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Beyond Courtrooms and Closings:

An Exchange of Ideas on Corporate Citizenship and Giving

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International and Corporate Philanthropy

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Introduction

Cross-border charitable giving has generally become known as "international philanthropy" and when involving multiple countries "global philanthropy." However, by whatever name and in whatever scope, worldwide charitable giving and activities have grown tremendously in recent years and are likely to continue as individuals are increasingly connected and more aware of those needing charitable support. Charitable giving in the United States rose to nearly $485 billion in 2021, and of that, international giving comprised approximately $27.5 billion.[1]

Leading this trend have been donors who are individuals, corporations, public charities and private foundations of the United States. This in turn has impacted U.S. lawyers, accountants and other professional advisors who counsel them with respect to charitable giving and, more than ever, made it important for these professionals to understand the complex network of applicable federal tax and other laws. It has long been recognized that the tax laws governing charitable giving are complicated. However, they are even more challenging in the international context when a professional advisor must take into account not only the domestic tax laws, but also the rules of international taxation, U.S. anti-corruption and counter-terrorism laws, and sometimes foreign law and practice that characterize the nature of a foreign charity for U.S. tax purposes.

These materials introduce some of the major U.S. tax issues applicable to global philanthropy, and through this introduction, a professional advisor should begin to acquire a basic conceptual framework within which to guide clients more effectively in this area.[2]

"Charitable Organization" Defined

A "charitable organization" or a "501(c)(3)" are commonly used terms that refer to an organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code.[3] Section 501(c)(3) is the cornerstone requirement and provides that the organization must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . ." The entity itself may be organized as a corporation, fund or foundation.[4] Often a charitable organization is created as a not for profit corporation under state law.[5]

Every organization that qualifies for tax exemption under Section 501(c)(3) is a private foundation unless it is a public charity as a result of falling into one of the following three categories:[6] (i) organizations that generally have broad public support,[7] (ii) organizations such as hospitals, educational and religious institutions, governments and others or (iii) organizations that support the

foregoing charities by generally being operated, supervised and/or controlled by the charity being supported (commonly referred to as "supporting organizations") subject to certain limitations.[8]

In the estate planning context, charitable organizations are often grantmaking or scholarship organizations funded primarily or exclusively from a family and are likely classified as a non-operating private foundation.[9] It is important to be aware of the distinction between private foundations and public charities because private foundations are subject to numerous regulatory requirements and certain excise taxes that do not apply to public charities. Additionally, the classification as a private foundation or public charity based on sources of financial support is not permanent. It may change depending upon its level of public support received over time from private sector and government donations.

Tax Deductible Charitable Contributions

A major question that every client asks is the simple but important one of whether the charitable contribution will be tax deductible. While it is a "simple" question, it is one that invokes more questions, many of which are relevant to charitable contributions made to *both* domestic and foreign charities. However, in the case of contributions to foreign charities or in support of foreign charitable activities, there are additional questions and issues to address.

The answer relating to tax deductibility of contributions to charitable organizations, domestic and foreign, begins with the oft-used words of tax lawyers, "it depends." It depends upon: Who is the taxpayer making the contribution … an individual, partnership,[10] corporation,[11] trust or estate? What is the type of charity that will receive the contribution … a public charity or private foundation, domestic or foreign, and, if it is a foundation, is it a grant-making or operating foundation? What is the amount of the charitable contribution … small or large? What is the nature of the contribution … money or property, and if property, what is the nature of the property? Is the property created by the donor such as art or intellectual property, is it a direct or indirect interest in real estate or is it intangible property such as publicly traded securities, interests in private or family controlled companies, or other capital asset property? Is the charitable gift made with or without conditions, restrictions or retained interests? Is the deduction desired for income, gift or estate tax purposes? These are among the important questions to resolve in order to make the determination of deductibility, and therefore the professional advisor should have a thorough discussion with the client about the nature of proposed charitable gift in light of these considerations.

Here are some general answers to these questions:

- An unrestricted contribution of money or property by an individual or corporation directly to a domestic public charity or domestic private foundation is deductible for federal income tax purposes subject to certain percentage limitations on the amount of the deduction.[12]

- A similar charitable contribution made directly to a foreign charity by an individual or corporation is not deductible for income tax purposes unless it is permitted under a tax

treaty that the United States has with the foreign country where the charity is located, such as the tax treaties with Mexico, Canada and Israel.[13]

- A charitable contribution made by a partnership is not deductible by the partnership because the partnership is a "pass through" entity. Rather, the deduction is allocated by the partnership to its partners (who may be individuals, corporations, partnerships, trusts or estates) as a separately stated item and will then be deductible or not by those partners according to the various federal income tax rules applicable to each of them.[14] A corporation with an "S election" in effect will allocate the charitable contribution among its shareholders, and each shareholder will report a charitable contribution deduction or not according to its taxpayer status in the same manner as partners of a partnership.[15]

- A charitable contribution made by a complex trust[16] will be deductible for income tax purposes if permitted by the express terms of the trust agreement as the governing instrument, and unlike the case of an individual or corporation, the trust can make the deductible contribution directly to a foreign charity if certain conditions discussed below are satisfied. The deductible charitable contribution can be in an amount up to the entire gross income of the trust for tax year and therefore completely eliminate the income tax liability of the trust for the year.[17] There is no percentage limitation that reduces the amount of the deduction as in the case of a charitable contribution by an individual or corporation. The deduction is claimed by the trust, not treated as allocated or distributed to the beneficiaries for use by them.

- A charitable contribution made by an estate can be deductible for income *or* estate tax purposes depending upon the terms of the will as the governing instrument.[18] If made for income tax purposes, like a trust, the deduction can be in an amount up to the gross income of the estate for the year and eliminate any possible estate income tax liability.[19] If made for estate tax purposes, the charitable contribution will be in an amount equal to the value of the money or property that is included in the gross estate and that constitutes the charitable gift; there is no percentage limitation imposed upon the amount of the deduction. Also, like a trust, the deduction is allowable for a charitable contribution made to either a domestic *or* foreign charity.

Following rules similar to those applicable to the estate tax deduction, a charitable contribution made by a U.S. citizen or resident to a domestic or foreign charity can be deductible for gift tax purposes so that the gratuitous transfer constituting the charitable contribution is not subject to U.S. gift tax.[20] A charitable gift made by a nonresident alien of U.S. situs property to a domestic charity is also deductible and therefore not subject to gift tax; however, if the nonresident alien makes the gift to a foreign charity, it will be subject to gift tax as no gift tax deduction will be available.[21] For example, if a nonresident alien were to make a gift of Florida real estate to a foreign charity, the charitable contribution would be subject to gift tax.[22]

Trust and Estate Tax Deductible Contributions When Made *Directly* to a Foreign Charity

As already indicated, a domestic complex trust or domestic estate may possibly claim an income tax deduction and an estate may possibly claim an estate tax deduction for a charitable contribution made *directly* to a foreign charity. In light of this, and given that affluent foreign individuals have been moving to the United States and becoming U.S. citizens or U.S. tax residents while nevertheless maintaining strong ties to their home countries, it is important to explore with these types of clients charitable gifting involving foreign countries as part of a domestic estate plan.

