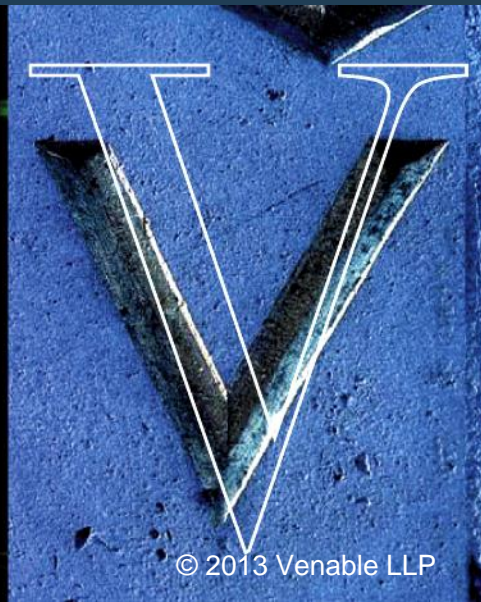
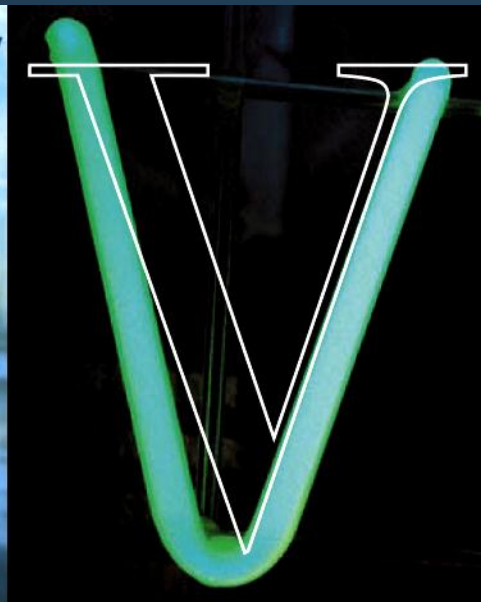
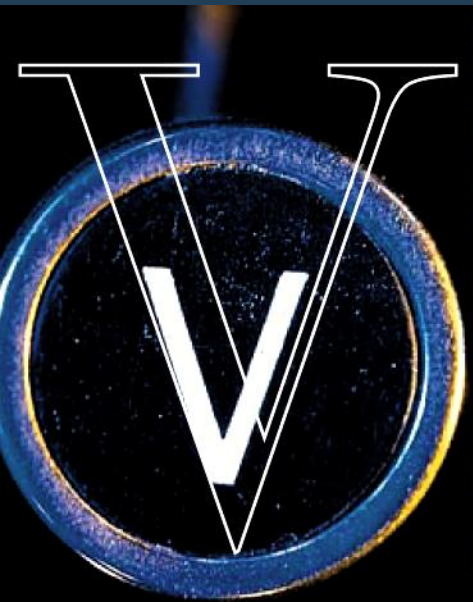


As Nonprofits Expand Their Global Reach, a Special Focus on Tax, Trademarks and the Foreign Corrupt Practices Act

Tuesday, May 14, 2013
12:30 p.m. – 2:00 p.m. EDT
Venable LLP
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:
Lindsay B. Meyer, Esq., Venable LLP
Andrew D. Price, Esq., Venable LLP
Charles K. Kolstad, Esq., Venable LLP



Upcoming Venable Nonprofit Legal Events

June 25, 2013 – [Employee Leaves of Absence and Other Employee Accommodations under the Law: What Every Nonprofit Needs to Know](#)

July 23, 2013 – Evaluating Your Nonprofit's Options under the Affordable Care Act: The Pros and Cons of Health Insurance Alternatives for Your Employees and Members (details coming soon)



Agenda

- Introduction
 - Jeffrey S. Tenenbaum, Esq., Moderator
- Trademark/Brand Strategy and Protection
 - Andrew D. Price, Esq.
- U.S. Foreign Corrupt Practices Act and Anti-Corruption
 - Lindsay B. Meyer, Esq.
- Cross-Border Tax Planning and Compliance
 - Charles K. Kolstad, Esq.



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Trademark/Brand Strategy and Protection

Getting to Brand Value



Threshold Brand Issues



Availability:

The “Bet the Nonprofit” Moment

- Launching key brands creates the moment
- Establishing a trademark is not like setting up a legal entity with a state
- The “likelihood of confusion” standard
 - Similarity of marks, goods/services, etc.
 - Low standard; compare with “beyond a reasonable doubt”
- The high cost of trademark litigation (\$775K)
 - Alternatives: move to new brand, pay licensing fees, buy the other side out
 - Risk of damages



Distinctiveness: The Hierarchy

- Fanciful: OXFAM
- Arbitrary: MENSA (“table” / “cafeteria”)
- Suggestive: RACE FOR THE CURE
- Descriptive: TENNIS INDUSTRY ASSOCIATION
- Generic: NONPROFIT; ASSOCIATION

Note: Terms that are “suggestive” in the U.S. are often considered “descriptive” outside the U.S.



Exclusivity: Don't Fall into the Joint-Brand Trap

- What happens when the split occurs?
 - A trademark is not divisible; not like other property
 - Cases are fact-specific, thus expensive
 - Factors:
 - What was the parties' intent?
 - Who used the mark first?
 - Who was responsible for quality?
 - What are consumers' perceptions?
 - Who owns the registration?



Exclusivity: Joint-Brand Takeaways

- Documentation is key
 - What does the affiliation agreement say?
 - What do the board minutes say?
- Applicant/registrant is key
 - Who owns the application(s)/registration(s)?
 - Some say the registry is “king”
 - Presumption of rights; first-to-file
- Moral: Own the brand outright
 - Fallback: Own the registration and plan for dissolution via written agreement



Brand Registration & Control



Registration: First to File/Use

- The problem of “first-to-file” countries
 - Compare with first-to-use/common-law countries
 - The high cost of being the second to file
 - “Trademark troll” extortion
 - Biggest problem countries: BRIC, Mexico



Registration: Nonprofit Nuances

- Descriptive names and acronyms
 - U.S.: Supplemental Register vs. Principal Register
 - Treatment in foreign countries
- Certification/accreditation marks (e.g., PG) vs.:
 - Testing/credentialing marks
 - Collective membership marks
- Modern goods/services:
 - Social media services
 - Apps
 - Downloadable content



Registration: The Chapter/Affiliate Problem

- “From Russia With Love”
 - Trademark registrations are the foundation of brand protection
 - How do you prove bad faith?
 - What does the charter agreement say?
 - What do the bylaws and policies say?



