TOPIC:

BOOTS ON THE GROUND: OPENING AN OFFICE IN A FOREIGN COUNTRY

INTRODUCTION:

Ideally, an institution would not consider opening an office in a foreign country without careful planning and preparation. Often, however, foreign operations begin when a campus administrator engages in a “fact finding” trip to another country to test out “the market.” Before long, the institution begins advertising the existence of a foreign office and the appointment of an office director. Soon after, the foreign office hires several individuals to provide administrative support, and suddenly the college or university finds it has become a “global” institution.

This scenario is playing itself out more and more at institutions across the United States as the race for the global education market heats up. That entry usually begins, as in the scenario above, with an office – a physical location on the ground that serves as a base camp for operations abroad in the selected country. Offices can range from a small single room, intended for meeting with in-country recruiters, to a large operation, complete with several employees.

College and university administrators will often turn to the General Counsel’s office for the roadmap of how to set up this foreign office. This NACUANOTE examines the basic issues associated with opening an office abroad and provides helpful tips on how to effectively advise senior academic officials. [1]

DISCUSSION:

The First Step: Develop a Written Strategic Plan

Creating an actual written plan is the single most defining step toward establishing an official presence in a foreign country. While counsel is not responsible for drafting this written strategic plan, counsel plays an important role in using this plan to determine what legal issues will arise during the course of opening an office abroad. At its most basic, the strategic plan should clearly describe where the institution is going to be and for how long. Thus, while deceptively simple, the first question to the administrator should be, “Do you have a formal, written plan?”

At the outset, the plan should address these three main, continuously present questions:

1. What are we doing now (present realities)?
2. What do we want to do next (implementation)?

3. What are we planning to do long-term (future visions)?

The plan should also include:

- Identification of the lead administrator for the entire project (or identification of the committee that will coordinate the project);
- An analysis of the specific locations under consideration;
- A preliminary timeline that begins with institutional approval;
- Projected staff needs, position descriptions, and legal relationships (contractor, employee, partner, etc.);
- Anticipated licensing requirements needed for various activities and projected timeframes for gaining any necessary approvals;
- Specific descriptions of activities to be conducted out of the foreign office (there is a big difference between coordinating in-country recruiters and providing full instructional classes from your location);
- Initial purchases (furniture, supplies, etc.);
- A preliminary budget; and
- A projected progression of activities for the next three to five years.

**Obtain On-Campus and In-State Approvals**

While all the decisions and preparations may be made at the executive level, the next step before actually creating a footprint and filing any paperwork is the presentation of the written plan for formal approval by the Board of Trustees or Regents. This proposal will most likely come from the office of the Provost, but campus counsel can assist by outlining the possible legal issues associated with moving forward. At its most basic level, opening an office in another country is not unlike expanding into a new building on or off-campus – it should not occur without the consent of the Board. Either through the charter of a private college or a state statute of a public institution, the Board is often given the powers to do all things necessary and required for the proper maintenance and successful and continuous operation of such universities. [2]

For public institutions, state law or practice may require that certain state agencies provide approval before the institution extends its reach to a foreign office. The institution may also be required to adopt additional tax and financial reporting requirements. For instance, the institution may need to complete Schedule F of IRS Form 990, which was implemented in 2009 to identify and track an institution’s foreign activities (depending upon the institution’s status as a state instrumentality or not). [3] Similar on-campus approvals may include an analysis from the treasury/tax department.
Research the Foreign Jurisdiction

Once the necessary approvals have been obtained, counsel can begin collecting preliminary information on the foreign country and area under consideration, such as:

- Information about the national and local government (does it have a Ministry of Education or equivalent division that could be of some help?);
- A general overview of the area’s employment and contract law (available from multiple sources like LexisNexis, private law firms, the ABA International Law Section, as well as some local counsel);
- Country-specific information from the Department of State’s International Travel site; [4]
- Other institutions’ experiences acquired through an inquiry on NACUANET or NACUALINK.

Identify Local Counsel

With a plan in hand and a location in mind, campus counsel must find local counsel to provide assistance navigating the more specific questions related to the process of setting up an office abroad. Because several U.S. firms have either offices abroad or cooperative agreements with local counsel, institutions may be able to work through current outside counsel in the U.S. to identify foreign counsel. There are also several organizations that can assist with finding local counsel such as The International Lawyers Network, [5] Lex Mundi, [6] the ABA’s International Law section, [7] and many others. [8] While it is often not financially realistic, it is helpful for campus counsel to make a one-time visit to the local counsel’s offices to establish the terms of the relationship and to see the firm’s operations first-hand. The most important question to ask local counsel is whether the firm (or individual) has experience with U.S. institutions of higher education or, at the very least, with a U.S. 501(c)(3) organization. As several countries do not recognize the U.S. concept of tax-exempt status, it remains important to find local counsel experienced with a structure similar to your organization, which will help both local counsel and campus counsel reach an understanding of all of the options available for opening an office.

