Complex International Grantmaking Issues:
A Practical Approach

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A. Expenditure Responsibility

1. Imposition of Tax on Taxable Expenditures

   a. **Amount of Tax**: Section 4945 of the Internal Revenue Code of 1986, as amended (the “Code”) imposes a tax equal to 20% of the amount of any taxable expenditures made by a private foundation. §4945(a)(1). If the expenditure is not corrected within a certain period of time, an additional tax equal to 100% of the amount of the expenditure is imposed. §4945(b).

   b. **Taxes on Management**: Additional taxes can also be imposed on any foundation manager who approved or made the expenditure knowing that it was a taxable expenditure. §§4945(a)(2) and (b)(2).

   c. **Expenditure Responsibility**: “Taxable Expenditures” include grants paid or incurred by a private foundation to an organization as a grant unless that grantee is described in section 509(a)(1) or (2), is described in section 509(a)(3) (other than non-functionally integrated supporting organizations or certain controlled organizations) or is an exempt operating foundation unless the private foundation exercises expenditure responsibility with respect to the grant.

2. Requirements of Expenditure Responsibility

   a. **General Requirements**: Expenditure Responsibility (or “ER”) requires a private foundation to do three things generally: (1) see that the grant is spent solely for the purpose for which it was made; (2) obtain full and complete reports from the grantee on how the funds are spent; and (3) make full and detailed reports with respect to ER grants to the IRS.

   **PRACTICAL TIP**: remember that ER applies to “grants” within the meaning of Treas. Reg. §53.4945-4(a)(2), which can include program-related investments but which does not generally include contracts for services.

   **PRACTICAL TIP**: if a foundation earmarks a grant through a public charity to a specified secondary grantee (ostensibly to avoid having to exercise ER over the grant), Treasury regulations make it clear that the secondary grantee will be treated as the primary grantee, and that ER will apply. Treas. Reg. §53.4945-5(a)(6). Remember that earmarking can be more “subtle” than a written agreement to fund a particular secondary grantee.

   b. **Specific Requirements -- Overview**: ER requires a number of due diligence and recordkeeping steps that are not otherwise required for grants to public
charities (or their equivalents). Specifically, ER requires a private foundation to: (1) conduct a pre-grant inquiry regarding the potential grantee prior to making the grant; (2) enter into a written grant agreement with the grantee containing certain required terms; (3) obtain annual narrative and financial reports from the grantee regarding how the funds were expended each year; (4) obtain a final narrative and financial report from the grantee once the grant funds are fully expended; (5) maintain adequate records regarding the grant; (6) provide certain information about each ER grant to the IRS on the foundation’s annual Form 990-PF; and (7) investigate potential problems or misuses of ER grant funds (i.e., “diversions”) and take appropriate action.

c. Specific Requirements – Pre-Grant Inquiry: Before making a grant to an organization that is not a public charity (or its equivalent), a private foundation must conduct a limited inquiry concerning the grantee that is complete enough to give a reasonable person assurance the funds will be used for the proper purposes. Treas. Reg. §53.4945-5(b)(2).

i. The inquiry can be tailored to the size and scope of the grant, the period over which the grant is to be paid, and the prior experience that the foundation may have with respect to the capacity of the grantee to use the funds for the proper purposes.

ii. Generally though, the inquiry should address the identity, prior history and experience (if any) of the grantee and its managers and any knowledge the foundation has based on experience or other information which is readily available concerning the management, activities and practices of the grantee.

**PRACTICAL TIP:** Remember that the regulations do not require an exhaustive search on the organization and its managers; rather, it specifically points a foundation to information that is readily available, which can include conversations with peer foundations. Be sure to document those conversations in writing.

d. Specific Requirements – Written Grant Agreement. Each grant that is subject to ER must clearly specify the purpose of the grant and be made pursuant to a written and signed grant agreement that requires the grantee to do the following:

i. repay any portion of the grant funds not used for the purposes of the grant;
ii. submit full and complete annual reports on how the funds were spent and the progress made in accomplishing the purposes of the grant;

iii. maintain records of receipts and expenditures and to make its books and records available to the foundation at reasonable times; and

iv. not to use any of the funds to:

1. carry on propaganda or otherwise attempt to influence legislation,

2. influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive,

3. make any grant that does not comply with the requirements of section 4945(d)(3) or (4), or


v. The grant agreement also should require the grantee to keep records that would enable the private foundation to meet its reporting and recordkeeping obligations to the IRS.

vi. Unless the grantee is a private foundation, the grantee also must be required to hold the funds in “a separate fund dedicated to one or more charitable purposes.” Treas. Reg. §53.4945-6(c)(1) and (2). This doesn’t necessarily require a physically separate bank account.

