

## IRS Regulations and Treasury Guidelines for International Giving

Host: Ted Hart

Guest: Jane Peebles | Karlin & Peebles

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Now, welcome the host of CAF America's Caring and Funding Podcast, Ted Hart.

**Ted Hart:** Welcome to this latest edition of the Caring and Funding Podcast. Thank you for joining us today. My guest today is Jane Peebles, who is senior partner of Karlin & Peebles in Los Angeles, California. Her primary areas of practice are US and international estate and charitable planning, where she represents high-net-worth families, entrepreneurs, philanthropists and nonprofit. She's a frequent speaker and author on a variety of domestic and international estate and charitable planning topics. Jane has taught an extensive course in cross-border philanthropy for the certified specialist in planned giving program for 16 years. I think from the perspective of CAF America more importantly, Jane you are an author in our new book, *Cross-Border Giving: A Legal and Practical Guide*. Chapter nine is your chapter, *Responsible Giving: The International Grantmakers Perspective*. Welcome here to the Caring and Funding Podcast, Jane Peebles.

It would help, Jane, if I turned on your microphone. There you are, Jane, you are now with us. Sorry about that.

**Jane Peebles:** [chuckles] Thank you, Ted. Thank you for having me.

**Ted Hart:** It's great to have you here. Now you started off your chapter, you got right to the heart of the matter; the penalties for violating US anti-terrorist financing rules are severe. I think that sort of leads right into, why is responsible giving an important topic to include in our new desk reference for international grantmakers?

**Jane Peebles:** Sure. I think working with international grantmakers over many years, one thing that I've focused on a lot is their ability to be sure that the money they are giving is actually being used for charitable purposes. We know that in the United States, charities have special advantages. They don't pay taxes, and that's because our government wants to encourage charitable activity.

Charities here have to follow a lot of rules, and if they break those rules, they can get fined, they can lose their tax exemption. That's not the case everywhere in the world. While we have a culture of accountability and transparency, other countries' laws may be very different from ours. It can be much harder for a nonprofit that's making grants to fund programs outside the United States to keep track of those dollars and be responsible and be able to show, "Yes, these dollars were used for what we wanted them used for."

**Ted Hart:** This isn't just as simple as writing a check and sending money to a charity. This is serious business.

**Jane:** This is very serious business. There's no question that our government, the IRS, also realize that charities making grants for use abroad just face a much higher risk that funds might be diverted to support terrorism, or [chuckles] in some other way that would violate our laws.

**Ted:** Violate our laws or just simply divert the funds to non-charitable purposes, which would violate the principle of the underlying tax receipt.

**Jane:** Absolutely. You're absolutely right.

**Ted:** When you're talking about a risk-filled world, and trying to provide a pathway for well-meaning Americans who truly want to be philanthropic, who want to be charitable, want to make important things happen around the world, while nobody likes regulations, and people bristle against a variety of different laws, these are guideposts that make certain that what is intended actually takes place.

**Jane:** Absolutely. That is their purpose.

**Ted:** Could you summarize some of the laws and give us some background on what are we talking about here, because there's a lot of moving pieces here. Anti-money laundering, anti-terrorist financing, protecting the underlying tax receipt for the contribution, making sure that the intent is followed. What are some of the laws that are pertinent to this topic?

**Jane:** Sure. Well, in the anti- terrorism arena, we have two things that happened very shortly after the September 11, 2001 attacks on the world Trade Center, when our country was very focused, obviously, on terrorism. About a week after that attack, then president George W. Bush, actually this was not a law, but he issued an executive order, that prohibits anyone in the United States from providing any funds or goods or services to so-called listed persons. I'll explain that in a moment. That prohibition also extended to providing humanitarian donations of food, of water that's safe for drinking, things we might not normally think of. What happened with that order was a list was formed, called the Specially Designated Nationals list. Basically, any organization or any person that our government believes is terrorist or engages in terrorist act, is supposed to be on that list. If a charity ever gets on that list, it immediately loses [chuckles] its tax exemption, of course.

That list has become quite important. The United Nations has a list, the European Union has a list. One of the rules for charities granting abroad, is particularly if you're granting into a politically unstable or corrupt or a war-torn area, you need to be checking everyone you can think of against one of these lists. If you know the board of directors of the foreign charity you want to support, take every name, run it through the list. That's sort of standard procedure now for anyone granting into other than a western country that has laws a lot like ours, and even then it's a good idea to do. There's some problems with it though.

