

# Legal and Regulatory Challenges Facing Civil Society Organizations in the United States



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The United States has a vibrant civil society with nonprofit organizations advancing an array of objectives from service delivery to advocacy. Despite the sector's continuing vitality, it faces new threats and looming dangers. Some of these challenges are addressed in this report. It explores how recent changes, or proposed changes, in laws or regulations in the U.S. may affect domestic civil society organizations (CSOs), international CSOs working inside the U.S., and U.S. CSOs working internationally.

## Domestic Civil Society Organizations

This section focuses on recent or proposed legal changes that affect domestic CSOs. It is not meant to be comprehensive, but rather highlights significant current issues.<sup>1</sup>

### Politicization of the Sector

The U.S. nonprofit sector has seen legal and policy changes that have increased involvement of the sector in partisan politics, raising concerns that components of the sector are becoming less independent and more politicized. For example, 501(c)(4) social welfare organizations may engage in some political activity, as long as it is not their "primary purpose."<sup>2</sup> In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the U.S. Supreme Court allowed for corporations and unions to give unlimited funding to 501(c)(4) organizations that make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate (previously, corporations and unions were barred from making such expenditures). Building on *Citizens United*, the D.C. Circuit held in *Speechnow.org v. FEC*, 599 F.3d 686 (2010) that the government could not restrict the size of donations to Political Action Committees (PACs), which can then make independent expenditures in support of or against candidates for federal office.

While PACs require public disclosure of donors, 501(c)(4) organizations do not. Commentators have been critical of the widespread use of anonymous donors either using 501(c)(4) organizations to engage in political activity directly or by having a 501(c)(4) in turn provide funding to a PAC.<sup>3</sup>

Concerns around the politicization of the U.S. nonprofit sector are compounded by recent efforts to repeal the so-called Johnson amendment, a provision of the U.S. tax code that bans 501(c)(3) organizations from supporting or opposing a political candidate.<sup>4</sup> Donations to 501(c)(3) organizations, unlike 501(c)(4) organizations, are tax deductible. President Trump has called for repealing the Johnson amendment to allow places of worship to support political candidates.<sup>5</sup> Some Republicans have gone further, calling for the Johnson amendment to be repealed for all 501(c)(3) organizations (not just places of worship), and the House version of the 2017 tax reform bill included such a broad repeal, although this provision was ultimately dropped from the final bill.<sup>6</sup> Critics of repealing the Johnson amendment fear that doing so would not only unduly politicize places of religious worship and charitable organizations more generally, but also allow 501(c)(3) organizations to be used to bypass campaign finance laws. Notably, if the Johnson amendment were repealed entirely, 501(c)(3)

1 The report focuses specifically on 501(c)(3) organizations. For a brief explainer on the legal categories of tax exempt organizations in the United States, see Internal Revenue Service, Types of Tax-Exempt Organizations <https://www.irs.gov/charities-non-profits/types-of-tax-exempt-organizations>

2 IRS, Social Welfare Organizations, <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations>

3 For an overview of the frequently complex world of nonprofit law and political campaigning, see B. HOLLY SCHADLER, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(c)(3)s, 501(c)(4)s, AND POLITICAL ORGANIZATIONS (Bolder Advocacy, 2012); Center for Responsive Politics, Dark Money Basics, <https://www.opensecrets.org/dark-money/basics>

4 Independent Sector, Nonprofit Political Activity, <https://www.independentsector.org/policy/policy-issues/political-activity-rules/>

5 Marc Landler and Laurie Goodstein, Trump Vows to 'Destroy' Law Banning Political Endorsements by Churches, NY TIMES, Feb. 2, 2017, <https://www.nytimes.com/2017/02/02/us/politics/trump-johnson-amendment-political-activity-churches.html>

