Legal & Tax Considerations

International Grants & Giving Through an Intermediary

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Approach

US Laws and Tax Considerations

An overview of
Grantmaking Intermediaries
in the U.S.

International Regulatory Landscape

When global laws
matter just as much

Review

- What is an intermediary?
- Grantmaking through an intermediary
- How does a funder work with an intermediary?
- Supporting the intermediary-grantee relationship
- Earmarking
- Self-dealing

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What is an intermediary?

IN·TER·ME·DI·AR·Y

noun

1. an organization that provides specialized expertise to foundations and other donors, in particular through the regranting of funds to organizations and projects outside the United States. An intermediary's expertise may include legal knowledge of U.S. and other governments' guidelines, a deep understanding of a specific issue or region of the world, or capacity building and other support to grantee organizations.

Corporate Foundations

Subject to the Section 4945 excise tax rules, which treat grants to foreign organizations as taxable expenditures.

In order for international grants to be tax deductible, the foundation must:

ED

obtain an "**equivalency determination**" from a qualified tax practitioner that the foreign grantee is equivalent to a 501(c)(3) charity

ER

exercise **"expenditure responsibility"** (ER) over the foreign grantee

Public Charity

Corporate funders can give directly to an intermediary like GlobalGiving without obtaining the ED or exercising ER

Working With an Intermediary: **What are the tax considerations?**

- Each organization's IRS annual reports should reflect the intermediary arrangement.
- The original funder reports on its Form 990-PF that it made a grant to the intermediary charity (*not* the foreign grantee).
- The intermediary reports on its Form 990 that it received a grant from the original funder, and the grants it has made to foreign grantees.

Performed by Intermediary

The intermediary performs the necessary **due diligence** to ensure that the foreign grantee is:

- A charitable organization in good standing with its local laws,
- Up-to-date and in compliance with its local filing requirements, and
- Conducting a charitable or educational program or projects that are in compliance with 501(c)(3) standards.

After conducting due diligence, the intermediary then grants to the grantees recommended by its donors.

As an intermediary, GlobalGiving **facilitates and monitors grant funds** so that a corporate funder does not have to.

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Working With an Intermediary:
Who maintains control of the funding?

- To relieve the originating funder of the obligation to oversee the subsequent grants to foreign charities, the intermediary maintains discretion and control over those foreign grants.

- The intermediary has the authority to approve and award grants, revoke grants, or require repayment, if a grantee misuses grant funds.

Working With an Intermediary: **How does reporting work?**

- The foreign grantees report to the intermediary, as the direct grantor, on the use of grant funds.

- The intermediary can then report back to its donors, if the donors so require.

- In the case of “expenditure responsibility” approved grants, **grantees are required by Section 4945 excise tax rules to report how they expended charitable funding to the intermediary, or risk being out of compliance.**

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Expenditure Responsibility

When equivalency determination isn't used, expenditure responsibility can be.

Here's what's involved:

1. make a **pre-grant inquiry** into the grantee
2. issue a **written grant agreement**, and
3. require the grantee to make **annual reports** to the foundation on the use of grant funds.


What programs or projects are considered *charitable*?

Q: Who ultimately benefits?

A: Section 170(c)(2)(B) of the U.S. Code

DO's and DON'Ts

supporting the grantee-intermediary relationship

Don't lead grantees to believe that a grant approval is guaranteed by the intermediary.

Do give the intermediary enough time to review grant proposals well in advance of the project start date.

Don't promise funding or material support to the grantee before the intermediary's approval.

Do direct grantees to inform the intermediary of project changes: delays, cancellations, change in deliverables, change in spending plan etc.

Don’t encourage grantees to advertise/schedule an event or project before the intermediary’s approval.

Do always communicate with the intermediary first.

Don’t direct a grantee to change the project before receiving the intermediary’s approval.

Do work with an intermediary that shares your giving and grantee support philosophy.

Don’t approve project changes before receiving the intermediary’s approval.