Control: The “Naked Licensing” Problem

- *Failure* to retain express contractual control over use of trademarks by others, including members;
- *Failure* to exercise actual quality control over use of the marks by others, including members; and
- *Failure* to appropriately delegate quality control to others, including members.



Control: Four Steps to Licensing

- (1) Treat marks used by members/chapters as collective membership marks
 - “Member”/“Chapter” in mark
- (2) Change policies to include trademark license and reference same in the bylaws
- (3) License other marks used by non-members/chapters separately
- (4) Enforce all of the above



Brand Strength & Value



Value “Brand Value”

- “Brand Value” considers
 - (1) The **performance** of the branded products or services;
 - (2) The **role of the brand** in the purchase decision process; and
 - (3) Brand strength.
- “Brand Strength” considers factors like:
 - **Clarity, differentiation, and consistency**
- Interbrand: founded in 1974; 40 offices in 27 countries; helps create and manage brand value
 - Known for **Best Global Brands** report



Why Does Brand Value/Strength Matter?

“Having a strong brand establishes a kind of parity between [a nonprofit] and the companies they want to influence.”








“The Role of Brand in the Nonprofit Sector,”
Stanford Social Innovation Review, Spring 2012



Brand Value Success Stories

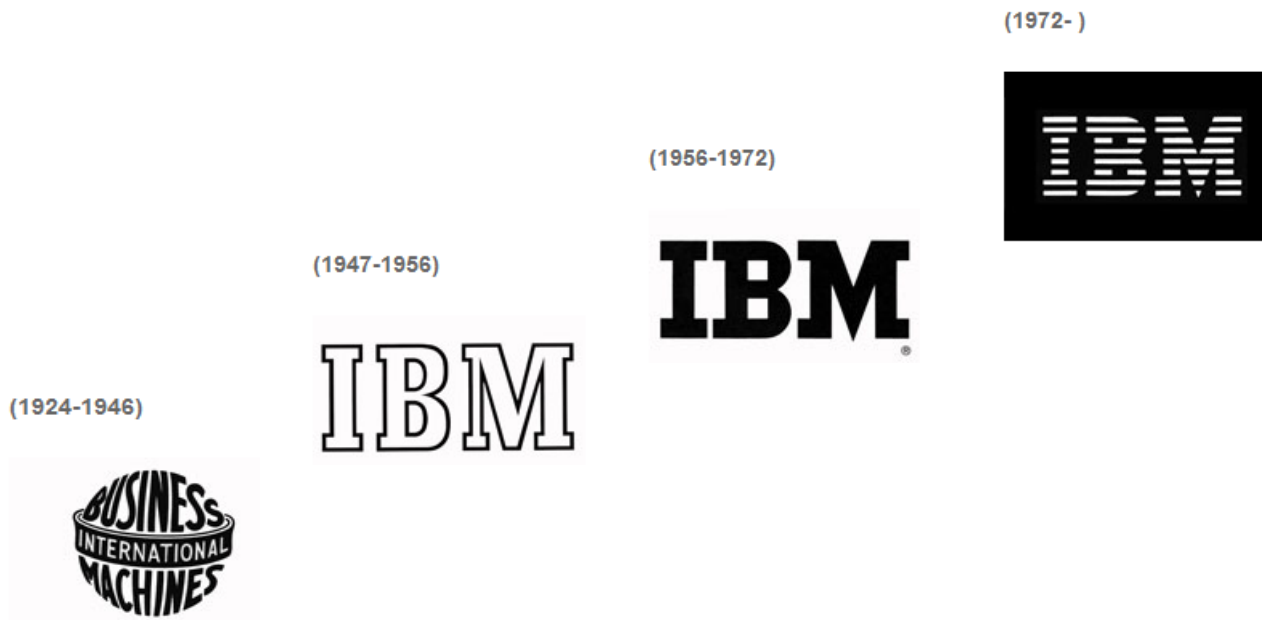
2011 Ranking of the Top 100 Brands

[Print](#)

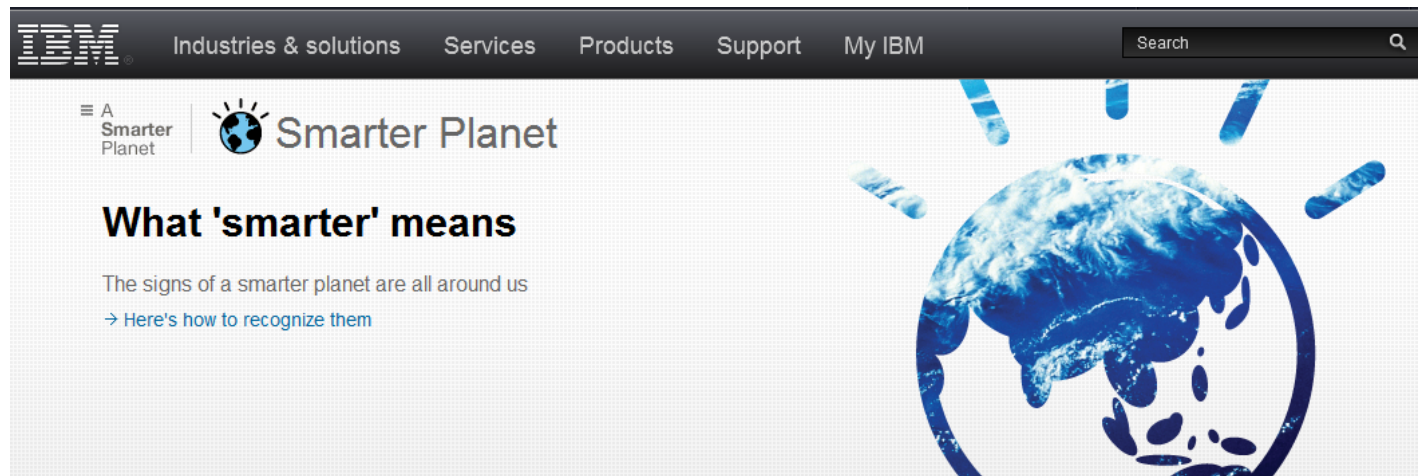
	Rank	Previous Rank	Brand	Region/Country	Sector ▲	Brand Value (\$m)	Change in Brand Value
	2	2		United States	Business Services	69,905	8%
	13	14		United States	Business Services	25,309	9%
	20	22		United States	Business Services	17,262	16%
	24	26		Germany	Business Services	14,542	14%
	45	47		United States	Business Services	8,005	7%