**Ted:** Well, it's not a defense to inadvertently say, "I didn't know."

**Jane:** It is not a defense to say, "I didn't know." Exactly. If you want to talk about what the consequences can be of unintentionally, unwillingly having some dollars [chuckles] get diverted to terrorism, it's quite alarming. The government can freeze the nonprofit assets immediately. No warning, suddenly, access or inaccessible. People may remember, if you were around then, right after 9/11, several Muslim charities had assets seized here in the US. Obviously, there's no warning, or before funds could be moved before our government seized them.

**Ted:** Before funds could be moved, right.

Jane: Another possible result, again, this is for unintentionally funding or supporting terrorism, is retroactive loss of the charities tax exempt status. That can be absolutely devastating. These are very serious penalties, even when you're not intending to help charities.

**Ted:** Right. Of course, in a charity, not following those guidelines or those laws, potentially the donors of that organization can also have their tax returns audited.

**Jane:** Yes, they can. Absolutely.

**Ted:** What other laws are we talking about in this regard? Because again, we're not trying to, on this podcast, scare people. We're trying to let them know how serious the government is about providing appropriate guidepost and laws to make certain that charitable giving to charitable purposes around the world is in fact charitable giving to charitable purposes around the world.

**Jane:** Exactly. If I may, Ted, before I touch on the next important law, I just wanted to let our audience know how our government defines listed persons or helping terrorists. The definition we have where these penalties might kick in is, if a non-profit engages in any transactions at all involving anyone who's on this list, the listed persons, or the property of a listed person, or unnamed person to assist or sponsor or provide financial support to a listed person, humanitarian aid included, and this one's most difficult, anyone who is "otherwise associated with listed persons." That's a fuzzy-- who's associated? How do you know that? That's part of the structure of these rules and guidelines, and why someone might unwittingly fund terrorists when they didn't mean to.

I would say the second important law is the Patriot Act. We had laws against supporting terrorists before 9/11, but about a month after 9/11, we really beefed up the prohibition against funding terrorists. What the Patriot Act does, is it prohibits intentionally and knowingly supporting terrorists. Very different bar, you really have to have meant to do it.

What can happen to your non-profit if you do? Well, pretty bad. Directors of the non-profit could serve 15 years or more in prison. If the terrorist or terrorist organization actually uses the funds to commit a terrorist act, up to life in prison. This is the directors of the charity. There are also very steep fines that the government imposes. If there were a civil suit, say, for wrongful death or something of that sort, damages are tripled in these situations. Our government is saying "We are really serious about this. Very, very serious."

**Ted:** Very serious about this. One thing that people I don't think necessarily remember or know, is that the USA Patriot Act that you're speaking of now that was signed into law October of 2001, actually stands for uniting and strengthening America by providing appropriate tools required to intercept and obstruct Terrorism Act of 2001. Patriot, while it has other meanings, actually is an acronym for what the Act is meant to do.

**Jane:** Yes, it is. It's quite a mouthful. Exactly why we call it the Patriot Act. [laughs]

**Ted:** Which is why we call it the Patriot Act. Right, exactly. I didn't mean to interrupt, I want to make sure that we continue listing the pertinent laws for this discussion.

**Jane:** We also have anti-money laundering laws. If you've got large funds moving across borders, again, highest risk in politically unstable or war-torn areas, in highly corrupt jurisdictions, you do need to watch out for whether money laundering is occurring. It puts an onus on the US charity that made that grant to track where those dollars are going, and perhaps, where they're coming from as well.

**Ted:** To understand, what is the potential or known relationship between the donor and that charity? Is there undue influence that that donor might be able to exert after the grant is made?

**Jane:** You can certainly say if we learn, and you're supposed to, if we learn that funds have been diverted from the charitable purpose that we meant to support, then that's it. We don't give you any more money.

**Ted:** That's right.

**Jane:** You can try to trace it, but it's very frequently impossible when the money has been used, so you can't recoup it.

**Ted:** That's right.

**Jane:** I would say the fourth one that I get concerned about is the Foreign Corrupt Practices Act. Can't give bribes to other governments, can't receive bribes. I've actually had situations where that has come into play unexpectedly for clients. It can really be a minefield.