As part of such an estate plan, a U.S. citizen or resident decedent, as well as a nonresident alien having U.S. situs property, could provide for charitable contributions to be made upon death directly by the estate to domestic or foreign charities, and thereby reduce or even eliminate all federal estate tax. The contributions could be deductible for federal estate tax purposes without limitation as to the amount even if they will be used for charitable purposes exclusively outside the United States.[23] The foreign charity that will receive a contribution can be established by the individual before or after becoming a U.S. citizen or resident, or in the case of a nonresident alien, before or after acquiring U.S. situs property.

To secure an estate tax deduction, a typical provision in a will would state a bequest of money or personal property or a devise of real property to a foreign charity, but only if the charity is determined to be an organization described in Section 2055 with respect to a U.S. citizen or resident decedent or Section 2106 with respect to a nonresident alien decedent.[24] *Before* permitting the estate to make the charitable gift to the foreign charity, however, it is strongly recommended that U.S. counsel of the personal representative of the estate opine that the requirements of Section 2055 or 2106, as applicable, and all the requirements of the governing instrument have been satisfied or, in the alternative, assist the personal representative of the estate in obtaining a favorable private letter ruling from the Internal Revenue Service ("IRS") that determines that the tax requirements for the deduction have been satisfied. In order to render the opinion or prepare the ruling request, counsel must carefully review the governance documents, internal policies and activities of the foreign charity, and also consider the laws and practices of the foreign country in light of all applicable U.S. tax law.[25]

Income Tax Deductible Contribution for Gifts that Benefit a Foreign Charity

As previously stated, *direct* contributions to a foreign charity by an individual or corporation are not deductible for federal income tax purposes unless a tax treaty applies. However, there are different legally permitted ways that an individual or corporation may achieve an income tax deduction while benefiting a foreign charity, and the attorney or other professional advisor should help the client understand these alternatives. Several factors should be considered such as the charitable purpose of the gift, the size and nature of it, whether it will be a single charitable gift or a series of gifts over time, and the nature of continuing involvement, if any, that the client would like to have regarding the administration of one or more charitable gifts.

To benefit a foreign charity or support a foreign charitable activity, an individual or corporation could make an income tax deductible contribution to a U.S. charitable organization with international

programs or that makes gifts to foreign charities in order to carry out the tax-exempt purposes of the U.S. organization.[26] To illustrate, consider the structure and operations of the Bill & Melinda Gates Foundation ("Gates Foundation") or the Catholic Near East Welfare Association ("CNEWA"). If an individual or corporation wanted to make an income tax deductible gift to be used to find solutions to health problems in developing countries, a contribution could be made to the Gates Foundation to support its Global Health programs.[27] Or, if an individual or corporation wanted to support education of children in Africa or the Middle East, a charitable gift could be made to CNEWA with a statement of desire that the gift be used for that purpose. In these circumstances, the individual or corporation would be entitled to an income tax deduction and not have any continuing responsibility or any administration or supervision burdens.[28]

If limited, continuing involvement is desired, however, an individual or corporation could make an irrevocable charitable contribution to a donor advised fund while contractually retaining the right to advise or recommend investments and grants to other eligible charities, but without a legal right to control the investment and grant decisions. For example, an individual could contribute money to a donor advised fund and then recommend that the gift be invested in certain ways and periodically used as grants to one or more foreign charities (often limited by donor advised funds to those foreign charities which have a Section 501(c)(3) determination letter from the IRS).[29] Similarly, a charitable gift could be made to a domestic public charity known as a "friends of" organization that supports a specific foreign charity such as the American Friends of the Louvre that helps the Louvre art museum in Paris.[30]

Finally, there is the possibility that the client would like to establish its own charitable organization rather than donate to an existing one. This newly-formed organization would, in turn, make charitable contributions to foreign charities.[31] Some reasons why one may choose to form a charitable organization rather than donate to an existing one relate to greater control, family considerations and estate planning aspects.

With regard to greater control, the distinctive nature of giving by millennials and younger generations is noteworthy: they seek to engage and track results.[32] Accordingly, in the coming years, more philanthropy may take the form of creating a charitable organization rather than donating to an existing one. With regard to family planning, forming a charitable organization provides a vehicle for a family to work together across generations in promoting shared values and to create a unifying family legacy. Philanthropy also may be viewed as an important part of family governance and wealth planning, creating an opportunity for children to make decisions together, which may assist them in working together in managing inherited wealth. Finally, as to estate planning aspects, the foundation can serve as the final receptacle of estate assets resulting in "zeroing out" the potential federal estate tax since there is no percentage limitation on the size of the estate tax deduction.

If the decision is made to form a charitable organization, a complex set of rules must be followed in order to assure the tax deduction for donors and also to protect the tax-exempt status of the organization itself and, with respect to private foundations, to avoid the application of certain excise taxes that generally apply when the organization is not operating for the "public benefit" as that concept is defined under the tax law. Although many of these excise taxes do not apply to public charities, and

some do not apply to *operating* private foundations, it is considered a best practice for all charitable organizations to comply with these requirements. A full discussion of these provisions is outside of the scope of these materials, but it is important to note that they generally involve excise taxes to guard against using a private foundation improperly. For example, (1) for making excessively risky investments or holding excessive interests in businesses, (2) using the private foundation as vehicle to earn investment income tax-free, (3) engaging in improper transactions with related parties such as paying salaries or making loans to family members for their personal benefit in manner not permitted by the tax law, (4) making grants for improper purposes or without pre-approval by the IRS where required, (5) paying excessive executive compensation, or (6) failing to make a sufficient amount of qualifying distributions thereby accumulating income and assets rather than using them for the exempt purposes for which the foundation was formed.[33]

Corporate Foundations

Larger corporations tend to establish private foundations through which to make charitable gifts. There are several advantages in doing so, both from a tax and philanthropy perspective. A corporation's gift to its private foundation is tax deductible, and the corporation may give more significant gifts in years in which the corporation is more profitable and smaller gifts in years in which it is less profitable. This has the effect of reducing taxable income in more profitable years while also building a reserve for charitable gifts in the future, which facilitates the corporation in consistently carrying out its charitable objectives over time, even in lean years. Having a foundation also provides a sound vehicle for a corporation to commit to a structured plan of giving with a clear mission and to build long-term strategic partnerships, which helps to make a stronger charitable impact and strengthen the corporation's relationship with its community. International giving may be especially appealing to corporations, particularly those operating outside of the United States, because often the gift can help more beneficiaries in foreign countries.[34]

Supporting Charitable Activities Abroad

Forming a U.S. charitable organization to support organizations or activities outside of the United States may be appealing to a client. A *domestic* charitable organization provides the opportunity for individual and corporate donors to receive federal income tax deductions and generally helps fundraising as the organization gains legitimacy because it is subject to U.S. tax laws, federal and state reporting obligations, and review by the IRS. In order to support charitable activities abroad, a private foundation must follow all the rules applicable to domestic private foundations as indicated above. Additionally, there are other requirements where grants are made to foreign organizations to ensure compliance with counter-terrorism and anti-corruption laws.

