HERE THERE BE DRAGONS: Navigating the Waters of Cross-Border Philanthropy

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Jane Peebles, Partner
Karlin & Peebles, LLP
5900 Wilshire Blvd., Suite 500
Los Angeles, CA 90036
jpeebles@karlinpeebles.com
(323) 852 0030

KARLIN & PEEBLES, LLP
ATTORNEYS AT LAW

HERE THERE BE DRAGONS:
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by

JANE PEEBLES, J.D.

As the world becomes increasingly globalized, international charitable giving by Americans has been steadily, and dramatically, increasing. Contributions by U.S. individuals, public charities and private foundations to fund charitable projects abroad are subject to complex tax rules. However, there are several of alternatives to effectuate international charitable giving while ensuring tax deductions for contributions by individual donors and qualifying distribution status for grants by U.S. private foundations.

Just as U.S. donations and grants for use abroad have increased, donations to U.S. charities by foreign donors have increased, and we can sometimes structure the gift so the foreign donor gets tax benefits in his home country.

I. THE BASIC RULES - OUTBOUND

The basic U.S. income tax rules governing the deductibility of charitable gifts by individuals for use abroad are easy to summarize: Such direct gifts to foreign charities are not deductible for income tax purposes but generally are deductible for gift and estate tax purposes. Similarly, the basic rules governing whether a U.S. tax-exempt organization may safely make grants to foreign organizations may be simply stated as follows: A U.S. charity may make such grants if its board takes appropriate steps to allow it to fulfill its fiduciary duty to see that the funds will, in fact, be used for charitable purposes as defined in the Internal Revenue Code (the “Code”).

The Code does not allow U.S. individuals any income tax deduction for direct contributions to foreign charities. An income tax deduction is permitted only if the donee organization was created or organized under the laws of the United States, any state, the District of Columbia or any U.S. possession. In the absence of an applicable treaty exception, if a U.S. individual donor wants a deduction against U.S. income for a gift to a foreign charity, the donation must be made to a U.S. tax exempt organization which operates abroad or can make grants abroad. Such donation to a U.S. charity is deductible only if it is to be used for charitable purposes as defined in Section 170(c) of the Code. A gift by a U.S. donor to a U.S. charity for use abroad may be made through a "friends of" organization, community foundation or other U.S. public charity, or through a U.S. private foundation. In each case, the Treasury has specified rules and guidelines intended to ensure that the use of the funds remains within the discretion of the U.S. donor organization and that the funds are utilized to further its charitable purposes.

A. *Donations to U.S. Charities Operating Abroad.*

An easy way for a U.S. individual to obtain an income tax deduction for a charitable donation to be used abroad is to make it to a U.S. public charity that operates abroad through a foreign branch office or subsidiary. Since the foreign branch or subsidiary is under the complete control of the U.S. charity, the U.S. charity is considered to be the true beneficiary, and an income tax deduction is permitted. The critical point is that the funds are to be used in a foreign country by a U.S. organization as opposed to being used by a foreign organization. A number of U.S. charities, such as the Red Cross, CARE and Oxfam America, have broad-based direct programs abroad. The U.S. donor may earmark contributions to such charities for a particular foreign program of the U.S. charity as long as the earmarking is limited to programs subject to total control by the U.S. donee organization. Gifts may not be earmarked for re-granting to a particular foreign charity.

B. *Donations Via "Friends of" Organizations.*

Contributions by U.S. individuals for use abroad may also be made via "friends of" or "feeder" organizations, which are U.S. public charities formed to support a foreign charity or charities. A U.S. donor who wished to benefit a program of a particular foreign university, for example, could make a donation to a U.S. organization formed to support that foreign entity. These organizations frequently have names such as "American Friends of Oxford University."

C. *Donations Via Donor Advised Funds or Community Foundations.*

A U.S. individual can also obtain an income tax deduction for a charitable gift for use abroad when the gift is made to a donor advised fund or community foundation, which, in turn, makes a foreign grant of the funds. Some specialize in international grantmaking such as CAF America, Give2Asia, King Baudouin Foundation US, and the Silicon Valley Community Foundation.

D. *Donations Via Private Foundations.*

A cross-border charitable gift may also be made by means of a contribution to a U.S. private foundation, which then makes grants to foreign charities. Stringent rules apply to such foreign grants, however, and the donor will want to be sure that the procedures of the private foundation meet IRS guidelines for assuring that the foundation has ultimate discretion over the use of the funds and adequate procedures in place to ensure the funds are used only for purposes recognized by U.S. taxing authorities as charitable purposes.

E. *Treaty Exceptions.*

The U.S. income tax treaties with Canada, Israel and Mexico contain more generous provisions regarding deductions for gifts by U.S. persons to charities in the foreign jurisdiction. Under limited circumstances, these treaties allow U.S. donors to deduct donations to charities in the contracting state against their foreign-source income from that jurisdiction.

II. RULES APPLICABLE TO U.S. PRIVATE FOUNDATIONS MAKING GRANTS ABROAD

U. S. private nonoperating foundations making grants abroad will want to determine whether the foreign grant counts as a "qualifying distribution" for purposes of the 5% payout rule under Section 4942 of the Code and is not a taxable expenditure.