6 Heather Long, In small win for Democrats, the final tax bill will not include a provision allowing churches to endorse political candidates, WASHINGTON POST, Dec. 14, 2017, [https://www.washingtonpost.com/news/wonk/wp/2017/12/14/in-small-win-for-democrats-the-final-tax-bill-wont-include-a-provision-to-allow-churches-to-endorse-political-candidates/?utm\\_term=.f7f232347f25](https://www.washingtonpost.com/news/wonk/wp/2017/12/14/in-small-win-for-democrats-the-final-tax-bill-wont-include-a-provision-to-allow-churches-to-endorse-political-candidates/?utm_term=.f7f232347f25)

organizations could be used to accept unlimited tax deductible and anonymous donations to support a political campaign.<sup>7</sup>

## Under-Enforcement of Tax Law by the Internal Revenue Service

There have been repeated criticisms over the years that the Internal Revenue Service (IRS) has under-enforced U.S. tax law in relation to U.S. nonprofits. This is a result of factors such as inadequate funding of the agency's work on tax-exempt organizations, challenges retaining talented staff, and poorly designed systems to track the activities of tax-exempt organizations.<sup>8</sup>

It is also a product of the political environment. Notably, in 2013 a controversy emerged involving whether the IRS engaged in greater scrutiny of conservative tax exempt groups compared to others.<sup>9</sup> Given this controversy and a larger climate of political pressure, some commentators have claimed the IRS has largely stopped enforcing restrictions on tax exempt organizations from engaging in "political activity" out of fear that its enforcement actions would be seen as politically motivated. For example, in 2016 the IRS tax exempt organizations division reportedly rejected just 37 of the 79,582 applications on which it made a final decision.<sup>10</sup>

## Tax Reform

In December 2017, the U.S. enacted major tax reform legislation. This legislation has at least two major consequences for nonprofits in the United States. First, the new tax bill nearly doubled the standard deduction for individuals from approximately \$6,300 to \$12,000 and for married couples from \$12,700 to \$24,000, meaning many more people are likely to take the standard deduction instead of individual deductions. Groups like Independent Sector, a coalition of nonprofits and foundations, have argued this will lead to fewer and smaller charitable contributions because under federal tax law charitable contributions are only tax deductible if the filer does not take the standard deduction.<sup>11</sup> Similarly, the exemption to the estate tax was doubled to \$10 million, reducing the number of estates that are taxed and so the number of people who would receive a tax deduction on their estate if they made a charitable contribution.<sup>12</sup> The Council on Foundations estimated that these two changes in the tax bill will lead to \$16 to \$24 billion less given to charitable organizations in the U.S. each year.<sup>13</sup>

Second, the tax reform bill includes a new 1.4% excise tax on the earnings of the wealthiest university endowments.<sup>14</sup> While this new tax will only effect a small number of universities there is concern that this might be used to justify increasing the current 2% tax on investment earnings of the endowments of foundations in the future<sup>15</sup> or justify a tax on the earnings of other university endowments or the endowments of non-university non-profits. Such action could significantly limit the funds available for U.S. civil society.

## Right to Assemble

Nonprofits have also faced a shift in the legal environment when it comes to assembly rights. Notably, since November 2016, over 50 laws have been proposed or enacted in 28 states and at the federal level that restrict the right to assemble or protest.<sup>16</sup> Among the most concerning measures are those that impose excessive penalties on protesters who commit minor infractions; those that limit the civil liability of drivers who hit protesters with their vehicle; and the use of untailed

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7 Jon Sarlin, Tax Bill Could Make 'Dark Money' Political Contributions Tax Deductible, CNN, Dec. 8, 2017 <http://www.cnn.com/2017/12/08/politics/tax-bill-dark-money-political-contributions-tax-deductible/index.html>

8 Marcus Owens, Challenged Regulators in REGULATING CHARITIES: THE INSIDE STORY 91-92 (Myles McGregor-Lowndes and Bob Wyatt Eds., 2017)

9 Andrew Prokop, The scandal over IRS scrutiny of conservative groups, explained, VOX, May 13, 2015, <https://www.vox.com/cards/irs-scandal-explained/what-is-the-irs-scandal>

