



LEGAL DIMENSIONS OF INTERNATIONAL GRANTMAKING

Conducting Overseas Site Visits

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The American public is the most generous in the world in terms of dollars given, and U.S. donors are becoming more and more involved with international issues. The enormous range of international activities conducted or funded by U.S. charities occasionally gives rise to the need to conduct site visits overseas. This article discusses how U.S. charities may use site visits to ensure, for themselves, their donors, and in some cases, the Internal Revenue Service (the "IRS"), that foreign activities are being conducted in conformity with the missions and standards of the U.S. charity and that funds are used for the purposes for which grants were made.

A U.S. charity may receive tax-deductible charitable contributions from U.S. donors and use these funds to conduct activities abroad. A U.S. charity may directly conduct programs in a foreign country, or it may fund activities abroad through another organization located in the foreign country. In the latter instance, to ensure that U.S. donors are eligible to receive a federal income tax deduction for their contributions, the U.S. charity must ensure that it has "discretion and control" over the flow of funds to the foreign recipient (i.e., the U.S. charity must show that it has full control over funds donated to it and discretion to ensure that the funds are used to carry out its charitable purposes). In addition, a U.S. charity may fund overseas activities by providing financial assistance to a foreign government, so long as the funds are used exclusively for charitable purposes and the grant furthers the purposes for which the U.S. charity was formed. Furthermore, if the U.S. charity is a private foundation, extensive record keeping is required in connection with international grants.

Site visits provide one excellent way for a U.S. charity to evaluate whether its overseas programs are effective, to determine that funds are used efficiently and to illustrate its exercise of discretion and control. While in many respects the planning and execution of international site visits are identical to those required for domestic visits, there are special issues that may arise for U.S. funders abroad.

In any site visit to a foreign country, the U.S. representative must be prepared for language barriers and cultural

differences. Cultural sensitivity is of paramount importance. For example, is it proper to meet with a local official in your office, or is it more appropriate for you to travel to the official's office? What is the relationship between men and women? Is it acceptable for a woman to conduct a business meeting with a man? If not, how should this be handled? As in the domestic context, grantmakers can show respect for international grantees by arranging their visit at a mutually convenient time, stating in advance what they wish to learn from their visit and specifying with whom they wish to meet.

A site visit may be used to conduct a financial audit or program audit, or to examine record keeping, and it is important to keep specific objectives in mind when planning such a visit. Keep in mind that accounting and legal requirements and practices will likely be different, and in some cases may be incompatible with requirements of U.S. laws. Determine in advance whether documents are in English or will need to be translated.

If a financial audit is planned, make sure that the finance director will be on hand and will have the necessary financial records available. Be prepared for accounting methods to be different and for funds to be reflected in local currency. Keep in mind that accepted practices in the United States (e.g., separate bank accounts, segregated funds) may be illegal or impossible in some countries.

If a program audit is planned, make sure that the relevant program officers will be available. If necessary, request that board members be available to discuss results. If seeing a grantee's program in action would be helpful in assessing its effectiveness, ensure that your visit is designed to minimize disruption of the grantee's services to clients.

In all cases be aware that foreign organizations may have the ability to conduct activities that U.S. charities cannot (e.g., charities formed in Germany may participate in political campaigns, although this is prohibited for U.S. charities). However, the IRS requires that foreign activities funded by U.S. charitable dollars comply with U.S. rules. Thus, among other things, foreign activities cannot result in private inurement or private benefit. The IRS has stated that "reliance on local law or custom as to what constitutes a charitable operation will not obviate an inquiry into whether private benefit or inurement is involved." In other words, "if local custom provides that [funds will be given] to a person who dispenses money as he/she sees fit with no



separate account for moneys received from the United States for charitable purposes”—a method of disbursement that raises a substantial likelihood of private inurement or benefit—a foreign charity with such a program would have its application of U.S. tax exemption denied. A U.S. charity providing funds for these disbursements runs the risk of jeopardizing its tax-exempt charitable status for supporting non-charitable activities.

Similarly, a U.S. private foundation, which is prohibited from lobbying, cannot fund lobbying abroad (keep in mind that lobbying may have a different meaning in countries with different political systems). A site visit is a good time to remind grantees' program directors of these rules.

In some instances, site visits may be necessary or useful to comply with IRS requirements. As stated above, a U.S. donor will be eligible to receive a charitable contribution deduction only if the U.S. charity exercises discretion and control over the contributions it receives. Site visits are not specifically required by the Treasury Regulations to illustrate discretion and control, but site visits can be evidence that a U.S. charity is actively supervising the expenditure of donated funds. The IRS has stated that discretion and control entails more than “merely being able to decide whether or not to contribute [to the foreign recipient] and being able to require the foreign recipient to furnish a periodic

accounting.” In one precedential ruling, the IRS cited with approval a U.S. charity that stated that it would maintain control and discretion by (1) making an investigation of the purpose to which the funds would be put, (2) entering into a written agreement with the recipient organization and (3) making field investigations to see that the funds were spent in accordance with the agreement. Indeed, in connection with a recent application for recognition of exempt status, the IRS requested that a U.S. public charity with significant international operations provide a supplemental submission confirming that it would conduct field investigations with regard to its foreign operations.

Site visits may be especially useful if a U.S. charity becomes aware that a foreign grantee may be diverting funds from charitable purposes. In the event of diversion, Treasury Regulations require a U.S. private foundation to, among other things, (1) take all reasonable and appropriate steps either to recover the diverted funds or ensure their restoration and (2) require the foreign organization to take “extraordinary precautions” to prevent future diversions. One effective way to comply with these rules is to send a representative of the U.S. charity to inspect books and records of the foreign grantee and to monitor accounting practices and procedures. Even if a U.S. charity is not required to take these steps, it may be prudent to do so.

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