REPORT

FARA: ISSUES AND RECOMMENDATIONS FOR REFORM

REPORT OF THE TASK FORCE ON
THE FOREIGN AGENTS REGISTRATION ACT

INTERNATIONAL LAW SECTION
AMERICAN BAR ASSOCIATION

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[*] The views contained in this report are those of the members of the Task Force in their individual capacities and do not necessarily reflect the views of their organizations, firms, or clients.

[†] The views contained in this report do not purport to represent the views of those persons identified as liaisons to the Task Force or their employing entities. Liaisons were invited to join the Task Force solely to offer, where appropriate, views and information that might assist the Task Force in forming its own conclusions and recommendations.

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The views expressed herein are presented on behalf of the International Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

SECTION I: INTRODUCTION

Considering potential reforms of the Foreign Agents Registration Act ("FARA"), a law originally enacted in 1938, has never been more essential or timely. Since 2015, enforcement of FARA by the Department of Justice ("DOJ" or "Department") has intensified to a level not seen in decades. This surge in enforcement is manifest not only in an increase in criminal prosecutions for FARA violations, but also in more aggressive, day-to-day administrative enforcement. Accordingly, heightened importance now attaches to compliance with FARA by companies, nonprofit institutions, individuals, and others whose activities come within the scope of FARA.

Compliance with FARA by the regulated community, however, is bedeviled by an antiquated statutory regime which is expansive in its jurisdictional scope, stigmatizing in its terminology, and laden with key definitions that are unduly broad or vague. Moreover, the law in its current form and application goes beyond what is necessary to accomplish its historical, core purpose – to establish transparency regarding influence activities conducted within the United States on behalf of foreign governments and foreign political parties. Congressional interest in amending FARA has been evidenced in several bills introduced in the past several years (including bills pending in the current 117th Congress), but there has been no attempt at overarching, structural reform, and no legislation materially amending FARA has been enacted since 1995.

In 2019, the International Law Section of the American Bar Association established a Task Force to consider possible reforms to the statute and how it is administered and enforced by DOJ. The Task Force included attorneys with extensive experience advising parties on FARA compliance, former senior DOJ officials responsible for FARA enforcement, the general counsel of a prominent think tank, experts in national security law from academia, and a senior official at a nonpartisan public interest advocacy organization.

From the outset and throughout its deliberations, the Task Force endeavored to reexamine FARA from a fresh and comprehensive perspective, concentrating on what kind of statutory and regulatory regime makes sense in the twenty-first century. The Task Force did not conduct its fact-finding or analysis, or devise its recommendations, burdened by the potential limitations of what types of reforms might be politically viable. Rather, it set out to craft proposed reforms which, in its members' collective judgment, are sound as a matter of law and policy, seeking to strike a reasonable balance between the government's legitimate enforcement interests and the importance of a clearer, more practicable, legal regime for parties engaged in activities within the United States on behalf of foreign interests. Certain reforms recommended by the Task Force will, indeed, require federal legislation to amend FARA. Other improvements may be implemented by DOJ without the need for legislation, either via regulatory action or through the publication of additional public guidance providing greater transparency into how DOJ construes FARA.

The Task Force hopes that this report[1] will stimulate consideration and action by both DOJ and Congress on measures to update and improve FARA.

SECTION II: EXECUTIVE SUMMARY

The Task Force recommends multiple reforms of FARA, its implementing regulations, and DOJ policy and practice. Indicative of the balanced but sweeping approach the Task Force brought to its effort, the Task Force at all times considered the national security considerations that underlie FARA while seeking to reframe the regulatory regime in a manner that is both more tightly tethered to the law's fundamental purpose, and more likely to produce public understanding and compliance.

The Task Force's key recommendations to Congress related to FARA reform are as follows:

- Congress should rename FARA and otherwise replace the term "agent of a foreign principal" with a term that elicits less stigma and causes less confusion.

- Congress should narrow the statute's "foreign principal" definition to focus on foreign governments, foreign political parties, and those acting on their behalf.