10 Robert O'Harrow Jr., *Fallout from allegations of tea party targeting hamper IRS oversight of nonprofits*, WASHINGTON POST, Dec. 17, 2017 [https://www.washingtonpost.com/investigations/fallout-from-allegations-of-tea-party-targeting-hamper-irs-oversight-of-nonprofits/2017/12/17/6403c1c0-c59e-11e7-a441-3a768c8586f1\\_story.html?utm\\_term=.fea3e4acc56](https://www.washingtonpost.com/investigations/fallout-from-allegations-of-tea-party-targeting-hamper-irs-oversight-of-nonprofits/2017/12/17/6403c1c0-c59e-11e7-a441-3a768c8586f1_story.html?utm_term=.fea3e4acc56)

11 Independent Sector, Independent Sector Statement on Tax Reform Developments in House and Senate, Nov. 10, 2017 at <https://www.independentsector.org/news-post/statement-tax-reform-developments/>

12 Id.

13 Council on Foundations, Council on Foundations Statement on Passage of the Tax Cuts and Jobs Act, Dec. 20, 2017 <https://www.cof.org/news/council-foundations-statement-passage-tax-cuts-and-jobs-act>

14 Andrew Kreighbaum, Final GOP Deal Would Tax Large Endowments, INSIDE HIGHER ED, Dec. 18, 2017, <https://www.insidehighered.com/news/2017/12/18/large-endowments-would-be-taxed-under-final-gop-tax-plan>

15 IRS, Tax on Net Investment Income, <https://www.irs.gov/charities-non-profits/private-foundations/tax-on-net-investment-income>

16 International Center for Not-for-Profit Law (ICNL), U.S. Protest Law Tracker, <http://www.icnl.org/usprotestlawtracker/>

states of emergency by governors when there is violence at protests or just the mere threat of violence.<sup>17</sup>

Of particular impact on civil society organizations, the use of collective liability has been on the rise.<sup>18</sup> For example, after the inauguration day J20 protests in January 2017, almost 200 protesters were charged by the Department of Justice for vandalism and other illegal acts on a theory of collective liability (i.e. that they participated in a protest where they should have known there would be vandalism). Each defendant faced decades in jail. The first batch of tried protesters were found innocent by a jury in December 2017, and charges against many others subsequently dropped, but there continue to be charges against 59 protesters, including those who organized the protest.<sup>19</sup> After the Keystone Pipeline protests in North Dakota, Oklahoma enacted legislation in 2017 that among other things allows groups to be fined up to one million dollars if they are found to be “conspirators” with a person who damages certain named infrastructure.<sup>20</sup> Similar legislation was introduced in Ohio in January 2018. Lawyers are concerned that with these laws if a CSO organizes a protest and a demonstrator damages infrastructure, the organization could then be held liable.

## International Civil Society Organizations Working in the U.S.

The United States has largely had a conducive environment for nonprofits headquartered abroad operating in the U.S.,<sup>21</sup> but one issue that may change this is stricter implementation of the Foreign Agents Registration Act (FARA).<sup>22</sup> Such a change would also effect domestic nonprofits that have foreign partners or funders.

FARA is a 1938 anti-propaganda statute that has rarely been enforced, but has sweeping and vague provisions. Under the Act, any “agent” of a “foreign principal” that undertakes particular covered activities, such as “political activities”, must register as a “foreign agent” with the Department of Justice. The Act covers the activities of media organizations and lobbyists, but also nonprofits, foundations, and other entities and individuals.

