



London's Calling! So is Syria, Sudan,  
North Korea ...  
Best Practices in International Grantmaking

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# Agenda

- Part 1: General legal framework
- Part 2: Equivalency determinations and expenditure responsibility
- Part 3: More U.S. law issues
- Part 4: Other countries also have laws!
- Part 5: Practical considerations

# Part 1: General legal framework

# All grants must have a charitable purpose

**All grants made by a private foundation whether in the United States or overseas must be clearly made for charitable/exempt purposes**

**Exempt purposes include educational, scientific or literary purposes, relief of the poor and distressed, combatting community deterioration, etc.**

# Types of grantees

Foundations can make grants to any type of organization:

- 501(c)(3) public charities and their foreign equivalents
- 501(c)(3) private foundations and their foreign equivalents
- Non-exempt organizations

# Different rules for different types of grantees

The rules we must follow differ depending on the type of organization

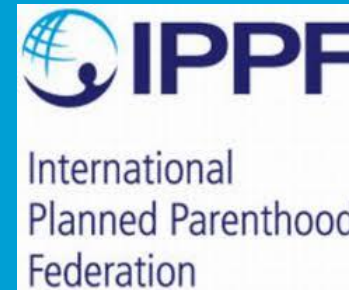
- 501(c)(3) public charities and their foreign equivalents – fewest rules
- 501(c)(3) private foundations and their foreign equivalents – more rules
- Non-exempt organizations – strictest rules

**The IRS rules are the same whether the recipient organization is organized in the United States or overseas**

# Grants to public charities

Grants to public charities and their equivalents have many benefits

- General support
- Capacity building
- Endowment support
- Capital equipment



# Grants to private foundations

Grants to private foundations and their equivalents have certain limitations

- Require expenditure responsibility
- Increased reporting requirements
- Requires flow through reporting

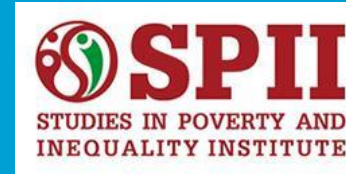




# Grants to non-exempt organizations

Grants to non-exempt organizations are subject to many limitations

- Require expenditure responsibility
- Require separate accounting
- Require charitable determination
- Cannot provide general support or capacity building
- Increased reporting requirements



# Part 2: Equivalency determinations and expenditure responsibility

# Equivalency determination and expenditure responsibility

There are two ways that a private foundation can make a grant to a non-U.S. organization

- **Equivalency determination:** grantor may treat the non-U.S. grantee as equivalent to a US public charity or US private foundation

*OR*

- **Expenditure responsibility:** grantor must treat the non-U.S. grantee as a non-exempt organization

# Equivalency determination

The IRS allows private foundations to make a *good faith determination* that a non-U.S. organization is the foreign equivalent of a public charity or private foundation.

# Equivalency determination

To qualify as the equivalent of a public charity the entity must:

- Be organized to carry out a charitable mission
- Not conduct any political activity and only insubstantial lobbying
- Not have any shareholders or members that are entitled to the assets or income of the entity
- Have a dissolution clause that requires all remaining assets be turned over to a similar charitable purpose
- Meet the public support test, or be a hospital, school or church

# Equivalency determination

In Revenue Procedure 92-94, the IRS laid out two ways to make this determination:

- Rely on a written opinion of counsel
  - Can cost \$5,000-\$10,000
- Make the determination based on a grantee affidavit

The IRS has issued regulations that have expanded the first option to include an opinion of any “qualified tax practitioner.”

# Equivalency determination

- **NGO Source:**
  - A qualified tax practitioner that has a data base of equivalencies from numerous foundations that can be relied on by its members at a reduced cost:
  - New equivalencies cost \$1,500-\$2,000
  - Re-certifications cost \$850
  - Existing certifications cost \$250

# Expenditure responsibility

- The foundation must put in place safeguards to guarantee that grant funds will be spent for charitable purposes
  - Pre-grant inquiry
  - Grant letter with clear charitable purpose and repayment requirement
  - Fiscal year-end reporting
  - Withhold payments if reports are not provided within a reasonable time
  - If funds are diverted must attempt to get repaid and prohibit future payments to the grantee unless/until the problem has been fixed



# Expenditure responsibility

- **Pre-Grant Inquiry**

- This requires the private foundation to make a “limited inquiry...complete enough to give a reasonable man assurance that the grantee will use the grant for proper purposes.”
- Look into the identity, prior history and experience of the organization and its managers.