**Ted:** Absolutely, without strong procedures in place and compliance with the law.

**Jane:** Exactly, yes. We'll talk about what some of those procedures are, I'm sure.

Exactly. Well, Jane, and moving beyond those guideposts, shortly after that, in 2002, the Treasury Department released the Anti-terrorist Financing Guidelines, Voluntary Best Practices for US based charities. Those were updated in 2006. At the time that those were updated, the IRS said that the guidelines urged charities to take a proactive risk-based approach to protecting against illicit abuse, and are intended to be applied by those charities vulnerable to such abuse in a manner that is commensurate with the risks they face, and the resources with which they work. It also goes on to say that these are in fact guidelines and do not supersede any existing statutes or regulations, many of which you just mentioned.

**Jane:** All right, and nor does following the guidelines automatically put you in a safe harbor situation where you're not going to get in trouble.

**Ted:** You're simply following the guidelines, but following the guidelines as a best practice while it does not necessarily create, as you said, a safe harbor where you can be certain, it is important to document the processes that you used, and certainly, being knowledgeable of and implementing the guidelines is a good way to become compliant.

**Jane:** Absolutely. Some of these things are just common sense. Do your research into this foreign organization you're thinking of funding. Find out as much about it as you can. Does it have charitable status in the country where it is? Who are members of the board? Run them through that specially designated nationals list. What are its finances? Does it have a track record of successful charitable projects? All kinds of questions to be asked before the US charity decides to make a grant to that foreign charity, and then to put into place procedures that help track where the dollars go.

The foreign charity must report back annually on the use of the funds, must give an accounting for where each dollar went. If the US charity is really diligent in-- if a reports late, it means chasing it and getting that report back. Even with my clients, I say just set up the forms, provide them to that foreign grant recipient, have a tickler, start reminding them when reports back are going to be due well in advance. Those are some pretty basic things to do. Some of them can be quite challenging. Trying to run names through the specially designated nationals list, you can run into variations in spelling, you can run into transliteration issues, you can get false positives. If you're running through a foreign person whose name is the equivalent of John Smith, how useful is that? I think it's important to do it.

**Ted:** You're going to have a lot of false positives, but it is important to do. As I think you said earlier, it's important that when you have procedures, and you're clear with the grantee what those procedures are, is to make certain that if they are not in compliance, that you no longer continue to fund them.

**Jane:** Absolutely. There should be--

**Ted:** Go ahead.

**Jane:** I was going to say there should always be a written grant agreement with the grant recipient that spells out we're going to require annual accountings, annual narratives on the progress of the project. Now, we generally ask the grantee to make a statement that they are not engaged in terrorism or terrorist activities and will not use any of the funds for those kinds of things.

**Ted:** Exactly, those are things that should be in a well-written grant agreements with the grantee. Jane, we're going to take a quick break, and when we come back, we're going to jump forward to 2007 and another attempt on the part of treasury to provide additional help to international grantmakers, and we will be right back.

**Jane:** Excellent.

**Announcer:** Remember, our podcasts and archives are always available 24 hours a day at [cafamerica.org](http://cafamerica.org) on iTunes, or just say, "Alexa, play C-A-F America on tune in". Now, back to the caring and funding podcast and our host, Ted Hart.

**Ted:** We are back here with Jane Peebles. Our topic today is Responsible Giving. Jane has written the chapter in CAF America's new book, *Cross-Border Giving: A Legal and Practical Guide*. Responsible Giving is her topic, and *The International Grantmaker's Perspective* is the subtitle to that.

What is the risk matrix for charitable sector that treasury provided in 2007?

**Jane:** Right. The risk matrix, Ted, was intended to help US nonprofits that are making grants for use abroad adopt very pragmatic, effective risk-based approaches to that grantmaking. The matrix is meant as a tool to assess risk, and it is intended to be extremely practical. I can give you some of the things that it covers.

When you see this thing physically, it's got here's a low-risk situation, this is medium, this is high risk. Something as can the grantee provide references from trusted sources. If they can, great. If they're from sources that nobody even knows who they are, not so great. If there are no references, you probably don't want to make that grant.