PRACTICAL TIP: In some countries, it is very difficult for a grantee to have multiple bank accounts, particularly those into which foreign funds are deposited (e.g., India). Therefore, diligence might focus on the sophistication of the grantee’s financial systems and ability to allocate costs internally to a dedicated “fund” or separate “account.”

e. Specific Requirements – Annual Report: A private foundation must require reports from the grantee on the use of the funds, compliance with the terms of the grant, and the progress made by the grantee toward achieving the purposes of the grant. Treas. Reg. §53.4945-5(c)(1).

i. Reports must be made “as of the end of its annual accounting period within which the grant or any portion thereof is received and all such
subsequent periods until the grant funds are fully expended or the grant is otherwise terminated.

ii. Reports are due within a “reasonable period of time” after the close of the annual accounting period of the grantee for which the reports are made.

PRACTICAL TIP: While “reasonable period of time” is not defined in the Code or regulations, common practice is to require such reports within 90 days of the end of the grantee’s fiscal year end.

f. Specific Requirements – Final Report: A private foundation also must require the grantee to provide a final report that covers the entire grant period and which includes all expenditures made from such funds (including salaries, travel and supplies) and indicating the progress made toward the goals of the grant. Treas. Reg. §53.4945-5(c)(1).

PRACTICAL TIP: In cases where a project ends early in a grantee’s fiscal year, and program staff need a final report sooner than the law would require, a private foundation can consider getting a final report “early,” and then requiring the grantee to provide an updated report only if there are material changes to the financial report (e.g., where the grantee’s auditors made changes).

PRACTICAL TIP: Grant funds cannot be considered fully expended until all subgrantees and subcontractors have also fully expended grant funds. Similarly, be aware of situations that could require very long term reporting from a grantee (and a corresponding inability to close a grant) where, for example, an ER grantee uses funds to make loans or equity investments to or in other organizations or individuals.

g. Specific Requirements – Reporting Generally: If a grantee fails to submit the required annual or final reports, the grant will not be treated as a taxable expenditure as long as the private foundation otherwise complied with the ER requirements and (1) makes a reasonable effort to obtain the required report; and (2) withholds all future payments on this grant and on any other grant to the same grantee until such report is furnished. Treas. Reg. §53.4945-5(e)(2).

PRACTICAL TIP: A foundation should ensure it documents its efforts to obtain outstanding required reports (copies of emails, notes on phone calls, etc.) to ensure it can demonstrate that it took reasonable steps to get them.

h. Specific Requirements – Recordkeeping:
i. **Grantee Recordkeeping**: Grantees must retain records of expenditures, as well as copies of the reports submitted to the grantor, for at least 4 years after completion of the use of the grant funds. Treas. Reg. §53.4945-5(c)(3).

**PRACTICAL TIP**: a foundation should include this record keeping requirement in the grant agreement with the grantee to ensure this requirement is not overlooked.

ii. **Foundation Recordkeeping**: In addition to the information required to be reported to the IRS (described below), a foundation must also retain a copy of each ER grant agreement, a copy of each grantee report, and a copy of each report made by the foundation’s personnel or independent auditors of any audits or other investigations made during the taxable year with respect to an ER grant. Treas. Reg. §53.4945-5(d)(3).

i. **Specific Requirements – Reports to IRS**: Treas. Reg. §53.4945-5(d) sets forth the requirements for reporting of ER grants to the IRS on a private foundation’s annual information return. The information is required for each ER grant upon which any amount or any report is outstanding at any time during the taxable year. The information that must be included is the following: name and address of the grantee, date and amount of the grant, purpose of the grant, amounts expended by the grantee (based on its most recent report), whether a diversion occurred, the dates of any grantee reports, and the date and results of any verifications of the grantee’s reports. Treas. Reg. §53.4945-5(d)(2).

j. **Specific Requirements – Investigate “Diversions”**: Any portion of ER grant funds not used for the charitable purposes of the grant is considered a misuse or “diversion” of funds. Unless a private foundation takes certain steps outlined in the regulations, this diversion could result in a taxable expenditure for the foundation. Treas. Reg. §53.4945-5(e). To avoid a taxable expenditure in the event of a grantee diversion, a foundation must:

   i. take all “reasonable and appropriate steps” either to recover the grant funds or to insure the restoration of the diverted funds and the dedication of the other grant funds held by the grantee to the charitable purposes of the project; and

   ii. withhold any further payments to the grantee until the foundation has: (a) received the grantee’s assurances that future diversions will not occur, and (b) require the grantee to take extraordinary

k. All “reasonable and appropriate steps” may include legal action where appropriate but need not if such action would in all probability not result in the satisfaction of execution on a judgment. Treas. Reg. §53.4945-5(e)(1)(v).

**PRACTICAL TIP:** Be aware of restrictions on the ability for foreign donations to be recovered (i.e., move out of the grantee organization’s country) in certain countries. For example, once funds are received into a properly-registered bank account in India, it is very difficult to get those funds back out of India because of the requirements of FCRA (Foreign Contribution Regulation Act) discussed below.