IBM: A Case Study in Branding



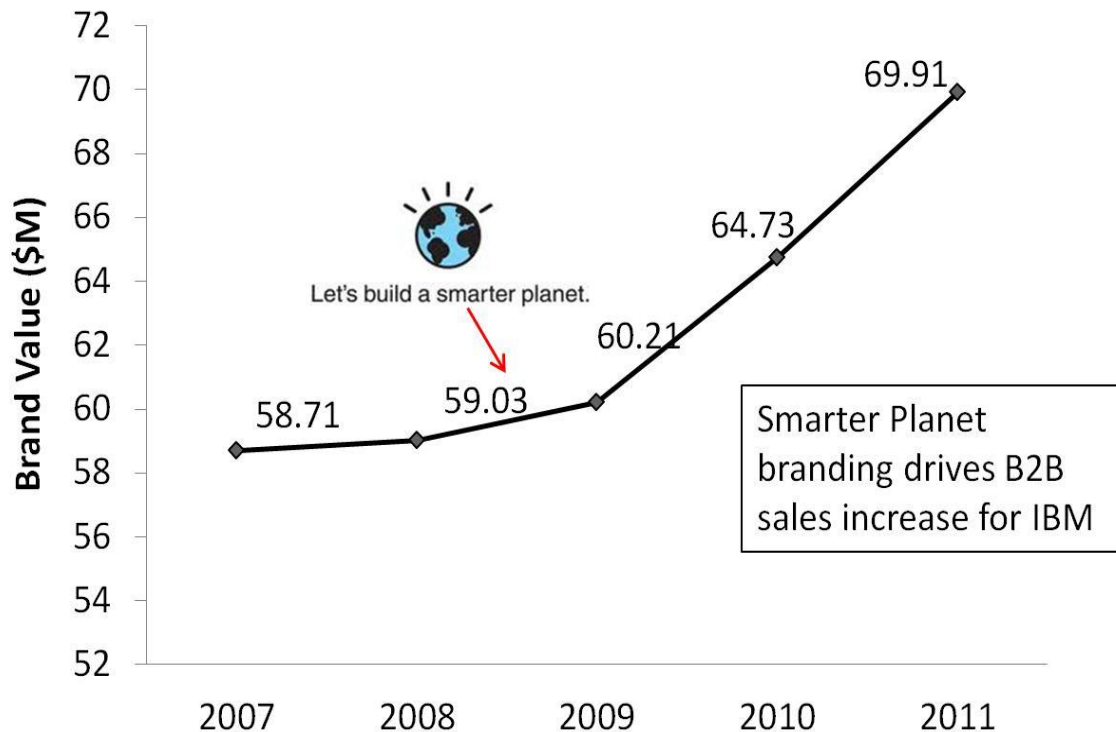
IBM: Brand Evolution in 2008



- Three elements working together:
 - Main trademark (stylized acronym): **IBM**
 - Slogan (word mark): **SMARTER PLANET**
 - Logo (color design): “**smart**” **blue globe**

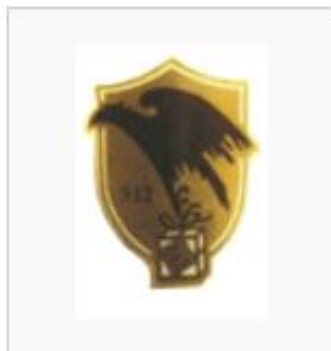


IBM Increase In Brand Value 2007 - 2011



UPS: Another Case Study in Branding

Brand mark



United Parcel Service logo
(1919–1937)



United Parcel Service logo
(1937–1961)



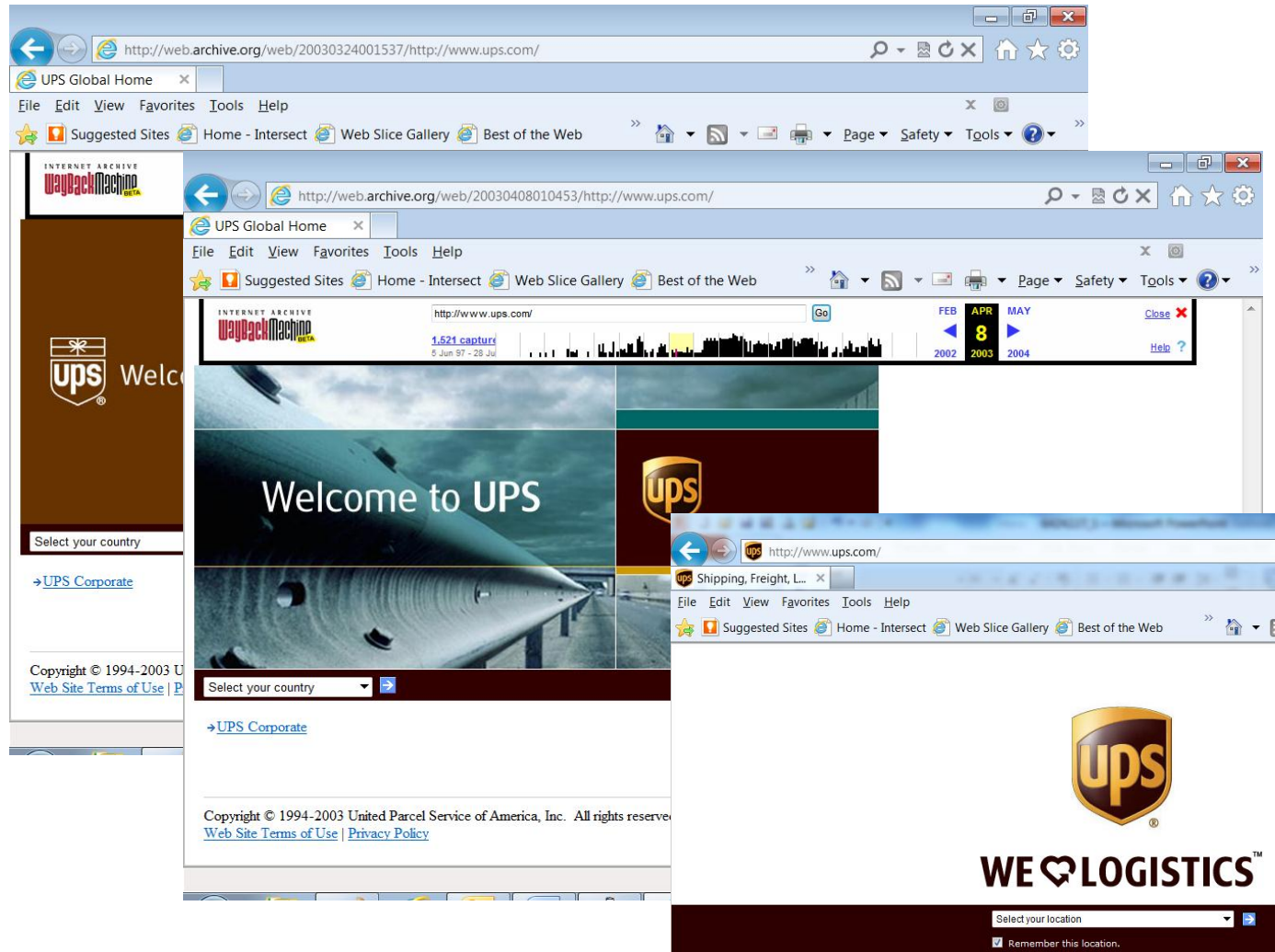
United Parcel Service logo
(1961–2003)