- Congress should adjust the "agent of a foreign principal" definition to eliminate the word "request" and clarify the phrase "in major part."

- Congress should change how FARA applies to media organizations by reformulating its legal standard to hinge on direction and control of content distributed within the United States.

- Congress should harmonize the FARA and Lobbying Disclosure Act ("LDA") disclosure regimes by requiring additional detailed information from filers under the LDA and by mandating that potential "agents" who want to avail themselves of the FARA exemption for LDA registrants to affirmatively check a box indicating that they intend to do so on the LDA registration form.

- Congress should institute a new requirement under FARA for each foreign principal to certify under penalty of perjury that the information submitted by the foreign principal's "agent" on Exhibit A and Exhibit B (and any amendment to these forms) is correct.

- Congress should amend the statute to provide more certainty surrounding the treatment of informational materials and the protection of filers' private information.

- Congress should repeal the filing fees associated with FARA submissions.

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[1] The Task Force thanks Michael Rondon at Wiggin and Dana for his meticulous assistance in preparing this report for submission to the International Law Section.

- Congress should grant DOJ authority to issue civil investigative demands in furtherance of administrative inquiries and to impose civil monetary penalties for FARA violations, and should update statutory language related to criminal penalties for violating FARA.

The Task Force also makes the following recommendations to DOJ concerning its policies and practices related to FARA:

- DOJ should publish new public guidance to clarify the term "political consultant," which is one of the ways that a person can become an "agent of a foreign principal."

- DOJ should issue clarifying guidance about what it means to "directly promote the public or political interests of a foreign government," which is a key phrase found in two important FARA exemptions.

- DOJ should issue new regulations that apply the statutory exemptions at 22 U.S.C. § 613(d)(1) and (d)(2) to situations other than state-owned enterprises.

- DOJ should issue new public guidance and revise its regulations to interpret the FARA exemption for certain legal representations more clearly.

- DOJ should replace "the principal beneficiary" standard in its regulation interpreting the FARA exemption for LDA registrants with a standard that focuses on the purpose of the potentially registrable work.

- DOJ should publish more Advisory Opinions and Letters of Determination with fewer redactions, and should resume inclusion of enforcement activities in its updates to Congress.

- DOJ should change its policies and practices to provide more certainty surrounding the treatment of informational materials and the protection of filers' private information.

Please note that, although the Task Force recommends that certain terms be replaced or removed from the statute and its implementing regulations, this report uses terms as they appear in current law (*e.g.*, even though the Task Force recommends replacing "agent" with "representative," the report presents other suggested amendments using the term "agent" for consistency with current law). Please also note that the Task Force's recommendations may not entirely cohere, such that if some recommendations are adopted then others may be unnecessary and superfluous.

SECTION III: CONGRESS SHOULD RENAME FARA

A. Background Discussion

The term "agent of a foreign principal" is central to FARA. "Agent" status is the trigger for individuals and entities to incur registration and other obligations under the law. FARA registrants commonly are referred to as "agents." And "agent" itself is obviously in the statute's very name.

FARA's ubiquitous use of the word "agent" throughout the law raises several issues. As a threshold matter, FARA's use of "agent" is misleading, since the statute covers relationships that fall outside those addressed in the Restatements of Agency and other "agency law" concepts. Courts interpreting the term have referenced formal "agency" concepts but have made clear that FARA's scope is not cabined by them.[2] As the Department of Justice has put it, "FARA's concept of agency . . . reach[es] less formally defined (and more episodic) behavior."[3] The term "agent" is not uniformly apt in the FARA context, then, because it invokes the entire body of agency law when agency-law concepts are not determinative in a FARA registration analysis. In addition, "agent" confuses the regulated community about FARA's scope as much or more than it clarifies.