**B. Equivalency Affidavits**

1. **Overview of Determinations of Equivalency**

a. Treas. Reg. §53.4945-5(a)(5) provides that if a foundation makes a grant to a foreign organization which does not have a ruling or determination that it is an organization described in section 509(a)(1), (2) or (3) of the Code (collectively referred to as a “public charity”), the grant will not be treated as a grant to an organization that is not a public charity if the foundation has made a “good faith determination” that the grantee is a public charity.

b. This good faith determination will generally be considered made where it is based on an affidavit of the grantee or an opinion of counsel (foundation or grantee) that it is an organization described in section 509(a)(1), (2) or (3) of the Code. The affidavit or opinion must set forth sufficient facts concerning the operations and support of the grantee for the IRS to determine that the grantee would likely qualify as a public charity.

c. Further, Treas. Reg. §53.4945-6(c)(2)(ii) provides that a foreign organization which does not have a ruling or determination letter that it is a public charity from the IRS will be treated as such if “... in the reasonable judgment of a foundation manager of the transferor private foundation, the grantee organization is an organization described in section 501(c)(3) (other than section 509(a)(4)). The term “reasonable judgment” shall be given its generally accepted legal sense within the outlines developed by judicial decisions in the law of trusts.”

d. Neither the Code nor the regulations provide further guidance regarding the making of an equivalency determination.
2. Overview of Process to Determine Equivalency

a. This gap is addressed by Revenue Procedure 92-94, 1992-1 C.B. 507, which sets forth standards for establishing the equivalency of foreign organizations. If the requirements of the Revenue Procedure are met, a grant to a foreign grantee will be treated as a grant to an organization that is described in section 501(c)(3) or section 4947(a)(1) of the Code, and, that is either a public charity within the meaning of section 509(a)(1), (2) or (3), or a private operating foundation under section 4942(j)(3) of the Code.

b. The Revenue Procedure outlines the two steps necessary for equivalency: (1) a foundation manager make a “reasonable judgment” that the grantee is described in section 501(c)(3) (other than section 509(a)(4)); and (2) the foundation must make a good faith determination that the grantee is described in section 509(a)(1), (2) or (3), or section 4942(j)(3).

c. In addition, the “reasonable judgment” and “good faith determination” must be based on a “currently qualified” affidavit prepared by the grantee for the grantor or another grantor that contains the information required by the Revenue Procedure.

   i. An affidavit will be considered currently qualified as long as the facts it contains are up to date and the relevant substantive requirements of the applicable Code sections remain unchanged.

   ii. The facts in an affidavit are considered up to date if they reflect the grantee’s latest complete accounting year or the affidavit is updated to reflect the most current year.

1. Where a grantee’s public charity status does not depend on a demonstration of the requisite financial support (e.g., a hospital, school, church, etc.), the affidavit can be updated simply by asking the grantee to make the foundation aware of any facts in the original affidavit have changed. If not, a signed statement by the grantee to that effect is sufficient to constitute an update.

PRACTICAL TIP: Make life easy for your grantees and develop a template that they can complete, sign and return. It’s particularly helpful to attach the original affidavit to it for their review.

2. If the grantee’s status does depend on financial support, the affidavit must be updated by asking the grantee to provide a
statement containing enough financial data to establish that it continues to meet applicable requirements.

a. The necessary financial data mirrors the public support rules, including the timing of the data, which need not necessarily be from the grantee’s latest accounting year.

b. There is some uncertainty, discussed further below, about the correct testing and reliance period for financial data after Temporary Regulations issued in 2008 updated the calculation period for public support for purposes of section 170(b)(1)(A)(vi) of the Code (e.g., changing the testing period from four to five years).

**PRACTICAL TIP:** Notice the language that the affidavit may be prepared for the grantor foundation or another grantor. Don’t reinvent the wheel – if you have peer foundations that have already make this determination, consider leveraging that work to save both you and the grantee time and effort.

3. **Affidavit Requirements**

a. The affidavit must be in English, signed by a principal officer of the grantee, and generally contain the following information:

   i. A declaration by the grantee regarding the purpose of the affidavit (Rev. Proc. 92-94, Sec.5.04);

   ii. The title of the officer submitting the affidavit;

   **PRACTICAL TIP:** Think about who is signing the affidavit – do they really have the authority to speak for the organization (e.g., a professor at a university)? Make sure an officer truly submits the affidavit.

   iii. The manner in which the organization was created and the purposes for which it was formed;

   iv. A statement of the organization’s past, current and future activities and operations;

   v. Copies of the governing documents of the organization;

   **PRACTICAL TIP:** Though they need to be in English, they do not need to be official translations, or certified copies.
vi. A statement to the effect that the organizations’ income and assets cannot inure to the benefit of private persons or noncharitable organizations;

vii. A statement that the grantee has no shareholders or members who have a proprietary interest in its income or assets;

viii. A statement to the effect that upon the grantee’s dissolution, its assets are permanently dedicated to charitable purposes (Rev. Proc. 92-94, Sec. 5.07);