In order for a charitable organization to make a grant to a foreign charity that does not have a Section 501(c)(3) determination letter issued by the IRS, the threshold question is whether the grant should be made pursuant to an "equivalency determination letter" or by exercising "expenditure responsibility."[35]

An equivalency determination letter is an opinion letter generally prepared by a qualified U.S. tax attorney or accountant that, in effect, performs the same due diligence as the IRS would when a domestic charity applies for tax-exempt status.[36] This letter is prepared in accordance with Revenue Procedure 2017-53 and involves the review and analysis of multiple issues, such as the foreign law applicable to the charity in its home country, the foreign charity's governance documents and internal policies, the foreign charity's activities, the foreign charity's financial statements and the foreign charity's officers and directors relating to anti-terrorism, discussed below. "Expenditure responsibility" refers to a specific type of due diligence in tracking the use of the grant funds made to the foreign charity, the requirements of which are set forth in detail in Section 4945(h) and the related Regulations.[37] This generally involves a pre-grant inquiry, a grant application and agreement, regular reports of the use of funds, grant funds maintained in a segregated account, and the requirement that the grant is terminated and all amounts returned if the funds are used improperly.[38]

The question becomes: Which is better? Expenditure responsibility or equivalency determination letter? The answer is -- it depends. If a U.S. charitable organization desires to make grants to multiple foreign charities, as determined from time to time, then expenditure responsibility may be a more efficient option because the U.S. charity will expend its resources as and when needed when the grants are made. However, if the U.S. charitable organization seeks to make grants to only one or two foreign charities over a long period of time, then an equivalency determination letter may be the better option because the upfront investment in time reviewing the operations of the foreign charity and the contours of the foreign law may save time and costs in the long run and also will streamline grant distributions. In the latter case, the U.S. charitable organization must be careful it is not merely serving as a conduit by simply funneling money to the foreign charity. If so, the grants made to the foreign charity would violate one or more of the various rules set forth above and could subject the U.S. charitable organization to excise taxes or loss of tax-exempt status.[39]

When the U.S. charitable organization makes a grant to the foreign charity described in Section 501(c)(3), withholding on that grant may be required unless the organization receives an IRS Form W-8EXP, "Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding and Reporting," properly completed and provided to the charitable organization *before* the grant distribution is made to the foreign charity or all of the funds made to the foreign charity are used or applied outside of the United States.[40] This requires a certification that the foreign charity is a public charity as officially determined by the IRS in a currently valid determination letter or attaches to the form an opinion from U.S. counsel concluding that the foreign charity is *described in* Section 501(c)(3). If the opinion of U.S. counsel provides the classification to be a public charity, then an affidavit must also be attached setting forth sufficient facts for the IRS to determine public charity classification is appropriate.[41] Without IRS Form W-8EXP and proper compliance, there may be a 30% withholding tax imposed on the amount of the grant. Therefore, compliance in this area is extremely important.

Further, after the U.S. charitable organization is formed, it may receive contributions from U.S. and foreign persons. If a foreign person makes a contribution, the U.S. charitable organization is not required to file IRS Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts."[42] However, if the gift from the foreign person is in excess of $5,000, the gift

and the identity of the donor would be reported in the organization's annual tax return, IRS Form 990 PF, "Return of a Private Foundation" ("Form 990 PF") on Schedule B, "Schedule of Contributors."

U.S. Counter-Terrorism and Anti-Corruption Aspects of Charitable Giving

In the years following 9/11 in the United States, and in part in response to Executive Order 13224, the Treasury Department issued additional regulations and guidance that apply to U.S. organizations providing funds to foreign recipients, including substantial penalties that can result if a person violates these counter-terrorism laws. Further, it released the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities,[43] which discusses best practices such as governance and financial accountability and transparency. Grants being made to foreign charities must comply with the Office of Foreign Asset Control (OFAC) regulations. This compliance must be demonstrated as part of the organization's application to the IRS obtain classification as a private foundation or public charity (Form 1023), where the application indicates grants will be made outside of the United States.[44] Further, the Form 990 PF specifically asks if the private foundation has an interest in or a signature or other authority over a bank, securities, or other financial account in a foreign country, and if the aggregate amount of the foregoing exceeds $10,000 at any time during the calendar year,[45] the foundation is required file a Report of Foreign Bank and Financial Accounts (FBAR).

U.S. Compliance and Recordkeeping

Compliance and recordkeeping are required as a matter of state law as well as the federal tax law. The applicable Florida statutes for a not for profit corporation are found in Chapter 617, Corporations Not for Profit.[46] Additionally, in Florida as well as in other states, a charitable organization that seeks to solicit donations from the general public must register with the appropriate state authority. In Florida, this is the Florida Department of Agriculture and Consumer Affairs.[47] The IRS has issued compliance guides that explain requirements relating to maintaining good accounting records, tracking donations and expenditures, and other matters.[48] These guides should be reviewed and followed.

Conclusion

The U.S. tax law encourages global charitable giving by allowing charitable organizations to be exempt from taxation and, in addition, allowing the charitable gifts to be deductible for all federal tax purposes … income, gift and estate taxation … even when all of the charitable purposes of the gift will be accomplished outside of the United States. However, the Code and Regulations in this area are extremely complex and must be strictly followed. Further, there must be full compliance with all applicable non-tax federal laws and state laws.

Impact Investing

In the context of private foundations, program-related investments ("PRIs") and mission-related investments ("MRIs") are two different impact investing tools that can be used by foundations to further their missions.

Introduction to PRIs

- PRIs are a powerful and catalytic tool for foundations to achieve their charitable goals.
- PRIs are defined in Section 4944 of the Internal Revenue Code (the "Code") as an exception to the jeopardizing investment rules.
- PRIs can be an important source of capital for innovative strategies that take a market-based approach to solving problems.
- PRIs typically take the form of a below market loan or equity investment.
- PRIs count towards a foundation's 5% payout requirement in the year the PRI is made.
- PRIs are excepted from the Excess Business Holding rules (Code Section 4943); Unrelated Business Income Tax (UBIT); and the Jeopardizing Investment rules (Code Section 4944).
- PRIs are investments that satisfy each of the following:
    - The primary purpose is to accomplish one or more of the foundation's exempt purposes;
    - No significant purpose is the production of income or appreciation of property; and
    - No purpose is influencing legislation or taking part in political campaigns.
- Note that Code Section 4945 imposes an excise tax on a private foundation if it makes a taxable expenditure. A taxable expenditure is an amount paid or incurred for the purpose of:
    - Lobbying
    - Influencing an election or carrying on a voter registration drive
    - Grants* to individuals, except under certain limited circumstances

  - Grants* to organizations, other than public charities, unless the foundation exercises expenditure responsibility
  - Any purpose other than an exempt-purpose under the Code
  - **NOTE: A PRI is considered a grant for these purposes. (MRIs are not subject to these rules.)

Introduction to MRIs

- Broadly defined as a financial investment that also further an organization's mission.
- There is no legal definition of an MRI and no legal requirements to qualify for, or prohibitions resulting from, MRI status.
- An MRI is not a charitable activity.
- Because an MRI is a commercial investment, it must be made prudently and satisfy the same investment standards under state and federal law as other investments.
- MRIs do not count toward meeting a foundation's annual distribution requirement and are not excluded from the foundation's assets on which its 5 percent distribution requirement is calculated.
- Because an MRI is a commercial investment, it must be made prudently and satisfy the same investment standards under state and federal law as other investments.
- MRIs do not count toward meeting a foundation's annual distribution requirement and are not excluded from the foundation's assets on which its 5 percent distribution requirement is calculated.

Public Benefit Corporations

Introduction

Some businesses may decide that they wish to do more to further social causes then make contributions to charitable organizations; rather, they want the very purpose of their organization to further a public benefit while still having a profit motive. Enter: public benefit corporations. Public benefit corporations, also known as “PBCs” or “benefit corporations,” are a relatively new form of entity. In 2010, Maryland was the first state to pass legislation allowing for the creation of PBCs.[49] Since that time, thirty-nine additional states have passed PBC legislation[50] and several of the remaining states have at least contemplated passing such legislation.[51] But there remains confusion as to what PBCs are and, just as importantly, what they are not. It is most helpful to think of PBCs as a subset of for-profit corporations. PBCs are corporations that have a public benefit purpose; they are not non-profit corporations. This type of entity allows a corporation to further some public benefit while also generating profit that can be distributed to its shareholders.