FARA's use of "agent" also causes the American public, federal law enforcement officials, and the news media[4] to conflate FARA with a separate statutory provision at 18 U.S.C. § 951, which makes it a crime to act as an "agent of a foreign government" in the United States without prior notification to the Attorney General.[5] Section 951 polices "espionage lite"[6] activities and is specifically utilized by federal law enforcement to "prosecute clandestine, espionage-like behavior information gathering, and procurement of technology on behalf of foreign governments or officials."[7] Despite some similarities, Section 951 and FARA "involve different sets of elements and different types of issues,"[8] meaning that efforts to enforce these separate laws are and should be distinct. The overlapping use of "agent" by Section 951 and

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[2] *Att'y Gen. of U.S. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982) ("We agree that the agency relationship sufficient to require registration need not, as INAC urges, meet the standard of the Restatement (Second) of Agency with its focus on 'control' of the agent by the principal.").

[3] Dep't of Justice, *The Scope of Agency Under FARA*, at 2 (May 2020) [hereinafter *DOJ Guidance on Scope of Agency Under FARA*], *available at* https://www.justice.gov/nsd-fara/page/file/1279836/download.

[4] *See* Matthew Kahn, *No, Maria Butina Wasn't Charged With Violating FARA*, Lawfare (Jul. 27, 2018), *available at* https://www.lawfareblog.com/no-mariia-butina-wasnt-charged-violating-fara.

[5] 18 U.S.C. § 951. FARA is not a criminal statute, although it contains criminal penalties for certain willful violations of the statute. *See id.* § 618(a).

[6] Dep't of Justice, Office of the Inspector Gen., *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, at 9 (2016) [hereinafter *DOJ IG Report on FARA*], *available at* https://oig.justice.gov/reports/2016/a1624.pdf.

[7] *Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Adam S. Hickey, Deputy Assistant Att'y Gen., Nat'l Sec. Div., Dep't of Justice), *available at* https://www.judiciary.senate.gov/download/07-26-17-hickey-testimony.

[8] *DOJ IG Report on FARA* at 10.

FARA historically has caused misunderstanding, particularly among federal prosecutors and FBI personnel, in a manner that historically has likely led to less effective enforcement of both laws.[9]

Finally and perhaps most importantly, the "agent" label unduly stigmatizes FARA registration because the word "agent" is regularly associated colloquially with covert government-sponsored espionage activities.[10] This pejorative label brands all FARA registrants with this stigmatized association, even though the statute requires registration for all manner of work on behalf of all types of foreign interests, including innocuous and overt public-relations work for foreign tourism bureaus. This stigma makes many individuals and organizations more hesitant to register, thereby undermining FARA's primary goal of facilitating public disclosure.

B. Recommendation

Congress should replace the term "agent" everywhere it appears in the statute with another term that reflects the statute's actual reach, avoids confusion with other laws, and reduces stigma for registrants. One such term that Congress should particularly consider is the word "representative."[11] Eliminating the term "agent" is a significant reform, since it is found in the very name of the statute, but changing the term "agent of a foreign principal" to "foreign representative" and renaming the statute as the "Foreign Representative Registration Act" would reduce the confusion, conflation, and stigmatization currently caused by the word "agent" – without any detrimental impact to the Department's administration or enforcement of FARA.

SECTION IV: CONGRESS SHOULD MODIFY FARA'S SCOPE AND STRUCTURE TO FOCUS ON ACCOMPLISHING ITS CORE POLICY GOALS

A federal law that establishes a regulatory compliance and enforcement regime should be precisely and narrowly tailored to accomplish the law's core policy goals. FARA, however, falls short of this standard. The law's key definitions are exceedingly broad, sweeping within its initial scope work undertaken for practically any type of foreign interest. Multiple statutory

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[9] *DOJ IG Report on FARA* at 10-11. The Task Force understands, however, that these misunderstandings may be easing due to enhanced training of FBI agents and prosecutors regarding the differences between FARA and Section 951, and the establishment in 2017 of the FBI's Foreign Influence Task Force, a focal point to "identify and counteract malign foreign influence operations targeting the United States." Fed. Bureau of Investigation, *Combating Foreign Influence* (visited Jul. 14, 2021), *available at* https://www.fbi.gov/investigate/counterintelligence/foreign-influence.