**PRACTICAL TIP:** Spend time on the dissolution provision – it really needs to mirror what is required for U.S. public charities. If the correct provisions are not in the governing documents, can you get an opinion of counsel that the correct dissolution procedures apply by operation of law? As a more extreme measure, can the grantee’s governing documents be amended to comply?

ix. A statement that applicable law does not permit the grantee (other than insubstantially) to: (1) engage in noncharitable purposes; or (2) attempt to influence legislation;

**PRACTICAL TIP:** Most grantee’s governing documents don’t contain an express provision prohibiting substantial efforts to influence legislation. Consider whether it is sufficient that the documents don’t expressly empower the grantee to lobby coupled with a statement from the grantee that they do not engage in those activities. If they do, more work needs to be done to determine whether the amount of lobbying is substantial in relation to their total activities.

x. A statement that the organization is prohibited from directly or indirectly participating or intervening in political campaigns on behalf of or in opposition to candidates for public office;

**PRACTICAL TIP:** Same point above as with lobbying.

xi. If the organization’s charitable equivalency requires a demonstration of financial support, a schedule of support for the five most recently completed taxable years showing certain categories of line items, and calculating a public support percentage taking into account grants subject to the 2% ceiling; and

xii. In the case of an organization that is a school, a statement that the grantee has adopted and operates pursuant to a racially
nondiscriminatory policy as to students, as set forth in guidance cited in the Revenue Procedure.

**PRACTICAL TIP:** Because it is highly unlikely a foreign organization will have adopted policies that strictly comply with unique requirements of US law, it may be easier to demonstrate that a foreign school is actually part of a government (i.e., a public university or school), as government entities are also treated as equivalent to public charities for purposes of expenditure responsibility.

xiii. Regarding the public support schedules, Rev. Proc. 92-94 was issued at a time when public support determinations were based on a four-year calculation period. However, Temporary Regulations issued in 2008 changed that period to five years (in addition to making other changes), but the Revenue Procedure was not updated to reflect these revised testing period. I.R.B. 2008-43, T.D. 9423 (Sept. 8, 2008).

xiv. Rev. Proc. 92-94 provides that an affidavit is “currently qualified” if it includes four years of financial data ending in either of the preceding two tax years. However, when read in conjunction with the Temporary Regulations, Rev. Proc. 92-94 seems to imply that an affidavit must include financial data from the five-year period ending with the current tax year or the immediately preceding tax year.

1. While in the midst of the “current tax year”, it could be nearly impossible for a foreign organization to provide financial data. Similarly, depending on the timing of the affidavit, it could also be hard to provide information on an “immediately preceding tax year,” where, e.g., a grantee is on a calendar year end and the request for an affidavit is made early the following year before the grantee’s accounts have been closed and/or financial statements prepared.

2. Practitioners have called upon the IRS to update Rev. Proc. 92-94 to provide that an affidavit is “currently qualified” if the financial data provided would qualify an organization as publicly supported under Treas. Reg. §1.509(a)-3T(c)(1). This way, if an affidavit provided data from 2009-2013 sufficient to demonstrate the required public support, it would remain qualified through the end of tax years 2014 and 2015.

4. **National Equivalency Affidavit Repositories**
a. **General Concept:** Grantees and grantmaking foundations have long discussed the potential benefits of reducing duplicative efforts and the costs of international grantmaking that might be possible if one or more “repositories” for equivalency affidavits could be established. Recall that the regulations regarding equivalency do permit one grantor to rely upon an affidavit prepared by the grantee for the grantor or another grantor. The idea of a repository uses that concept, such that if one foundation obtains a qualified affidavit from a foreign organization, other organizations (both grantors and grantees) could benefit from the “legwork” of obtaining the required information.

b. **Legal Basis:** In 2012, the Department of Treasury and the IRS issued proposed regulations applicable to private foundations seeking to utilize equivalency affidavits when making grants to foreign organizations. The principal change was an expansion of the types of professionals that could issue a written opinion of equivalency (previously, the law only contemplated opinions of counsel). See 77 C.F.R. 58796 (Sept. 24, 2012).

   i. Under the proposed regulations, the class of professionals that could issue an opinion of equivalency was expanded to include attorneys, certified public accountants or enrolled agents who are subject to the professional conduct rules of Circular 230.

   ii. In this manner, Treasury and the IRS opened the door for the concept of equivalency affidavit “repositories”, under the supervision of a qualified tax professional, to issue equivalency determinations. Previously, the prior regulations only permitted reliance on an opinion of counsel – opinions provided to the grantmaker or the grantee.

c. **NGO Source:** The Council on Foundations, TechSoup Global and several private foundations have supported the development of the first such repository – NGO Source.