When contracting with local counsel, it is advisable to negotiate a flat rate for any necessary registrations and/or property agreements (most likely lease agreements in the initial stages of international involvement), and then an hourly rate for additional work divided by associate level (paralegal vs. senior attorney). It is also best to include a “not to exceed” clause (maximum number of hours or total billing cost) in the retainer agreement as well as a clause establishing whether the work will be charged and payable in local currency or in U.S. Dollars. As in-person meetings throughout the relationship are often logistically impossible, the practice of trading e-mails and phone calls, in addition to the usual research and drafting fees, can result in substantial legal fees accumulated in a relatively short amount of time.

Find the Specific Location for the Office

With plan, country, and counsel in place, campus counsel’s focus should now shift to the brick and mortar concerns of operating a foreign office – what will our new address be? Presumably, the lead office administrator has a specific office space, area, or building in mind to house the foreign office. If not, U.S. institutions can often turn to partner foreign universities to provide site assessments. In some cases, the foreign university may propose office space on its campus. The location of the office
also invokes different jurisdictional considerations. The regional and municipal laws of the target location are key to providing an initial indication of the regulatory boundaries and local customs within which the university will operate its office.

When selecting a location, be sure to consider future plans. The duration of leases and partnerships are likely to outlast the initial start-up phase. Moreover, the simple act of acquiring space in some foreign countries can be difficult and time consuming, eating into budgets and timelines. Resist the temptation to get a smaller or less expensive “anchor” location if the plan calls for greater use in the foreseeable future. It is usually better to plan ahead and get the space you will need a few years down the road if you can afford it.

**Determine Registration Requirements**

At this point, counsel can now ask this crucial question of local counsel: Does the institution need to register with any governmental or local entity before formally opening an office in this location? This question is often downplayed in the beginning by project initiators with academic ties to the country with comments like, "That’s not how they do it there," or "Other schools didn’t register so why should we?" Failure to obtain required legal registrations at the outset, however, can result in government sanctions as well as a ban on further operations in the country altogether.

Formal registration is necessary in many countries to lease office space, employ local citizens in the area of operation, or even open a bank account. In some countries, the institution may even find it hard to contract for services without a formal entity or registration number. The type of registration may also affect the transfer of liability between the foreign office and the U.S. institution’s home campus. Common forms of registered entities are representative offices, branch offices, the foreign country’s equivalent of an LLC, or a corporation. Each country is different with respect to registration. In some countries an institution may only be required to register its program and office with an agency, while in other countries the institution could be required to engage in the formation of a formal entity such as a liaison or representative office.

The effects of formal registration, however, can also have repercussions with reporting processes at the home campus (i.e. year-end budget reporting, taxable income issues, etc.). Counsel must not only perform due diligence regarding registration in the foreign area of operation, but also must determine how the entity will be accounted for by the university’s central business operations.

The process for registering and opening the foreign office can be lengthy depending upon where the institution chooses to do business. Local counsel should be asked for a realistic timeline, but be prepared to wait. While there will likely be a great deal of pressure to get the program up and running, it is important that everyone involved understands the risks associated with any premature activities. A stern look from a government official in one location could be a possible jail term for a project leader in another.

The registration with a foreign government and associated contracts with the office itself should be coordinated through counsel, who can delegate various duties and fulfill requests through other members of the team. In order to ensure the timely processing of any necessary information, counsel should coordinate on a regular basis with the party filing the formal paperwork in the foreign country and serve as a liaison to the Provost and President for continuing updates.

During the registration process, it is critical for counsel to educate the other participants about the Foreign Corrupt Practices Act (FCPA). The FCPA makes it unlawful for individuals and entities to make payments to foreign governmental officials to assist the entity in obtaining or retaining business. All officials participating in the process to open the office should be aware of the FCPA and remain vigilant during the operation of the office to ensure compliance.
Other Operational Issues

After your institution is registered, but before the first phone is turned on, the following issues should be addressed:

- **Local counsel’s review of the lease or terms of sale.**
  - Check the length of the lease vs. the available budget for the office as provided in the strategic plan. Use local counsel to determine any zoning or regulatory limitations to the area not represented in the lease but which will be levied upon the institution once the office commences operations.