Rationale for PBCs

The legal justification for PBCs is often attributed to the corporate convention of shareholder wealth maximization or shareholder primacy.[52] Under this concept, the board of directors for a for-profit corporation must manage the business solely for the benefit of its shareholders. Advocates for PBC legislation argued that benefit corporations were needed to allow for-profit corporations to pursue both their social mission and corporate profits without the fear of director liability for straying from a shareholder wealth maximization norm. However, there is an argument that PBCs are not needed as the business judgment rule affords wide latitude to the board of directors in determining how to run a corporation and the articles of incorporation of a particular corporation may define its purpose. Regardless, the fact that, in some states, the chambers of commerce pushed for the passage of PBC legislation indicates that the need for PBC legislation may not be strictly legal. Many see the benefit of PBCs as more of a marketing or branding opportunity. Being a PBC may help attract customers as younger generations cite a desire to spend their resources on companies who they see are doing good in the world.[53] Likewise, being a PBC may help attract employees. Lastly, being a PBC could also help secure socially-conscious investors.[54]

Creation of a PBC

The formation of a PBC is fairly easy. Like other for-profit corporations, it requires the filing of articles of incorporation with the secretary of state of the state where it desires to be incorporated. Each state may have slightly different filing requirements so it is best to confirm prior to filing but, generally, the articles of incorporation of a PBC must include a statement that the company is a public benefit corporation and must recite its public benefit purpose. Additionally, most states require that the name of the corporation include “PBC”, “public benefit corporation” or “benefit corporation” instead of “Inc.” or “incorporated.”[55]

An existing corporation may convert to a public benefit corporation by amending its articles of incorporation to include the requirements outlined above. The conversion threshold can vary by state but, generally, all states require a greater threshold of shareholder consent than what is required to make other amendments to the articles of incorporation. In Kentucky, for example, the threshold is 90% of the outstanding shares of each class of stock, even nonvoting stock.[56]

Once the entity is formed as, or converts to, a PBC, the directors are statutorily required to manage the PBC in a manner that "balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its articles of incorporation."[57]

The Public Benefit

What is a public benefit? Each state may define it a little differently but in Kentucky it is defined as a "positive effect or reduction of negative effects on one (1) or more categories of persons, entities, communities, or interests other than stockholders in their capacity as stockholders."[58] In Maryland, a distinction is made between a "general public benefit," which all PBCs must have as its purpose, and a "specific public benefit," which may be identified in the PBC's articles of incorporation.[59] A general public benefit is defined as "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."[60] The definition of a specific public benefit sets forth a non-exhaustive list of potential specific public benefits, which include the following:

1. Providing individuals or communities with beneficial products or services;
2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
3. Preserving the environment;
4. Improving human health;
5. Promoting the arts, sciences, or advancement of knowledge;
6. Increasing the flow of capital to entities with a public benefit purpose; or
7. The accomplishment of any other particular benefit of society or the environment.[61]

These broad definitions allow for endless possibilities for a PBC's public benefit.

Reporting Obligations

All states that have passed PBC legislation have some requirement of a periodic report to shareholders related to the public benefit. The statutorily-required content may vary from state to state but, generally, the report is required annually and must describe the ways in which the PBC pursued its

stated public benefit, whether that public benefit was created and any obstacles faced in obtaining the public benefit.[62] Several PBC states require that the board's assessment of the corporation's overall social and environmental performance of the PBC is measured against a "third-party" standard, although they may not require the assessment to be performed, audited or certified by a third party.[63] Third-party certification is discussed below.

The PBC states differ on whether or not this annual report must be made public. Some PBC states require these annual reports to be posted online or, if the PBC does not have a website, provided at no charge to anyone who requests a copy.[64] In other PBC states, the report is not required to be made available publicly unless the PBC's articles of incorporation or bylaws so require.[65]

Difference between a PBC and a B Corp

A common misconception is that PBCs are "B corps," and those terms are often used interchangeably. However, a PBC is not the same as a B corp. A B corp is an entity that has been certified by B Labs, a nonprofit entity whose mission is to transform the global economy to benefit all people, communities and the planet.[66] B Labs has designed an intensive certification program for entities that wish to be designated as a "B corp" and requires them to meet high standards of social and environmental performance, accountability, and transparency.[67] For corporations formed in states that have passed PBC legislation, B Labs requires the corporation to be a PBC in order to achieve certification. Some examples of B corps include Bombas, Allbirds, Athleta, Patagonia, Toms, and Ben & Jerry's.

Conclusion

Public benefit corporations are a relatively new form of entity permitted in most states. Forming, or converting to, a public benefit corporation is one way that a corporation can signal its commitment to a purpose greater than its bottom line.

Environmental, Social and Governance ("ESG")[68]

Introduction to ESG

Sustainability has become a defining megatrend affecting businesses and charitable organizations worldwide.

Around the world, more and more organizations are influenced by sustainability criteria.

Comprehensive Environmental, Social and Governance (ESG) goals are used to implement and monitor sustainability.

ESG Stands For?

The term ESG is vast, complicated, and difficult to define and fulfill. It includes:

- "E" (Environmental) includes topics like greenhouse gas emissions, climate change, biodiversity, soil contamination, water contamination, air pollution, and the protection of marine resources.
- "S" (Social) includes living wages, child labor and human rights in the supply chain, diversity and inclusion, data security and privacy, social practices, and product labelling.
- "G" (Governance) includes anticorruption, ethics, anticompetitive behavior, responsible tax records, whistleblower procedures.

Organizations will place different emphasis on each of these topics.

There Are Challenges in Implementing ESG

Currently there appears to be no consensus about what is the gold standard for ESG. It is often in the eye of the beholder.

Organizations often struggle to quantify their findings and related impacts or benefits to the organization.

Be careful not to engage in greenwashing or socialwashing.

What Are Indicators of Good ESG?

Mature ESG organizations can make a strong link between their sustainability strategy and their ESG.

Organizations should be focused on value creation opportunities (i.e., "upsides") rather than just mitigation of ESG risks. This means top level persons of an organization need to focus on a culture of

ESG goals, as opposed to a "fragmented" model where "E", "S", and "G" topics are handled by separate teams.

Benchmarking: Where an organization's Board of Directors may be drawn from businesses where "if you can't measure it, maybe we don't need it" is the motto, ESG provides a way for the organization stand apart from others.