EAR·MARK·ING

verb

1. when there is an oral or written agreement that the corporate funder may cause the selection of the secondary grantee.
2. when a grantmaking intermediary does not exercise full control over the secondary grantee selection process.
3. **if a corporate funder is perceived as earmarking funds for a specific grantee, the funder could be deemed to be the *direct* grantor to a foreign organization, and thus liable for penalty excise taxes** under Section 4945.

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GlobalGiving's **control** over the grant avoids liability, tax or otherwise, for the corporate foundation.

Tip

If a corporate funder identifies particular foreign grantees it wants the intermediary to direct grants to, the intermediary must include **key language** in documents and **agreements** affirming their ultimate discretion and control over the funds once the initial donation is made.

What is self-dealing?

SELF DEAL·ING

noun

1. the act of a company or foundation providing benefit to itself.
2. under section 4941 of the Internal Revenue Code, a private foundation's disqualified persons, those who control and fund the foundation, are prohibited from direct and indirect financial transactions with the foundation unless a specific exception applies.
3. an excise tax can be imposed on most transactions that occur through a self-dealing act.

Who are "disqualified persons"?

- A foundation's substantial contributors (e.g. the corporate partner's company)
- Owners of more than 20% of an entity that is a substantial contributor
- Foundation managers, which means the officers, directors, or trustees, or similar

What are considered self-dealing acts?

The IRS considers six acts of prohibited self-dealing between a foundation:

1. the **sale, exchange or leasing of property**
2. the **lending of money** or other extension of credit
3. the **furnishing of goods, services or facilities**
4. the **payment or compensation or reimbursement of expenses**
5. the **transfer to**, or use by or for the benefit of, **a disqualified person** of any income or assets of the foundation
6. an agreement to **pay a government official**

Tip

Corporate grantmakers **should not require *or incentivize* grantee organizations to use their products or services** as a condition of a grant.

Doing so may raise a concern of self-dealing.

Other Legal & Tax Considerations

- Executive Order 13224
- U.S.A. Patriot Act
- Office of Foreign Asset Control (OFAC)
- Foreign Corrupt Practices Act (FCPA)
- UK Bribery Act
- U.S. Department of the Treasury Anti-Terrorist Best Practices
- Country-specific regulations

Tip

A knowledgeable intermediary partner will be aware of the previously mentioned considerations.

Such a partner will **provide strategic guidance** and support to funders who wish to give abroad.

Compliance with Anti-Terrorism Rules: Executive Order 13224

Executive Order 13224 prohibits financial transactions with persons who commit, threaten to commit, or support terrorism.

This includes a prohibition on making contributions (monetary or in-kind) and providing technical assistance to or for the benefit of "Specially Designated Nationals" (or "SDNs") and unlisted persons who provide support and assistance to persons on the SDN list.

Penalty for noncompliance is seizure and blocking of assets.

Compliance with Anti-Terrorism Rules: U.S.A. Patriot Act

USA Patriot Act prohibits knowingly and willingly providing material support (including grants and technical assistance) for terrorism or to Foreign Terrorist Organizations ("FTOs").

Penalties include asset forfeiture, civil liability for persons injured in terrorist act, and criminal liability up to $1M and 20 years imprisonment.

Compliance with Anti-Terrorism Rules:

Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities

First released by the U.S. Department of the Treasury in 2002, and amended in response to feedback from the philanthropic sector, the guidelines attempt to identify a set of voluntary best practices that U.S. tax exempt organizations can utilize to reduce the risk of inadvertently being involved in terrorist activity.

The Guidelines do not have the force of law and do not offer a safe harbor.

Compliance with OFAC Sanctions

Through the US Department of the Treasury Office of Foreign Assets Control (OFAC) Sanctions, U.S. law imposes sanctions with embargoed countries and restricted persons.

- OFAC administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.
- Any form of dealing, provision of a service, conferring of any benefit, or any financial transaction involving a prohibited party is a violation of U.S. law. This includes any extension of credit, awarding of grants, or the reimbursement of expenses to a prohibited party, even where the prohibited party is one of several beneficiaries. Any of these actions could be in violation of OFAC sanctions.