[10] *See, e.g.*, Kate Ackley, *Companies, Nonprofits Put Brakes on Foreign Lobbying Bills*, Roll Call (Mar. 2, 2018), *available at* https://www.rollcall.com/2018/03/02/companies-nonprofits-put-brakes-on-foreign-lobbying-bills/ (quoting the leader of a nonprofit organization as saying: "To label them as a foreign agent would have a chilling effect on their interest in talking to their elected representatives and hamper their ability to communicate their policy concerns").

[11] Congress previously has considered such an approach to mitigating the stigma associated with the term "agent." *See To Strengthen the Foreign Agents Registration Act of 1938: Hearing on H.R. 1725, H.R. 1381, H.R. 806 Before the H. Subcomm. on Admin. L. & Governmental Relations of the H. Judiciary Comm.*, 102d Cong. 29 (1991) (statement of Rep. Dan Glickman) (proposing the deletion of the term "agent" in order "to remove the stigma of being labeled a foreign agent by changing the name of the law to the Foreign Interests Representation Act").

exemptions from registration, on their face, limit the scope of FARA, but are difficult to construe, sometimes leaving parties in the position of simply hoping the Department, in its discretion, refrains from enforcing the law's most expansive and questionable edges.

This over-breadth in FARA's definitions of "foreign principal" and "agent of a foreign principal" contributes to vagueness in the statute, causes uncertainty among those who represent both foreign and domestic clients (and, correspondingly, needless additional compliance risk for those clients), promotes unnecessarily aggressive enforcement, and detracts from FARA's underlying goals. Statutory fixes that address these issues would provide greater clarity both to those enforcing the law and those seeking to comply with it, as well as promote greater compliance with FARA without compromising the national security goals underpinning FARA. In particular, Congress should amend FARA to: (A) narrow the "foreign principal" definition; (B) adjust the "agent of a foreign principal" definition; (C) change how FARA applies to media organizations; and (D) harmonize the FARA and Lobbying Disclosure Act disclosure regimes.

A. Narrowing the "Foreign Principal" Definition

1. Background Discussion

Through its many iterations, FARA's central policy goal has been to "combat the spread of hidden foreign influence"[12] from foreign governments and foreign political parties by "shining 'the spotlight of pitiless publicity'" on their activities.[13] FARA, however, broadly defines the term "foreign principal" to include not only any foreign government and any foreign political party, but also any individual outside of the United States (unless the individual is a U.S. citizen *and* domiciled within the United States) as well as any foreign partnership, association, corporation, organization, or other combination of persons.[14] Thus, FARA's "foreign principal" definition encompasses U.S. citizens who live abroad, as well as foreign individuals and organizations lacking even any indirect relationship with foreign governments or foreign political parties. Virtually all foreign interests of any type and character are "foreign principals" and are therefore within FARA's ambit.

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[12] Press Release, Dep't of Justice, Department of Justice Posts Advisory Opinions on FARA.gov Website (Jun. 8, 2018), *available at* https://www.justice.gov/opa/pr/department-justice-posts-advisory-opinions-faragov-website.

[13] H.R. Rep. No. 1381 at 2 (1937). A Senate amendment in 1993 would have narrowed the definition of "foreign principal" to include only foreign governments and foreign political parties. S. Rep. No. 103-37 (1993). That intent was reflected ultimately in Congress's effort to distinguish between FARA and the Lobbying Disclosure Act. Cong. Rec. H.1258 (Mar. 18, 1998) (statement by Rep. Canady) ("This change reaffirms the congressional intent of requiring disclosure of foreign nongovernment representations under the Lobbying Disclosure Act and disclosure of foreign government representations under the Foreign Agents Registration Act."); *see also* H.R. Rep. No. 104-399, pt. 1 at 21 (1997) ("FARA is limited to agents of foreign governments and political parties. Lobbyists of foreign corporations, partnerships, associations, and individuals are required to register under the Lobbying Disclosure Act, where applicable, but not under FARA."); *Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 1 (2017) (statement of Adam S. Hickey, Deputy Assistant Att'y Gen., Nat'l Sec. Div., Dep't of Justice), *available at* https://www.judiciary.senate.gov/download/07-26-17-hickey-testimony ("The Act's purpose is to ensure that the American public and our lawmakers know the source of information that is provided at the behest of a foreign principal, where that information may be intended to influence U.S. public opinion, policy, and laws. The statute enhances the public's and the government's ability to evaluate such information.").