The availability of income tax charitable deductions for grants abroad is not a concern for private foundations, since they are generally not subject to income taxes in any event. However, if a private foundation fails to make sufficient qualifying distributions annually of amounts equal to 5% of the aggregate fair market value of all of its assets held for investment, it will be subject to an excise tax in that year. The term “qualifying distribution” is defined by reference to qualifying charitable purposes and the tax classification of the recipient, rather than by the location of the grantee. The taxable expenditure provisions of the Code also have a substantial impact on grants abroad by private foundations. A private foundation makes a taxable expenditure subject to excise tax if it makes a grant (i) for any purpose other than one specified in Section 170(c)(2)(B) of the Code or (ii) to an organization that is not a foreign equivalent of a U.S. public charity unless the private foundation exercises “expenditure responsibility” with respect to the grant.

A. *“Good Faith Determination.”*

A grant by a U.S. private foundation to a foreign organization that has received an IRS determination letter that it is the equivalent of a U.S. public charity is always a qualifying distribution for purposes of the 5% minimum distribution rule. If the foreign donee does not have an IRS determination letter, and if the U.S. private foundation believes it can collect data to show that the proposed foreign grantee is the equivalent of a U.S. public charity, the private foundation will try to make a "good faith equivalency determination." If this equivalency determination **(“ED”)** can be made, the foreign grant will be a qualifying distribution even if the U.S. grantor foundation does not exercise expenditure responsibility.

In making a good faith determination, the private foundation used to be able to rely on an opinion from its counsel or the grantee's counsel or an affidavit of the grantee. However, if this method is used, each potential U.S. grantor private foundation must obtain its own equivalency letter or grantee affidavit, and the cost may be prohibitive for smaller foundations. In **Revenue Procedure 92-94**, the Internal Revenue Service (“IRS”) approved a form of affidavit of the foreign grantee that could be relied upon by multiple U.S. charities as long as it contained current information. See **Exhibit A** for this form. This helped small foundations make their good-faith determinations at a reasonable cost. As of fairly recently, a U.S. private foundation can no longer make an equivalency determination based solely on a Revenue Procedure 92-94 affidavit from the foreign grantee. Effective September 25, 2015, the IRS and the Treasury Department published

final regulations changing the process for making good faith equivalency determinations. The **Reliance Standards for Making Good Faith Determinations** clarify multiple aspects of conducting equivalency determinations. Here are some of the key points:

1. The final regulations now confirm that ED can be used by sponsoring organizations of donor advised funds (DAFs) in determining whether a foreign organization is the equivalent of a public charity.

2. Grantmaking organizations seeking to complete an ED can now rely on written advice from "Qualified Tax Practitioners" such as attorneys, certified public accountants, or enrolled agents when conducting EDs.

3. The written advice from the Qualified Tax Practitioner must have a substantial factual basis and must rely on current legislation and current documents provided by grantees; however, an attorney-client relationship is not necessary for this advice to be considered valid under the law. This is a change from previous ED regulations where a grantmaker was able to rely solely on a grantee affidavit to make an ED. It is now necessary for the facts stated within the affidavit to be substantiated. If the ED is based on a 5-year public support test, the ED is "current" for two years following the end of the test period.

On September 14, 2017, the IRS released **Revenue Procedure 2017-53**, which offers Qualified Tax Practitioners a safe harbor for issuing equivalency opinions. While the document is 24 pages long, here are some of the important and new elements of an equivalency review drawn from Rev. Proc. 2017-53:

- Section 3.03 (4): The IRS reminds grantmakers they should take into account the "education, sophistication, and business experience" of the preparer of any ED for which they plan to "reasonably rely in good faith" for making foreign grants.
- Section 3.03 (5): Provides a checklist of "general requirements" imposed on practitioners in preparing written ED advice.
- Section 4.02: Requires written advice and any attachments thereto (such as the foreign grantee's governing documents) to be written in or translated into English, but the requirement for certified copies of translations "is not required".
- Section 4.03: Affidavits must be signed or attested to by an officer or trustee of the organization, not by a staff person who does not also hold one of these designations of leadership for the organization.
- Section 4.04: The grantor and Qualified Tax Practitioner may rely on translations of and public information about foreign laws that apply to the charity under review.

- Section 5.02: Such written advice should include the grantee's organizing documents and financial support schedules.
- Section 5.06: A grantee affidavit is now sufficient for determining prohibitions on political activity and the extent of lobbying undertaken by the grantee. Attestations about this in the affidavit no longer need to be substantiated within governing documents or relevant law.
- Section 5.08: Grantees who have previously supplied an affidavit can provide an updated affidavit describing only material changes, while providing a copy of the previously-supplied affidavit.
- Section 5.09: There is a new requirement that the "preferred written advice" must also confirm that the grantee is not subject to sanctions or designated as a terrorist organization by the US government. It is now also required that private foundations confirm that controlling persons, officers, or trustees of the organization do not have sanctions or terrorist designations, although this need not be included in the written advice.
- Section 5.10: Foreign hospitals do not need to comply with Section 501(r) related to the Affordable Care Act (ACA).
- Section 5.11: The new regulations confirm that foreign schools need to have a nondiscrimination policy in their governing documents, and they need to provide evidence that these policies are being followed in practice.
- Section 6.03: A foreign grantee in its first five years of existence may be treated as publicly-supported if the written advice determines the grantee can reasonably be expected to meet the applicable public support test.
- Section 7: Provides outstanding examples of current written advice for publicly supported organizations, which will be helpful to the practitioner preparing an equivalency determination.

