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
Equivacency 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
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?