



# BEST PRACTICES IN INTERNATIONAL GRANTMAKING

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# AGENDA

1. General legal framework
2. Equivalency determinations and expenditure responsibility
3. Selected US regulatory issues
4. Other countries' laws
5. Practical considerations
6. Resources

# I. GENERAL LEGAL FRAMEWORK

ALL PF GRANTS  
MUST HAVE A  
CHARITABLE  
PURPOSE

- All grants made by a private foundation 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 individuals and to organizations (so long as the grant made is for a charitable / exempt purpose).

Grants to Individuals – a foundation can only make grants to individuals for travel, study or similar purposes if they are awarded (i) on an objective and non-discriminatory basis (ii) pursuant to a procedure approved *in advance* by the IRS *and* (iii) the grant constitutes a scholarship, fellowship, prize or award (as defined by the IRS), or is to achieve a specific objective, produce a report, or improve or enhance a capacity, skill or talent of the grantee.

Grants to Organizations -

- 501(c)(3) public charities and their foreign equivalents
- Units of government (domestic and foreign)
- International organizations designated by executive order
- 501(c)(3) private foundation and their foreign equivalents
- Non-exempt organizations

## DIFFERENT RULES APPLY TO DIFFERENT TYPES OF GRANTEES

- The rules private foundations 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

NOTE: 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 expenditures

# 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

## 2. EQUIVALENCY DETERMINATIONS AND EXPENDITURE RESPONSIBILITY

# EQUIVALENCY DETERMINATIONS AND EXPENDITURE RESPONSIBILITY

- There are 2 ways that a private foundation can make a grant to a non-U.S. organization:
  - **Equivalency determination:** A good faith determination that a non-US organization is the equivalent of a U.S. public charity. It examines whether organization's organizational documents, operations and funding structure meet the requirements of a public charity.
  - **Expenditure responsibility:** A set of federally-mandated oversight and monitoring procedures designed to ensure that grant funds are spent solely for the charitable purposes for which they are awarded.

# EQUIVALENCY DETERMINATION

## **To be a public charity equivalent, the non U.S organization must:**

Be organized & operate exclusively for charitable purposes.

Have a dissolution clause that requires all remaining assets to be turned over to a similar charitable purpose

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

Meet the public support test, or be a hospital, school or church

## EQUIVALENCY DETERMINATION

In Rev. Proc. 92-94, the IRS laid out two ways to make this determination:

- 1) Rely on a written opinion of counsel, OR,
- 2) Make the determination in-house based on grantee affidavits.

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

A few third-party qualified tax practitioners, which have helped reduce duplication of efforts (by different foundations assessing the same organizations) and costs (which can range between \$5k-\$10K) include:

- *NGO Source* - they have a database of equivalency determinations requested by numerous foundation that can be relied on by its members at a reduced cost. They do a review of regulations in the foreign country where the grantee operates and alerts the foundation of any foreign country restrictions on the operations of civil society organizations that may be of concern. New EDs cost \$1500-1800; Renewal-EDs cost \$850; Existing certifications cost \$250
- *Paragon Philanthropy* – they have a database of equivalency determinations. The services and costs are similar to NGO Source.

# EQUIVALENCY DETERMINATION

Circumstances that favor seeking equivalency determinations:

**Long-term relationships** – Grantmakers may expect to establish long-term relationships with their grantees and an ED permits them to more easily make subsequent grants to an organization that has been certified.

**Flexible funding** – The grantmaker may want to provide more flexibility over the disbursement of grant funds (like for capital equipment or general operating support) and an ED can help.

**Good candidates** – The grantee organization may be a charity in the country where they operate and they can supply governing documents, financial data over several years and meet the public support test.

## EXPENDITURE RESPONSIBILITY

However, under some circumstances, equivalency determination will not be an option:

- **For-profit companies** – the grantee is a non-charitable enterprise that will use the grant for charitable purposes.
- **Private foundations**
- **Foreign organizations without an “equivalency determination”**. Grantee cannot supply the information required for an equivalency affidavit AND / OR does not meet the requirements.
- **New organizations** waiting on their “IRS determination letter;” that recognizes their 501c3 public charity status.
- **Other 501(c) tax exempt organizations** that are **not section 501c3** public charities, like 501c4s (social welfare orgs), 501c6 (business association - like chamber of commerce)



EXPENDITURE RESPONSIBILITY

# EXPENDITURE RESPONSIBILITY

Certain safeguards must be put in place to guarantee that grant funds will be spent for charitable purposes:

1. **Pre-grant inquiry**
2. **Grant agreement**
3. **Separate accounts**
4. **Reports from the Grantee**
5. **Reports to IRS on Foundation's tax return**
6. **Investigation of Diversion**



## EXPENDITURE RESPONSIBILITY

If the Foundation believes the Grantee has diverted funds, then the foundation must:

- Take “all reasonable and appropriate steps” to ensure the grantee either returns the diverted funds to the foundation, or restores the amount to the grant account; and
- Withhold all further payments to the grantee on all grants until the diverted funds are restored/recovered and the foundation has received appropriate assurances that further diversions will not occur.