B. *Expenditure Responsibility.*

The IRS used to require that a U.S. private foundation wishing to make a grant to a foreign charity first attempt to make a good faith determination that the foreign entity is the equivalent of a U.S. public charity. However, this attempt at making an equivalency determination is no longer required. In 2001, the IRS issued a general information letter allowing the U.S. private foundation to make such a grant subject to "expenditure responsibility" **("ER")** without first attempting a "good faith determination." Exercising ER entails making a pre-grant inquiry to allow the grantor to make a reasonable determination that the proposed grantee can fulfill the charitable purpose of the grant. An officer or director of the foreign grantee must also sign a written grant agreement specifying the charitable purpose of the grant and committing the grantee to:

1. repay any funds not used for the grant's purpose;

2. submit annual reports detailing how the funds have been used, compliance with the grant agreement and the grantee's progress in achieving the purpose for which the grant was made;

3. maintain books and records which are made reasonably available to the grantor;

4. maintain the grant funds in a separate fund dedicated to one or more charitable purposes recognized under the Code so that the donee can properly account for the grant funds; and

5. refrain from using any of the funds for lobbying, direct or indirect influence on any public election or voter registration drive, or any activity for a noncharitable purpose, to the extent such use of the funds would be taxable to a private foundation.

The agreement will typically also prohibit the grantee from re-granting the funds to other organizations or individuals since that triggers additional complicated rules to minimize the odds that the funds will be diverted from charitable purposes.

The U.S. grantor private foundation must make all reasonable efforts to establish adequate procedures to see that the grant is spent solely for the purposes for which made. It must also provide the IRS with annual reports on all expenditure responsibility grants and details about its expenditure responsibility grants.

C. *Grants to Governmental Units.*

Grants to foreign governmental units do not require either an equivalency determination or expenditure responsibility. The Treasury Regulations provide that a foreign organization will be treated as a public charity if it is a foreign government, or any agency or instrumentality thereof even if it is not described in IRC Section 501(c)(3). However, any grant to such a governmental unit must be for charitable, not public purposes. The U.S. grantor organization's file should contain (i) documentation establishing that the grantee is a foreign government or governmental unit, and (ii) a copy of its grant letter specifying the charitable purpose of the grant.

Ideally, the foreign government will sign a grant agreement of the sort required for grants subject to expenditure responsibility even though the grantor is not required to exercise expenditure responsibility.

D. *The "Out of Corpus" Requirement.*

If the foreign charity grantee is the equivalent of a U.S. private foundation, the U.S. foundation's grant to it must also meet the "out of corpus" requirement. A grant from one private foundation to another will not be a qualifying distribution for purposes of application of the 5% minimum payout rules unless the grantee satisfies the "out of corpus" rule. The "out of corpus" rule

requires that any grant from one private foundation to another must be spent by the grantee within 12 months after the close of the taxable year in which it received the funds. One private foundation cannot make grants to endow another. The grantee must take the grant funds "out of corpus" and spend them within the required amount of time. This policy is designed to ensure that such private foundation grants will be used for the public benefit and not to build the recipient organization's investment portfolio.

Furthermore, the grantee foundation must provide records to the grantor foundation showing that: (i) the grantee met its minimum payout requirement before it received the grant, and (ii) the grantee satisfied its minimum payout requirement for the year in which the grant was received in addition to spending the grant. Since most foreign charities are unfamiliar with the minimum payout rules and do not maintain the records necessary to compute it, satisfying the "out of corpus" requirement frequently will not be possible. In such a case, the grantor may adopt one of the following approaches: (i) If the foreign grantee is small and spends all donations and grants in the year in which it receives the funds, the out of corpus rule is satisfied; (ii) If the U.S. private foundation's grants during the year far exceed its 5% minimum payout requirement, it can exercise expenditure responsibility over the grant to the foreign private foundation equivalent and simply not count the grant in meeting the minimum payout requirement. This would allow it to avoid the "out of corpus" rule entirely with respect to the grant; and (iii) In the alternative, if the grant to the foreign charity is earmarked for the purchase of capital equipment, and if the purchases are completed within 12 months after the close of the taxable year in which the foreign charity receives the funds, the "out of corpus" rule will be satisfied. See **Exhibit "B"** for a summary of these rules.

III. ANTI-TERRORIST FINANCING GUIDELINES

U.S. private foundations should also be aware of the potential for criminal prosecution, civil penalties and the freezing of their assets if they are found to have made contributions to foreign or domestic charities that engage in or support terrorism.

A. *Executive Order 13224 and the Patriot Act.*

Very soon after the terrorist attacks of 9/11/01, then President George W. Bush issued **Executive Order 13224**, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism" (the "Executive Order"). One month later, the USA PATRIOT Act, "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (the "**Patriot Act**"), was signed into law.

The Executive Order provides a means to disrupt the financial support network for terrorists and terrorist organizations by authorizing the U.S. government to designate and block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of

terrorism. It also authorizes the U.S. government to block the assets of individuals and entities that provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under the Executive Order. The Executive Order specifically prohibits engaging in any transaction involving designated persons, "including but not limited to the making or receiving of contributions of funds, goods, or services."

Once an entity or individual is designated under the Executive Order, the Office of Foreign Assets Control ("OFAC") of the Treasury Department takes appropriate action to block the assets of the individual or entity in the U.S. OFAC then adds the individual or entity to its list of "Specially Designated Nationals and Blocked Persons." The list is not limited to foreign organizations since U.S. individuals or entities (including U.S. charitable organizations) that provide support for terrorism may be designated persons. Of particular importance is that Executive Order 13224 does not require knowledge or intent, so that making a contribution to a designated entity may subject the donor to sanctions, even though the donor did not intend to support terrorism and did not know that the grant would be used for such purposes.