After the Russian government was accused of meddling in the 2016 U.S. Presidential election, several bills were introduced into Congress, by members of both political parties, to increase enforcement of FARA and even expand some of its provisions.<sup>23</sup> In September 2017 the Department of Justice asked RT, a state backed Russian TV network, to register as a “foreign agent”, which it did in December.<sup>24</sup>

These signs that FARA may be enforced more strictly has alarmed civil society organizations and others. In recent years, “foreign agent” laws in other countries, such as Russia and Hungary, have been used to target nonprofits with foreign funders as a way to suppress dissent. In fact, many of these other countries claim to model their restrictive laws on FARA.<sup>25</sup> There is concern that FARA could be enforced in a politically targeted way in the U.S. or just that its increased enforcement could create undue regulatory burden and unintentional stigmatization of cross-border civil society activity.

To understand these potential dangers, it is useful to break down the key components of the Act:

1. **Who is a Foreign Principal?** A “foreign principal” under the Act equally includes not just foreign governments, but also foreign individuals, foundations, nonprofits, companies, or other entities.<sup>26</sup>
2. **Covered Activity.** The activities covered under the Act includes “political activities” defined to include an attempt to influence “any section of the public within the United States” on domestic or foreign policy. In other words, it covers almost any type of advocacy. Nor do the activities even have to be political. For example, an “agent” solic-

17 For an overview of right to assembly challenges in the U.S., See WRITTEN SUBMISSION OF THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW ON THE RIGHT TO PEACEFUL ASSEMBLY IN THE UNITED STATES, submitted to the 166<sup>th</sup> ordinary period of the Inter-American Commission of Human Rights, Nov. 22, 2017, available at <http://www.icnl.org/programs/US%20Programs/ICNL%20IACHR%20Submission.pdf>

18 Id.

19 *Charges dropped for 129 anti-Trump protest defendants*, AL JAZEERA, Jan. 19, 2018, <http://www.aljazeera.com/news/2018/01/charges-dropped-129-anti-trump-protest-defendants-180119092812846.html>

20 International Center for Not-for-Profit Law (ICNL), U.S. Protest Law Tracker, <http://www.icnl.org/usprotestlawtracker/>

21 U.S. Department of State, Non-Governmental Organizations in the United States, June 20, 2017, at <https://www.state.gov/j/drl/rls/fs/2017/266904.htm>

22 Andy Segedin, *Nonprofits Face ‘Foreign Agent’ Tag*, THE NONPROFITTIMES, Jan. 16, 2017, <http://www.thenonproftimes.com/news-articles/non-profits-face-foreign-agent-tag/>

23 See, International Center for Not-for-Profit Law (ICNL), *The Danger of the Foreign Agents Registration Act (FARA) to Civil Society in the United States and Abroad*, <http://www.icnl.org/programs/US%20Programs/FARA%20home.html>

24 Jack Stubbs and Ginger Gibson, *Russia’s RT America registers as ‘foreign agent’ in U.S.*, REUTERS, Nov. 13, 2017 <https://www.reuters.com/article/us-russia-usa-media-restrictions-rt/russias-rt-america-registers-as-foreign-agent-in-u-s-idUSKBN1DD25B>

25 See, e.g., INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (ICNL), *FARA’S DOUBLE LIFE ABROAD* (Nov. 2017), [http://www.icnl.org/programs/US%20Programs/FARA%20briefing\\_Final\\_c.pdf](http://www.icnl.org/programs/US%20Programs/FARA%20briefing_Final_c.pdf)

26 22 U.S. Code Ch. 11, Sec. 611(b)

ing or disbursing contributions or other things of value on behalf of a foreign principal is also covered by the Act.<sup>27</sup>

3. **FARA’s “Principal-Agent Relationship.”** FARA does not require a true principal-agent relationship. Instead, an entity or person can be considered an “agent” of a foreign principal even if the “agent” acts at the principal’s mere “request” or is financed “in major part” by the principal (with “major part” being undefined in the Act).<sup>28</sup>

4. **The Burden Imposed by FARA.** An “agent” under FARA needs to register with the Department of Justice (DoJ), provide regular updates to DoJ of its activities covered by the Act, and when providing information to the public must make a “conspicuous” statement that it is acting on behalf of a foreign principal. An agent that knowingly does not comply with these rules faces criminal penalties.<sup>29</sup>

Given the broad provisions of the Act,<sup>30</sup> it could apply to the activities of a wide range of groups. For instance, if the employee of a European foundation came to the U.S. to coordinate and pay the expenses of a visiting youth swim team, they would arguably need to register because they are disbursing funds in the U.S.

