

ANTI-CORRUPTION COMPLIANCE IN THE IMPLEMENTATION OF CHARITABLE ACTIVITIES



With the spread of the culture of corporate social responsibility, many companies in Kazakhstan have started to pay special attention to charity and allocate substantial funds for charitable assistance annually.

The Law of the Republic of Kazakhstan On Charity¹ (the “Charity Law”) was passed in 2015. It has been amended six (6) times in recent years. The latest amendments were introduced by the Law dated 4 July 2022², most provisions of which came into effect on 5 September 2022.

In this Article, we will highlight the recent amendments to the Charity Law and share our advice with the companies on the aspects they should pay attention to when considering and approving requests for charitable assistance in order to comply with requirements of the Charity Law, anti-corruption laws of Kazakhstan, and applicable foreign laws.

I. Recent Amendments to the Charity Law

The Law dated 4 July 2022 introduced numerous changes into five (5) codes and fourteen (14) laws, including Labor Code³, Code on Health of People and Health System⁴, Law On Volunteer Activity⁵, Law on State Social Order⁶, and others. We will focus only on the most significant amendments introduced into Charity Law:

- The following new concepts have been introduced:
«corporate charity» means voluntary activities of business entities to provide charitable assistance;
«fundraising» means the process of raising voluntary donations and (or) charitable assistance;
«electronic charity» means the activity associated with the attraction of voluntary donations in the form of money carried out electronically. According to the Dossier to the Draft Law dated 4 July 2022, the electronic charity was introduced in order to increase transparency of charitable activities and accountability on the use of donations by charitable organizations and beneficiaries;
«authorized agency in the sphere of charity» means a central executive agency that governs charity. To date, no government agency is specified in the legal database to act as the authorized agency in the sphere of charity.

¹ Law No. 402-V of the Republic of Kazakhstan On Charity, dated 16 November 2015.

² Law of the Republic of Kazakhstan No. 134-VII dated 4 July 2022 «On amendments to some regulatory acts of the Republic of Kazakhstan on volunteer activities, charity, state social order, state order for implementation of strategic partnership, grants and bonuses for non-governmental organizations, medicine and social support».

³ Labor Code of the Republic of Kazakhstan, dated 23 November 2015, No. 414-V.

⁴ Code of the Republic of Kazakhstan On Health of People and Health System, dated 07 July 2020, No. 360-VI.

⁵ Law of the Republic of Kazakhstan No. 42-VI On Volunteer Activity, dated 30 December 2016.

⁶ Law No. 36 of the Republic of Kazakhstan On State Social Order, State Order for Implementation of Strategic Partnership, Grants and Bonuses for Non-Governmental Organizations in the Republic of Kazakhstan.

However, analysis of the Dossier to the Draft Law dated 4 July 2022 allows assuming that this agency is likely to be the Ministry of Information and Public Development of Kazakhstan;

- The competence of the authorized agency in the sphere of charity includes implementation of the state policy in the field of charity, interaction with individuals, legal entities and government agencies in the field of charity, development and approval of rules for awarding an honorary title in the field of charity, awarding an honorary title in the field of charity, exercise of other powers provided by the laws of Kazakhstan;
- Minor clarifications have been introduced into the definitions of the concepts «*sponsorship*» and «*voluntary donations*»;
- An important amendment is the introduction of the business entities’ obligation to develop internal documents for provision of charitable assistance, if and when a decision is made to develop corporate charity. Internal documents should define the principles, key directions, procedure for providing charitable assistance to users, procedure for the formation of the expenditure part of the budget of a business entity. The purposes of the provided charitable assistance are determined in accordance with the Charity Law;
- Amendments introduced an obligation for a charitable organization to publish a report in mass media and (or) Internet resource of a charitable organization on the completed charitable program at least once (1) a year. The report shall include brief information on revenues and expenses, goals achieved in the framework of the charitable program;
- The amendments provide for additional information added to the requirements to a charitable program, according to which a charitable program shall be developed, approved and implemented by a benefactor and (or) a charitable organization. The charitable program shall include goals, objectives, implementation period (terms), estimates of expected income and expenses, and the procedure for providing charitable assistance. A benefactor and (or) a charitable organization may implement one or more charitable programs.

II. Algorithm of the company’s actions when providing the charitable assistance

Further, we would like to recommend an algorithm of actions that companies can follow when providing charitable assistance in order to comply with requirements of the laws of Kazakhstan, applicable foreign laws (in some cases), and comply with provisions of internal acts of a company.

STEP 1 - Approval of the Company’s Internal Acts Related to Provision of the Charitable Assistance

Before providing charitable assistance, the company shall approve the charitable program and the Regulations on charitable assistance, which shall indicate the goals, principles, key directions, procedure for providing the charitable assistance, and procedure allowing to form the expenditure part of the company’s budget. We also recommend that the Regulations clearly indicate the responsible persons of the company involved in the procedure for approval of the provision of charitable assistance by the company.