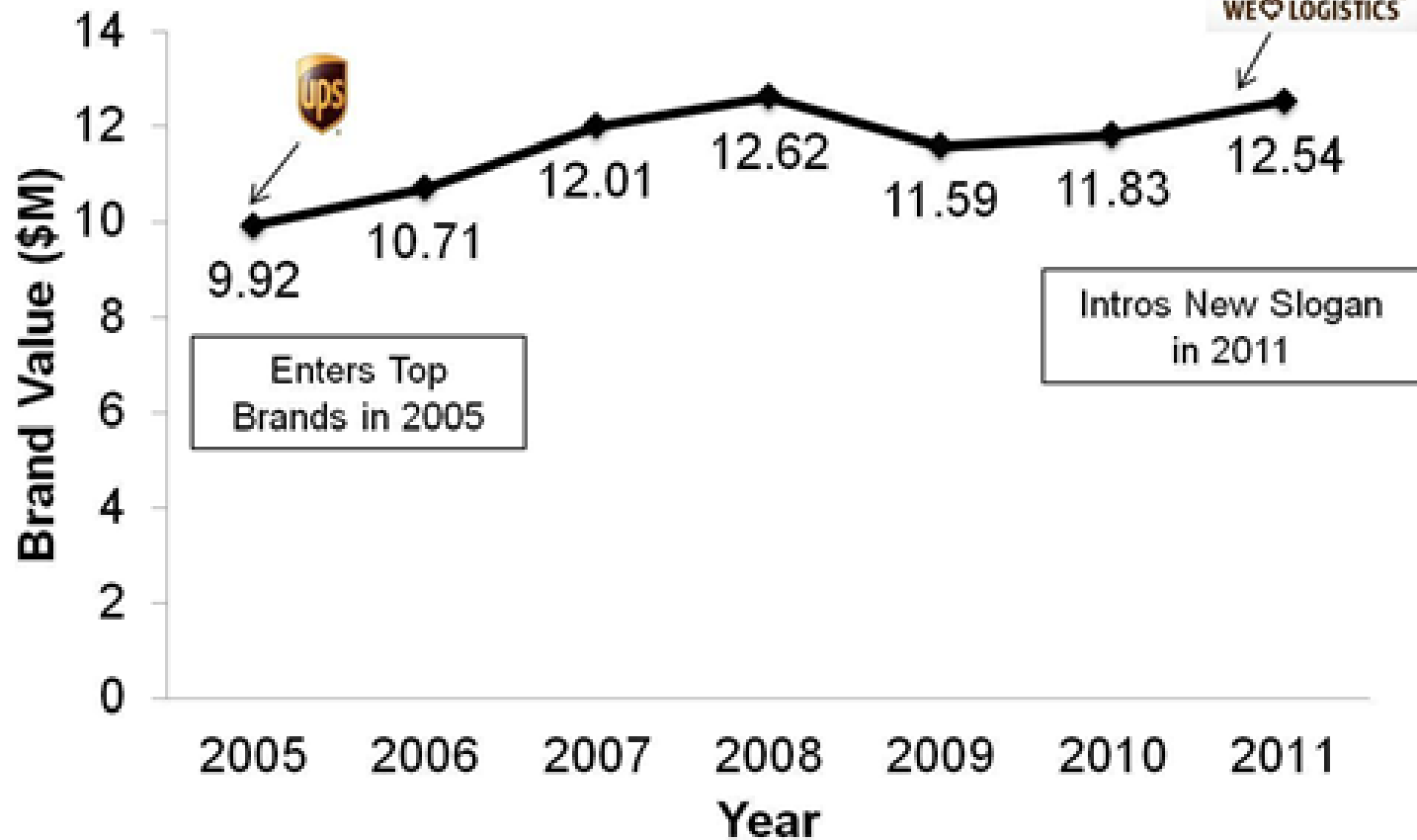
United Parcel Service logo
(2003–present)



UPS: Brand Evolution in 2003, 2011



UPS Increase in Brand Value 2005 - 2011



2003 – Brand Update



Nonprofits: Act Like a Strong Brand



What Do the Top 100 Brands Have in Common?

- **Acronyms** are increasingly popular (30% of top 25)
- Other elements that are both distinctive and **differentiating**:
 - The majority use distinctive *stylization* or **designs** as part of the brand (approx. 80%)
 - The majority use **color** as part of the brand (approx. 70%)
- **Consistency** and **clarity** in use of brands
- **Social media** presence/performance



Nonprofits Can Act Like Top 100 Brands

LeadingAge[™]



LeadingAge[™]
formerly *aahsa*




aahsa[®]
creating the future of aging services



You've Arrived



Business and Legal Action Items

- Value “**brand value**”
- **Act like a top brand**
- **Control chapters/affiliates** in charter agreements, bylaws and/or policies
- **Avoid naked licensing**
- **Apply to register** key trademarks for key goods/services in key countries
- **Avoid joint ownership**
- Pick **distinctive brands** and clear them



“The Single Greatest Asset”

“Our brand is the single greatest asset that our network has, and it’s what keeps everyone together.”

Marci Marsh, COO, World Wildlife Fund

“The Role of Brand in the Nonprofit Sector,”

Stanford Social Innovation Review, Spring 2012



Venable's Global Focus

- We have flexibility that is unique among *AmLaw 100* firms
 - Venable is not bound to use certain firms or individuals outside the U.S.
 - Venable is one of two *AmLaw 100* firms without foreign offices
- We work with foreign firms that provide the best combination of expertise and value



Venable Has Long Relationships with Top Foreign Counsel





U.S. Foreign Corrupt Practices Act and Anti-Corruption

What Is the U.S. Foreign Corrupt Practices Act or “FCPA”?

