

Publications

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Proposed Restrictions on Foreign Grantmaking by U.S. Tax-Exempt Organizations

Executive Summary

On May 15, 2024, the House Ways and Means Committee (the “Committee”) approved a package of Bills that would increase scrutiny on U.S. tax-exempt organizations’ foreign grantmaking activities if passed.¹ The bills include: (1) the Foreign Grant Reporting Act (H.R. 8290), (2) the American Donor Privacy and Foreign Funding Transparency Act (H.R. 8293), (3) the No Foreign Election Interference Act (H.R. 8314), and (4) the End Zuckerbucks Act (H.R. 8291) (collectively, the “Bills”).² Committee Chairman, Jason Smith explained the Bills follow the “Committee’s investigation into tax-exempt organizations and concerns surrounding their potential financial support for antisemitism, terrorism, and undue influence in American politics.”³ The Bills largely increase reporting requirements and restrictions on U.S. tax-exempt organizations’ grantmaking activities.⁴

This article provides a summary of the current state of the law, a detailed discussion of the Bills, and practical recommendations for charities with foreign grantmaking activities.

Background: The Current Laws

1. Foreign Grantmaking

All grants from a public charity must be consistent with the charity’s exempt purpose. If the grant recipient is a Section 501(c)(3) organization, this requirement is presumed to be met so long as the recipient’s purposes and activities are consistent with those of the grantor.⁵ However, if the grant recipient is an individual or non-Section 501(c)(3) organization and the recipient does not have an IRS determination letter, then the charity must establish that the grant was (a) made for a charitable, educational, or other 501(c)(3) activity or purpose; and (b) used for the purposes for which it was made.⁶ While there are no specific statutory or regulatory requirements for public charities to rely on when establishing that the grant was made for such an activity or purpose, a public charity can look to the rules for private foundations for best practices and guidance.

To avoid excise taxes under Section 4942 and Section 4945 of the Code, a private foundation must exercise caution when making grants to foreign organizations.⁷ In some

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cases, a foreign organization may have applied for and received a favorable IRS determination indicating that the foreign organization is a 501(c)(3) public charity. Absent that, a foundation must follow certain guidelines to prevent the grant from being treated as a “taxable expenditure.” Specifically, a foundation must (1) make a good faith determination that the foreign organization is the equivalent of a U.S. public charity (i.e., an “equivalency determination”) or (2) limit the use of the grant to section 170(c)(2)(B) purposes and exercise expenditure responsibility over the foreign grant payments. “Expenditure responsibility” requires that a foundation use reasonable efforts and establish adequate procedures to ensure the grant is spent only for the purposes it was made, to obtain reports from the grantee organization on how the funds are spent, and to make full reports on the expenditures to the IRS.

Certain “public” foreign organizations will be deemed to be a 509(a)(1) public charity without a determination letter and without an equivalency determination (e.g., a college or university that is an instrumentality of a foreign government; a foreign government, agency, or instrumentality of a foreign government, or an international organization designated as such by Executive Order).⁸

2. Form 990 Reporting

Although the Form 990 collects significant information from tax-exempt organizations, the current Form 990 reporting landscape permits the identities of foreign donors and foreign recipients to remain anonymous. Schedule B of the Form 990 requires public charities to report all grants received in excess of \$5,000 to the IRS, including the donor’s name, address, the amount of the grant, and the nature of goods received if a non-cash contribution. However, the donor’s identity is redacted on the copy made available to the public. This general exclusion for donor information on annual returns does not apply to private foundations filing Form 990-PF.

Schedule F of the Form 990 requires public charities to report certain foreign activities and grants. Part I requires organizations to report their activities by foreign region, offices, number of employees, a description of activities, and expenditures. Parts II and III of Schedule F require information regarding grants made to foreign organizations and individuals, respectively. This includes the region, number of recipients, amount of cash grants, manner of cash disbursements, amount of noncash assistance, a description of the noncash assistance and method of valuation. Again, the identity of foreign grantees is not required to be disclosed to the public. In contrast, private foundations are required to list the name, address and foundation status of all grant recipients, including foreign organizations, on Part XV of the Form 990-PF.

Heightened Scrutiny: Proposed Restrictions on Foreign Grantmaking: Four Bills

(1) The Foreign Grant Reporting Act (H.R. 8290)

The Foreign Grant Reporting Act would require 501(c) organizations to report grants they provide to foreign entities on their annual Form 990. The act would also require the 501(c) organization to disclose whether the foreign entity is an entity recognized as a charity by the foreign country where it is organized, a 501(c)(3) organization exempt from tax under I.R.C. § 501(a), and whether the organization has made a good faith determination that the foreign entity is a §4945(d)(2)(4)(A) organization.

(2) The American Donor Privacy and Foreign Funding Transparency Act (H.R. 8293)

The American Donor Privacy and Foreign Funding Transparency Act would require

"[e]very specified tax-exempt organization" to annually disclose information regarding contributions from foreign sources on their Form 990. Required information would include the total amount of donations from those sources, whether the entity accepted any foreign donations, a list of countries of donation origin, and the amount of donations sourced from each country. The reporting requirement would apply to those organizations with more than \$200,000 gross receipts in the taxable year or \$500,000 or more in assets at the close of the taxable year.