More info: www.treasury.gov/resource-center/sanctions/Pages/default.aspx

OFAC Embargoed Countries

- Cuba, Iran, Libya, North Korea, Sudan, Republic of South Sudan, Syria, and Ukraine/Russia
- Some sanctions also apply to activities in Belarus, Burundi, Burma, Democratic Republic of Congo, Iraq, Lebanon, Liberia, Somalia, Venezuela, Yemen and Zimbabwe.
- Grantors that wish to fund in a country subject to sanctions should carefully determine whether the proposed activities are permitted and consider whether an exception/license may be needed.

OFAC Restricted Persons

- U.S. sanctions prohibit transactions with Specially Designated Nationals, Specially Designated Narcotics Traffickers, Significant Foreign Narcotics Traffickers, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and persons engaged in the proliferation of weapons of mass destruction (collectively, “restricted persons”).

- Restricted persons may be located anywhere in the world; the prohibition follows the restricted person and is not dependent on their physical location.

Tip

As part of its due diligence review, GlobalGiving screens all staff and board members against OFAC database.

OFAC speaks louder in 2019

The Office of Foreign Assets Control ("*OFAC*") has assumed an unprecedented pace after an quiet year – announcing settlements for sanction violations at an average of one settlement per week.

"The settlements have been as large US$639,023,750 for 9,335 distinct violations, and as small as US$13,381 for just six, and have targeted major international financial institutions and modest, privately held companies alike – underscoring that no potential violations are too big or too small to escape OFAC's interest."

- *Source: JD Supra*

OFAC red notice in 2019

Legal definition and internal understanding of violation

Determine organization’s response to violation

Reputation assessment

Corporate partner escalation

Foreign Corrupt Practices Act (FCPA)

In addition to anti-terrorism regulations, grant funders should consider other regulations that may be applicable to international grants:

- FCPA makes it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

- FCPA prohibits the willful use of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions.

UK Bribery Act

In addition to anti-terrorism regulations, grant funders should consider other regulations that may be applicable to international grants:

- This act enhanced UK law on bribery and is the strictest legislation internationally. It places the burden of proof companies to demonstrate that they have adequate procedures in place to prevent bribery.
- It impacts UK companies operating abroad and foreign companies with a presence in the UK.
- It also prohibits both active and passive bribery by individuals and companies.


What are some country-specific challenges to grantmaking?

Country-Specific Challenges to Grantmaking

Country-specific requirements, regulations and challenges may also delay or prevent foreign funders in engaging in philanthropy in certain markets.

40% of 79 country representatives surveyed reported facing a **more restrictive philanthropy environment** over the last five years.

Source: *Lilly Family School of Philanthropy*

INDIA

The Indian Foreign Contribution Regulation Act of 2010 (“FCRA,” not to be confused with the US FCPA) requires charitable organizations to obtain permanent registration or prior **permission from the Ministry of Home Affairs** (MHA) to receive foreign funds.

To register under FCRA, organizations must have been **in existence for at least 3 years** and **renew every 5 years**.

CHINA

The Law on the Management of Foreign Non-Governmental Organizations’ Activities in the People’s Republic of China (“Foreign NGO Law”) has been in effect since January 2017.

It requires foreign funders to either **establish permanent registration as a foreign charity**, or **apply for a temporary activity permit** related to a specific charitable project under the sponsorship of a local charity through the Ministry of Public Security (MPS).

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MEXICO

Mexico has anti-money laundering legislation called Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita or “LFPIORPI.”

It requires recipients of funds of **100,000 pesos or more** to **provide donor information** to the Mexican government, **register in the Taxpayers Registry**, and **obtain additional documentation** from the funder.

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Tip

The International Center for Not-For-Profit Law (www.icnl.org) is a good resource on country-level laws and reports.

Q&A