- Enacted by Congress in 1977 to stop the practice of bribing foreign officials
- Two main provisions:
 - Anti-bribery provisions
 - Books and records provisions
- Who enforces?
 - Jointly enforced by:
 - U.S. Department of Justice (DOJ)
 - U.S. Securities and Exchange Commission (SEC)



The Anti-Bribery Provisions

15 U.S.C. § 78dd-1

- Prohibits:
 - Paying
 - Offering or promising to pay
 - Authorizing to pay or offer
- Money or “anything of value,” directly or indirectly, with corrupt intent,
- To a “foreign official,” political party, political party official, or a candidate for political office,
- For the purpose of:
 - Influencing an official act or decision, or
 - Causing the official to fail to perform his lawful duty, or
 - To secure any improper business advantage, or
 - To assist in obtaining or retaining business for or with any person.
- Limited exceptions and affirmative defenses exist.



The Anti-Bribery Provisions (cont'd.)

- Consider your Code of Conduct
 - All employees must avoid even the appearance of impropriety
 - The Code of Conduct prohibits employees from providing or offering money or anything of value, directly or indirectly,
 - To any external party, e.g., foreign officials, but also subcontractors, sponsors, vendors, or other business associates,
 - To improperly obtain or retain business, or
 - To reward favorable treatment.
 - Consequences include:
 - Adverse employment actions up to and including termination, or
 - Potential civil and criminal penalties.



Accurate Books and Records

- FCPA also contains provisions requiring **public** companies to maintain books and records that accurately reflect all transactions (15 U.S.C. § 78m)
- What about nonprofit or charitable organizations?
- Do you have a Code of Conduct?
 - While the books and records provisions of the FCPA do not apply to non-profit or charitable entities directly, often an organization's Code of Conduct will require its employees to keep accurate records and use proper accounting methods.
 - Each organization employee is responsible for the integrity of his/her reports, records, and information, and for creating, using, storing, preserving, and disposing of records properly.



Accurate Books and Records (cont'd.)

- What does your Code of Conduct require?
 - To comply with the FCPA, employees should track, vet, and appropriately monitor:
 - Promotional accounts
 - Charitable giving
 - Entertainment expenses
 - Payments to middlemen, agents, or venture partners



Who Is Subject to the FCPA?

- “Domestic Concerns”
 - Any corporation, partnership, association, unincorporated organization (such as a nonprofit organization), or sole proprietorship that is organized under U.S. law or has its principal place of business in the United States.
 - Also includes most non-U.S. subsidiaries of U.S. companies and organizations, and U.S. subsidiaries of non-U.S. companies and organizations
 - U.S. citizens, nationals, and residents
- Non-U.S. companies whose securities trade on U.S. exchanges via American Depositary Receipts (ADRs)



Who Is Subject to the FCPA? (cont'd.)

- *Respondeat Superior* Liability:
 - Organizations subject to the FCPA are vicariously responsible for the actions of their employees, agents, independent sales representatives, distributors, and other service providers, so long as they are acting on the organization's behalf and are joint-venture partners.
 - “Directly or Indirectly”
 - Example: BAE made unlawful payments to “market advisors” to facilitate sales of defense articles to European and Middle Eastern governments.
 - BAE “failed to conduct adequate due diligence into these advisors” who were acting as BAE agents.
 - Paid \$400 million and £30 million in penalties.



Understanding Territorial Jurisdiction

- Both DOJ and the SEC take an extremely broad view of U.S. FCPA jurisdiction:
 - Any contact with the U.S. in furtherance of the corrupt scheme, no matter how slight, gives rise to FCPA jurisdiction, to include:
 - E-mails,
 - Telephone calls, and
 - Use of U.S. accounts to clear dollar-denominated transactions (“correspondent bank accounts”).
- **Example:** In 2011, allegations that JGC, a Japanese corporation, bribed Nigerian government officials to obtain business related to designing/building an LNG plant.
 - “Territorial jurisdiction” theory from JGC’s co-conspirator’s use of correspondent bank accounts to transfer alleged bribes between two foreign banks.
 - \$218.8 million criminal penalty paid as part of 2-year deferred prosecution agreement with DOJ.



So, What Are the Elements?

- “Anything of value”
- “Directly or indirectly”
- “Foreign official”
- “Obtaining or retaining business”
- As the cases show, the devil is in the details!
- For nonprofits, consider:
 - Promotional accounts
 - Charitable giving
 - Entertainment expenses
 - Payments to middlemen, agents, service providers, venture partners



Watch Out for “Willful Blindness”

- FCPA applies to knowing violations, i.e., payments made with corrupt intent.
 - **BUT**, can’t engage in willful blindness where probability that an illegal payment is likely, or it satisfies the “knowledge” or “corrupt intent” requirement.
- Examples where “knowledge” might be found:
 - Doing business in a country with rampant corruption without vetting suppliers and representatives
 - Hiring a foreign representative with a history of making illegal payments without properly supervising or vetting the representative
 - Hiring an agent whose function is unclear
 - Building into a contract price extra costs to “grease” wheels
 - 2009 *Bourke* case - U.S. Dis. Ct. for S.D.N.Y, Jury instructed that “knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact.”
 - Bourke found guilty and sentenced to 1 year in jail. © 2013 Venable LLP



Affirmative Defenses and Exceptions

- **Note:** Extremely limited
- When the payment is lawful under the **written laws** of the foreign government official's country
 - There are no such written laws
- When the payment is a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign government official and directly related to:
 - The performance, demonstration, or explanation of products or services; or
 - The execution or performance of a contract with a foreign government or agency.
 - That does NOT include a weekend in Vegas!



The Disappearing Facilitation Payment Exception

■ Facilitation Payment Exception

- A narrow exception for nominal payments
- Also known as “grease payments”

■ BUT...

- Action sought to be facilitated must be ministerial
- It must not involve any discretion on the part of the foreign government official
- The amount paid must be modest
- Tension with “business nexus concept”
- Contrary to OECD Treaty
- Violates the UK Bribery Act
- Violates the national law of most nations



What Happens If?

■ Criminal Penalties

- For corporations/organizations, up to \$2 million per violation or twice the pecuniary gain, whichever is higher
- For officers, directors, shareholders, employees and agents, up to \$100,000 and imprisonment up to five years

■ Civil Penalties

- Disgorgement;
- Injunction;
- A fine of \$10,000 per violation; and/or
- Enhanced penalties of up to \$500,000.

■ Private Lawsuits

- Currently, no FCPA private right of action
- But, civil litigation involving or stemming from alleged FCPA violations is rampant

■ Don't Lose the Golden Goose:

- Loss of Grants/Contracts!