(3) The No Foreign Election Interference Act (H.R. 8314)

The No Foreign Election Interference Act, if enacted, would prohibit tax-exempt organizations from making contributions to a political committee for eight years after receiving a contribution or gift from a foreign national. The bill would also establish a penalty equal to twice the amount of such prohibited contributions and amend the Code to revoke the tax-exempt status of any organization that makes three prohibited contributions.

(4) The End Zuckerbucks Act (H.R. 8291)

The End Zuckerbucks Act would bar tax-exempt status under Section 501(c)(3) for organizations that provide direct funding to any State or unit of local government for the administration of an election for public office. While tax-exempt organizations are barred from participating in political campaigns on behalf of specific candidates under current law, if enacted, H.R. 8291 may prevent Section 501(c)(3) organizations from participating in activities, such as voter education, even if done in a neutral and impartial manner.

Implications

All four Bills require heightened disclosures for donor and donee tax-exempt organizations. The Foreign Grant Reporting Act, focusing on outbound grants, and the American Donor Privacy and Foreign Funding Transparency Act, focusing on inbound grants, would increase the amount of information charitable organizations would be required to disclose. While the goal with these Bills is to more efficiently trace where charitable dollars are being spent and potential sources of influence from abroad in charitable donations received, the overall effect likely will mean subjecting tax-exempt organizations to heightened scrutiny from the general public and state and federal regulators. Additionally, the No Foreign Election Interference Act carries this concept further, disqualifying tax-exempt organizations that receive money from foreign nationals from contributing to political committees.

Finally, the End Zuckerbucks Act is meant to further inhibit private individuals from providing funding to a 501(c)(3) organization to provide supplemental grants for the administration of elections (e.g., paying for ballot drop boxes, voting equipment, additional manpower, protective gear for poll workers and public education campaigns on new voting methods) to state and local governments. There has been bipartisan concern that such funding creates the appearance of private individuals having undue influence in local elections. Many states already prohibit or restrict administering or running elections with private funds.

While it is unclear whether one or more of these Bills will pass, they collectively signal a concern from Congress whether charities are being used as conduits for foreign bad actors. However, as is often the case, organizations that are doing good work and partnering with legitimate foreign organizations will be subject to the same heightened reporting requirements and scrutiny to weed out bad actors.

The legal risks are one element of concern, but of equal concern to all nonprofits should be the public relations risk, which can include congressional subpoenas, newspaper articles, and/or social media coverage. In addition to any legal concerns, the reputational risk can occur more quickly and be more damaging financially.

Suggested Actions: Legal & Public Relations Risks

1. Review your organization's foreign grantees and foreign grantmaking procedures. Specifically, take a close look at grant agreements to ensure proper procedures are in place to (a) confirm a grantee's activities are consistent with your organization's 501(c)(3) purposes; and (b) require a periodic accounting as to how funds were used.
2. Consider whether your organization should have a template agreement for its expenditure responsibility grants and a separate template for grants to grantees with a 501(c)(3) determination letter (or that are the equivalent of a U.S. public charity).
3. Review your grant receipt agreements and procedures.
4. Consider adding morality clauses both to outbound and inbound grant agreements that allow for either a clawback of funds or removal of name association in the event the clause is violated.
5. As part of internal procedures, conduct basic research on donors, including basic background search, due diligence, and confirmation of funds.
6. Involve senior leadership and the board when receiving a potential large donation from a foreign individual or company.
7. Review and become familiar with the U.S. Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities ([link here](#)). In addition, before making a grant to a foreign organization, review OFAC economic and trade sanctions to ensure that the grant will not be running afoul of any current embargoes.

[1] See U.S. House Ways & Means Committee, *Committee Republicans Take Aim at Foreign Funding Influencing U.S. Elections and Policy Through Tax-Exempt Organizations* (May 13, 2024) <https://waysandmeans.house.gov/2024/05/13/committee-republicans-take-aim-at-foreign-funding-influencing-u-s-elections-and-policy-through-tax-exempt-organizations/>.

[2] *Id.*

[3] See U.S. House Ways & Means Committee, *Ways and Means Advances Solutions to Protect Election Integrity, Fight Foreign Money in American Politics* (May 16, 2024) <https://waysandmeans.house.gov/2024/05/16/ways-and-means-advances-solutions-to-protect-election-integrity-fight-foreign-money-in-american-politics/>.

[4] For purposes of this article, "public charity" means a 501(c)(3) organization described in 509(a)(1) or 509(a)(2) of the Code. "Private foundation" means a 501(c)(3) organization described in Section 509(a) of the Code.

[5] See, Office of Chief Counsel of the Internal Revenue Service Advice Memorandum 200504031.

[6] See, Rev. Rul. 56-304, 1956-2 CB 306; Rev. Rul. 68-489, 1968-2 CB 210.

[7] IRC 4942; IRC 4945.

[8] Treas. Reg. 53.4945-5(a)(4).