Resources for Developing an ESG Program

International Affiliates

https://www.cowellclarke.com.au/news/insights/environmental-social-governance-esg-in-franchising-how-esg-obligations-can-be-contractually-enforced-in-franchising-contracts

https://www.cornwalls.com.au/is-failure-to-have-and-monitor-a-substantive-environmental-social-and-governance-esg-policy-a-breach-of-a-directors-duty-of-care/

https://www.charlesrussellspeechlys.com/en/insights/expert-insights/litigation--dispute-resolution/2023/2023-spotlight-on-esg-in-the-product-and-supply-sectors/

https://www.charlesrussellspeechlys.com/en/insights/expert-insights/corporate/2021/esg---do-your-priorities-need-to-change-with-a-changing-landscape/

https://www.charlesrussellspeechlys.com/en/insights/expert-insights/corporate/2023/how-are-sustainability-and-esg-shaping-the-role-of-in-house-counsel/

https://www.blg.com/en/insights/2023/06/what-does-the-s-stand-for-understanding-the-social-pillar-of-esg

https://www.blg.com/en/insights/2021/09/private-equity-the-rise-of-esg-considerations

US Affiliates

https://wlj.com/esg-dei-and-your-current-and-future-employees/

https://wlj.com/will-your-bank-make-the-list-hb1307-discourages-values-based-business-decisions/

https://www.kmklaw.com/corporate-securities/sec-opens-floodgates-for-esg-proposals

https://www.kmklaw.com/newsroom-publications-1469

https://www.mcneeslaw.com/what-are-esg-bonds-and-green-bonds-and-should-you-consider-issuing-them/

https://www.mcneeslaw.com/esg-meets-ai/

Corporate Transparency Act

Introduction

All businesses, whether or not organized for a public benefit or charitable purposes, should be aware of the Corporate Transparency Act (the "CTA"). The CTA, which was enacted January 1, 2021 as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021, became effective on January 1, 2024. The stated purpose of the CTA is to curb illicit financing by requiring information about the individuals who own or control businesses.[69] While the CTA may be well-intentioned, it requires a complicated analysis of which entities need to report under the CTA and, if they are required to report, which individuals need to be reported by that entity. According to a survey of small business owners by the National Small Business Association conducted in November of 2023 (less than two months before the CTA became effective), almost half of the companies surveyed had not heard of the CTA and another quarter were unsure if their business would be required to report under the CTA.[70] Additionally, the survey found that compliance with the law will run businesses approximately $8,000 on average in the first year alone.[71] The willful failure to comply with the CTA could result in hefty fines and prison. The complexity of the CTA, coupled with the fact that (1) it is not widely known among business and (2) there are stiff penalties for willful noncompliance, is sure to lead to a lot of confusion and consternation for businesses across the country.

CTA Requirements

The CTA requires certain companies to submit certain beneficial owner information of the applicable company to the Financial Crimes Enforcement Network ("FinCEN"). The below sections provide an overview of the various portions of the CTA.

What entities are subject to the CTA?

The CTA applies to "reporting companies" as defined in the CTA. A reporting company means a "corporation, limited liability company, or other similar entity that is created by the filing of a document with the secretary of state or a similar office under the law of a State or Indian Tribe; or formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe," subject to certain exceptions which mainly address companies which would otherwise be required to provide beneficial ownership information in a different context.[72] Essentially all businesses that are formed by the filing of a document with the secretary of state (which would exclude sole proprietorships, general partnerships and certain trusts) will be subject to the CTA unless one of the limited exemptions applies. These exemptions include:

1. *Securities reporting issuers*: issuers registered under section 12 of the Securities Exchange Act of 1934;

2. *Governmental authorities*: entities that exercise governmental authority and were established under the laws of the United States or a state;

3. *Banks and Depository institution holding companies*: certain banks and bank holding companies;

4. *Broker or dealer in securities*: certain broker/dealers;

5. *Investment companies or investment advisers*: investment companies or investment advisers registered with the SEC;

6. *Accounting firms*: public accounting firms;

7. *Tax-exempt entities*: certain entities that are tax exempt;

8. *Large operating companies*: entities that employ more than 20 employees on a full-time basis in the United States, filed income tax returns demonstrating more than $5,000,000 in domestic gross receipts or sales, and have an operating presence at a physical office within the United States; and

9. *Inactive entities*: entities that have been in existence since January 1, 2020, are not engaged in active business, are not owned (directly or indirectly) by a foreign person, have not experienced a change in ownership or sent or received funds greater than $1,000 in the preceding 12-month period, and that do not otherwise hold any kind of assets.[73]

The above list is not exhaustive, as the CTA exempts from the definition of "reporting company" twenty-three (23) specific types of entities.[74] However, the list above provides certain examples showing the intent of the CTA. Entities of the types listed above are typically highly regulated and subject to various reporting requirements, many of which require the entity to disclose beneficial ownership information much like that required by the CTA to the United States government through existing regulation. Many small businesses, however, will not fall into any of the categories of exceptions.

What information must be included in the report?

Reporting Company Information

An initial report of a reporting company will need to include the following information:

- the full legal name of the reporting company,

- any trade name or "doing business as" name (i.e., assumed name) of the reporting company,

- the street address of the principal place of business (for a reporting company with a principal place of business in the U.S.) or the primary location where business is conducted (in all other cases),
- the jurisdiction of formation of the reporting company, and
- the tax identification number of the reporting company.

A reporting company must also report certain identifying information regarding its beneficial owners. This, in most circumstances, includes the beneficial owners' full legal name, date of birth, residential address, a unique identifying number such as a passport or driver's license number, and a copy of that passport or driver's license.[75] Notably, the CTA requires the same information to be reported with regards to each applicant of a reporting company formed on or after January 1, 2024 (a "company applicant").[76] A reporting company that was created or registered before January 1, 2024 is required to report that fact, but is not required to report information respecting any company applicant.[77]

Company Applicant Information

A company applicant is an individual who files an application to form an entity or registers or files an application to register an entity to do business in the United States by filing a document with the secretary of state or similar office or who is primarily responsible for directing or controlling the filing of the relevant document. The company applicant must report (1) the full legal name of the individual, (2) the date of birth of the individual, and (3) a complete current address.[78] FinCEN provides an example of who would be considered a company applicant:

> *Example: Individual A is creating a company. Individual A prepares the necessary documents to create the company and directs individual B to file the documents with the relevant state or Tribal office. Individual B then directly files the documents that create the company.*
>
> Individuals A and B are both company applicants—Individual B directly filed the documents, and Individual A was primarily responsible for directing or controlling the filing. Individual B could, for example, be Individual A's spouse, business partner, attorney, or accountant; in all cases, Individuals A and B are both company applicants in this scenario.[79]

It is common for lawyers to assist clients in filing articles of organization to form an entity. Given the definition and FinCEN's guidance, the lawyer or paralegal who is submitting the articles of incorporation or articles of organization with the secretary of state will qualify as a company applicant and will thus be subject to providing the information required by the CTA.[80] However, FinCEN's guidance indicates that attorneys qualifying as applicants can report their business address instead of their residential address, but otherwise must provide the same information as provided for beneficial owners.[81]

Beneficial Ownership Information

The CTA's definition of a beneficial owner is "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercises substantial control over the entity or owns or controls not less than 25% of the ownership interests of the entity," subject to certain exceptions.[82] The exceptions include:

1. minor children, if the information of the parent or guardian is reported;
2. individuals acting as nominee, intermediary, custodian, or agent on behalf of another;
3. individuals acting solely as an employee of an entity whose control over or economic benefits from such entity is derived solely from such individual's employment status;
4. individuals whose only interest in the entity is through a right of inheritance; or
5. creditors of an entity, unless the creditor otherwise meets the ownership or control requirements.[83]

An individual may directly or indirectly own or control an ownership interest of a reporting company through:

- joint ownership with one or more other persons of an undivided interest in such ownership interest;
- through another individual acting as a nominee, intermediary, custodian or agent on behalf of such individual;
- with regard to a trust or similar arrangement that holds such ownership interest:
    - as a trustee of the trust or other individual with the authority to dispose of trust assets,
    - as a beneficiary who:
        - is the sole permissible recipient of income and principal from the trust, or
        - has the right to demand a distribution of or withdraw substantially all of the assets from the trust;
    - as a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or

- through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.