Recent Trends

- Enforcement against Individuals
 - **Jean Rene Duperval**, sentenced to **9 years** in prison for involvement in the *Haiti Telecom* case.
 - First foreign official to stand trial in an FCPA case.
 - **Albert Jack Stanley**, sentenced to **30 months** in prison for his involvement in the *KBR/TSKJ* case.
 - **Manuel Caceres**, sentenced to **23 months** in prison for his involvement in the *Latin Node* case.
 - **Fernando Basurto**, sentenced to time served after **22 months** in prison for involvement in *ABB* case.
 - **Jeffrey Tesler**, sentenced to **21 months** in prison for involvement in the *KBR/TSKJ* case.
- Challenges to case law by settlement!



2012 Enforcement Actions

- 12 Corporate FCPA Enforcement Actions (\$260M)
- Average fine/penalty \$21.7 million (median \$17.3M)
 - **5 DOJ & SEC:**
 - Smith & Nephew (\$22.2M)
 - Biomet (\$22.8M)
 - Orthofix (\$7.4M)
 - Pfizer (\$60.1M)
 - Tyco (\$26M) (follows 2006 \$50M & \$1M disgorgement)
 - **4 DOJ only:**
 - Marubeni (\$54.6M)
 - BizJet/Luftansa (\$11.8M)
 - Data Systems & Solutions (\$8.82M)
 - NORDAM Group (\$2M)
 - **3 SEC only:**
 - Oracle (\$2M)
 - Allianz (12.3M)
 - Eli Lilly (\$29.4M)



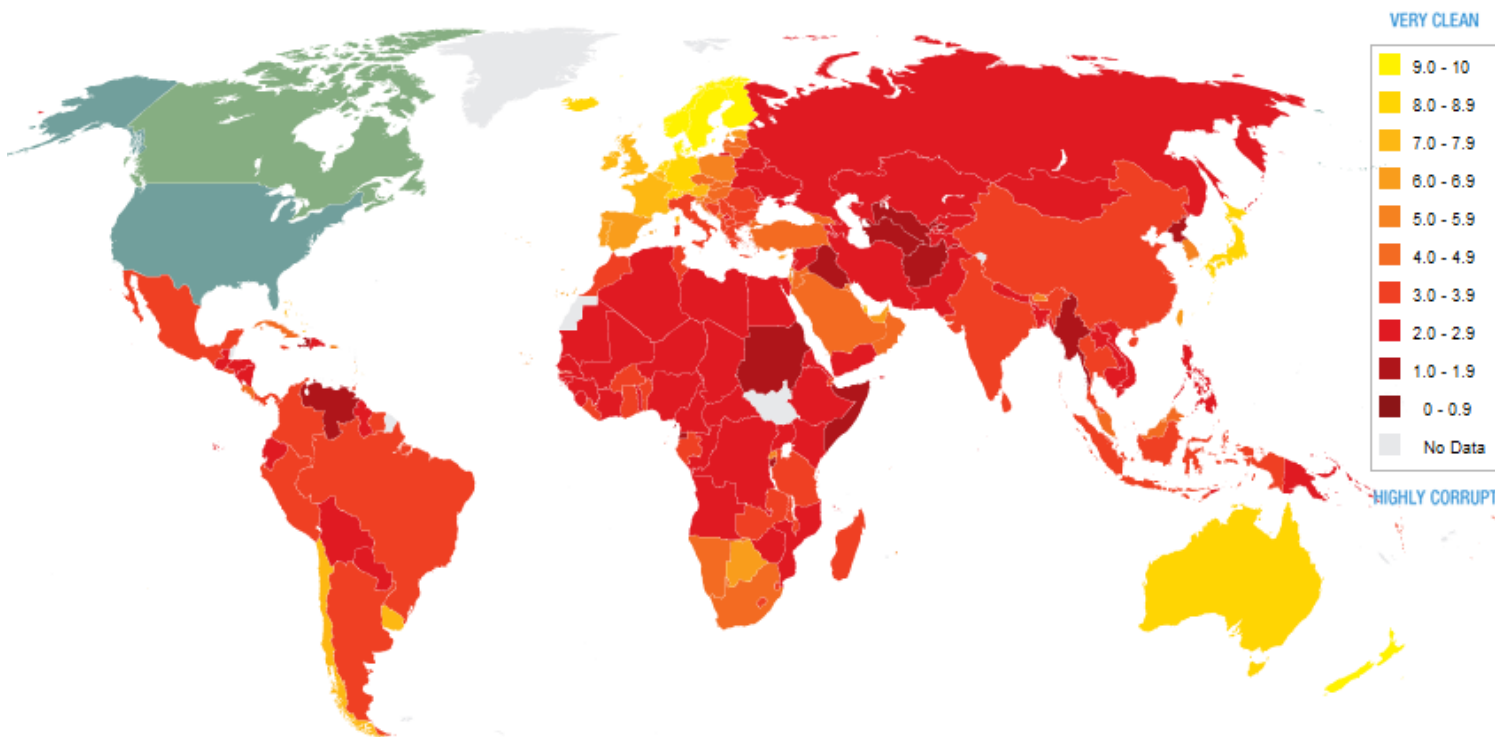


FCPA “Red Flags”: What You Should Investigate

- The transaction is in, or involves, a high corruption risk country (e.g., Indonesia, China, India, Iraq, Afghanistan)
- Representative or agent is requesting an unusually high “commission” or fee
- Entertaining or giving gifts to government officials or relatives
- Unusual contract terms or payment arrangements (e.g., requests for cash payments or “special” invoices)
- Use of shell companies
- Foreign customer’s insistence that a particular agent be used
- Role or function of agent or middleman is unusual or unclear
- Extraordinary payments
- Charitable donations
- Payments via third countries without sound commercial reasons



The Global Heat Map: Where Are You Doing Business?



RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	9.5
2	Denmark	9.4
2	Finland	9.4
4	Sweden	9.3
5	Singapore	9.2
6	Norway	9.0
7	Netherlands	8.9
8	Australia	8.8
8	Switzerland	8.8
10	Canada	8.7
11	Luxembourg	8.5
12	Hong Kong	8.4
13	Iceland	8.3
14	Germany	8.0
14	Japan	8.0
16	Austria	7.8
16	Barbados	7.8
16	United Kingdom	7.8
19	Belgium	7.5
19	Ireland	7.5
21	Bahamas	7.3
22	Chile	7.2
22	Qatar	7.2
24	United States	7.1

95	India	3.1
95	Kiribati	3.1
95	Swaziland	3.1
95	Tonga	3.1
100	Argentina	3.0
100	Benin	3.0
100	Burkina Faso	3.0
100	Djibouti	3.0
100	Gabon	3.0
100	Indonesia	3.0
100	Madagascar	3.0
100	Malawi	3.0
100	Mexico	3.0
100	Sao Tome and Principe	3.0
100	Suriname	3.0
100	Tanzania	3.0
112	Algeria	2.9
112	Egypt	2.9
112	Kosovo	2.9
112	Moldova	2.9
112	Senegal	2.9
112	Vietnam	2.9
118	Bolivia	2.8
118	Mali	2.8

