

## CONSIDERATIONS IN ESTABLISHING FOREIGN OPERATIONS

This summary is intended to very briefly outline some of the considerations in establishing operations in foreign jurisdictions. The discussion is necessarily general as the types of foreign operations and their locations vary widely. With respect to many of the issues raised, the assistance of local legal counsel and accountants will be necessary, and Harvard's Office of the General Counsel ("OGC") should be consulted. The Office of the Provost, which has promulgated Guidelines on Establishing Remote Locations, should also be consulted.

1. CORPORATE/STRUCTURAL ISSUES. If a foreign project will involve the hiring of local employees, the purchase or rental of real estate, the establishment of local bank accounts, an in-country presence by Harvard personnel over an extended period of time, or other activities which might be deemed the doing of business within a foreign jurisdiction, the University may be required to register to do business in the jurisdiction. Depending on the nature and duration of the activities, registration as a branch or representative office of the University may be desirable; such registration generally involves the appointment of an agent for service of process, the filing of copies of corporate resolutions authorizing the establishment of the branch and appointing a local manager, and information regarding Harvard's charter, by-laws, directors, etc. In other situations, the creation of a subsidiary of the University, whether as a U.S. or foreign entity, may be advisable. The foreign project will implicate various filing, reporting, tax and other obligations, depending on the nature and structure of the project.

2. TAXATION. Harvard's U.S. exemption from income taxation, as a Section 501(c)(3) non-profit entity, does not shelter foreign revenues from taxation in the jurisdictions in which the revenues arise. It may be possible, in some cases, to pursue similar status as a non-profit in the foreign jurisdiction. Alternatively, an income tax treaty between the U.S. and the foreign country may eliminate tax liabilities, where the activities are not conducted through a permanent establishment in the foreign country or

where other treaty exclusions apply (such as provisions relating to royalties or to income from educational activities).

Foreign activities may also attract local sales or value-added taxes (“VAT”) or real property taxes. The exemptions accorded Harvard from the sales taxes of Massachusetts and several other states, and from local property taxes within the United States do not necessarily translate to foreign operations. Unless a separate exemption is available or can be obtained, the effect of VAT and other taxes on purchases of goods and services required for a foreign project can be significant.

3. EMPLOYMENT AND LABOR RULES. Engaging individuals as employees to provide services in foreign jurisdictions may require registration by Harvard, the withholding and remission of income and social welfare taxes, and adherence to local rules governing hours of employment, holidays, vacations, conditions of employment, severance, discipline, etc. It is often preferable to engage individuals as independent contractors or to have locally established entities do the hiring and reimburse them for the costs. Placing local individuals on the Harvard payroll in an attempt to provide Harvard benefits and to incorporate Harvard personnel policies often results in unintended administrative difficulties.

Various employment issues will arise when Harvard’s U.S. employees are “seconded” to a foreign project. Such individuals may find income earned by providing services in a foreign jurisdiction subjected to tax in that jurisdiction. In appropriate circumstances, the individuals may be able to exclude amounts of foreign earned income and a housing cost amount from U.S. income taxation (under Code Section 911); the Tax Services Office can provide assistance in electing this exclusion. Additional issues will involve the need for salary adjustments, housing allowances, moving expense reimbursements, travel allowances, etc. Often written employment agreements will be executed to spell out these additional details.

4. INSURANCE. The Insurance Office (Risk Management and Audit Services Department) should be advised of overseas travel or foreign assignments of Harvard employees. Consideration must be given to out-of-network health coverage, coverage for overseas medical travel expenses, and medical evacuation and war-risk travel insurance.

Additional issues surround coverage for project activities. The Insurance Office should be consulted to determine whether notification of insurers is required with respect to foreign activities, or additional coverage is necessary due to the nature of the project.

5. VISAS, WORK PERMITS AND CUSTOMS. Harvard employees may face various obstacles to travel and to work on foreign projects, including the need for visas, work permits, inoculations, etc. Additionally, customs rules and duties should be considered with respect to equipment that will be required for the project.

6. FINANCIAL MANAGEMENT. Foreign operations raise numerous financial management issues regarding the establishment of bank accounts, the making of foreign payments, financial reporting and recordkeeping, financial controls and audits, currency restrictions and translation gains and losses, etc. Harvard's Cash Management Department and the Office of Risk Management and Audit Services can provide assistance in these areas.

7. U.S. LAWS ON FOREIGN ACTIVITIES. U.S. regulatory restrictions on foreign activities include those under the Foreign Corrupt Practices Act, prohibiting certain payments to foreign government officials, the U.S. Export Administration Regulations, restricting the export of certain goods and technologies, the Foreign Assets Control Regulations, the U.S.A. Patriot Act and other anti-terrorist legislation and executive orders prohibiting various transactions with designated countries and individuals. The OGC should be consulted with any questions in these areas.

8. HUMAN SUBJECTS RESEARCH. Foreign projects that involve research with human subjects must comply with all relevant rules and regulations from the federal

Office for Human Research Protection (“OHRP”) as well as any internal University or School policies. In general terms, this means that any foreign institution that is acting as Harvard’s research partner or collaborator must have its own Institutional Review Board (“IRB”) and must obtain its own Federal Wide Assurance (“FWA”) from the U.S. government. No human subjects research may begin without valid FWAs in place and without approval from both the Harvard IRB and the foreign institution’s IRB. Differences in cultural norms and expectations can make compliance with the OHRP regulations difficult to navigate for the foreign entity’s IRB and, subsequently, for the Harvard IRB. The existence and impact of various local laws and regulations also should be investigated and considered, requiring the assistance of local legal counsel and possibly other experts. In addition, for the Harvard IRB to evaluate a foreign study’s informed consent and other documents, it may be necessary to hire a translator external to the project. Obtaining the appropriate advice thus will have cost implications for the project and/or the University. As the consequences of going forward with human subjects research that has not been adequately reviewed and approved may be serious, the principal investigator(s) will need to work very closely with the Harvard IRB and, if necessary, the OGC.

9. CHARITABLE GIVING. It is often desired that alumni or other benefactors from the foreign jurisdiction be able to contribute to the project. Generally, contributions by foreign individuals to Harvard for the benefit of the project will not be eligible for charitable deductions for income tax purposes in the foreign locale. If this is a significant concern, it may impact the decision regarding corporate structure discussed above; a local entity may be created and non-profit status sought within the foreign jurisdiction for purposes of charitable contribution deductions and relief from various taxes

10. TRAVEL ADVISORIES. The U.S. State Department advisories on travel to various locations should be consulted. Where travel warnings have been issued, the Dean

or other University official overseeing the project should be consulted. Emergency protocols, evacuation procedures, release forms, etc. should be addressed.

11. USE OF HARVARD NAME/INTELLECTUAL PROPERTY. The use of the Harvard names and insignias by the project should be discussed with the individuals having approval authority under the policies of the Provost's Office. The Office of Technology and Trademark Licensing can also provide assistance with registrations or filings necessary to protect intellectual property developed in connection with the project.

The preceding list is not exhaustive, but touches on many commonly encountered issues. Hopefully, the summary will be useful in attempting to navigate this complex area.