When developing the Regulations on charitable assistance, the company’s management may provide for certain restrictions, for example, that charitable assistance shall be provided only in the field of education, healthcare, or to support the development of a certain region of Kazakhstan. The company may also provide, for example, that only a certain type of charitable assistance is allowed (philanthropic, sponsorship or patronage activities).

Given that most queries on application of anti-corruption legislation and Charity Law come from Kazakhstani companies with foreign interest, we in AEQUITAS Law Firm have an extensive experience in developing various internal regulations (policies) in accordance with requirements of the Kazakhstan laws, as well as foreign legislation, which is followed by the subsidiaries of foreign companies doing business in Kazakhstan. As a rule, these companies seek to indicate in documents with counterparties that, in addition to requirements of the Charity Law of Kazakhstan, provisions of foreign laws shall be observed, such as the US Foreign Corrupt Practices Act (the «FCPA»), the UK Bribery Act 2010, etc.

STEP 2 – Receipt of the Request and Legal Analysis

Pursuant to Charity Law, charitable assistance is understood as «property provided by a benefactor on a gratuitous basis in order to assist a user in improving the financial and (or) material conditions:

- *in the form of social support to an individual;*
- *in the form of sponsorship;*
- *to a non-profit organization to support its statutory activities; and*
- *to an organization engaged in social activities as defined in accordance with the Tax Code.*

According to our practice, charitable assistance is provided in most cases to non-profit organizations to support their statutory activities. So, upon receipt of a request for a charitable assistance of such kind, the charter and information on the registered legal entity should be reviewed.

The charter shall indicate that the legal entity is a non-profit organization, e.g., a charitable organization, foundation, public association or another type of a non-profit organization provided for by the Kazakhstan Law on Non-Profit Organizations. In order to determine whether the planned purpose of spending the requested funds specified in the request for charitable assistance corresponds to the goals, and types of activities of the non-profit organization, it is also required to review the text of the organization's charter. For example, charitable assistance may be provided to a non-profit organization to support its statutory activities.

Kazakhstani companies with foreign interest, complying with the FCPA, should pay attention to the fact that one of the key purposes of the FCPA is to prevent from the provision of charitable assistance as a mechanism to channel funds or other benefits to foreign officials⁷.

The FCPA establishes a number of prohibitions and restrictions for certain persons defined therein (issuers, «domestic enterprises», individuals and legal entities determined on the basis of territorial features), failure to comply with which by such persons is regarded as a corruption offence.

Thus, it is prohibited to perform actions specified in the FCPA with respect to:

- a foreign official;
- a foreign political party and (or) its members, candidate for a foreign public office; or
- any person contributing to the corrupt acts by a foreign official, foreign political party and (or) its members, candidate for a foreign public office.

FCPA is not an international treaty ratified by Kazakhstan, but an internal regulatory act of a foreign state, so, in our opinion, it may be applied in Kazakhstan only within the scope of an agreement between parties to a

⁷ «Foreign official» in the FCPA means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

civil law contract on the applicable law. However, in any case, such application should not violate the imperative requirements of the Kazakhstan laws. In particular, a corruption offence committed in Kazakhstan will in any case be considered by the authorized agencies of Kazakhstan, and the guilty persons will be brought to liability in accordance with the Administrative Code and the Criminal Code.

Meanwhile, in case such violation also falls under the definition of a corruption offence under the FCPA, we believe that issuers and «domestic enterprises» and their officers, shareholders (participants) and representatives (as defined in the FCPA) may actually be held liable both in the USA and in Kazakhstan.

In this regard, Kazakhstan companies that have internal regulations (policies) and enter into contracts with counterparties that provide for compliance with the FCPA should carefully check whether there is any affiliation between a non-profit organization, which filed a request for charitable assistance, and Kazakhstan officials, as well as the persons performing management functions for a state organization or a quasi-public sector entity of Kazakhstan in accordance with requirements and restrictions established by the Kazakhstan Corruption Control Law and other applicable regulatory acts.

Furthermore, special care shall be taken to confirm that the charitable assistance is not conditional upon the receipt of future orders or any other future benefit to the company.

The analysis should also distinguish between the forms of charity under the Charity Law:

- Patronage activity is aimed at the development of science, education, culture, art, sportsmanship, preservation of historical and ethnocultural patrimony of public and state.
- Philanthropic activity is intended to satisfy the needs of public and individuals, improve their living conditions, and usually relates to assistance to specific individuals in difficult life situations.
- According to the latest amendments, sponsorship activity means the sponsor's activity on provision of the sponsor's assistance under conditions of popularization of the sponsor's name in accordance with the Kazakhstan laws. Accordingly, unlike any other forms of charity, sponsorship pursues advertising purposes. Since government agencies cannot perform advertising functions, we consider it impossible to «sponsor» the events held by government agencies.

