

CREATING A UNIVERSITY AFFILIATE/NONGOVERNMENTAL ORGANIZATION FOR GLOBAL/INTERNATIONAL IN-COUNTRY OPERATIONS

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Why do U.S. institutions create a separate entity to support overseas operation?

- **Legal reasons**
 - U.S. and foreign law considerations
- **Practical/business reasons**
 - Not feasible or efficient to operate without separate entity
- **Social/cultural reasons**
 - Separate entity may have more credibility overseas
- **Diplomacy**
 - Certain privileges/exemptions not available to U.S. entities

Foreign law may prohibit the following activities absent registration of a local entity:

- Hiring local employees
- Opening a foreign bank account
- Enrolling subjects into a clinical trial
- Owning land and other real property
- Leasing office space
- Conducting a degree-granting educational program
- Registering a vehicle

Types of Projects that lend themselves to in-country operation

- Long term project – 5 years or greater
- Type of project, e.g. Technical Assistance, Systems Strengthening, Post-Graduate Education
- 50% or greater of project conducted in-country
- Large dollar award
- Absence of Partner Organization

Reasons for Creating Separate Entity

- Minimize Institution's Liability
- Country Laws Require Registration
- Flexibility to Operate
- Credibility for Institution
- Sponsor Requirement
- Need to lease space, hire people, open bank account, procurement of goods and services

Risk Assessment

- Institution's Mission
- Unfunded obligations
- Tax liability to foreign jurisdiction
- Inflation/currency exchange issues
- Safety and Security
- Insurance
- Export Control

Public Versus Private Institution Considerations

- Private – direct registration of University
- Public – State supported – may require the creation of not-for-profit entity

Operating models

- **Many different types of operating models, and not all require formation of a separate legal entity:**
 - Direct registration of U.S. institution to do business in foreign country
 - Branch office
 - Representative/liaison office
 - Memorandum of Understanding with foreign government

Decision to create a separate entity

- **Many different types of separate entities:**
 - U.S. special purpose entity (e.g., separate non-profit subsidiary of university)
 - Foreign company (e.g., “company limited by guarantee”)
 - Foreign NGO
 - Foreign foundation
 - Foreign association
 - Foreign trust

Considerations Related to Management/Control of the Separate Entity

- Relationship to parent institution
- Ownership and management
- Tax exempt status (U.S. and host country)
- Capitalization requirements
- Organizational taxes
- Auditing and reporting

Decided on Model– Next Steps

- Seek Legal Advice
 - University Counsel
 - U.S. Attorneys
 - Local in-country

How to Identify In-Country Counsel

- U.S. Attorneys
- U.S. Embassy in-country
- Colleagues
- On-Line Rankings

Request for Proposal for Law Firms

- Scope of Work to be Performed
- Legal Services Required – Registration, Type of Entity
- Firm's Experience Working with U.S. Institutions
- Professional Staff Bio's and
- Identification of Staff Assigned to Project
- Cost – Partners, Associates, Paralegals – melded rates?
- References
- Billing
- Communication

Management of Project

- Institutional Policies – Foreign Setting
- Financial Accounting Systems/Software
- SOP Manuals – General and Human Resources
- Accounting Firms – Office Set-up/Payroll and Audit
- Signature Authority/Delegation
- Selection of Bank

Management of Project (cont.)

- Employee Contracts
- Lease Space
- Payment Mechanism – Field Advances
- Tax Issues
 - Local nationals
 - Expatriates
 - Third Country Nationals

Implications for Federally Sponsored Research

- How does the prime grantee (e.g., U.S. institution) treat its separate entity for federal research purposes?
- What forms of arrangement exist?
 - 1. Separate entity and U.S. institution are one and the same
 - 2. Separate entity is a subawardee
 - 3. Separate entity is the grantee
- How do you treat separate entity's costs (e.g., F&A)?
- What federal guidance exists on this topic?

What mistakes do institutions make?

- Failure to address registration/separate entity at beginning on project (e.g., trying to fly under radar)
- Failure to take foreign law into account
- Failure to conduct due diligence about implications of separate entity
- Failure to consider implications for federally sponsored research
- Failure to maintain control over separate entity