[14] 22 U.S.C. § 611(b).

This expansive definitional sweep may seem harmless and even advantageous, promoting the disclosure of as much foreign activity in the United States as possible and affording federal prosecutors the maximum amount of flexibility in uncovering foreign government influence activities. An overbroad "foreign principal" definition is unnecessary, though. Nongovernmental "intermediary" entities are already covered under FARA, even without a sprawling "foreign principal" definition. And while it is certainly important for FARA to expose to public scrutiny any state-owned enterprises, nonprofits, and other organizations that are not part of a foreign nation's formal governance or political structure but are nonetheless working directly or indirectly to accomplish its agenda, such intermediary organizations are already covered under the statute's "agent" definition[15] in an express reference to those "whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized, in whole or in major party, by a foreign principal."[16] Continuing to categorically consider all individuals outside the United States and all manner of non-U.S. entities to be "foreign principals" because they *may* act as intermediaries for foreign governments or foreign political parties is unnecessary when the statute separately already covers individuals and entities that actually *do* act as intermediaries. Narrowing the "foreign principal" definition to omit this surplusage would not prevent the Department from policing individuals and entities who, in fact, act as intermediaries for foreign governments and foreign political parties. It will simply require the Department to engage in appropriate fact-finding (or rely on probative intelligence information) to determine whether ostensibly independent parties are actually operating in the United States as instruments of a foreign government or foreign political party.

More importantly, an overbroad "foreign principal" definition is also counterintuitive and counterproductive. FARA's regulatory regime casts the widest possible net initially, potentially covering all individuals outside the United States and all non-U.S. entities under its "foreign principal" definition, only to then exempt from registration, through an intricate series of exceptions, most work on behalf of foreign private individuals, businesses, nonprofits, and other groups that is not directed or funded by – primarily for the benefit of – a foreign government or foreign political party.[17] The FARA statute and regulations, in other words, look to whether a foreign government or foreign political party is somehow or in some manner behind the activity. If so, registration is required. If not, registration is not required.

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[15] FARA's 1942 amendments included a "foreign principal" definition that covered individuals and entities who acted as intermediaries for foreign principals by receiving direction, control, or funding, but those provisions were ultimately moved underneath the "agent" definition in 1966. *See* Pub. L. 77-532, 56 Stat. 248-258 (1942), Pub. L. 89-486, 80 Stat. 244 (1966).

[16] 22 U.S.C. § 611(c)(1).

[17] For example, two common registration exceptions utilized by those working on behalf of "foreign principals" are at 22 U.S.C. § 613(d)(1) and (d)(2), which have been interpreted by the Department to exempt commercially oriented work that does "not directly promote the public or political interests of a foreign government or of a foreign political party" and other work that (1) furthers "bona fide commercial, industrial, or financial operations; (2) is not "directed by a foreign government or foreign political party"; and (3) does not "directly promote the public or political interests of a foreign government or of a foreign political party."