The rule provides detail on how total ownership interest is calculated, setting out separate standards respecting individuals, companies that issue capital or profit interest, and corporations that issue shares of stock. The calculations are as follows: (1) for individuals, ownership interest is calculated at the present time, and any options or similar interests of the individual are treated as exercised; (2) for reporting companies that issue capital stock or profit interest, an individual's ownership interests are the individual's capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests of the entity; (3) for corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage is the greater of: (a) the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote, or (b) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and (4) if the facts and circumstances do not permit the calculation described in either (2) or (3) to be performed with reasonable certainty, any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company will be deemed to own or control 25 percent or more of the ownership interests of the reporting company.

The rule outlines various factors for determining when an individual "exercises substantial control", as described below:

1. The individual serves as a senior officer. This term is defined to mean "any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." However, FinCEN excluded the roles of corporate secretary and treasurer from the definition of "senior officer", as those roles "tend to entail ministerial functions with little control of the company."[84]

2. The individual has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body).

3. The individual directs, determines, or has substantial influence over important decisions made by the reporting company. The scope of such "important decisions" includes decisions regarding: (1) the nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company; (2) the reorganization, dissolution, or merger of the reporting company; (3) major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company; (4) the selection or termination of business lines or ventures, or geographic focus, of the reporting company; (5) compensation schemes and incentive programs for senior officers; (6) the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; (7) amendments of

any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.

4. The individual has <u>any other form of substantial control</u> over the reporting company.

The rule also addresses the direct or indirect exercise of substantial control. An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through: (1) board representation; (2) ownership or control of a majority of the voting power or voting rights of the reporting company; (3) rights associated with any financing arrangement or interest in a company; (4) control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (5) arrangement or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or (6) any other contract, arrangement, understanding, relationship, or otherwise.

Therefore, though the threshold of ownership may be simple to determine in many circumstances, the question of whether an individual "exercises substantial control" over a reporting company may be more difficult. According to FinCEN's discussion of the rule, FinCEN expects that a reporting company "will always identify at least one beneficial owner under the 'substantial control' component, even if all other individuals are subject to an exclusion or fail to satisfy the 'ownership interests' component."[85]

Given that the CTA requires reporting companies to file updated reports when there are changes of "beneficial owners," which includes these senior officers, practitioners should counsel their clients on these requirements and remind the reporting company of its obligation to timely report any updated information with FinCEN. Though updates to the senior officers may usually occur around an annual meeting, it is possible for changes to take place at any time throughout the year.

When must reports be filed?

Timing of the initial report depends on when the entity was formed. If the entity was formed before January 1, 2024, the reporting company must file its initial report by the end of 2024 (not later than January 1, 2025). Entities formed on or after January 1, 2024 must file the initial report upon formation (within 90 calendar days of the earlier of the date on which it receives actual notice that formation has become effective or the date on which the applicable filing office provides public notice of the formation).[86]

Reporting companies must also submit updated reports for changes in beneficial ownership that occur after initial formation. Updated and corrected reports must be filed within 30 days after the change or upon learning of the need for correction. There is no good faith or other standard regarding the requirement to update or correct reports, as the CTA "places the reporting responsibility on reporting companies, and this responsibility includes the obligation to report accurately...[and] to update information when it changes."[87] However, FinCEN does not expect an updated report upon company termination or dissolution.[88] There is no fee charged for submitting the initial report or updated/corrected reports to FinCEN.

Where does the reported information go?

FinCEN will maintain the beneficial ownership information submitted by reporting companies. Any such information must be treated as confidential. However, there are certain exceptions to this included in the CTA. The four exceptions to the confidential information of the beneficial ownership information are as follows:

1. a request from a federal agency engaged in national security, intelligence, or law enforcement activity for use in furtherance of such activity or from a state, local, or tribal law enforcement agency if a court authorizes such law enforcement agency to seek the information in a criminal or civil investigation;

2. a request from a federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country that meets certain criteria;

3. a request from a financial institution which is subject to due diligence requirements, so long as the reporting company consents to such disclosure;

4. a request made by a federal functional regulatory subject to certain requirements.[89]

The CTA requires such information to be protected by the establishment and maintenance of a secure system in which the beneficial ownership information is stored, along with other parameters and requirements intended to safeguard such information.

What are the penalties for noncompliance?

The CTA imposes penalties upon persons who willfully provide false or fraudulent beneficial ownership information or who willfully fail to report complete or updated beneficial ownership information to FinCEN as required by the CTA. The penalties are both of civil and criminal nature, consisting of a civil penalty of up to $500 for each day that the violation continues, up to a maximum of $10,000, and up to two years imprisonment. The rule states that a person is considered to have failed to report complete or updated beneficial ownership information if the person causes the failure or is a senior officer of the entity at the time of the failure. There are exceptions to these penalties, including if the person had reason to believe that the report submitted was accurate and voluntarily and promptly submits a report correcting the information. With respect to compliance, FinCEN indicates that the agency "intends to prioritize education and outreach to ensure that all reporting companies and individuals are aware of and on notice regarding their reporting obligations."[90] It also appears that FinCEN will possibly add examples of reporting violations in future guidance issued by the agency.

Conclusion

The CTA imposes strict reporting requirements upon entities that qualify as reporting companies. Lawyers who assist clients with forming business entities are likely to be impacted the most, as they will need to advise clients of the reporting requirements and assist with identifying who

may qualify as a beneficial owner subject to providing information, a process which may be time consuming depending on the complexity of the company's structure.

In addition, lawyers may be in a position where they must provide identifying information if they are considered company applicants. Finally, law firms themselves may be considered a reporting company and subject to file a report with FinCEN, whether formed before or after January 1, 2024. Lawyers should be prepared to advise clients on the upcoming effectiveness of the reporting requirements and of the ongoing need to provide updates to FinCEN in the event of any change of beneficial ownership, which includes senior officers and others exercising substantial control over a reporting company.

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[1] *See* https://givingusa.org/wp-content/uploads/2022/06/GivingUSA2022_Infographic.pdf (last visited December 13, 2023).

[2] These materials are written for educational purposes only and is not intended to provide tax or other legal advice. The laws discussed herein are complex, and an appropriate course of action is dependent upon all applicable laws, rules and regulations as well as the pertinent facts and circumstances. Any person interested in forming a charitable organization should consult with his or her legal and tax advisors.

[3] References in this article to "U.S. tax law" or "for U.S. tax purposes" encompass the complete federal tax law represented by the Internal Revenue Code, Treasury Regulations and IRS administrative rulings, and case law. All Section references in this article are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

[4] *See* 26 U.S.C. § 501(c)(3).

[5] Despite its state law status as a not for profit corporation, federal tax exempt status can only be achieved by filing with the IRS Form 1023, "Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code" ("Form 1023"), or IRS Form 1023-EZ, "Streamlined Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code," and receiving a favorable determination from the Internal Revenue Service based upon the application.

[6] *See* 26 U.S.C. §§ 509(a)(1) and 170(b)(1) (including additional sections referenced therein).

[7] *See* 26 U.S.C. § 170(b)(1)(a)(vi); Treas. Reg.§ 1.170A-9(f).

[8] *See* 26 U.S.C. § 509(a)(3).