Under the Patriot Act, substantial civil penalties or prison terms up to 20 years, or both, are imposed for providing material support or resources, knowing or intending that they will be used for terrorism or by a foreign terrorist organization. "Material support or resources" for this purpose is broadly defined and clearly would include grants used by a recipient to engage in terrorist acts or if the recipient is a foreign terrorist organization.

B. *Treasury Department's Anti-Terrorism "Best Practices".*

In November 2002, the Treasury Department issued "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities." These guidelines are entirely voluntary but, according to the press release announcing the issuance of the guidelines, if a U.S.-based charity follows these guidelines, "there will be a corresponding reduction in the likelihood of a blocking order against any such charity or donors who contribute to such charity in good faith, absent knowledge or intent to provide financing or support to terrorist organizations." In addition to containing certain standard suggestions for organizational transparency, the guidelines provide for U.S. organizations to perform significant due diligence and collect an abundance of information prior to distributing funds to foreign organizations.

C. *Best Practices Under the Anti-Terrorist Financing Guidelines.*

Most contributions to foreign charitable organizations have little risk of being diverted to support terrorism since they are made to well-known and reputable foreign charities. Nevertheless grant-makers engaged in international philanthropy should routinely assess the risk of diversion of funds and adopt and follow policies and procedures so as not to inadvertently run afoul of the

Patriot Act or Executive Order 13224. This is an area that is evolving, and the policies and procedures will vary depending on the nature of the particular grant and donee organization. A U.S. private foundation should take basic precautions when making grants to foreign charities, particularly if the proposed foreign donee is not a well-established charity:

1. Ensure that the proposed foreign charitable donee is not on the OFAC list of "Specially Designated Nationals and Blocked Persons." The OFAC list is available on the OFAC web site.

2. If an organization makes numerous foreign grants, it should consider using a software program to run automated checks, including those checking multiple terrorist lists, such as those of the Justice Department, the United Nations, and the European Union lists.

3. Conduct due diligence to ensure that the proposed foreign donee is a bona fide charitable organization. This should include obtaining organizational documents, financial statements and tax returns, information about the organization's charitable programs, history, board of trustees and key employees, and the identity and qualifications of the individuals administering the grant. Knowing the foreign grantee organization is usually the best way to avoid the diversion of funds from their intended charitable purposes.

4. Assess the likelihood of diversion based on the grantee and the circumstances.

5. Manage the risk by taking steps most likely to prevent diversion, such as by disbursing funds in installments upon receipt of the grantee's reports on the use of previously granted funds and/or using a reliable individual in the foreign jurisdiction to help administer and monitor the grant.

6. Keep good records of the organization's due diligence, grant procedures and risk assessments.

IV. TREASURY'S RISK MATRIX

In March of 2007, OFAC released a risk matrix for the charitable sector outlining possible security threats. The risk matrix is intended to help charitable organizations that deliver aid in high-risk areas understand and comply with U.S. Sanctions programs. The matrix indicates characteristics of low-, medium-, and high-risk situations in 11 categories, including the specificity of a grantee's charitable purposes, the size of the donation, the location of the charitable activity, and the history of the grantee's charitable activities.

OFAC suggests that charities that work overseas will benefit particularly from the matrix, because working internationally poses "increased risks." Using the matrix can only minimize that risk, however. It will not guarantee protection from terrorist infiltration. OFAC further acknowledges that, because all charities are unique in "size, products, and services, sources of funding, the

geographic locations that they serve, and numerous other variables," use of the matrix will differ from organization to organization. See **Exhibit "C"** for a copy of the matrix.

V. STAYING OUT OF TROUBLE

A private foundation that wants to avoid dealing with the stringent requirements applicable to direct grants abroad may instead choose to make the grant to a U.S. public charity that will use the funds to support a charitable project overseas. This is common for smaller foundations, which lack the staff to process direct overseas grants and the funds to have consultants to guide them in making such grants.

Even if a U.S. private foundation is able to clear all of the hurdles described in this article, it will still need sufficient staff capacity to exercise the required ongoing oversight of grants for use abroad, and grantors can become quite frustrated chasing financial reports and other follow-up data needed for expenditure responsibility grants. It is therefore critical that such foundations have knowledgeable legal counsel and other advisors.

VI. INTERNATIONAL FUNDRAISING – INBOUND

Most foreign countries also deny their residents tax benefits for gifts to U.S. charities. There are a few ways that a foreign donor can enjoy tax benefits for a gift to a U.S. charity.

A. *Deduction Against Effectively Connected Income.*

The donor who is neither a citizen nor a resident of the U.S. is subject to U.S. income taxes only on certain types of income. Income that is effectively connected with a U.S. trade or business and capital gains on the sale of U.S. real property ("ECI") may be offset by income tax deductions for gifts to U.S. charities.

B. *Treaty Exceptions.*

If the donor is from Mexico, Canada or Israel, treaty provisions may allow an income tax deduction for a gift to a U.S. charity.

C. *Foreign "Reverse Feeders"*

If a foreign donor to a U.S. charity has no ECI for the year of the donation, the donor may qualify for income tax benefits in his or her home jurisdiction. Except for rare treaty exceptions, though, other countries do not allow their residents income tax benefits for gifts to U.S. charities. If the foreign donor does not make a gift directly to a U.S. charity but instead gives it to a community foundation or other "reverse feeder" tax exempt organization in the donor's home jurisdiction, and that foreign charity then re-grants the gift to a U.S. charity, the foreign donor may qualify for income tax benefits in the jurisdiction in which the donor resides.