The Act’s broad provisions would also cover many domestic nonprofits. For example, if an international nonprofit requested that a U.S. nonprofit organize a public meeting for the international nonprofit to share its policy views on topics like climate change, immigration, or global public health the U.S. nonprofit would arguably need to register. This is because the U.S. nonprofit would be acting at the “request” of a foreign principal in a way that may influence a “section” of the U.S. public on a policy issue.

While historically the U.S. has been generally welcome to international nonprofits, increased enforcement of FARA could stop or chill these nonprofits from operating in the U.S. or their ability to form partnerships and engage in advocacy within the country.

## U.S. Civil Society Organizations Working Internationally

Nonprofits in the United States, like other U.S. entities, are barred from working with governments or individuals under U.S. sanctions and groups designated as foreign terrorist organizations.<sup>31</sup> This section highlights challenges created by sanctions, anti-terrorism, and anti-money laundering measures, along with the U.S. government’s “Mexico City Policy”.

### Material Support

Under U.S. law it is a crime to provide “material support” to a designated foreign terrorist organization. This provision was interpreted broadly by the U.S. Supreme Court in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In the case, Humanitarian Law Project proposed to train members of two designated terrorist organizations in how to engage in international advocacy and use tools to resolve conflicts peacefully. The Court though upheld the constitutionality of this provision and ruled even peacebuilding assistance would be “material support” to these designated terrorist organizations in violation of the law. Commentators assert this strict reading of “material support” has limited the ability of civil society to engage in areas where terrorist organizations are present.

### Sanctions

The U.S. has both comprehensive and selective sanctions against certain countries limiting or barring U.S. entities, including nonprofits, from working with governments or other entities in these countries.<sup>32</sup> In some cases, the U.S. government may require that a nonprofit receive a license from the Office of Foreign Asset Control (OFAC) to undertake their work in a specific country.<sup>33</sup> These sanctions regimes have chilled the activities of certain nonprofits seeking to operate in these countries.

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27 22 U.S. Code Ch. 11, Sec. 611(c)

28 22 U.S. Code Ch. 11, Sec. 611(c)

29 22 U.S. Code Ch. 11, Sec. 614

30 There are important exemptions under the Act. These include for activities related to religious, academic, and scientific activities; for the fine arts; and for “soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering.” There is also an exemption for activity that does not predominantly serve a “foreign interest” (left undefined in the Act). However, these exemptions still leave extensive amounts of cross-border civil activity covered. 22 U.S. Code Ch. 11, Sec. 613

31 U.S. Department of State, Non-Governmental Organizations in the United States, June 20, 2017, <https://www.state.gov/j/drl/rls/fs/2017/266904.htm>

32 U.S. Dept. of the Treasury, Sanctions Programs and Country Information, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>

33 U.S. Dept. of the Treasury, OFAC FAQs: General Questions, [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_general.aspx#licenses](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#licenses)

## Access to Financial Institutions

Stricter enforcement of money-laundering, sanctions, and terrorist financing laws have led to banks disengaging from certain geographic areas or sectors.<sup>34</sup> This phenomenon is called “derisking”.<sup>35</sup> Nonprofits have been caught up in this process because they have been mistakenly viewed as particularly vulnerable to being used for illicit ends. In 2016, the Financial Action Task Force (FATF), an intergovernmental group that coordinates activities to combat money laundering and terror financing, removed its longstanding characterization of nonprofit organizations as being particularly vulnerable to terrorist abuse from its official recommendations.<sup>36</sup> Still, the “derisking” challenge remains. A recent survey by the Charity & Security Network found that two-thirds of all U.S. nonprofits that work abroad have financial access difficulties (37% have faced delayed wire transfers, 33% an increase in fees, and 26% unusual document requests).<sup>37</sup> Other CSOs were unable to open bank accounts, while others had their accounts closed with little or no explanation. All parts of the globe are impacted and the problem is not limited to just conflict zones or fragile states.