[9] A private foundation is further classified as either "operating" under Sections 4942(j)(3) or not an operating foundation under that provision. In general, an operating foundation is one that spends at least 85% of the lesser of its adjusted net income or minimum investment return directly for the active conduct for its charitable activities, rather than indirectly by making grants to other organizations. A foundation that provides scholarships or grants often will not be considered an operating foundation unless it maintains significant involvement in the active programs in support of which such grants or scholarships were made or awarded.

[10] References in this article to a "partnership" include all types of partnerships and limited liability companies permitted under applicable state law that are classified as a partnership for federal tax purposes under Treas. Reg. § 301.7701-2, *et seq.*

[11] References in this article to a "corporation" includes corporations and other entities created under applicable state law treated as associations taxable as corporations for federal tax purposes under Subchapter C of the Internal Revenue Code commonly referred to as "C corporations." The term does not include corporations taxable under Subchapter S commonly referred to as "S corporations."

[12] Generally, contributions to public charities and private foundations may be deducted up to 50 percent of the donor's "contribution base," that is, the adjusted gross income computed without regard to net operating loss carrybacks. However, a 30% limitation often applies to nonoperating private foundations, unless they make qualifying distributions of all contributions received in a taxable year shortly after the close of that taxable year or otherwise satisfy the requirements of the Code. *See* 26 U.S.C. § 170(b). The Tax Exempt Organization Search website uses deductibility status codes to indicate these limitations (https://apps.irs.gov/app/eos/ last visited December 19, 2023).
[13] This generally requires that the foreign charity would be considered a charitable organization if it were organized and operated in the United States and that the U.S. donor has income sourced in the country in which the foreign charity is located. *See* Convention Between United States and Mexico for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Income Taxes, Including Protocol, Mex.-U.S., Sept. 18, 1992, at Article 22; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Can.-U.S., September 26, 1980, at Article XXI; and Convention Between the Government of The United States of America and The Government of The State of Israel with Respect to Taxes on Income, Israel-U.S., December 30, 1994, at Article 15-A.
[14] *See* 26 U.S.C. § 702(a)(4). Also refer to IRS Form 1065, "U.S. Return of Partnership Income," which, *inter alia*, requires on Schedule K-1 precise identification of the type of partner. Observe also that line 13 of the tax return and Schedule K-1 report charitable contributions as a separately stated item and not as a deduction in arriving to taxable income of the partnership.
[15] *See* 26 U.S.C. § 1366(a) flush language referencing 26 U.S.C. § 702(a)(4). Also refer to IRS Form 1120S, "U.S. Income Tax Return for an S corporation," which, *inter alia*, requires on Schedule K and K-1 for each shareholder on line 12a that charitable contributions be separately stated and not treated as a deduction in arriving to taxable income of the corporation.
[16] In general, a complex trust is one that can accumulate income, distribute out of corpus and make charitable gifts under 26 U.S.C. § 642(c). See 26 U.S.C. §§ 661, 662 and Treas. Reg. § 1.651(a)-1(b) ("Trusts subject to section 661 are referred to as 'complex' trusts."). A simple trust under Section 651 cannot make a charitable contribution.
[17] *See* 26 U.S.C. § 642(c).
[18] *See* 26 U.S.C. § 642(c) for income tax deductibility and Section 2055 for estate tax deductibility.
[19] *See* 26 U.S.C. § 642(c).
[20] *See* 26 U.S.C. § 2522(a) and Treas. Reg. § 25.2522(a)-1.
[21] See 26 U.S.C. § 2522(b) and Treas. Reg. § 25.2522(b)-1.
[22] The charitable gift should not be subject to FIRPTA withholding tax under Section 897 as not constituting a sale or other disposition, except to the extent of any indebtedness on the property being transferred therewith. However, the Internal Revenue Service may disagree as indicated in the IRS website. If the real property is contributed to a U.S. corporation, partnership or limited liability company, and the ownership interest of the entity is transferred as a charitable gift by the nonresident alien, this should not constitute a transaction subject to gift tax. *See* 26 U.S.C. § 2501(a)(2).
[23] *See* 26 U.S.C. § 2055; *see also, e.g.,* PLR 201702004 (Jan. 13, 2017).
[24] These sections of the Code are similar to 26 U.S.C. § 501(c)(3).
[25] Foreign law and practice are particularly relevant when determining whether a foreign charity meets the U.S. requirements of an organization described in Sections 501(c)(3), 2055, 2106 or 2522. For example, the laws and practices of Colombia and governmental supervision align positively with those of the United States in fundamental areas and therefore increase the likelihood that, under appropriate circumstances, a charitable gift to a not for profit Colombian entity (*entidad sin ánimo de lucro*) would be deductible for U.S. tax purposes.
[26] *See, e.g.,* Rev. Rul. 63-252, 1963-2 CB 101.
[27] *See* https://www.gatesfoundation.org/Who-We-Are/General-Information/Leadership/Global-Health (last visited December 19, 2023).
[28] However, see footnote 39 and related text regarding the adverse consequences of a U.S. charity acting as a conduit of the foreign charity.
[29] *See* 26 U.S.C. §§ 4966 and 4967. Typically donor advised funds (DAFs) are created by public charities, community foundations, and large financial institutions where they serve as the sponsoring organization. In the role of sponsoring organization, the DAF establishes an account to which the donor makes an irrevocable charitable contribution, manages the investments of the account and effectuates charitable gifts to eligible charities from the account normally consistent with the donor's desires but without legal obligation to do so. Many DAFs will not permit a grant to a foreign charity unless the

foreign charity has a Section 501(c)(3) determination letter from the IRS because the DAF does not want to have the obligation to carry out expenditure responsibility with respect the foreign charity grantee.

[30] *See* Rev. Rul. 63-252, 1963-2 CB 101 (reviewing the deductibility of contributions by individuals to a charity organized in the United States which thereafter transmits some or all of its funds to a foreign charitable organization under five fact patterns); Rev. Rul. 66-79, 1966-1 CB 48 (Contributions to a domestic charity described in section 170(c)(2) of the Internal Revenue Code of 1954 which are solicited for a specific project of a foreign charitable organization are deductible under section 170 of the Code where the domestic charity has reviewed and approved the project as being in furtherance of its own exempt purposes and has control and discretion as to the use of the contributions.); *see also Bilingual Montessori School of Paris v. Comm'r.*, 75 TC 485 (1980) (No requirement that a U.S. 501(c)(3) must have a "substantial operational nexus" in the United States.).

[31] *See, e.g.,* Rev. Rul. 74-229, 1974-2 CB 142 (U.S. organization will qualify as a public charity (as a supporting organization) where it is organized and operated exclusively to support a foreign organization that would qualify as a U.S. public charity (not as a supporting organization) if it were organized and operated in the United States.)

[32]*See*https://www.forbes.com/sites/theyec/2018/08/15/how-millennials-are-changing-philanthropy/#f70982e7c686; https://givingcompass.org/article/how-millennials-are-changing-philanthropy/; and https://www.thebalancesmb.com/how-millennials-have-changed-charitable-giving-2501900 (all last visited December 19, 2023).