C. **Withholding of Tax on Payments to Foreign Persons**

   1. **General requirements:** Sections 1441, 1442, and 1443 of the Code generally require U.S. grantors to withhold tax on payments (grants or prizes) made to foreign persons that perform all or part of their grant-funded activities in the United States. Payments are considered to be fixed, determinable, annual, periodical income (FDAP), and thus subject to withholding requirements. Treas. Reg. § 1.1441-2. Withholding is required at the time of payment.
PRACTICAL TIP: Withholding requirements must be considered if grantee will use funds to conduct activities within the U.S., for travel to or from the U.S., or to pay a U.S.-based consultant for services.

a. **Notable exclusions and exceptions:** Withholding does not apply to:

i. recipients that qualify for an exception under a U.S. tax treaty, certified using Form W-8BEN/W-8BEN-E/Form 8233. Treas. Reg. § 1.1441-6.

ii. recipients that are foreign governments unless activity is a commercial activity, certified by W-8EXP. Section 892 and Treas. Reg. § 1-1441-8(a).

iii. recipients that are international organizations, certified using Form W-8EXP. Treas. Reg. § 1-1441-8(d).

iv. recipients that establish that they can qualify as a U.S. tax-exempt organization, certified using Form W-8EXP. Treas. Reg. § 1-1441-9.

v. portions of grant funds that will be used exclusively for activities outside the U.S.

vi. income effectively connected with a U.S. trade or business (other than compensation for personal services). Section 1441(c)(1).

PRACTICAL TIP: If relying on a withholding exception, consider including language in your grant agreement letters making clear that an exception applies. For example, specifically state that grant funds may only be used for activities outside the U.S.

2. **Definition of foreign persons:** Foreign persons include nonresident alien individuals, foreign corporations, foreign partnerships, foreign trusts, and foreign estates.

PRACTICAL TIP: Remember that withholding requirements are based on a grantee’s nationality, and not based on whether the grant was made using an equivalency determination or expenditure responsibility.

3. **Amount of tax:** The withholding amount for most types of U.S. source income is 30% of the gross amount, unless reduced by federal statute or treaty. For example, certain scholarships are subject to a reduced withholding rate of 14%. Section 1441(a).

4. **Filing Requirements:** By March 15th, grantors must file informational return Form 1042 with the IRS disclosing reportable amounts paid to foreign persons,
total withholding tax liability, and amounts withheld. Additionally, grantors must file Form 1042-S with the IRS for each foreign person reporting the amount paid, even if no taxes were withheld, and any applicable withholding exemptions. The Form 1042-S must also be issued to the foreign recipients. If the withholding agent has properly withheld and reported on Form 1042-S, the foreign recipient does not usually have to file a tax return. Treas. Reg. § 1.1461-1T.

5. **Taxes and penalties:**

   a. **Failure to withhold:** Grantors will be held liable for taxes that are not properly withheld and subject to a penalty of up to 25% of the tax due. Normal IRS rates of penalties and interest apply. Section 1461.

   b. **Failure to file Form 1042:** The penalty is $100 per delinquent Form 1042 and up to 25% of the unpaid tax for a late return, with additional penalties available for intentional violations.

6. **Grants as income:**

   a. Withholding rules apply to Fixed, Determinable, Annual, or Periodical (FDAP), and FDAP does not include amounts excludable from gross income without regard to the U.S. or foreign status of recipient. Treas. Reg. § 1-1441-2.

   b. Section 102 of the Code states that the value of property acquired by gift is not included in gross income. While the term gift is not defined in Section 102 or the Treasury regulations, several IRS rulings suggest that grants can be considered gifts (and therefore not income).


v. PLR 200529004 – Grant by private foundation to foreign nonprofit a gift. Grant by U.S. private foundation to foreign nonprofit (not 501(c)(3)) to support grantee’s project; the project is charitable within the meaning of §170(c)(2)(B). Grantee personnel would use a portion of grant funds to travel to U.S. to attend and make presentations at conferences related to the grant activity. Foundation requested a ruling that the grant funds were not U.S.-source income, even though a portion would be used for U.S. activity. IRS instead ruled that the grant was a gift and therefore not subject to withholding because the foundation made its grant for the public purpose of assisting the development of education in the foreign country. Ruling notes that the grant was motivated by a “detached and disinterested generosity” rather than the necessity of fulfilling any legal or moral duty. Grantee did not provide (and was not obligated to provide) any goods or services to or for the benefit of the foundation in return for the grant. IRS P.L.R. 200529004 (July 22, 2005).


D. Compliance with Anti-terrorism Rules and OFAC Sanctions

1. Anti-terrorism Rules

a. The Code and accompanying regulations prohibit the use of charitable assets for non-charitable activities (including terrorism). Charitable organizations are subject to revocation of tax-exempt status for violating the non-diversion prohibition. Section 501(c)(3).

b. 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.
c. 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.