## Mexico City Policy

In January 2017, President Trump reinstated and expanded the Mexico City Policy via executive order. The original Mexico City Policy, adopted first under President Reagan and then readopted under the Bush administrations, required foreign non-governmental organizations (NGOs) to certify that they would not perform or actively promote abortion as a method of family planning as a condition for receiving family planning assistance. Under the Trump administration, this policy was expanded to include foreign NGOs receiving any U.S. global health assistance.<sup>38</sup>

The Mexico City Policy restricts the ability of U.S. nonprofits to work internationally. U.S. NGOs that accept U.S. government global health funding must ensure that their foreign NGO sub-recipients adhere to the policy. This limits the partners with which they can work. It also undermines the mission of these groups. For example, a recent report by Sida estimated that in Ethiopia alone 1.8 million people would be denied access to sexual or reproductive services over the next three years because of the Mexico City Policy.<sup>39</sup>

## Conclusion

The legal and policy developments that affect CSOs detailed here are not meant to be exhaustive, but rather to be illustrative and to highlight some major areas of concern. Other challenges include a complex regulatory environment for CSOs at the local, state, and federal level in the U.S. that makes organizations more vulnerable to the possibility of selective government enforcement.<sup>40</sup> CSOs also face attacks (electronic, physical, or reputational) on their organizations and staff, strategic lawsuits against public participation (or SLAPP suits), and tighter immigration restrictions that not only affect communities with which they work, but also the ability of nonprofits to attract and retain staff or engage in cross-border activities.<sup>41</sup>

While the issues highlighted in this report are significant, nonprofit organizations are working together to address these challenges and proactively shape the future of the sector in the United States.

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34 Emile Van Der Does De Willebois, *De-risking impedes access to finance for non-profit organizations*, WORLD BANK, Feb. 24, 2017, <http://blogs.worldbank.org/psd/de-risking-impedes-access-finance-non-profit-organizations>

35 *A crackdown on financial crime means global banks are derisking*, THE ECONOMIST, July 8, 2017, <https://www.economist.com/news/international/21724803-charities-and-poor-migrants-are-among-hardest-hit-crackdown-financial-crime-means>

36 *NPOs applaud important changes in Financial Action Task Force (FATF) policy – NPOs no longer considered “particularly” vulnerable*, [http://www.icnl.org/news/2016/2016%20NPOs%20applaud%20important%20changes%20in%20Financial%20Action%20Task%20Force%20\(FATF\)%20policy.pdf](http://www.icnl.org/news/2016/2016%20NPOs%20applaud%20important%20changes%20in%20Financial%20Action%20Task%20Force%20(FATF)%20policy.pdf)

37 SUE ECKERT, FINANCIAL ACCESS FOR U.S. NON-PROFITS (Feb. 2017), available at [https://www.charityandsecurity.org/resources/CSN\\_Publications](https://www.charityandsecurity.org/resources/CSN_Publications)

38 The Henry J. Kaiser Family Foundation, *The Mexico City Policy: An Explainer*, June 1, 2017, <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/>

39 Sida’s input to the Swedish Ministry of Foreign Affairs on actual and predicted consequences of the Mexico City Policy/ Protecting Lives in Global Health Assistance (MCP/PLGHA) (Oct. 12, 2017)

40 For an overview of some of these legal compliance issues, see ICNL, *Resources for U.S. Nonprofits: Legal and Financial Compliance, Risk Management, and Pro Bono Assistance*, available at <http://www.icnl.org/programs/US%20Programs/Resources%20for%20US%20nonprofits.html>

41 Nonprofits may also face specific legal and regulatory challenges because of the topic on which they work or the communities that they serve.