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Nonprofits – International Charity Activities

By Gene Takagi (<http://www.nonprofitlawblog.com/author/gene-takagi/>) on August 13, 2015

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A 501(c)(3) organization may advance its “charitable” purpose through international activities. But

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there is much that needs to be considered when operating in a foreign country, including –

Registration

It is very common for a country, state/province, and/or city/municipality to require a foreign nonprofit to register with a governmental agency and be subject to its regulations. Operating without proper registration can result in a warning, a fine, or, in a worst case scenario (as might be the case in Egypt), imprisonment.

It makes sense that a country would want some identification of and control over foreign organizations operating within its borders. It also makes sense that a nonprofit would want to look into applicable requirements of operating in a foreign country and be compliant with such requirements.

For foreign nongovernmental organizations (NGOs) operating in the United States, there are multiple levels of qualifications, registrations, and other filings to be considered. For example, in California, a foreign charitable NGO would need to (1) qualify to do business in the state by filing with the Secretary of State, (2) register with the Attorney General's Registry of Charitable Trusts, and (3) register with the city or county, as required under local laws. If it wanted tax-exemption, it would need to apply for recognition of exemption from both the IRS and California Franchise Tax Board. But if it wanted to be able to receive deductible charitable contributions, it would be out of luck. Only domestic 501(c)(3) organizations are eligible to receive deductible charitable contributions. So, it may make sense for a foreign NGO to set up a domestic "friends of" organization instead of operating itself in the United States.

One big problem with complying with foreign registration requirements is the difficulty in finding then deciphering the requirements in a particular country at various levels. And in some countries, it may be incredibly burdensome and time-consuming to complete all of the registration requirements, if it's even possible. The NGO Law Monitor (<http://www.icnl.org/research/monitor/index.html>) on the website of the International Center for Not-for-Profit Law ("ICNL") serves as a good introductory resource for what may be required in various countries.

Licenses and Permits

For certain activities like the provision of education or healthcare, charities operating abroad must consider the applicable licensing requirements. Simply setting up shop and operating a school or health clinic without proper licensing may result in harsh consequences for the charity and its staff and volunteers.

Anti-Terrorism

U.S. Executive Order 13224 (<http://www.treasury.gov/resource-center/sanctions/Documents/13224.pdf>), which President Bush issued shortly after the 9/11 terrorist attacks, blocks property and prohibits transactions with persons and entities who commit, threaten to commit, or support terrorism ("Prohibited Persons"). Donations of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering are included among the prohibited transactions with Prohibited Persons, who include those on the Specially Designated Nationals List (<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>) regularly updated by the Office of Foreign Assets Control ("OFAC"). But strict compliance is challenging particularly where there is somebody on the SDN List who has a very common name.

The USA Patriot Act (<http://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>) was signed into law shortly after Executive Order 13224 "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." As described by the Center for Effective Government:

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SOCIAL ENTERPRISE

The Patriot Act gives the executive branch largely unchecked power to designate any group as a terrorist organization. Once designated, a group can have all of its materials and property seized and its assets frozen, "pending an investigation." Assets can be taken even if the organization faces no criminal charges. Once all assets are seized and frozen, an organization can be denied access to evidence (the organization's computers, files, documents, etc.) that might prove its innocence; the government has authority to withhold this information for "national security" reasons.

In response to concerns of charities and foundations on how to comply with the anti-terrorist laws, the Department of the Treasury issued Anti-Terrorist Financing Guidelines: Best Practices for U.S.-based Charities (http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf) first in 2002 and a revised version in 2006. A coalition of more than 40 nonprofit organizations led by The Council on Foundations vigorously objected to the original version and produced its own Principles of International Charity (<http://www.icnl.org/research/resources/foreignfund/principles.pdf>).

The Foreign Corrupt Practices Act (<http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>) (FCPA) generally makes it unlawful for persons (including employees, officers, and directors of nonprofits) to make, or to offer to make, payments to foreign government officials to assist in obtaining or retaining business. In other words, it's unlawful to bribe foreign officials. According to BDO's Nonprofit Standard (<http://nonprofitblog.bdo.com/index.php/effective-audit-committees-for-nonprofit-organizations/appendix/foreign-corrupt-practices-act/>):

Violations can result from:

- *Making improper payments to obtain government licenses, registrations, special tax or custom treatment which allow a company to do business in a foreign country (i.e., broad application – not just limited to those activities that directly influence the acquisition or retention of government contracts)*
- *Inappropriate activities conducted by third parties acting on behalf of the company that the company may be deemed to have (or deemed as should have had) knowledge of*
- *False characterization of improper payments on a company's books and records – this includes books or records ultimately consolidated for financial reporting purposes*

A Resource Guide to the U.S. Foreign Corrupt Practices Act (<http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>) is the Department of Justice's and Securities and Exchange Commission's detailed compilation of information about the FCPA.

Sanctioned Countries

OFAC administers a number of different sanctions programs. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. Among the countries subject to certain sanctions are Burma, Cuba, Iran, Libya, North Korea, Somalia, Sudan, Syria, and Zimbabwe. See Sanctions Programs and Country Information (<http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>). American nonprofits must be careful not to violate any restrictions against the transfer of assets to a sanctioned country or operation in a sanctioned country without an appropriate license from OFAC where it is necessary. See Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations (http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf) (OFAC).

