

Grantmaking in Mexico

By Vivian L. Cavalieri, Caplin & Drysdale, Chartered

U.S. private foundations are making more grants abroad. Foundations are becoming increasingly familiar with—and less intimidated by—the tax rules that must be followed when making grants to foreign organizations, and the IRS has approved streamlined procedures that facilitate making such grants. The U.S.-Mexico income tax treaty makes it especially easy to make grants to Mexican charities.

Foreign Grantmaking in General

For many years, U.S. private foundations—particularly smaller ones—tended to shy away from foreign grantmaking. Foundations were often discouraged by the need to determine whether a particular foreign organization is the equivalent of a U.S. tax-exempt “public charity.” Without such a determination, the grantor foundation must exercise “expenditure responsibility” with respect to the grant, a process that many foundations prefer to avoid.

Several years ago, the IRS simplified the procedure for making the necessary determination. The rigors of expenditure responsibility can now be avoided where a grantor foundation determines—on the basis of information furnished by the prospective grantee in a “currently qualified affidavit”—that the prospective grantee is equivalent to a U.S. tax-exempt public charity. The affidavit need not be completed for the prospective grantor; a foundation may rely upon information furnished to another prospective grantor, provided that the information is current.

The U.S.-Mexico Tax Treaty

Grantmaking to Mexican charities was further simplified with the adoption of the U.S.-Mexico income tax treaty and the accompanying protocol (together, the “Treaty”). The effect of the Treaty is to treat any organization classified as a public charity by the Mexican authorities under Mexican law

as a public charity described in section 509(a)(1) or (a)(2) of the U.S. Internal Revenue Code. Mexico is the only foreign country to which the U.S. currently accords such deference.

For these purposes, an organization classified as a public charity in Mexico is one that has been granted special authorization as an organization described in Article 70-B of the Mexican income tax law (“Article 70-B”) by the Mexican Ministry of Finance and Public Credit (Secretaría de Hacienda y Crédito Público). It is not enough that an organization meet the criteria set forth in Article 70-B. What is needed is special authorization from the Ministry (which reflects the fact that the organization has met not only the criteria set forth in Article 70-B but some additional requirements as well). Thus, although 2,500 organizations currently enjoy Article 70-B status (by virtue of meeting the criteria set forth in Article 70-B), to date *only about 70* of those have requested and received the requisite special authorization.

The Treaty has had less of an effect upon foundation grantmaking than was anticipated—at least at the outset. This was due both to limited awareness of the Treaty’s existence among U.S. grantmaking foundations and to some delays in establishing administrative procedures under which Mexican organizations could qualify for Article 70-B special authorization.

This has now changed. U.S. foundations are becoming increasingly aware of the provisions of the Treaty. More importantly, more than 70 charities have now qualified for special authorization.

The requirements for special authorization and the names of those organizations that have obtained such authorization are published in the Official Gazette (Diario Oficial) at least

once a year. Once authorized, an organization remains so unless its authorization is revoked.

A current list may be obtained by contacting Consuelo Castro at the Mexican Center for Philanthropy (Centro Mexicano Para la Filantropia) at 011-525-256-3739, by writing to: Consuelo Castro, Mexican Center for Philanthropy, Mazatlán No. 96, Col. Condesa, 06140, México, D.F., or by its Internet address: cemefi@cemefi.org. Or you could contact Joyce Chandran, editor of *International Dateline* at 202/467-0386 or via e-mail at chanj@cof.org.

Foundation Options

A foundation considering making grants to Mexican charities thus has several viable options:

1. The foundation should ask a prospective grantee whether it has been granted the special Article 70-B authorization. If so, the foundation should obtain proof of the granting of such status (a copy of the list of authorized Article 70-B organizations that appears in the Official Gazette should suffice). The foundation should also obtain a signed statement from a principal officer of the prospective grantee that such status has not been revoked and that no such revocation is currently threatened.

If Article 70-B special authorization has been granted, the foundation may treat the prospective grantee as equivalent to a U.S. tax-exempt public charity—it need not exercise expenditure responsibility and may count the grant as a qualifying distribution in satisfaction of the foundation's minimum distribution requirement.

2. If the prospective grantee does not have Article 70-B special

authorization, the foundation may still treat the organization as a U.S. tax-exempt public charity on the basis of information provided in a currently qualified affidavit. Where such information indicates the prospective grantee is equivalent to a U.S. tax-exempt public charity, the foundation need not exercise expenditure responsibility and may count the grant as a qualifying distribution in satisfaction of its minimum distribution requirement.

Where a foundation determines that the prospective grantee is equivalent to a U.S. tax-exempt public charity—and, thus, would presumably meet the Article 70-B criteria—the foundation may wish to encourage the organization to apply for Article 70-B authorization in order to simplify future grantmaking to it by that foundation and by others as well.

Even if a foundation does not have proof of Article 70-B special authorization or a currently qualified affidavit indicating the prospective grantee is equivalent to a U.S. tax-exempt public charity, the foundation may still make the grant, but the foundation must exercise expenditure responsibility with respect to such grant.

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