2. Treasury Department Anti-Terrorism Guidelines

a. First promulgated by the U.S. Department of the Treasury in 2002, and subsequently amended in response to comments from the philanthropic sector, the guidelines attempt to identify a set of voluntary best practices that U.S. tax-exempt organizations can employ 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. See http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf.

b. The Guidelines have been widely criticized as, among other things, being overly broad and detailed, not tailored to the varying size and scope of U.S. organizations, and not truly being “voluntary” in nature. Treasury has responded to these criticisms by making some revisions to the Guidelines. See www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/response.pdf. Despite efforts by the philanthropic sector, Treasury has been resistant to revising the Guidelines to remove some of what the group believed were the more burdensome and/or impractical barriers to implementation.

c. The Treasury Department issued a risk matrix for the charitable sector that provides charities with guidance on the risks they should consider. The matrix does not have the force of law and does not offer a safe harbor. See http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf.

PRACTICAL TIP: Consider adding special language in your grant agreement letters to include prohibitions against financing violence or terrorist activities.

3. Treasury Department Office of Foreign Assets Control (OFAC) Sanctions

a. U.S. law imposes sanctions on transactions with embargoed countries. In addition, U.S. sanctions regulations prohibit transactions with “Specially Designated Nationals” (or “SDNs”), “Specially Designated Narcotics Traffickers” (“SDNTs”), “Significant Foreign Narcotics Traffickers” (“SDNTKs”), “Specially Designated Global Terrorists” (“SDGTs”), “Foreign Terrorist Organizations” (“FTOs”), and persons engaged in the proliferation of weapons of mass destruction (collectively, “restricted persons”). OFAC primarily administers these
sanctions programs and the Commerce Department Bureau of Industry and Security ("BIS") administers sanctions related to exports of technology and equipment.

b. Restricted persons may be located anywhere in the world; the prohibition follows the restricted person and is not lifted depending on their physical location. The prohibitions also do not depend on the status of the U.S. person (i.e., U.S. exempt organizations generally are not exempt from the application of the sanctions programs, unless a specific exemption for humanitarian and charitable activities applies).

**PRACTICAL TIP:** Grantors should screen all grantees, contractors and others with which or with whom it deals directly or indirectly against the lists of restricted persons maintained by the U.S. government. These lists are updated regularly in the Federal Register, and current lists are available on agency websites. See [https://sdnsearch.ofac.treas.gov/](https://sdnsearch.ofac.treas.gov/).

c. As discussed below, virtually 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 means that 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, could be in violation of the OFAC sanctions.

d. **Country-Based Sanctions.**

**PRACTICAL TIP:** Grantors that wish to operate or fund in a country subject to sanctions should carefully determine whether the proposed activities are permitted and consider whether an exception/license may be obtained to permit an otherwise prohibited activity.

i. **Cuba.** Most transactions between the U.S. and Cuba continue to be prohibited. However, in January 2015 amendments were made to the Cuban Assets Control Regulations to facilitate authorized travel to Cuba by U.S. persons, certain authorized commerce, and the flow of information to, from, and within Cuba. OFAC issued general licenses authorizing certain types of travel-related transactions. Additionally, the Department of Commerce is amending its rules to allow for a greater export of certain items into Cuba. See [http://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx).

ii. **Iran.** Iranian persons and entities, including the Iranian Government, are generally treated as prohibited persons under U.S. sanctions. In 2004, the
United States agreed to temporary sanctions relief in some areas in return for Iran’s commitment to place meaningful limits on its nuclear program. Additionally, certain limited transactions and activities are allowed to be performed and conducted in Iran if they are for the conduct of the official business of the United Nations, the World Bank, the International Monetary Fund, the International Atomic Energy Agency, the International Labor Organization, or the World Health Organization. See www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx.

iii. **Libya.** Executive Order 13566 (February 25, 2011) provides that property and interests of certain persons (primarily, senior government officials of Libya, relatives of Colonel Qadhafi or anyone having committed or assisted the commission of human rights violations) that are in the U.S. or in the control of any U.S. person are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in. See http://www.treasury.gov/resource-center/sanctions/Programs/pages/libya.aspx.

iv. **North Korea.** Sanctions on North Korea have largely been terminated, but targeted sanctions and export and import controls remain in place. See http://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx.

v. **Sudan.** Generally, all transactions between U.S. persons (entities and individuals) and the Government of Sudan or entities owned by the Government of Sudan, including a number of government-owned banks, are prohibited by the Sudanese Sanctions Regulations ("SSR") unless specifically approved by OFAC, regardless of where the transactions takes place. However, the SSR exempts certain activities from sanctions, including certain humanitarian work. Additionally, all transactions and activities that are otherwise prohibited by the SSR are permitted if they are for the conduct of the official business of the United States Government or the United Nations. See http://www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf.

vi. **Republic of South Sudan.** Current sanctions block the property and interest of persons that are responsible for, complicit in, or that have engaged in actions or policies threatening the peace and stability of South Sudan. See http://www.treasury.gov/resource-center/sanctions/Programs/Documents/southsudan.pdf.
vii. **Syria.** There is a broad ban on U.S. exports and re-exports to Syria, and a number of banks in Syria are designated as being of “primary money laundering concern.” See [http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx).

viii. **Ukraine/Russia.** Executive Orders 13660, 13661, and 13662 authorize sanctions on individuals and entities responsible for violating the sovereignty and territorial integrity of Ukraine or for stealing the assets of the Ukrainian people. These executive orders designate Russian and Ukrainian entities and impose targeted sanctions limiting certain financial transactions with Ukrainian and Russian banks and energy companies. See [http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx).

ix. **Others.** In addition, sanctions may apply to activities in Burma, Cote d'Ivoire, the Democratic Republic of Congo, Iraq, Liberia, Somalia, Venezuela, Yemen, and Zimbabwe. See [http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx).