As with gifts made by U.S. donors to U.S. charities such as certain community foundations, which then re-grant the funds to foreign charities, there can be no earmarking; the foreign

grantmaking charity must retain dominion and control over the use of the funds. The number of community foundations around the world is growing rapidly, and those foreign community foundations will generally take in gifts from local donors to a donor advised fund equivalent and then re-grant the gift to a U.S. charity at the donor's nonbinding request. This may allow the foreign donor to claim income tax benefits in his or her home jurisdiction.

Some resources for this are: (i) Charities Aid Foundation Canada, (ii) The Asia Foundation's Give2Asia donor advised fund program /www.give2asia.org (which can take in funds in various Pacific Rim jurisdictions, including Korea), (iii) The Border Partnership /www.borderpartnership.org (Mexico), King Baudouin Foundation (EU and Africa) www.kbfus.org and (v) Charities Aid Foundation-U.K. /www.CAFonline.org. There are many more.

VII. TREATY EXCEPTIONS

A. *U.S.-Canada Treaty: The First Breakthrough*

Under the U.S.-Canada income tax treaty, income tax deductions are generally allowed for direct gifts by U.S. donors to Canadian charities that are equivalent to U.S. public charities and vice-versa. Paragraph 5 of Article XXI of the U.S.-Canada treaty provides that contributions by a U.S. citizen or resident to a Canadian tax-exempt organization which could qualify in the United States to receive deductible contributions if it were a U.S. public charity are deductible against the donor's Canadian-source income, subject to U.S. percentage limitations. This exception does not permit any deduction if the U.S. donor has no Canadian income. The Canadian Revenue Agency maintains a database of all registered Canadian charities, but a grant maker must still go through the equivalency determination process before making a grant to a Canadian charity.

A more generous exception permits a deduction against a U.S. donor's U.S.-source income (again, subject to U.S. percentage limitations) for contributions to a Canadian college or university at which the donor or a member of the donor's family is or was enrolled.

B. *U.S.-Mexico Treaty*

The U.S.-Mexico tax treaty also contains unusually relaxed provisions allowing deductions for cross-border charitable gifts. Article XXII of the treaty allows income tax deductions to U.S. citizens and residents for contributions to Mexican charities other than churches. The deductions are allowed only with respect to Mexican-source income and are subject to U.S. percentage limitations. Mexicans are allowed reciprocal deductions against U.S. source income (subject to Mexican percentage limitations) for contributions to U.S. charities.

The U.S.-Mexico treaty recognizes that the standards for income tax exemption under the laws of the two contracting states are essentially equivalent. The responsibility for determining public charity status is consigned to the taxing authority of the nation in which the charity was

organized. This permits U.S. private foundations to make grants to most Mexican public charities free of expenditure responsibility and without a separate determination of public charity status.

C. *U.S.-Israel Treaty*

Article 15-A of the U.S.-Israel Tax Treaty permits U.S. citizens and residents to deduct contributions to Israeli charities against their Israeli-source income if the Israeli charity would have qualified for tax exemption under U.S. law had it been established here. The deduction is capped at a fixed percentage of Israeli-source adjusted gross income for individual donors and a different fixed percentage of Israeli-source taxable income for corporate donors. Israelis are permitted a reciprocal deduction against U.S.-source income for contributions to U.S. charities that would qualify for tax exemption under Israeli law if organized there.

D. *Mutual Recognition Treaties*

Some income tax treaties, such as the treaty between the U.S. and the Netherlands, contain mutual recognition provisions under which the U.S. recognizes organizations granted tax-exempt status under Dutch law as equivalent to U.S. charitable organizations and vice versa. Such a treaty provision does not allow a U.S. donor to make a direct contribution to that Dutch charity and claim a U.S. income tax charitable deduction. However, U.S. private foundations may make grants to Dutch charities that are the equivalent of U.S. public charities without exercising expenditure responsibility. Furthermore, a gift or bequest to such a Dutch entity by a U.S. donor or decedent will qualify for the U.S. gift or estate tax charitable deduction.

Exhibit A

Sample Affidavit for Equivalency Determination

NO LONGER SUFFICIENT ON ITS OWN

Rev. Proc. 92-94
FOREIGN PUBLIC CHARITY EQUIVALENCE
AFFIDAVIT OF OFFICER

The undersigned, to assist grant making foundations in the United States of America to determine whether _____ (the "Grantee")
[name of grantee organization]
is the equivalent of a public charity described in section 509(a) (1), (2), or (3) of the United States Internal Revenue Code, makes the following statement:

1. Office. I am the _____ of the Grantee.
[official title]

2. Formation and purposes. The Grantee was created in _____ by
[year]
_____ and is operated under the laws of
[identify statute, charter, or other document]
_____ exclusively for the following purposes [check applicable boxes]:
[country]

- ☐ charitable
- ☐ religious
- ☐ scientific
- ☐ literary
- ☐ educational
- ☐ fostering national or international amateur sports competition
- ☐ prevention of cruelty to children or animals

3. Programs and activities. The Grantee's programs and activities have included and will include the following:

_____

[describe past, current, and future activities; add pages if necessary]

_____

_____

4. Governing documents. We have attached copies of the charter, bylaws, and other documents under which the Grantee is governed.