If a company intends to provide charitable assistance and has no goal of promoting the sponsor's (company's) name, we recommend using the opportunity to provide patronage assistance in the form of a charitable grant.

STEP 3 - Signing Contract

After the company approves the charity assistance a contract shall be signed between a benefactor and the recipient of the charity assistance, where we recommend clearly stating the purpose of the charity assistance, amount of the charity assistance in monetary terms, including all possible taxes, procedure for providing the charity assistance, liability of the parties, regulations on compliance with the anti-corruption laws, dispute resolution procedure, procedure for submitting the reports and other documents by the recipient of the charity assistance, including accounting documents confirming the expenditure of funds for implementation of the predetermined contractual purpose. We also recommend specifying in the sponsorship agreement the procedure of how sponsor's name will be promoted.

Note that the procedure for using a charitable grant or individual scholarship may be changed by a user with the benefactor's (patron's) consent.

STEP 4 - Verifying the Report on the Use of Charity Assistance

According to the laws, a benefactor or a charitable organization that has given its property to a user shall be entitled to demand from the user to provide a report on the use of that property. In turn, a user who has received money from a benefactor or a charitable organization as purpose-oriented charity assistance shall submit a report at the request of the benefactor or the charitable organization within the time limits and according to the procedure stipulated by the contract.

Undisbursed part of a charitable grant or individual scholarship is a repayable financial assistance, which should be returned to the benefactor.

Kazakhstan residents shall publish annual reports in mass media on the use of funds provided on a gratuitous basis by international organizations, foreigners and (or) stateless persons for charitable assistance.

In addition, according to the latest amendments, a charitable organization shall publish reports in mass media and (or) on the Internet resource of the charitable organization a report on the implemented charitable program at least once (1) a year. The report shall include brief information about income and expenses, and the goals achieved as part of the charitable program.

STEP 5 - Reporting by a Benefactor and (or) a Charitable Organization

The implementation of the charitable program must be confirmed by the report of the benefactor and/ or the charitable organization.

According to the recent changes to Charity Law, benefactors in Kazakhstan should, in their turn, keep record and submit information on their charitable activities to authorized government agencies in compliance with the procedure stipulated by the laws of Kazakhstan. Taking into account the fact that benefactor is understood as a **person**, a philanthropist and (or) sponsor, and (or) a patron of the arts, and (or) a person providing support to his native place (or “small motherland”) who carries out charity activities, we believe that the provisions of the legislation concerning the obligation of a benefactor to keep record and provide information to the authorized body are very broadly formulated and, in fact, will hardly «work in practice». For example, given the wide spread of money transfers and that many people use money transfers for charity, it is unlikely that most of them will provide information to the authorized body.

In conclusion, we would like to note that Kazakhstan’s legislation on charity is at the initial stage of its formation. In the West, engagement in charity is, first of all, beneficial, from the point of view of taxation incentives. Second, it brings prestige and raises the social status and reputation of a benefactor. Meanwhile, in Kazakhstan, major taxpayers are under monitoring are given a 3% incentive, while all other taxpayers are given to the large taxpayers, who are under monitoring, while all other taxpayers are given a 4% incentive.

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WHY IS DUE DILIGENCE CRITICAL PRIOR TO ENTERING INTO TRANSACTIONS?



The oil and gas industry is known for its significant capital investments with high risks. Given the complex and capital-intensive nature of this industry due diligence has become an essential process to timely evaluate and mitigate any potential risks, establish credibility, and ensure success of business transactions.

Due diligence is a comprehensive and systematic review of all the relevant data, financial statements, legal documents, and operational processes of a company or an asset to assess its value, risks, and potential opportunities. The primary goal of due diligence is to gather enough information to make informed decisions and avoid any issues that could arise after a transaction is complete.

All due diligence begins with gathering information about the counterparty. It is important to validate and verify the accuracy of the reported data through online resources. Depending on the level of risk presented by a counterparty, a different level of additional information gathering may be appropriate.

By conducting due diligence, companies can ensure that they are doing business with reputable and trustworthy partners, which can help build trust and confidence among them and ensure that a counterparty has the necessary expertise, resources, and capabilities to deliver on their commitments.

Therefore, due diligence of a counterparty is critical for several reasons, including:

- **Mitigating Risks:** Before entering a business transaction with a counterparty, it is crucial to identify any potential risks that could negatively impact the business.
- **Legal Compliance:** Due diligence of a counterparty helps ensure that they comply with all relevant laws and regulations. This includes verifying that they hold the necessary licenses, permits, and certifications. This helps avoid legal issues that could arise from non-compliance.
- **Evaluating Reputation:** Conducting due diligence on a counterparty helps evaluate their reputation in the market.