**PRACTICAL TIP:** Don’t forget to consider other rules that may apply, including the Foreign Corrupt Practices Act (anti-bribery), Sarbanes-Oxley (whistleblower protection and document retention), and the U.K. Anti-Bribery Act.

4. **Financial Action Task Force (FATF) Recommendation 8**

   a. FATF is a multilateral policy-making organization that establishes standards for anti-terrorist financing and money-laundering to assess and rate the adequacy of country laws.

   b. Recommendation 8 relates to Nonprofit Organizations and states that non-profit organizations are particularly vulnerable to abuse for the financing of terrorism. The recommendations are not legally binding, but are intended to be the basis for country laws. See [http://www.fatf-gafi.org/topics/fatfrecommendations/documents/bpp-npo-2013.html](http://www.fatf-gafi.org/topics/fatfrecommendations/documents/bpp-npo-2013.html).

   c. Civil society and experts raised concerns about application of Recommendation 8. FATF has responded to criticism by stating that the recommendations should not harm legitimate activities of nonprofits. FATF is planning to update its recommendations in 2015.

E. **Country-Specific Barriers/Challenges to International Grantmaking**
1. **Overview:** Various countries have unique registration or operational requirements for grantees or projects funded by foreign grantors. While the countries discussed below is not an exhaustive list of such countries, it is meant to be illustrative of the types of requirements that may apply in an international grantmaking context and of which international grantmakers should be aware.

2. **Bangladesh**

   a. Pursuant to the Foreign Donations (Voluntary Activities) Regulation Rules, 1978, individuals and organizations seeking to receive foreign contributions must register with the National Affairs Bureau and receive pre-approval to do so. The Act imposes harsh penalties for noncompliance.

   b. In June, 2014, the Bangladeshi Cabinet of Ministers approved the Foreign Donations (Voluntary Activities) Regulation Act (FDRA), which is currently pending Parliamentary review. Among other things, the Act, if enacted, would continue to prohibit the receipt of foreign contributions without government pre-approval, would require all organizations seeking to receive and use foreign contributions to register with a government agency and obtain advance project approval, and comply with certain reporting requirements. In addition, the government would have the authority to impose penalties on an organization if it believes the organizations activities are “illegal or harmful for the country.”

3. **India**

   a. The Foreign Contribution Regulation Act, 2010 (FCRA) provides that foreign contributions can be received by organizations having a definite cultural, economic, educational, religious or social program only if the organization has obtained from the Ministry of Home Affairs (MHA) either a permanent registration or a prior permission for receiving a specific amount for carrying out charitable activities.

      i. **Registration:** Organizations may register under FCRA once they have been in existence for at least three years, by submitting an application to the MHA. Registration must be renewed every five years.

      ii. **Prior Permission:** If an organization has been in existence for less than three years, it must receive “Prior Permission” to accept foreign contributions. Prior Permission is given by the Indian government on a case-by-case basis. This permission must be obtained prior to accepting a foreign contribution, and is applicable to a specific project and specific amount.
b. Recipients must also agree to accept contributions through designated banks and segregated accounts, and to file reports with the MHA.

   i. Organizations can sub-grant to other Indian entities, but only if the sub-grantee also has FCRA authorization and a FCRA bank account.

   ii. Note: the requirement that funds can go only to another organization with a FCRA license means that funds likely cannot be returned to the grantor foundation (note ER discussion on diversions above).

   iii. Some organizations have FCRA accounts and non-FCRA accounts, but they cannot transfer funds between the accounts.

**PRACTICAL TIP:** while a foundation is not legally responsible to verify the FCRA status of sub-grantees, it may be important to determine whether the primary grantee has the knowledge and capacity to comply with FCRA. If any sub-grants are going into India, consider confirming that the grantee is aware of FCRA and taking appropriate steps to comply with it.

c. Other noteworthy points about FCRA:

   i. A grantor foundation needs to verify an organization’s FCRA status if it is an NGO established under the laws of India.

   ii. Some government entities in India also require FCRA registration.

   iii. There is ambiguity about whether the law applies to for-profits.

   iv. FCRA applies to grants/contributions from a foreign source, but not to contracts for services.

   v. FCRA prohibits foreign grants/contributions to media companies.

   vi. 501(c)(3) status in the U.S. is not relevant to FCRA.

d. Consequences of Noncompliance:

   i. The grantee could be subject to financial and/or criminal penalties.

   ii. If the grantee doesn't comply with FCRA, foundation grant funds could be seized by the Indian government.
**PRACTICAL TIP:** FCRA registration often takes a significant amount of time (six months or more, easily). Before making a grant, confirm that grantees have obtained the necessary FCRA clearance.