- **Bank account, local accountants, international tax specialist.**
  - Depending upon the size of the operation, the university may need a local bank account. Campus counsel should coordinate this effort with the university's fiscal officers. Because of the various social contributions and tax laws that may apply (depending upon the operations), counsel should also review any contracts for local accounting and international tax services.

- **Purchase of furniture and other office needs.**
  - The ability to open an office does not automatically equate to the immediate transferability of current purchasing practices. As indicated previously, the institution may have to open a local bank account, or create as well as adjust current purchasing practices. Moreover, it is important to consider any state or federal limitations on moving existing equipment to a foreign locale, or similar limitations on what a university can purchase, from where, and from whom.

- **Service providers for office functions.**
  - In addition to arranging for general contractors, electricians, plumbers, and waste management contracts, review the Internet and IT services contracts with special attention to any restrictions on use of the Internet in the country of operation.

- **Safety services.**
  - Does the office currently meet the fire code for the local jurisdiction, and who is responsible for responding to emergencies both medical and otherwise? Are private security agencies depended upon more than the local jurisdictional services? Does this new office constitute a campus or noncampus building or property as defined under the Clery Act? [16]

- **Hiring Issues.**
  - Who is going to operate the office once it opens? Depending upon the country, the institution may not be able to hire a local citizen, and may have to utilize the services of a third-party employment provider – meaning yet another contracting partner! Also, if the university plans on hiring an office manager or similar position, the institution will need to create an employment manual governing the basic duties and benefits provided for the employees of the office. [17] Also, be ready with form contracts for employees and independent contractors that should be vetted with local counsel to ensure compliance with the laws of the country and local government. During the shift from hiring U.S. workers to foreign employees abroad, counsel should also consult internal employment policies that may need to be revised or amended to accommodate this new group of foreign employees.

  - The extraterritorial extension of U.S. laws (such as the Americans with Disabilities Act, as amended; state and federal civil rights and anti-discrimination laws, etc.) is
often a concern when engaging in any employment activities abroad. Depending upon the country, the local laws may not provide the same protections for its employees that U.S. citizens are provided by U.S. laws. When operating in another country, the structure of the entity and its employees will determine the ability for the extraterritorial application of these laws. If the entity is simply an office with all U.S. employees (rotating faculty/staff from the United States), then there is a greater chance that U.S. laws will apply than if the office is an entity established under the laws of the foreign jurisdiction and staffed with local employees or employees from neighboring countries. [18]

- **Insurance services.**
  - Expanding the institution’s coverage to the foreign office may be possible, but the procurement of local coverage may be necessary to conduct business.

- **Intellectual property and trademark registration.**
  - As intellectual property rights do not always cross oceans, the institution should engage local counsel to prepare a quote for services for registering the institution, its name, logos, and associated IP in the area of operation to avoid the costly process of disputing an already-established entity in the country that decides to adopt the institution’s name or a version of it (or logo, or both!). This can also protect institutional identity moving forward.

- **Data protection.**
  - When it comes to data protection, several countries have adopted data protection laws that may place a greater duty on university operations than the university’s current data security policy. Know if the country has such an act, and then find out the key tenets to compliance. [19]

The opening of an office can also trigger several immediate obligations, depending upon whether or not the host country or jurisdiction considers the institution’s presence and operations as creating a “permanent establishment” in the country for tax and other purposes. For example, in some countries such as Switzerland, a “permanent establishment” for tax purposes means “a fixed place of business through which the business of an enterprise is wholly or partly carried on.” [20] Other countries provide for a non-profit or “public service/educational” exception to taxation. If available, the institution may attempt to seek a preliminary tax ruling of the governmental taxing authority made through an anonymous inquiry by local counsel.

**Engage and Evaluate**

Three of four months after the office is formally established and operating, the institution should establish a review with the appropriate stakeholders on campus. The group can convene with these questions in mind: “Is this working? And if not, what do we need to do about it?” While seemingly simple questions, the issues that arise during the first year of operation may not always have simple answers. While counsel is part of this review, the process should be coordinated by the administrator in charge of the office. The purpose of this review is not only to evaluate the current operation of the office to address any immediate deficiencies, but also to evaluate the entire process of establishing an office abroad as a model for the institution’s expansion into other countries. The operations staff and project leaders need to closely partner with counsel and be in frequent and effective communication throughout the life of the office. When the institution has a foothold in one country, other opportunities may arise in surrounding cities that provide for an equally beneficial justification to expand the institution’s global footprint through the placement of another office abroad.
CONCLUSION:

A number of institutions have already moved into the global marketplace, and many more are currently planning to throw their proverbial hats into the ring. A structured entry into a foreign country ensures the responsible expansion of an institution’s operations abroad. Campus counsel need to assist senior academic officials in navigating the unfamiliar regulatory requirements for establishing an office while maintaining control over the legal and regulatory responsibilities of the home institution during the actual registration and contracting process.