## EXPENDITURE RESPONSIBILITY

Restrictions on grantee's use of grant funds under expenditure responsibility:

- Cannot be used for **lobbying** or **propaganda**
- Cannot be used to **influence the outcome of any specific public election** or to carry on, directly or indirectly, any **voter registration drive**
- Cannot be **re-granted to organizations** unless the grantee also exercises “flow down” expenditure responsibility
- Cannot be used for **grants to individuals** for travel, study, or other similar purposes unless complying with IRS requirements for such grants (objective/nondiscriminatory basis, procedure pre-approved by IRS)
- Use for **capital expenditures** is not prohibited but capital must be used exclusively for charitable purposes; extensive reporting may be required

## 3. SELECTED US REGULATORY ISSUES

## U.S. ECONOMIC SANCTIONS

- The Office of Foreign Assets Control is a regulatory agency within the U.S. Department of Treasury. It enforces U.S. economic sanctions against designated individuals, entities and countries through:
  - **List-Based Sanctions Programs**—lists of individuals and entities, identified as “Specially Designated Nationals” or “SDNs”. SDN list has over 8,000 entries, including individuals, companies, banks and airlines (among others). All U.S. persons are prohibited from transacting and interacting with SDNs; and
  - **Comprehensive Sanctions Programs**—entire countries or geographic areas that are subject to broad embargoes. Cuba, Iran, North Korea, Syria, Venezuela and the Crimea Region of Ukraine are subject to comprehensive sanctions. This is effectively a prohibition against most dealings in these markets. A transaction that involves a U.S. person and an individual or entity from a comprehensively sanctioned market needs a general or specific license from OFAC, or must fall within an OFAC exemption, to be compliant.
- Breaching U.S. economic sanctions can have grave consequences for the organization and the individuals involved in the breach.

# FOREIGN TERRORIST ORGANIZATIONS

- The U.S. Department of State designates Foreign Terrorist Organizations, or FTOs, which are organizations deemed to engage in terrorist activity. U.S. persons are prohibited from providing “material support” to FTOs and any violation is subject to criminal prosecution.
- Additionally, FTOs, including their key leaders and members, are identified on the SDN list and any violation may be subject to stiff civil and criminal penalties.

## SANCTIONS RED FLAGS

- No matter where in the world a grantee conducts activities, there may be a sanctions risk if a grantee will engage or interact, directly or indirectly, with a group or person associated with ANY ILLICIT ACTIVITY, including terrorism, narcotics trafficking, weapons proliferation, or criminal activities.
- Red flags:
  - In certain higher-risk regions, could activities involve interactions with interactions with government officials, illicit actors, or armed groups?
  - Does the engagement include peace negotiations or reintegration efforts?

# FOREIGN CORRUPT PRACTICES ACT

- Prohibits the paying of, offering, promising to pay (or authorizing to pay or offer) money or “anything of value” with corrupt intent (directly or indirectly) to a foreign government official or political party official for the purpose of:
  - Influencing an official act or decision
  - Causing the official to fail to perform his/her lawful duty
  - Obtaining or retaining business or to secure any improper advantage

# FOREIGN CORRUPT PRACTICES ACT

- 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 as well



# FOREIGN AGENTS REGISTRATION ACT

- Post-2016 election investigations into Russian interference have generated interest in the Foreign Agents Registration Act (FARA), which requires registration and disclosure by those acting “for or on behalf of” foreign governments and entities.
- Intended to create transparency on communications of foreign governments, political parties, corporations and individuals.
- Requires registration and disclosure by those acting “for or on behalf of” foreign governments and entities.
- Concern that FARA can be politicized to target nonprofits in the U.S. (see FARA inquiries issued to environmental advocacy groups).

## 4. OTHER COUNTRIES' LAWS

## LAWS RE: FOREIGN FUNDING OF DOMESTIC NGOS

- Each country has its own, often highly-specific laws governing foreign funding of domestic NGOs.
- Trend is toward more restriction, not less, including:
  - Outright or de facto prohibition on foreign funding of any kind
  - Limits on foreign funding
    - Limit to a certain percentage of NGO budget
    - Imposing excessive taxes on foreign grants to domestic NGOs
    - Prohibiting or restricting foreign funding for certain political or human rights activities
  - Burdensome requirements
    - Re-registration requirements and changing / unclear rules
    - Mandatory government approval of foreign funding or foreign-funded activities
    - Burdensome registration requirement for foreign grants
    - Requirement to channel funding through a centralized state agency or designated bank account
    - Onerous reporting requirements for all foreign-funded activities

## QUESTIONS TO ASK

- Do grants need to be authorized by a government agency? Who is responsible for seeking authorization? Must this be obtained before the grant funds are provided?
- Do grantees need to be pre-approved by any government agency?
- Do donors need to register with any government 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?
- Tax issues?

## 5. PRACTICAL CONSIDERATIONS

# SOME CONSIDERATIONS

Type of support – general support, project/program support

Grant period and reporting

Data disclosures on 990 and websites and grantee sensitivities

Banking issues

Incremental funding/rolling advance payments

## 6. RESOURCES

## WHERE TO FIND...

**Learn Foundation Law** - Primer on laws applicable to private foundations: [www.learnfoundationlaw.org](http://www.learnfoundationlaw.org) including on expenditure responsibility, anti-bribery/corruption, electioneering, and more.

**International Center for Not-For-Profit Law** - Information re legal framework applicable to grantmaking and civil society in many jurisdictions across the globe: [www.icnl.org](http://www.icnl.org)

**NGO Source** – among other things, provides equivalency determination services, alerts client to compliance risks in country as well as on OFAC. <https://www.ngosource.org/> Has monthly newsletter: Legalease

**Paragon Philanthropy** – among other things, provides equivalency determination, expenditure responsibility, anti-terrorist finance screening of grantees <https://www.paragonphilanthropy.com/>

**Global Grant Community** –platform that rates CBOs, NGOs, research/academic institutions on their capabilities to manage grants with the goal of a global platform with GFGM (good financial grant practice ) that aims to promote transparency and integrate approach to standardize, simplify and strengthen financial governance of grant funding worldwide. <https://www.aasciences.africa/ggc>

“**International organizations**” under [Title 22 USC 288](#) as designated by authority of President.