5. No improper private benefit. Under the applicable laws and customs or under the Grantee's governing instruments, none of Grantee's income or assets may be distributed to, or applied for the benefit of, a private person or non-charitable organization other than (a) as part of the conduct of the Grantee's charitable activities, or (b) as payment of reasonable compensation for services rendered, or (c) as payment representing the fair market value of property which the Grantee has purchased.

6. No proprietary interest in Grantee. The Grantee has no shareholders or members who have a proprietary interest in its income or assets.

7. Distribution of assets on dissolution. Under the applicable laws and customs, or under the Grantee's governing instruments, all of its assets will be distributed upon its dissolution or liquidation to another non-for-profit organization for charitable, religious, scientific, literary, or educational purposes, or to a government instrumentality. We have attached a copy of the relevant statutory law or provisions in the grantee's governing instruments controlling the distribution of the Grantee's assets on dissolution or liquidation.

8. Limits on activities. Under the laws and customs applicable to the Grantee, or under the Grantee's governing instruments, the Grantee is not permitted, other than as an insubstantial party of its activities, to:

(a) engage in activities that are not for religious, charitable, scientific, literary, or educational purposes; or

(b) attempt to influence legislation, by propaganda or otherwise.

9. No candidate campaign activity. The laws and customs applicable to the Grantee do no permit it to participate or intervene, directly or indirectly, in any political campaign on behalf of, or in opposition to, any candidate for public office.

10. Control by other organizations. The Grantee is [choose one]:

☐ not controlled by, or operated in connection with, any other organization.

☐ controlled by or operated in connection with another organization or organizations, as follows:

_____

[describe]

_____

_____

11. Qualification as publicly supported organization. The Grantee is [check one of the following]:

- ☐ a school (that is, an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on and that has adopted and operates pursuant to a racially nondiscriminatory policy as to students, and we have completed IRS Form 5578).
- ☐ a hospital (that is, an organization whose principal purpose or function is the providing of medical or hospital care).
- ☐ a church (that is, a church, synagogue, or mosque).
- ☐ none of the above, but it satisfies a public support test as demonstrated by the Schedule of Financial Support for the four most recently completed taxable years, attached.

12. Authorization. The _____ of the
[governing body; e.g., board of directors]

Grantee has authorized me to make this Declaration and affirms its contents.

13. Binding representations. The representations made in this Declaration are binding on the Grantee.

I declare that the foregoing is true and correct of my own knowledge.

DATE: _____ _____
[signature of declarant]

2019
SCHEDULE OF FINANCIAL SUPPORT
PART ONE

	2018	2017	2016	2015	2014	TOTAL
1. Gifts, grants, and contributions received						
2. Membership fees received						
3. Gross receipts from admissions, merchandise sold, services performed, or facilities provided (only from activities whose conduct is related to the exempt purposes of the organization)						
4. Gross income						
5. Net income						
6. Value of services or facilities furnished by a government unit without charge						
7. Total of lines 1 through 6						
8. Line 7 minus line 3						
9. Two percent of the total for line 8						
Complete Part TWO; then complete the rest of Part ONE.						
10. Total from Column C, Part TWO						
11. Public support -- Four-year total of line 8 minus the four-year totals of lines 4, 5, and 10						
12. Public support percentage -- line 11 divided by line 8						%

2019
SCHEDULE OF FINANCIAL SUPPORT
PART TWO

Instructions: Complete one line for each person or organization who, during the entire four-year period, contributed more than the amount on Line 9, Part ONE. In Column A, identify each donor by name or otherwise. In Column B, enter the total amount donated by that person or organization during the four-year period. In Column C, enter the difference between the amount on Line 9, Part ONE, and the amount entered for that donor in Column B. Add the amounts entered in Column C, and enter the total for Column C at Line 10, Part ONE (previous page).

A. Identification of Donor	B. Total Contributed	C. Excess Contributions
TOTALS		

Exhibit B

INTERNATIONAL GRANTS BY U.S. PRIVATE FOUNDATIONS

	Grantee's Status	May Pvt. Fdn. Fund?	Equivalency Determination Required?	Expenditure Responsibility Required?	Does Grant Satisfy Minimum Payout Rule?
1	U.S. §501(c)(3) operating overseas	Yes	No, if grant in furtherance of grantee's purposes.	No, if grantee is public charity.	Yes
2	"Friends of" organization	Yes	No	No, if grantee is public charity.	Yes
3	Foreign government unit without §501(c)(3) status	Yes	No, but grant must be limited to charitable, not public, purposes.	No	Yes
4	Foreign entity with §501(c)(3) IRS determination letter	Yes	No	No, if grantee is public charity.	Yes
5	Foreign equivalent of §501(c)(3) public charity	Yes	Yes	No, if grantee can qualify as public charity.	Yes
6	Foreign equivalent of §501(c)(3) private foundation	Yes	Yes	Yes	Yes, if out-of-corpus rule satisfied.
7	Other foreign organization that cannot qualify as §501(c)(3) equivalent	Yes	No. Not possible.	Yes, and grant funds must be segregated.	Yes

Exhibit C

Risk Matrix for the Charitable Sector

Introduction

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is charged with administering and enforcing U.S. economic sanctions programs, which include a range of sanctions against foreign states, terrorists, international narcotics traffickers, and other specially designated targets. Since September 11, 2001, a number of investigations in the United States and abroad, as well as reports by international organizations and in the media, have revealed the vulnerability of the charitable sector to abuse by terrorists, rogue actors, and other sanctions targets. In particular, terrorist organizations have exploited charitable organizations, both in the United States and worldwide, to raise and move funds, provide logistical support, or otherwise cultivate support for their organizations and operations.