Foreign Bank Accounts

For American nonprofits that maintain foreign bank accounts, it is critical to meet the annual filing requirement of the Report of Foreign Bank and Financial Accounts ("FBAR"). The Pro Bono Partnership / Atlanta has a good resource (<http://www.pbpatl.org/wp-content/uploads/2014/04/Reporting-Requirements-for-Nonprofits-with-Foreign-Bank-Accounts-.pdf>) on FBAR reporting

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requirements:

An FBAR must be filed annually by each United States person having an interest in, or a signature authority over, any financial account in a foreign country if the aggregate value of these accounts exceeds \$10,000 at any time during the calendar year. FBAR reports are due by June 30 of the year following the year which the account holder meets the \$10,000 threshold.

If your organization meets the requirements above, then at least one FBAR must be filed on behalf of the organization. In addition, one FBAR must be filed for each person with signature authority over the organization's foreign account(s).

Political Activities and Lobbying

The absolute prohibition against political intervention activities applicable under 501(c)(3) applies regardless of whether the election involves candidates for public office in the United States or in any other country. Furthermore, permissible political activities in the U.S., such as nonpartisan voter registrations and get-out-the-vote drives, may not be permissible in another country and could even constitute a crime. American charities must be careful and make sure they know the rules around political activities and lobbying in the context of the laws of each country in which they are thinking about engaging in such advocacy.

Trademarks

American charities operating in foreign countries must be aware that the trademarks they use domestically (including their name and logo) may be infringing on another person's or entity's rights in another country. Having trademark rights in the United States does not mean that a charity has such rights in another country. Accordingly, before using a trademark abroad, charities should find out if such trademark is available and, if it is, how it can be protected.

Insurance

Insurance must also be considered as operating in a foreign country may not be a covered activity, particularly if operating without the required registrations. An American nonprofit should anticipate in advance the risks of an employee or volunteer getting hurt, getting arrested, and/or creating legal obligations for the nonprofit in the foreign country.

Partnering

A nonprofit may advance its charitable goals in another country by supporting the work of a local NGO qualified to operate there. Such a *partnership* may be merely a collaborative effort memorialized in a memorandum of understanding or more of a formal joint venture or legal partnership.

There may also be a governance connection created between the nonprofit and foreign NGO. For example, the governing documents of a foreign NGO might provide an American nonprofit with the right to select one or more board members of the NGO. For an American nonprofit that desires the strongest level of governance control over a foreign NGO, a parent-subsidiary structure could be created with the American nonprofit having the right to select all of the board members of the NGO.

Grantmaking

Making grants to foreign NGOs is likely the most common way American nonprofits advance their charitable goals in another country. Private foundations must either exercise expenditure responsibility (<http://www.nonprofitlawblog.com/expenditure-responsibility/>) or obtain an equivalency determination (<http://www.nonprofitlawblog.com/international-grantmaking-equivalency-determinations/>) in making such grants. While public charities are not subject to the same requirements, their boards are responsible for exercising reasonable care in making grants in part to ensure that the grants are not diverted from their charitable purpose. Accordingly, many lawyers representing public charities advise that they also follow the private foundation rules when making

grants to foreign NGOs. The anti-terrorism and political activity issues described above should also be considered in a charity's grantmaking policies.

Operational Support

While grantmaking may be the most common way American nonprofits support a foreign NGO *partner*, many also provide operational support to their *partners* with technical assistance and staffing. In such case, the American nonprofit may be operating in the foreign country and consequently may need to consider all of the above issues, including registration.

In order to avoid operating in a foreign country and triggering the accompanying requirements, an American nonprofit may want to simply maintain a grantmaking relationship with a foreign NGO and supplement the funding with staff and volunteers who will work for the foreign NGO as agents of the NGO (not as agents of the American nonprofit). This distinction must be clear to protect such individuals from penalties for working without due authorization (which of course presumes that the foreign NGO is properly qualified and authorized). One disadvantage to take into account with this structure is the lack of protection that the American nonprofit may be able to provide through insurance where individuals are not acting as agents of the nonprofit, but as agents of a *partner* NGO.

Concluding Thoughts

Many nonprofit 501(c)(3) organizations provide funds, goods, and/or services to communities outside of the United States in furtherance of their respective charitable missions. Such work is important on so many levels and is widely understood to benefit our country through the goodwill created internationally. Nevertheless, not all countries' governments view such assistance as friendly, particularly where it supports advocacy or strengthens individuals that might oppose the status quo. American nonprofits operating abroad must be careful to understand the laws of each country in which they operate, how to comply with such laws, the risks of noncompliance, and how to best protect their employees and volunteers on the ground. We hope this general overview serves as a helpful introduction to such matters. The advice of qualified legal counsel in a foreign country will be invaluable in helping American nonprofits operate there safely.

References

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Canada

Foreign Charities Operating in and from Canada (http://www.globalphilanthropy.ca/articles/foreign_charities_operating_in_and_from_canada), Mark Blumberg

Mexico

Mexico (<http://www.cof.org/content/mexico>), Council on Foundations

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