# Expenditure responsibility

## Written Grant Agreement

- Must include a requirement that the funds be used for a clear charitable purpose
- Must include a requirement that the funds be repaid to the grantor if they are diverted for any other use
- Must require a segregated account on the grantee's books



# Expenditure responsibility

## Reporting

- Requires written reports on the use of the funds at the end of each fiscal year of the grantee
- Can result in more than one report in a year



# Expenditure responsibility

## If Grantee Fails to Comply with ER Rules

- Grantor is not permitted to make any payments if the grantee fails to provide a required report
- Grantor must attempt to get back any funds diverted for improper use and cannot make any future payments unless the repayment is received and the underlying problem has been fixed



# Equivalency determination or expenditure responsibility?

Expenditure responsibility is required when ...

- Grantee is a non-charitable enterprise (that will use the grant for charitable purposes)
- Grantor evaluates the affidavit and concludes that despite everyone's best efforts, the grantee is not the equivalent of a public charity
- Grantee cannot supply the information required for an equivalency affidavit

# Equivalency determination or expenditure responsibility?

An equivalency determination might be required or convenient if....

- Grantor wants to make a grant for general support, capacity building or capital equipment
- Grantor expects a long-term relationship
- Grantee can supply governing documents and financial data that support equivalency without undue difficulty
- Grantee can supply governing documents that support equivalency and no financial data is needed (i.e., grantee is a school, hospital or church)

# Equivalency determination or expenditure responsibility?

Expenditure responsibility might be convenient if....

- Grantor plans a one-time grant for a particular charitable project.
- Grantee may have considerable difficulty in supplying historical financial data or obtaining a certified copy of its governing documents.

# Part 3: Selected other U.S. law issues



# Other U.S. law issues

- OFAC – restricted countries and designated persons list
  - Countries subject to comprehensive sanctions programs include Cuba, Iran, North Korea, Sudan and Syria
  - Many other countries subject to limited sanctions; generally limited to blocking transactions involving designated organizations, entities and individuals
  - These are subject to change

# Other U.S. law issues

- Travel by US government officials
  - With some exceptions, private foundation funds may not be used to make payments to or for US government officials, including any foreign travel

Part 4: Other countries also have laws!

# Shrinking space for civil society

- Each country has different, often highly-specific laws governing foreign funding of domestic NGOs
- Trend is more regulation, oversight and enforcement
- Recent developments include:
  - China recently enacted new PRC law on the Management of Overseas Non-Government Organizations' Activities within Mainland China, effective January 1, 2017
  - Egyptian parliament recently passed new law on Resolving the Law of Civil Associations, Foundations, and Organizations Performing Civil Activities (awaiting Presidential signature)
  - India has focused over past few years on enforcing its Foreign Contribution (Regulation) Act, 2010

# Complying with non-U.S. laws

- Some questions a donor may consider:
  - Do grants need to be pre-authorized by any governmental agency?
  - Do grantees need to be pre-approved by any governmental agency?
  - Do foreign donors need to register with any governmental agency?
  - Are there restrictions on grants to particular locations?
  - What rules apply to wire transfers into the country?
  - What travel rules apply to donor staff when visiting the grantee?
  - Are there any tax issues?

# Part 5: Practical considerations

# Practical considerations

- Critical to understand cultural norms
- Social media activity about your charitable projects
  - yours and your grantees
  - be aware and intentional
- Know your (actual) local legal protections
  - Understanding typical local practices is as important as knowing the official laws
- Safety
  - Your staff, your non-U.S. grantees and other local partners
  - Plan ahead when contemplating travel to sensitive areas; utilize State Department website and other resources for information

Questions?