The statute should incorporate this ultimate filter into the "foreign principal" definition in the first place, particularly when it would not compromise the core purpose of FARA or the government's enforcement efforts, and when the unnecessary complexity and inefficiency of the current statutory scheme has several drawbacks. For one, an overbroad "foreign principal" definition may require registration for work on behalf of purely private interests simply because the work does not fit neatly within the intricate criteria of an exemption, which results in over-registration and diverts enforcement resources away from activity at the core of FARA. Moreover, an overbroad "foreign principal" definition can chill work that otherwise has important societal benefits. Consider this hypothetical example: an independent and privately funded nonprofit in the United States enters into an agreement with an independent and privately funded Canadian nonprofit to assist with a public meeting on fighting the opioid epidemic. Under current law, the Canadian nonprofit is a "foreign principal" under FARA and by agreeing to support the meeting, the U.S. nonprofit could be viewed as acting under that foreign principal's direction and the conference could fall within the activities covered by the "agent" definition at 22 U.S.C. § 611(c)(1)(i) or (ii). Is the U.S. nonprofit obligated to register under FARA as an "agent" of the Canadian nonprofit? An exemption may well apply and obviate the need to register. But to reach any certainty as to its obligations under FARA, this hypothetical U.S. nonprofit must either choose to forgo the opportunity to collaborate with its Canadian counterpart *or* go through the exercise of analyzing whether one of FARA's complex and vague exemptions apply.[18] In other words, applying FARA to this circumstance could be a disincentive to foreign nonprofit organizations agreeing to undertake important, beneficial work in the United States by causing the U.S. nonprofit to decline participation in the conference *or* by causing the U.S. nonprofit to incur the resource costs necessary to analyze FARA. FARA should not impose these kinds of costs on valid and valuable nonprofit activity, particularly when it does so without clearly serving the statute's core policy objectives.

2. Recommendation

Congress should amend the definition of "foreign principal" located at 22 U.S.C. § 611(b) as follows (changes in red and strikeouts marked as such):

> **(b)** The term "foreign principal" includes--
>
> (1) a government of a foreign country and a foreign political party;
>
> (2) any of the following who act on behalf of the government of a foreign country or a foreign political party:
>
> a. **(2)** a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

[18] The hypothetical nonprofit also could seek certainty by requesting a written advisory opinion from the FARA Unit at DOJ, but it can take several weeks (and sometimes longer) to receive a response, and in requesting an advisory opinion the U.S. nonprofit would be required to disclose all of the underlying facts of its potential engagement with its Canadian nonprofit counterpart – some of which it might view as confidential.

b. **(3)** a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

Additionally, to avoid potential government overreach resulting in required registration for engagements with foreign interests who may be acting independently of a foreign government or foreign political party, DOJ should promulgate a clarifying regulation to any new statutory amendment that reads as follows:

> As used in 22 U.S.C. § 611(b), "acting on behalf of" includes those who act at the order, or under the direction or control of a foreign principal, or whose activities are otherwise undertaken for the purpose of benefiting a government of a foreign country or a foreign political party.

This narrowing of the "foreign principal" definition would provide greater certainty to the regulated community, while returning the focus of FARA to its primary intended purpose.

B. Adjusting the "Agent of a Foreign Principal" Definition

1. Background Discussion

The current statutory definition of "agent of a foreign principal," which is at the very center of FARA's structure, reads as follows:

> **(c)** Expect [sic] as provided in subsection (d) of this section, the term "agent of a foreign principal" means—
>
> **(1)** any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, *request*, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole *or in major part* by a foreign principal, and who directly or through any other person—
>
> (i) engages within the United States in political activities for or in the interests of such foreign principal;
>
> ( ) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
>
> (i) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
>
> (ii) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

> **(2)** any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.[19]

As discussed further below, this current "agent" definition has fundamental flaws: (a) the inclusion of the word "request" in the definition of "agent of a foreign principal" sweeps too broadly and adds no enforcement value; and (b) the financed or subsidized "in major part" reference is unclear and fails to capture a link between a foreign principal's financing or subsidization and the FARA-registrable activities in a manner that the legislative history of FARA supports.

a. The Word "Request" Is Superfluous and Confusing

Within Section 611(c)(1) of the definition, the term "request" carries a connotation different from the other words used – "order" and "under the direction or control" – that introduces confusion regarding the breadth of the statute. In ordinary usage, "request" means "the act or instance of asking for something," while "order" means to "command."[20] Likewise, "under the direction or control" connotes being commanded or instructed, and is very different from a request that may not be tied to any supervisory or controlling relationship. The inclusion of "request" in the statute contributes to uncertainty regarding the need to register on the part of those who may be on the receiving end of simple requests that do not rise to orders or direction, as well as to uncertainty regarding registration triggers for those enforcing FARA.