4. **Mexico**

   a. In 2013, new Mexican anti-money laundering legislation (Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita or “LFPIORPI”) took effect. The law’s stated objective is to protect Mexico’s economy and financial system from transactions that potentially involve illegal funds, and it defines a set of “vulnerable activities” to which one or more information gathering, registration, or reporting obligations attach.

   b. The law specifically defines donations from NGOs or civil associations as “vulnerable activities.”

   c. The law requires recipients of funds in the amount of 100,000 pesos (roughly $7,600 USD) or more to provide donor information to the Mexican government. Specifically, the law requires grantees to register in the Mexican Taxpayers Registry, obtain documentation from foreign donors, including governing documents, proof of residency, and personal information about individuals who serve as the grantors legal representatives, and file regular reports with the Ministry of Finance about donations received.

   d. There are civil and criminal penalties imposed for noncompliance.

   **PRACTICAL TIP:** To expedite responses to requests from Mexican grantees, create a checklist of documents your organization will provide upon request.

5. **Vietnam**

   a. In 2009, the Vietnamese government enacted Decree No. 93-2009 – ND-CP, which regulates the management and use of foreign contributions from international non-governmental organizations to Vietnamese grantees.

   b. The law defines the organizations within Vietnam that are eligible to receive foreign aid, sets forth the “priority areas” for foreign aid (e.g., agricultural development and humanitarian assistance), and establishes a process for the Vietnamese organization to obtain the prior approval of the Vietnamese government prior to accepting foreign funds.
c. Significant information about the project and its budget must be submitted for approval. Once a project is approved, if certain changes outlined in the Decree are made, such changes must also be submitted to the government for approval.

d. A project management unit (PMU) must be established for each such project, which is tasked, among other things, with providing periodic annual reports about the use of funds and project activities to the government.

e. In the case of noncompliance with the provisions of the Decree, the aid will be considered illegal, implementation of the project cancelled, and the case will be reported to the “competent authority” for review and decision.

6. Ethiopia

a. In February of 2009, the Ethiopian government enacted the Proclamation to Provide for the Registration and Regulation of Charities and Societies. Many have argued that this law violates international laws regarding freedom of association and there have been numerous calls for the government to repeal this law. Nevertheless, the law remains in effect at this time.

b. The law requires all charities and societies to register, and comply with periodic reporting obligations. Foreign organizations seeking to work in Ethiopia must obtain a letter of recommendation from the Ethiopian Ministry of Foreign Affairs. The government can deny registration if, among other things, (1) the proposed charity or society is “likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia”; or (2) the name of the charity or society is in the opinion of the Agency contrary to public morality or illegal. These are very broad rights to deny registration, with virtually no recourse to an organization that believes it was wrongfully denied registration rights.

c. In addition, the law prohibits organizations from participating in certain activities including the advancement of human and democratic rights, the promotion of equality of nations and nationalities and peoples and that of gender and religion, the promotion of the rights of disabled and children’s rights, the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services to Ethiopian Charities and Societies.

d. Further, the law prohibits organizations that receive at least 10% of their funding from foreign sources from engaging in almost all human rights and advocacy activities.
e. Finally, the law imposes virtually no time frames or review standards on the
government, provides almost no recourse for organizations that believe the law
was wrongfully applied, and establishes very vague criminal penalties for
noncompliance.

7. China

a. China’s nonprofit sector is still somewhat nascent by Western standards. While
there has been increasing activity in China’s nonprofit sector, with many
organizations being created or attempting to begin activities in China, Chinese
law has not kept pace and there is little consistent regulation of the sector.

b. There is, however, significant activity currently underway to develop national
legislation governing the definition, registration and regulation of the nonprofit
sector.

c. Currently, nonprofits must obtain government approval to establish a legal
entity, work in China or to transfer funds into the country. The government has
broad discretion to deny registration and approval for any organization.

d. Further, a 2009 regulation – the Notice of the State Administration of Foreign
Exchange on Issues concerning the Administration of Foreign Exchange Donated
to or by Domestic Institutions (issued by the State Administration of Foreign
Exchange December 25, 2009) – makes it very difficult for a foreign organization
to obtain permission to donate funds to a domestic organization (requires the
establishment of a specific bank account, along with registration and reporting
obligations).

e. In addition, there are often requirements to obtain the approval of the Ministry
of Commerce regarding any foreign currency moving in and out of the country.

f. As a result, it can be difficult to get funds both in and out of China, and the
government approval process can be lengthy (easily in excess of a year).

8. Other Countries? Good sources of information on the laws applicable to charitable
giving in the countries discussed above, as well as many others, can be found at the
following websites:

a. International Center for Not-For-Profit Law (ICNL): www.icnl.org; and