Does the grant recipient have a history of legitimate charitable activities? Well, if they're new or recently formed, maybe not. Towards leadership, or do any red flags go up when you run those people through the lists. Even two does the grantee have explicit charitable purposes, and does it disclose how its funds are used with specificity?

The things that we take for granted here where we can go on the internet and look at any US charities tax returns, those safeguards are not in place when we're making grants and outside of the country, of course.

**Ted:** Right. This is one of the complexities of international grantmaking that brings so many international grantmakers to CAF America, because there are so many moving pieces and so many things that need to be well-documented that you need to have the expertise of what questions to ask and when. I think to your point, on the risk matrix, is to know what you're seeing when you're seeing it because as we've learned so many times here at CAF America, is that when things don't necessarily look right, it doesn't necessarily mean that the charity is fraudulent, or that the grant can't be made, but it does increase the risk, more questions need to be asked, more answers need to be received. In many parts of the world, charitable work is being done and not necessarily in the same framework that we would necessarily recognize in the United States. That doesn't mean that it's not charitable or that it's not good work being done, but around the world, the charitable structure that we have and it's so well-known in here in the United States does not exist in every part of the world.

It's having the expertise to be able to know what you're seeing, know the difference between what is charitable, what's defensible, and what is not.

**Jane:** Absolutely. Also to know what information you should be seeking about the grantee and the jurisdiction where they're operating.

**Ted:** Exactly. In that risk matrix that provides some good, again, I always think of them as guideposts roadmaps that can direct you towards understanding, are you in a low-risk environment, are you in a high-risk environment, and making a grant and each of those environments is not exactly the same.

**Jane:** That's exactly true. I think one of the most dramatic items in the matrix is whether in the country where that charity is working, are there reliable banking systems and other regulated financial channels for moving money around? You may find that the grantee doesn't use regulated financial channels. It's something as simple as I had a client who wanted to get funds into Venezuela recently, but the way I had that we might be able to do it actually was from charities aid foundation who had that knowledge already.

**Ted:** Right. Exactly. That's why we're here. CAF America has 27 years of experience in grantmaking to 110 countries. We pride ourselves on the difficult, we pride ourselves on maintaining regulatory compliance, but seeing what's often missed, and our topic today, of course, we're focusing on the laws, the regulations, and the roadmaps that are provided by the US government, the IRS, treasury, and other departments. As we try to help people understand, that is often only part of the story.

The other part of the story, which is not the topic of today's conversation, are the regulations of the host country of that charity. Many times, there are roadblocks to getting money into the country. As you just pointed out, once you've identified the charity which may be doing very, very good work, they may be working in poor or difficult conditions, they may not have the same legal structure, they may not have simple and easily understandable, the financial statements, or even as you just pointed out, a banking system within which they can account for the funds.

**Jane:** Absolutely. I think that's why the government-- Yes?

**Ted:** Yes, no, go ahead.

**Jane:** I was just going to say, I think that's why the government has issued so much guidance for US grantmakers who are funding projects abroad. We recognize that it is much harder and riskier than doing grants within the US.

**Ted:** Well, it's an interesting hand in glove approach because when you mentioned regulations and things like that, oftentimes people bristle and say, "Well, there's always room for less regulations". I think in this instance, that the regulations, while there are many and the penalties, while there are many, are focused on making sure the funds that are meant to be charitable are, in fact, going to charitable means and are not being diverted either accidentally or on purpose for in a direction that is not charitable. To make certain that there is accountability for the use of those funds, because there are a lot of needs around the world, and having funds diverted, it potentially makes it even more difficult for worthy charities to attract the funding that they so desperately need.

**Jane:** Absolutely. Ted, I think, if anything, we're going to see more and more guidance and perhaps, additional laws enacted because these random terrorist attacks that are now spreading all around the world, keep this very much front of mind for grantmakers in this arena. It's just getting harder to do well and properly, and so all resources are very much appreciated. Again, I've turned to charities aid foundation several times, and I've been practicing in this area 35 years. [laughs] You need all resources, and CAF has been a wonderful resource, Ted.

**Ted:** Well, thank you, Jane. As have you and your years of experience, make your endorsement of CAF America all the more valuable to us because you are one of those people who are so now knowledgeable, you know the difference. Once again, Jane Peebles, thank you for being our guest here today on the Caring and Funding Podcast.

**Jane:** Thank you again for having me, Ted.

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