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Issues in Working Overseas for U.S. Charities

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Overview

- Type of presence overseas
- Where does your money come from?
- What are your goals/necessary operations?
- Country presence options and entity selection
- Liability arising from the new entity
- Transferring assets into a country – compliance and monetary issues
- Repatriation – generally and enforcement

Where does your money come from?

- Revenue source affects your choices
- Your donors have different needs/requirements
 - ✓ U.S. Government Grant
 - ✓ Multilateral
 - ✓ Foundations
 - ✓ Private Donations (e.g. high net worth givers)
 - ✓ Small Sum Giving
 - ✓ Revenue

What do you need to do in the foreign country?

- Necessary operations and goals affect your choices – will you need to:
 - ✓ Hire employees?
 - Requires a local employer (separate entity or payroll company)
 - ✓ Fundraise ?
 - Often not allowed for foreign charities
 - ✓ Receive and hold assets/donations?
 - Often requires local government approvals

What do you need to do in the foreign country (continued)?

- ✓ Provide goods or services, sign contracts?
 - Requires the right registration and subjects you to local courts
- ✓ Provide grants?
 - Requires due diligence of local recipient
- ✓ Make loans, collect repayments?
 - Highly regulated, may prevent charitable status under local law
- ✓ Will you want representation on the local board?
 - Some countries prohibit foreign nationals from serving

What are the options for you country presence?

- Set up separate organization
- Branch office (also called “liaison” or “representative offices”)
- Relationship with another entity

Branches

Benefits	Concerns
<ul style="list-style-type: none">• Most control afforded to the U.S. charity• High transparency• Can work with local government to receive well-tailored permissions to implement a projects• Can sometimes local hire staff	<ul style="list-style-type: none">• Limited permissible operations• Limited local leadership• Scope of MOU with local government may be limited• No liability shield• Will still probably need to work through local charities

Separate Organizations

Benefits	Concerns
<ul style="list-style-type: none">• Mission-aligned• Self-reliant• Governance control and can set policies• Can have local leadership• Long-term presence allows for expansion	<ul style="list-style-type: none">• Cost and time to set up• Maintenance (taxes, registrations)• Labor and employment laws• Not a “branch with a board”• Joint governance is complicated

Local Partners

Benefits	Concerns
<ul style="list-style-type: none">• Quickest entry – no registrations or structuring• Availability of local support and expertise• Local empowerment	<ul style="list-style-type: none">• Know-you-customer issues• Mission alignment• Lack of control except for contract terms• Lessened ability to avoid AML / FCPA issues

What kind of liability can arise?

- Types of liability:
 - ✓ Liability of local organization – regulatory, employment & labor, etc.
 - ✓ Liability of directors and officers serving on the local board
 - ✓ Vicarious liability of parent
 - ✓ U.S. – based compliance liability (e.g. FCPA violations)

Transferring Assets into a Foreign Country

- Transferring funds?
 - ✓ Registration requirements / central bank approval
 - ✓ E.g., Indian FCRA (Foreign Contribution Regulation Act)
- Transferring goods?
 - ✓ With goods, you have the extra issue of import laws
 - ✓ Can you / should you source local?

U.S. general compliance issues

- Anti-terrorism/Anti-money laundering
 - ✓ Know what an SDN is
 - ✓ Have a policy
 - ✓ Do appropriately robust screening
- Foreign Corrupt Practices Act (FCPA)
 - ✓ Understand what types of payments are improper
 - ✓ Know local anti-bribery laws

U.S. tax exempt compliance issues

- Could money received from overseas be considered unrelated to your purpose?
 - ✓ Know the UBIT rules
- If you are sending funds raised by U.S. donors, what steps have you taken to ensure its use for charitable purposes?
 - ✓ If using an entity, incorporate purposes into the Articles
 - ✓ If working with local charity, incorporate terms and claw-back provisions

Local compliance issues

- Are other registrations required beyond corporate?
- If you hire employees what are the local rules for withholding, insurance, pensions
 - ✓ If you need to terminate, do you understand notice and redundancy/retrenchment requirements?
- Are you subject to taxes? Are you allowed to give tax receipts for donations?

Monetary Issues

- Does the country have a capitalization requirement?
 - ✓ Some countries have very amount requirements
- Do you need a local bank account?
 - ✓ Finding a reliable bank
 - ✓ Can you keep U.S. signatories on the bank account?
Remember FBAR
 - ✓ Do you have good internal controls and signing authority?

Monetary Issues

- Can you keep money in dollarized account?
- How will currency fluctuations and other changes affect you?
 - ✓ Do you have specific goals (“build X schools”) that will have to change if currency devalues or laws change?

Getting Assets Back – Generally

- Can you repatriate funds at all?
- If so, what types of payments are permitted?
 - ✓ Loan repayments are treated differently from dividends
- Will there be local withholding taxes?
 - ✓ Look at the DTA between U.S. and the country – in some cases there may be no taxation

Getting Assets Back -- Enforcement

- Choice of law and forum selection clauses
- Do local courts recognize U.S. law and judgments?
 - ✓ What about another law and forum?
- Can disputes be handled through ADR with enforceable results?
 - ✓ Also, which system? Be specific about choice of ADR principles, UNCITRAL, ICC, etc.
- Handle disputes in neutral venues
 - ✓ Certain countries have become regional ADR venues

Strategy / Takeaways

- Extra care with entity selection
- Prioritize good governance and internal controls
- Use professional employer organizations for local staffing if appropriate
- Have a Business and Risk Management plan: include project-threatening changes as well as compliance issues
- Don't send all the money at once if you don't have to.
- Exit strategy should take into account repatriation and local enforceability issues



For More Information:

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

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