFLICT AND POST CONFLICT SETTINGS

**Tip 1:** Do your Research

**Tip 2:** Be prepared to take Risks

**Tip 3:** Focus on Conflict Prevention

**Tip 4:** Know your Partner: Establish relationships with grantees and other key stakeholders.

**Tip 5:** Support Indigenous Efforts

**Tip 6:** Provide Core Support: Core support allows grantees to be flexible in volatile, changing settings.

**Tip 7:** Be a Connector: By leveraging their ability to connect local actors with national and international players, funders can help build networks of peace.

**Tip 8:** Stay the Course: Peacebuilding work is long-term and requires long-term commitment.

*Peace & Security Funders' Group (2015) [www.peaceandsecurity.org](http://www.peaceandsecurity.org)*

# Legal Context

- U.S. Charitable organizations: 501(c)(3) is the section of the Internal Revenue Code where charitable organizations are defined
- Two types of U.S. charitable organizations: public charities and private foundations

# U.S. Charitable Organizations

- Public charity
  - receives a substantial part of its income, directly or indirectly, from the general public or from the government
  - Can be classified by type of activity as well, regardless of the amount of support
- Private foundation
  - does not have a broad source of support

# Grant Making Concerns

- Earmarking
- General support
- Project support
- To U.S. public charities
- To “other” organizations
  - Expenditure responsibility
  - Equivalency Determinations

# Earmarking Concerns

- “Earmarking” means setting aside funds to support specific activities
- Grant letter earmarks funds; safeguards are included in the letter
- Earmarking comes into play:
  - Re-granting
  - Lobbying, political campaign activity



# Public Charities

- If the U.S. public charity engages in lobbying, a private foundation can still make a grant to support it
  - General Support
    - Permissible if not “earmarked” to fund *specific* activities of grantee
    - Special reports on activities should not be requested
  - Project Support (for projects that contain lobbying)
    - The grant seeker must submit a budget dividing the project into lobbying and non-lobbying expenditures (i.e., a “bifurcated” budget)

# Grant making to Organizations that are **NOT** U.S. Public Charities

- These organizations include:
  - Fiscally sponsored organizations
  - Non-U.S. organizations
  - Other exempt organizations (not PCs)
  - For-profit companies
  - Charitable organizations (not PCs)
- These grants would be made pursuant to Expenditure Responsibility
  - For non-U.S. organizations, grants can also be made through equivalency determinations

# Expenditure Responsibility

- ER is a federally mandated procedure that a private foundation **must** follow for any grant made to an organization that is not a U.S. public charity.
  - Pre-Grant Inquiry – reasonable investigation
  - Grant Letter – countersigned; state ER rqmnts
  - Separate account for grant funds
  - Annual grant reports until funds are expended
  - PF has to report annually to the IRS per above

# ER (Cont'd)

- Grant Letter terms:
  - Specify charitable purposes – grant funds/income
  - Repay amounts not used for grant purposes
  - Report on how grant funds are spent
  - Maintain records and make books available
  - CANNOT use funds to:
    - Lobby, influence elections, re-grant (without permission), engage in noncharitable purposes
- Project support (general support is tricky)
- Re-granting requires grantee to impose ER

# ER (Cont'd) – Individual Grants

- Re-grants to organizations for individuals
  - Must follow grants to individuals rules for private foundations
- Funding to **intermediary organizations** can also present grants to individual questions
  - Type of organization and amount of involvement from private foundation are integral
  - **Public charity** – foundation can play a limited role in selection
  - **Governmental agencies** – foundation can exercise considerable control
  - **Other organizations** – selection is made completely independent of the foundation

# Grants to Individuals

- Private foundations **cannot** make grants to individuals for travel, study, or similar purposes, ***unless*** they follow certain pre-approved IRS procedures
  - Scholarships, fellowships, internships, prizes, and awards
- *Other* grants to individuals and salaries and service arrangements are excluded from the above requirement

# Equivalency Determinations

- Few non-U.S. organizations obtain public charity status from the IRS
- Only 2 ways to make a grant to a non-U.S. org:
  - Expenditure Responsibility **OR**
  - Equivalency Determination
    - Written opinion from counsel or the PF making a *reasonable determination* of equivalency
- What is an Equivalency Determination?
  - It is a good faith determination that the grantee is a U.S. public charity equivalent

# ED (Cont'd)

- What is an Ideal ED candidate?
  - Charitable organization (a **must**);
  - Five years or more in existence;
  - Long-term grantee;
  - Receives large grants or general support grants;  
**and**
  - Generally receives a substantial amount of its support from the general public (not just one source)



# ED (Cont'd)

- Sticking Points for ED candidates:
  - They must have organizational documents (e.g., charter, bylaws)
  - All of their documents **must** be in English.
  - Their activities **cannot** include political campaign intervention.
  - Need financial information for several years with certain exceptions (e.g., school, hospital)