This type of abuse can result in violations of OFAC-administered economic sanctions programs. For this reason, OFAC has actively engaged with charitable organizations to assist them in understanding and complying with their legal obligations under U.S. sanctions programs while delivering aid in high-risk areas.[1] OFAC has encouraged charities to develop proactive, risk-based compliance programs, informed by best practices, to protect their assets and resources from diversion or exploitation by rogue actors, terrorists, or other sanctions targets.[2]

To assist the charitable sector in adopting an effective, risk-based approach, OFAC is providing this matrix of common risk factors associated with disbursing funds and resources to grantees.[3] This matrix will be particularly useful to charities that conduct overseas charitable activity due to the increased risks associated with international activities.[4] The matrix is designed to provide charities with an understanding of the risks that they should consider in the course of conducting their due diligence. However, the matrix is not a comprehensive list of risk factors indicating abuse or exploitation of a particular charity or its operations, nor is it meant to establish whether or not a charity or grantee is engaged in illicit activities. Any of the risks highlighted in this matrix could constitute normal business operations for certain charities, given the resources they possess, the environments in which they work, and the constraints under which they operate. We hope that charities find this matrix to be a helpful tool in developing an appropriate compliance program.

Risk Factors for Charities Disbursing Funds or Resources to Grantees[5]

Low Risk	Medium Risk	High Risk
The grantee has explicit charitable purposes and discloses how funds are used with specificity.	The grantee has general charitable purposes and discloses how funds are used with specificity.	The grantee has general charitable purposes and does not disclose how funds are used.
The charity and the grantee have a written grant agreement that contains effective safeguards. For example, provisions addressing proper use of funds by the grantee, delineation of appropriate oversight, and programmatic verification.	The charity and the grantee have a written grant agreement with limited safeguards.	The charity and the grantee do not have a written grant agreement.
The grantee has an existing relationship with the charity.	The grantee has existing relationships with other known charities but not with this charity.	The grantee has no prior history with any charities.
The grantee can provide references from trusted sources.	The grantee's references are from sources with which the charity is unfamiliar.	The grantee can provide no references or sources to corroborate references provided.
The grantee has a history of legitimate charitable activities.	The grantee is newly or recently formed, but its leadership has a history of legitimate charitable activities.	The grantee has little or no history of legitimate charitable activities.
Charity performs on-site grantee due diligence through regular audits and reporting.	Charity performs remote grantee due diligence through regular audits and reporting.	Charity performs no grantee due diligence, or due diligence is random and inconsistent.
Grantee provides documentation of the use of funds in the form of video, receipts, photographs,	Grantee provides documentation of the use of funds. Documentation may only include receipts and	Grantee provides no documentation of use of funds.

testimonies, and written records.	written records.	
The charity disburses funds in small increments as needed for specific projects or expenditures.	The charity authorizes grantee discretion within specified limits.	The charity disburses funds in one large payment to be invested and spent over time or for unspecified projects selected by the grantee.
Reliable banking systems or other regulated financial channels for transferring funds are available and used by the grantee, subjecting such transfers to the safeguards of regulated financial systems consistent with international standards.	Reliable banking systems or other regulated financial channels for transferring funds are not reasonably available for the grantee's relevant activity, but the charity and the grantee agree on alternative methods that they reasonably believe to be reliable, trustworthy, and protected against diversion.	The grantee does not use regulated financial channels or take steps to develop alternative methods that the charity and grantee reasonably believe to be reliable, trustworthy, and protected against diversion.
Detailed procedures and processes for the suspension of grantee funds are included within the written agreement and enforceable both in the United States and at the grantee's locale.	Detailed procedures and processes for the suspension of grantee funds are included within the written agreement but may not be enforceable at the grantee's locale due to instability or other issues.	There exist no procedures or processes for suspension of grantee funds in the event there is a breach of the written agreement.
The charity engages exclusively in charitable work in the U.S. or in foreign countries/regions where terrorist organizations are not known to be active.	The charity engages in some work in foreign countries/regions where terrorist organizations may be active.	The charity primarily engages in work in conflict zones or in countries/regions known to have a concentration of terrorist activity.

[1] Engaging in a prohibited sanctions transaction, including one with a person on the Specially Designated Nationals and Blocked Persons List, administered by the Office of Foreign Assets Control ("OFAC"), is a violation of U.S. law. Nevertheless, in implementing and enforcing sanctions programs, OFAC recognizes that charities and their grantees differ from one another in size, products, and services, sources of funding, the geographic locations that

they serve, and numerous other variables. OFAC will take these variables into account in evaluating the compliance measures of charities. OFAC addresses every violation in context, taking into account the nature of a charity's business, the history of the group's enforcement record with OFAC, the sanctions harm that may have resulted from the transaction, and the charity's compliance procedures.

[2] To assist charities in protecting their funds against terrorist diversion, Treasury developed the Anti-Terrorist Financing Guidelines: Voluntary Practices for U.S.-Based Charities ("Guidelines") and released them in November 2002. In December 2005, after extensive public comment and numerous outreach engagements with the sector, Treasury revised the Guidelines and released them in draft form for public comment. Based on the comments received, in September 2006, Treasury released an updated version of the Guidelines. These updated Guidelines encourage charities to adopt a risk-based approach in developing protective measures to guard against the risk of terrorist abuse. They acknowledge that charities are in the best position to understand and address the specific risks they face in their operations. The Guidelines also reference various materials that demonstrate and describe the ongoing risks of terrorist abuse of the charitable sector. Many of these materials are available on the Treasury Web site at http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml.