25	France	7.0
25	Saint Lucia	7.0
25	Uruguay	7.0
28	United Arab Emirates	6.8
29	Estonia	6.4
30	Cyprus	6.3
31	Spain	6.2
32	Botswana	6.1
32	Portugal	6.1
32	Taiwan	6.1
35	Slovenia	5.9
36	Israel	5.8
36	Saint Vincent and the Grenadines	5.8
38	Bhutan	5.7
39	Malta	5.6
39	Puerto Rico	5.6
41	Cape Verde	5.5
41	Poland	5.5
43	Korea (South)	5.4
44	Brunel	5.2
44	Dominica	5.2
46	Bahrain	5.1
46	Macau	5.1

120	Bangladesh	2.7
120	Ecuador	2.7
120	Ethiopia	2.7
120	Guatemala	2.7
120	Iran	2.7
120	Kazakhstan	2.7
120	Mongolia	2.7
120	Mozambique	2.7
120	Solomon Islands	2.7
129	Armenia	2.6
129	Dominican Republic	2.6
129	Honduras	2.6
129	Philippines	2.6
129	Syria	2.6
134	Cameroon	2.5
134	Eritrea	2.5
134	Guyana	2.5
134	Lebanon	2.5
134	Maldives	2.5
134	Nicaragua	2.5
134	Niger	2.5
134	Pakistan	2.5
134	Sierra Leone	2.5
143	Azerbaijan	2.4

RANK	COUNTRY/TERRITORY	SCORE
46	Mauritius	5.1
49	Rwanda	5.0
50	Costa Rica	4.8
50	Lithuania	4.8
50	Oman	4.8
50	Seychelles	4.8
54	Hungary	4.6
54	Kuwait	4.6
56	Jordan	4.5
57	Czech Republic	4.4
57	Namibia	4.4
57	Saudi Arabia	4.4
60	Malaysia	4.3
61	Cuba	4.2
61	Latvia	4.2
61	Turkey	4.2
64	Georgia	4.1
64	South Africa	4.1
66	Croatia	4.0
66	Montenegro	4.0
66	Slovakia	4.0
69	Ghana	3.9
69	Italy	3.9
69	FYR Macedonia	3.9

143	Belarus	2.4
143	Comoros	2.4
143	Mauritania	2.4
143	Nigeria	2.4
143	Russia	2.4
143	Timor-Leste	2.4
143	Togo	2.4
143	Uganda	2.4
152	Tajikistan	2.3
152	Ukraine	2.3
154	Central African Republic	2.2
154	Congo Republic	2.2
154	Côte d'Ivoire	2.2
154	Guinea-Bissau	2.2
154	Kenya	2.2
154	Laos	2.2
154	Nepal	2.2
154	Papua New Guinea	2.2
154	Paraguay	2.2
154	Zimbabwe	2.2
164	Cambodia	2.1
164	Guinea	2.1
164	Kyrgyzstan	2.1
164	Yemen	2.1

69	Samoa	3.9
73	Brazil	3.8
73	Tunisia	3.8
75	China	3.6
75	Romania	3.6
77	Gambia	3.5
77	Lesotho	3.5
77	Vanuatu	3.5
80	Colombia	3.4
80	El Salvador	3.4
80	Greece	3.4
80	Morocco	3.4
80	Peru	3.4
80	Thailand	3.4
86	Bulgaria	3.3
86	Jamaica	3.3
86	Panama	3.3
86	Serbia	3.3
86	Sri Lanka	3.3
91	Bosnia and Herzegovina	3.2
91	Liberia	3.2
91	Trinidad and Tobago	3.2
91	Zambia	3.2
95	Albania	3.1

168	Angola	2.0
168	Chad	2.0
168	Democratic Republic of the Congo	2.0
168	Libya	2.0
172	Burundi	1.9
172	Equatorial Guinea	1.9
172	Venezuela	1.9
175	Haiti	1.8
175	Iraq	1.8
177	Sudan	1.6
177	Turkmenistan	1.6
177	Uzbekistan	1.6
180	Afghanistan	1.5
180	Myanmar	1.5
182	Korea (North)	1.0
182	Somalia	1.0



Due Diligence on All Involved Parties

- Ensure that any agent, business representative, or independent contractor/service provider performing work on your behalf:
 - Is properly vetted
 - Has agreed to abide by your Code of Conduct, the FCPA, and any other applicable anti-corruption laws
- Consider your:
 - Employees
 - Venture partners
 - Service providers
- Remember your overseas affiliated entities too!
- Consider all parties with whom you interact overseas



Considerations for Your Employees

- Appropriate, risk-based due diligence requires your employees to consider a variety of factors.
- For example:
 - Is the target country prone to corruption?
 - Does representative have a corrupt/questionable reputation?
 - Are representative's demands for fee/commission excessive or unusual?
 - Does representative have close relationships with foreign officials?
 - Are payment methods questionable?
 - Was representative recommended by government official?
 - Is the role of the representative unclear?
 - Does representative lack the skill, qualifications, or resources to undertake representation of your organization?



What Due Diligence May Be Needed?

- Red flags trigger the need for further inquiry and greater vigilance on the part of your organization. Consider:
 - Third-party due diligence
 - Interviews and physical inspections of offices/facilities
 - Obtaining an opinion from counsel or another reliable source, such as the local U.S. embassy or consulate, about the representative's reputation and qualifications
- Do your documents and agreements put other parties operating with you or on your behalf on notice that you hold them responsible for compliance with FCPA?
 - Establish your first line of defense
 - Think Morgan Stanley
- **Educate, Train, Audit... Repeat!**





Cross-Border Tax Planning and Compliance

Overview

- Form of foreign operations
- Foreign tax treatment of the foreign operations
- U.S. tax treatment of the foreign operations
- VAT/GST issues
- Employee and independent contractor issues
- U.S. compliance issues



Form of Operation

- There are a number of ways in which a U.S. nonprofit entity can operate in a foreign jurisdiction
 - Branch office
 - Wholly owned subsidiary
 - Local member-owned company
 - Other local entity



Form of Operation (cont'd.)

- Branch office
 - The U.S. nonprofit registers as a foreign company doing business in the foreign country
 - The U.S. nonprofit may have local filing obligations, and may or may not qualify as a nonprofit under local rules
- Wholly owned subsidiary
 - The U.S. nonprofit establishes a new company in the foreign country, with the U.S. nonprofit as the sole shareholder
 - Qualification issues similar to those of a foreign branch office



Form of Operation (cont'd.)