[33] For excise taxes applicable to private foundations, *see* Sections 4940 (Excise Tax Based on Investment Income), 4941 (Taxes on Self-Dealing), 4942 (Taxes on the Failure to Distribute Income, only applies to non-operating private foundations), 4943 (Taxes on Excess Business Holdings), 4944 (Taxes on Investments which Jeopardize Charitable Purpose) and 4945 (Taxes on Taxable Expenditures). For excise taxes applicable to both private foundations and public charities, *see* Sections 4960 (Tax on excess tax-exempt organization executive compensation), Section 4958 (Taxes on excess benefit transactions) and 511-512 (Imposition of Tax on Unrelated Business Income of Charitable, Etc., Organizations and Unrelated Business Taxable Income).

[34] *See* "Giving Tuesday: How to donate to a charity with a purpose and intention," National Public Radio transcript, https://www.npr.org/2023/11/27/1199885880/giving-tuesday-how-to-donate-to-a-charity-with-purpose-and-intention#:~:text=Use%20your%20household%20budget%20to%20decide%20how%20much%20to%20give&text=But%20Scally%20recommends%20a%20more,your%20groceries%2C%22%20he%20says (last visited December 13, 2023) ("GiveWell has found that donations go further overseas, so they focus on charities working internationally.").

[35] The requirements of obtaining an equivalency determination letter or exercising expenditure responsibility apply to grantmaking by private foundations, but do not apply to grantmaking by public charities. Nevertheless, it is advisable for a public charity to follow the same rules that apply to private foundations in this area in order to demonstrate clear compliance with the U.S. tax laws.

[36] Rev. Proc. 2017-53, 2017-40 IRB 263, at Section 3.02 provides a definition of tax practitioners qualified to prepare an equivalency determination letter: "A “qualified tax practitioner” is an attorney, certified public accountant (CPA), or enrolled agent who is subject to the standards of practice before the IRS set forth in Circular 230 (31 CFR Part 10)." Further, Section 3.05 sets forth general requirements imposed on qualified tax practitioners in preparing the letter.

[37] *See* 26 U.S.C. § 4945(h) (expenditure responsibility); *see also* 26 U.S.C. § 4942 for special rules that may apply to grants made by U.S. private foundations to foreign charities that would be considered non-operating private foundations or controlled by the U.S. private foundation in order for the U.S. private foundation to satisfy its requirement of making minimum qualifying distributions. In the case that a grant to an organization is not subject to expenditure responsibility under Section 4945, the grant must still meet the standards of Rev. Rul. 68-489, 1968-2 CB 210.

[38] Form 1023 references these requirements in Part VIII, Lines 13 – 14.

[39] *See* Rev. Rul. 63-252, 1963-2 CB 101 for examples regarding the manner in which grants from U.S. charitable organizations to foreign charities are properly and improperly made in order for the donor of funds to the U.S. charitable organization to be eligible for an income tax deduction.

[40] *See generally* Treas. Reg. §§ 1.1441-9 and 1.863-1(d)(2)(iii). Withholding may be required to the extent the amounts received by the foreign organization are includible under Section 512 in computing the organization's unrelated business taxable income.

[41] *See* Treas. Reg. § 1.1441-9(b)(2).

[42] *See* 26 U.S.C. § 6039F(a).

[43] Available at https://www.treasury.gov/press-center/press-releases/Documents/0929%20finalrevised.pdf (last visited December 19, 2023).
[44] *See, e.g.,* IRS Form 1023 at Part VIII, Lines 12 and 14.
[45] *See* Form 990 PF at Part VII-A, Line 16 and instructions.
[46] This is referred to as the "Florida Not For Profit Corporation Act." This statute is generally based upon the for profit corporate statute, and includes specific requirements for not for profit corporations (such as the requirement of a minimum of three directors).
[47] *See* Ch. 496, Fla. Stat. (2023); Fla. Admin. Code R. 5J-7.004.
[48] For the guideline for private foundations, see https://www.irs.gov/pub/irs-pdf/p4221pf.pdf; for the guideline for public charities, see https://www.irs.gov/pub/irs-pdf/p4221pc.pdf (both last visited December 19, 2023).
[49] *See* https://www.csrwire.com/press_releases/29332-maryland-first-state-in-union-to-pass-benefit-corporation-legislation (last visited January 1, 2024).
[50] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii (referred to as "Sustainable Business Corporations"), Idaho, Illinois, Indiana, Kentucky, Louisianna, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgina, Washington (referred to as "Social Benefit Corporations"), West Virginia and Wisconsin.
[51] Mississippi, North Carolina and North Dakota.
[52] *See* https://www.law.cornell.edu/wex/public_benefit_corporation#:~:text=Unlike%20traditional%20C%20Corporations%20whose,advancement%20of%20their%20intended%20public (last visited January 3, 2024).
[53] See https://www.forbes.com/sites/forbesbusinesscouncil/2022/05/12/the-business-case-for-mission-based-why-you-should-become-a-public-benefit-corporation/?sh=65c673a32141 (last visited January 3, 2024).
[54] *See* Michal B. Dorff, James Hicks, Steven Davidoff Solomon, The Future of Fancy? An Empirical Study of Public Benefit Corporations, ECGI Working Paper Series in Law, Working Paper No. 495/2020 (February 2020).
[55] *See* KRS 271B.2-020(4).
[56] *See* KRS 271B.11-025.
[57] KRS 271B.8-300(8).
[58] KRS 271B.1-400(22).
[59] *See* MD Corp & Assn Code 5-6C-06.
[60] MD Corp & Assn Code 5-6C-01.
[61] *Id*.
[62] *See* KRS 271B.16-210.
[63] *See* CO Code 7-101-597.
[64] *See e.g.* Alabama (Code of Ala. § 10A-2A-17.05), Arizona (A.R.S. § 10-2442) and Arkansas (A.C.A. § 4-36-401).
[65] See KRS 271B.16-210.
[66] *See* https://www.bcorporation.net/en-us/movement/about-b-lab/ (last visited on January 2, 2014).
[67] *Id*.
[68] This portion of the outline about ESG is in part drawn from the 2023 ALFAI ICS presentation on "Evolution of M&A Due Diligence-New Issues in a New World," presented by Jasmine Kingsley (Hudl), Daniel Rosenberg (Charles Russel Speechlys), Brett Cowell (Cowell Clarke), Igancio López-Balcells (Buigas, now Bufete Barrilero), and Richard Latta (Stafford Rosenbaum LLP).
[69] *See* https://www.fincen.gov/news/news-releases/us-beneficial-ownership-information-registry-now-accepting-reports#:~:text=The%20bipartisan%20Corporate%20Transparency%20Act,secure%2C%20and%20free%20of%20charge. (last visited January 3, 2024).
[70] *See* https://www.nsba.biz/surveys (last visited January 3, 2024). *See also* https://www.inc.com/melissa-angell/complying-with-corporate-transparency-act-could-cost-thousands-many-small-businesses-dont-even-know-what-it-is.html (last visited January 3, 2024).
[71] *See* https://www.nsba.biz/surveys (last visited January 3, 2024).

[72] 31 USC 5336.
[73] *Id*.
[74] 87 FR 59539.
[75] 31 USC 5336(b).
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *See* https://www.fincen.gov/boi-faqs (last visited January 3, 2024).
[80] *See* https://www.fincen.gov/boi-faqs#F_4 (last visited January 3, 2024).
[81] *Id*.
[82] 31 USC 5336(a)(3).
[83] *Id*.
[84] 87 FR 59526.
[85] 87 FR 59525.
[86] *See* https://www.fincen.gov/boi-faqs#B_2 (last visited January 3, 2024).
[87] 87 FR 59513.
[88] 87 FR 59514.
[89] 88 FR 88732.
[90] 87 FR 59546.