[3] This risk matrix is designed to assist charities that attempt in good faith to protect themselves from abuse by sanctioned parties or other bad actors and are not intended to address the problem of organizations that use the cover of charitable work, whether real or perceived, to provide support for illicit causes. The matrix is not mandatory; non-adherence to this guidance, in and of itself, does not constitute a violation of existing U.S. law. Conversely, adherence to the risk matrix does not excuse any person (individual or entity) from compliance with any local, state, or federal law or regulation, nor does it release any person from or constitute a legal defense against any civil or criminal liability for violating any such law or regulation. In particular, adherence to the risk matrix shall not be construed to preclude any criminal charge, civil fine, or other action by Treasury or the Department of Justice against persons who engage in prohibited transactions with persons designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, as amended, or with persons designated under the criteria defining prohibited persons in the relevant Executive orders issued pursuant to statute, such as the International Emergency Economic Powers Act, as amended.

[4] The term "grantee," as it is used throughout the matrix, means an immediate grantee of charitable resources or services. To the extent reasonably practicable, charitable organizations should also use the matrix and the Guidelines to ensure the safe delivery of charitable resources by any downstream sub-grantees.

[5] OFAC appreciates The American Bar Association's instructive comments on risk factors listed in Table 1 of Comments in Response to Internal Revenue Service Announcement 1003-29, 2003-20 I.R.B. 928 Regarding International Grant-Making and International Activities by Domestic 501(c)(3) Organizations, July 18, 2003 (Comment). The Comment represented the views of individual members of the Committee on Exempt Organizations of the Section of Taxation and contained recommendations on how the IRS might clarify existing requirements of section 501(c)(3) organizations with respect to international grant-making and other international activities.

Jane Peebles, J.D.

Partner
Karlin & Peebles, LLP
5900 Wilshire Blvd., Ste. 500
Los Angeles, CA 90036
jpeebles@karlinpeebles.com
(323) 852-0030

JANE PEEBLES, J.D.
BIOGRAPHY

Jane Peebles is a principal in the law firm of Karlin & Peebles, LLP, in Los Angeles, California. A frequent lecturer on sophisticated estate and charitable planning, Jane has also published several articles on domestic and international estate and charitable planning and is the author of *The Handbook on International Philanthropy*. Her practice areas are U.S. and international estate and charitable planning. She counsels high net worth individuals, family owned businesses, nonprofit organizations and philanthropists.

Jane is a Fellow of The American College of Trust and Estate Counsel (ACTEC), a member of the Society of Trusts and Estate Practitioners (STEP) and has been certified by the California State Bar Association as a specialist in Estate Planning, Trust and Probate Law. She has been voted by her peers to be a Southern California Super Lawyer every year since 2005 and a Best Lawyer in America in Trusts and Estates since 2007.

Representative Publications

- “Responsible Giving: The International Grantmakers’ Perspective,” Cross-Border Giving: A Legal and Practical Guide, Charity Channel Press (2018) (edited by Charities Aid Foundation)
- "International Estate Planning," Major Tax Planning (Proceedings of the 61st Annual Institute on Federal Taxation of the USC Law School), Matthew Bender (2009) (Co-author with Michael Karlin)
- “Implications of the Anti-Terrorist Financing Rules for U.S. Charities Making Grants for Use Abroad,” Family Foundation Advisor, Volume 7, No. 1 (November/December 2007)
- "Emerging Legal Issues in International Philanthropy," Perspectives on Foundation Management: Innovation and Responsibility at Home and Abroad, John Wiley & Sons (2002)
- "Estate Planning Design and Drafting After the EGTRRA," Major Tax Planning (Proceedings of the 54th Annual Institute on Federal Taxation of the USC Law School), Matthew Bender (2002)
- "Hot Topics in Charitable Giving," Major Tax Planning (Proceedings of the 52nd Annual Institute on Federal Taxation of the USC Law School), Matthew Bender (2000)
- "Creative Uses of Charitable Lead Trusts," Major Tax Planning (Proceedings of the 51st Annual Institute on Federal Taxation of the USC Law School), Matthew Bender (1999)
- "Cross-Border Gifts," Journal of Gift Planning (2nd Quarter 1999)
- "Charitable Gifts of Retirement Plan Assets," Planned Giving Design Center Website (April 1999)
- "The Handbook of International Philanthropy," Bonus Books (Chicago, 1998)
- "Tax Planning for Cross-Border Philanthropy by U.S. Donors," Trusts & Estates Magazine (May 1998)
- "Here There Be Dragons: Navigating the Waters of Cross-Border Philanthropy," Thirty-First Annual University of Miami Philip E. Heckerling Institute on Estate Planning, Matthew Bender (1997) (Lecturer)
- "Socially Responsible Investment and the Private Trust," Probate & Property Magazine (July/August 1992) (Co-author with Mark Rapaport)
- "A Primer on U.S. Estate and Gift Taxation of Aliens," Major Tax Planning, University of Southern California, Matthew Bender (1991) (Co-author with Michael Karlin)

Awards and Honors

Fellow, American College of Trust and Estate Counsel (ACTEC)
Top 50 Female Super Lawyer, *Los Angeles* magazine, 2005-2007
Southern California Super Lawyer, *Los Angeles* magazine, 2008 - present
Best Lawyers in America in the field of Trusts and Estates, 2007 - present
Martindale Hubbell AV preeminent rating