FOOTNOTES:

FN1.
This Note will address international employment and tax issues briefly but is not meant to be comprehensive. For a more detailed analysis of these issues see Kevin Cranman and Natasha Baker, *Where in the World Are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Programs*, 36 JCUL 565 (2010). The Note also does not address the provision of any academic programs abroad or the opening of a campus to provide educational opportunities and degrees. For more information on these issues, see Peter F. May, *Introduction to Common Overseas Program Operating Models*, NACUA April 2008 One-Day CLE.

FN2.
See, e.g., Oberlin College Charter and Bylaws, and Ohio Rev. Code 3341.04.

FN3.
Depending upon the scope of operations, other tax and financial compliance steps may be necessary including Form TDF 90-22.1 (FBAR) and/or IRS Form 5713 (International Boycott Report). See NACUBO, *International Compliance Risks & Best Practices. Retrieved at: http://irc.nacubo.org/pages/nacubo annual meeting presentation-international compliance.pptx*. See also *International Resource Center* from NACUBO for several whitepapers outlining the financial requirements for operating abroad. http://irc.nacubo.org/Pages/default.aspx.

FN4.

FN5.

FN6.

FN7.
http://www.americanbar.org/groups/international_law/membership.html.

FN8.
The following site has a list of many of the associations with networks of international lawyers: http://www.hq.org/lawfirms-associat.html. See also *Select English Speaking Foreign Counsel Representing U.S. Higher Education Institutions Abroad by Country* (NACUA 2011). (William P. Hoye, Compiled Summer 2001, Updated April 2011).

FN9.
For example, an office in Mumbai, India and an office in Delhi, India are subject to two different
“shops and establishments acts” that counsel needs to consider when operating as an employer or business entity (depending upon whether the employee in the office will be “managerial” or not).

FN10.
For example, Article 213 of the Company Law of the People’s Republic of China states, “Where any foreign company violates this Law by unlawfully establishing any branch within China, it shall be ordered by the company registration authority to make corrections or to close it down, and may be fined not less than 50,000 Yuan (RMB) but not more than 200,000 Yuan (RMB).” As translated by China Daily. Retrieved at http://www.chinadaily.com.cn/bizchina/2006-04/17/content_569258.htm. For more information on China, see Rebecca M. Ginzburg, Establishing a Legal Presence in China for Educational Activities, NACUANOTES, Vol. 8, No. 12 (August 19, 2010).

FN11.
For example, when considering large countries such as China and India, location could mean the difference between having to formally register the office with the central government or an informal letter of intent to the local provincial leader. Institutions do not just “go” to China. There are many political subdivisions in China, each with its own government and sometimes unique processes.

FN12.
During the registration process, it is also important to take into consideration whether the structure in place allows the transfer of liability from the foreign office to the institution in the United States. There are several different models for organizing offices abroad that provide varying degrees of liability from the office to the campus. The ability to reach back to the U.S. institution is an important topic and should be discussed with local counsel, as well as between the stakeholders on the U.S. campus.

FN13.
Several NACUA resources are available regarding the formation of an entity abroad, thus this Note provides only a cursory explanation of the basic concepts involved. See William P. Nicholson, Global Engagement: Key U.S. and Foreign Law Considerations When Doing Business Abroad, NACUA 2009 Annual Conference.

FN14.

FN15.
A companion often cited alongside FCPA is the Anti-Kickback Enforcement Act of 1986, Public Law 99-634 codified at 41 U.S.C. §§51-58, which ensures that no employee of the institution has received kickbacks for their work. Several countries have similar laws in place, so counsel should consult both U.S. laws and laws regarding corruption in the foreign destination.

FN16.

FN17.
NACUA has extensive materials on both general and specific considerations of the employment of U.S. citizens, expatriates, and foreign resident citizens in offices abroad. For example, as presented at a recent NACUA conference: Natasha Baker, We Need Help! Hiring Workers: Whose Law, Which Law, Whose Taxes, Which Taxes 2011 NACUA April One-Day Workshop.

FN18.


FN20. 1990 Federal Law on the Harmonisation of Direct Cantonal and Communal Taxes and Art. 128 FC Federal Law on Direct Federal Tax (12/1990). However, each canton is free to set their own tax rates or establish new taxes.

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