# Fiscal Intermediaries

- Fiscal Sponsor
  - (nonprofit) Organization that provides fiduciary oversight, financial management, and other administrative services to help build the capacity of charitable projects
  - Has discretion and control
- Fiscal Agent
  - Acts as the legal agent for a project
  - No discretion and control

# Fiscal Intermediaries (Cont'd)

- **Grant agreement funding through a fiscal sponsor structure**
  - Names organization as FS's project
  - Treats FS as ultimate grantee
  - Puts obligations on FS only
  - ER considerations based on FS tax type
- **Grant agreement funding through a fiscal agent structure**
  - Names both FA and organization
  - Names organization as ultimate grantee
  - Can put obligations on both parties (negotiable)
  - ER considerations likely
- ***Best practice:*** use grant agreement regardless of amount

# Sanctions/OFAC

- *“Designating and freezing the assets of an organization engaged in charitable work is a decision not taken lightly because the last thing we want to do is cut off needed humanitarian assistance. However, when charitable organizations use charity and humanitarian assistance to provide support for a terrorist organization or as a cover to fund terrorist activity...we have a responsibility to do all we can to shut down the funding channels of terrorism.”*

Stuart Levey, Treasury Under Secretary for Terrorism and Financial Intelligence

# OFAC (Cont'd)

- U.S. Treasury department that enforces economic and trade sanctions against countries and groups of individuals involved in terrorism, narcotics, and other disreputable activities
- Regulations are in place in part to ensure organizations do not do business with terrorist organizations or individuals
- Affects all U.S. persons (and foreign branches)

# OFAC (Cont'd)

- Comprehensive approach to combating terrorist exploitation of the charitable sector
- Focus is also on what charities can do to protect themselves
- Risk-based diligence framework
- Collect basic information about grantees
- Conduct basic vetting (run against SDN list)
  - Organizations and people (directors, officers, ee's)
- Review financial and programmatic operations

# Foreign Corrupt Practices Act

- 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/her lawful duty; or (iii) obtaining or retaining business or to secure any improper advantage

# FCPA (Cont'd)

- Also applies to nonprofit organizations
- Be careful about use of agents in this context; can be held liable for their actions
- Anti-bribery laws apply in other jurisdictions, not just U.S.



# Hypo 1

- Foundation makes a grant to World Alive, a non-U.S. nonprofit organization working in public health throughout sub-Saharan Africa.
- World Alive would like to make the following grants:
  - To two individuals for a public health fellowship
  - To a local partner organization working on groundbreaking research
  - To fund public health projects in Zimbabwe

## Hypo 2

- Foundation funds Social Aspects, an organization that often incubates global arts projects.
  - Social Aspects funds a project on documentary photography, but has no written agreement in place and the project engages with the Foundation directly, explaining Social Aspects' role is to serve as back office support
  - Social Aspects has asked for additional funding to pay certain government officials as part of a routine process to secure public display space for one of its art projects.

# Hypo 3

- Foundation makes a grant to Better World, a U.S. public charity focusing on criminal justice reform, specifically the school to jail pipeline, throughout the global South.
  - Foundation works with Better World to make a project support grant to ABC Learn, a school in Belize; Foundation controlled the selection process.
  - Foundation makes a grant to Better World to support reform efforts in Cuba; Foundation's diligence focuses on Better World's efforts to ensure programmatic success.

## Hypo 4

Foundation seeks to make a grant to *Teachers First* to provide mentoring and school-based support to new teachers in rural districts in Botswana. Even though this is the third grant and they are confident that TF's energetic leadership can deliver, the Foundation has continued concerns about the overall strength of the organization.

# www.learnfoundationlaw.org

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### Welcome to Learn Foundation Law

In 2010, legal staff at the David and Lucile Packard Foundation, Bill & Melinda Gates Foundation, The William and Flora Hewlett Foundation and Gordon and Betty Moore Foundation (collectively the "Foundations") joined together to develop a comprehensive training program on legal issues in grantmaking. The goal of this collaboration is to create online, web-based trainings to supplement existing in-person training programs. The Foundations identified a shared need for this type of instructional resource, and a common desire to collaboratively develop a training system that speaks to a variety of learning styles and organizational training needs.



As a result, the Foundations developed Learn Foundation Law, a free first-of-its-kind resource for private foundations (and others who are interested), to host e-trainings and tools related to the basic legal rules for private foundations. Most e-learnings developed by the Foundations take less than one hour to complete and feature a program officer named Maya who leads participants through each course. Participants can return to any training at any time for a refresher and click on individual modules to refer back to specific topics. In addition, other e-learnings developed by any one of the Foundations may also be hosted on this site.

The Foundations hope you find value in this site, as it is intended to be an ongoing project to benefit the field and support the outcomes we seek in the charitable communities served.

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