- Local member-owned company
 - A local nonprofit company is formed in the foreign country, under its nonprofit laws, with local residents being the members, etc. of that company
 - Trade and professional organizations versus public charities
- Other local entity
 - In some countries nonprofits are formed using other forms of legal entities, such as trusts



Form of Operation (cont'd.)

- Stand-alone entities versus affiliated entities
 - Does the fundraising, if any, go to the U.S. operations or to other projects outside of the U.S.?
 - Is there an affiliation agreement between the U.S. and foreign entity, or does the foreign entity operate on a stand-alone basis with no support from the U.S.?



Foreign Tax Issues

- What functions does the local entity perform?
 - Conferences from time to time, collecting dues from local members (trade organizations)?
 - Fund-raising from local residents, with the funds being used for local or foreign projects (charities)?
- The foreign tax treatment of the local entity will depend upon the functions and activities of the local entity
- May have to register with a specific agency if seeking local charitable contributions



Foreign Tax Issues (cont'd.)

- If local entity is a branch of the U.S. nonprofit, then the U.S. nonprofit may have to register its U.S. and local officers and directors for corporate and tax law purposes
- The U.S. nonprofit may have to file financial accounts for both the U.S. and local operations (under local accounting methods) for corporate law and nonprofit law purposes
- May also have to file foreign tax returns similar to the U.S. Form 990



Foreign Tax Issues (cont'd.)

- If local entity is a subsidiary or other separate legal entity, then it may have its own financial account and tax return filing requirements
- If there is an affiliation agreement between the local entity and the U.S. nonprofit, may have to disclose information regarding the cost allocations from the U.S. nonprofit and the use of the funds outside that foreign country



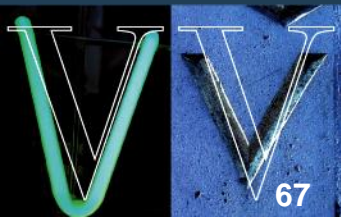
U.S. Tax Issues

- If the local entity is a branch of the U.S. nonprofit, then the U.S. nonprofit would need to include the income and expenses of the branch in its financial accounts and U.S. Form 990
- Where the local entity is a wholly owned subsidiary, then typically would not have to include any income of the local subsidiary in income for U.S. tax purposes until the local subsidiary declares a cash dividend to its U.S. parent
- However, if the local entity is a member-owned entity or a foreign charity, there may be no U.S. tax reporting requirements



VAT/GST Issues

- Many foreign countries impose a value-added tax (VAT) or general sales tax (GST)
- U.S. nonprofits that put on conferences or conventions in a foreign country may be required to register with the local VAT/GST authority, typically a taxing authority different from the authority responsible for income taxes
- May be required to register for VAT/GST, even though not considered to be engaged in business for income tax purposes



VAT/GST Issues (cont'd.)

- If subject to VAT/GST, then the U.S. nonprofit or local entity should register for VAT/GST, and collect the tax from conference participants.
- VAT/GST would be paid with respect to taxable events, such as hotel conference rooms, meals, and other supplies paid for by the U.S. nonprofit or local entity
- The difference between the VAT collected and the VAT paid is then paid over to the appropriate taxing authority



VAT/GST Issues (cont'd.)

- Failure to register for VAT/GST and to pay over VAT/GST when due can result in significant penalties
 - Also, if the U.S. or local entity pays VAT/GST but does not collect it when required, then the VAT/GST becomes a cost to the U.S. or local entity and not to program participants



Employee Issues

- When a U.S. nonprofit expands its global operations, it is typical to have one or more U.S. employees work abroad
- May also have employees from foreign country work in the U.S. from time to time
 - For example, at a U.S. tradeshow or convention



Employee Issues (cont'd.)

- U.S. employees paid by the U.S. nonprofit
 - Typically, still subject to U.S. payroll and social security taxes
 - May be subject to local country income taxes, depending upon how much time they spend in that country
 - May be subject to local country social security taxes, but effect could be reduced by a totalization treaty between the U.S. and that foreign country



Employee Issues (cont'd.)

- U.S. employees paid by the U.S. nonprofit
 - Employee can claim a foreign tax credit for the local country taxes against the U.S. tax liability on the income allocated to time spent working abroad
 - Typically allocated on a days-worked basis



Employee Issues (cont'd.)

- U.S. employees paid by the local entity
 - Employee subject to local income and social security taxes and applicable withholding requirements
 - Employee generally not exempt from local social security taxes, even if there is a totalization agreement, since paid by a local entity
 - Can still claim a foreign tax credit for the local income taxes, but not the social security taxes, against the U.S. income tax on that income



U.S. Compliance

- The U.S. imposes significant information reporting requirements on U.S. taxpayers with overseas operations
- Those requirements apply to U.S. nonprofits, not just for-profit entities
- The IRS and the Justice Department are very focused on international information reporting, even by nonprofits



U.S. Compliance (cont'd.)

- Form 90-22.1 (FBAR)
 - Filed if a person has signature authority over, or a financial interest in, one or more foreign financial accounts with a total aggregate balance of more than \$10,000
 - Must be filed, even if the person does not have an actual financial interest in the account(s)
 - For these purposes, the term “person” includes individuals and nonprofits
 - Due June 30 of each year; a U.S. Treasury Department form, not a IRS tax form



U.S. Compliance (cont'd.)

- Form 90-22.1 (FBAR) (cont'd.)
 - Considered to have a financial interest if the U.S. person owns more than 50% of the equity or other interests in a foreign entity
 - Foreign financial accounts include foreign bank accounts, securities brokerage accounts, mutual funds, hedge funds, private equity funds, and certain insurance contracts
 - Penalty of \$10,000 for each unreported foreign financial account; six-year statute of limitations



U.S. Compliance (cont'd.)

- Forms 926/5471
 - Filed if the U.S. nonprofit owns at least 10% of the stock of the foreign entity
 - Form 926 is filed for the taxable year the foreign entity is formed
 - Form 5471 is an annual information reporting form, used to report the operations of the foreign entity (includes a balance sheet, income statement, and other information)
 - Filed with Form 990



U.S. Compliance (cont'd.)

- Forms 8938
 - A new IRS tax form that became applicable starting with the 2011 tax year
 - At the moment, only applicable to individuals and not nonprofit entities
 - Reports specified foreign financial assets
 - Includes many assets reported on Form 90-22.1, but also includes stock of foreign entities, and a broader range of foreign financial accounts
 - Not filed with Form 990, until the regulations change



U.S. Compliance (cont'd.)

- Other Forms
 - Form 8865: Filed to report investments in foreign partnerships
 - Form 8621: Filed to report investments in Foreign Passive Investment Companies



Questions?

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