In considering the existence of the term "request" in the statute, the Second Circuit Court of Appeals cautioned that the term cannot be interpreted in its "most precatory sense" because such an interpretation would "sweep within the statute's scope many forms of conduct that Congress did not intend to regulate."[21] The court determined that a person's mere agreement with a foreign principal's views or suggestions will not mean that the person acts "at the order, request, or under the direction or control" of the foreign entity.[22]

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[19] 22 U.S.C. § 611(c) (emphasis added).

[20] *Compare Request*, Merriam-Webster.com (visited Apr. 20, 2021), *available at* https://www.merriam-webster.com/dictionary/request, *with Order*, Merriam-Webster.com (visited Apr. 20, 2021), *available at* https://www.merriam-webster.com/dictionary/order.

[21] *See Att'y Gen. of the U.S. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982). The Second Circuit cited to a House of Representatives report on the 1966 amendments, which noted that the broad scope of the language might extend to those whose actions the law should not cover. *See* H.R. Rep. No. 1470, p. 6 (1966).

[22] *Irish N. Aid Comm.*, 668 F.2d at 161. The Second Circuit stated that the following was an "illustration of independent action that incidentally benefits a foreign government but does not fall within the purview of the Act": "[I]n his testimony before the Senate hearings on Billy Carter's relationship with Libya, former Assistant Attorney General Heymann stated: For instance, a congressman visits Turkey and during his trip he meets with government officials. The government officials urge the case for foreign policies favorable to Turkey, and he supports these when he returns to Washington. If that is considered a 'request' under the statute, the congressman is an unregistered foreign agent, even though he has taken no orders, is under no one's direction or control, and is not anyone's agent." *Id.* at n.6; *see also Inquiry Into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Foreign Governments of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 700, 701 (1970) (statement of Phillip B. Heymann, Assistant Att'y Gen.).

DOJ's recent May 2020 White Paper on "The Scope of Agency Under FARA" supports the argument that the term "request" is superfluous. As noted in the DOJ White Paper, prior testimony by senior DOJ officials reflects that, rather than being construed broadly to include all forms of argument or persuasion, the term "request" should be construed in a manner consistent with the terms "order" and "direction and control." [23] The DOJ White Paper further opines that the "circumstances must evince some level of power by the principal over the agent or some sense of obligation on the part of the agent to achieve the principal's interest." Thus, a mere request, without more – *e.g.*, without some indication of the other words within the statute ("at the order of" or "under the direction and control of") – would be insufficient to trigger an agency relationship.[24]

No adverse consequences would result from removal of the term "request," as the remaining language is broad enough to capture the desired targeted conduct. A statutory change to remove "request," on the other hand, would add clarity and prevent government overreach to situations FARA was not intended to cover, while maintaining necessary enforcement parameters.

b. The Phrase "In Major Part" Is Unclear and Untethered to Registrable Activities

Another part of Section 611(c)(1) that would significantly benefit from greater clarity is language regarding the registration requirement for those acting under the direction of certain intermediaries – in the words of the statute, "under the direction or control" of "a person any of whose activities are supervised, directed, controlled, financed, or subsidized in whole *or in major part*" by a foreign principal.[25] Neither the FARA statute nor its regulations contain a definition of "in major part," though courts have held that even significant financial support itself is not enough to trigger "agent" status.[26] If a foreign corporation has a 51% equitable ownership in a U.S. corporation, and the U.S. corporation, unbeknownst to the foreign corporation, directs an individual to engage in certain political activities that would benefit the foreign principal, is the

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[23] *See DOJ Guidance on Scope of Agency Under FARA* at 3 (citing *Inquiry Into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Foreign Governments of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 700, 701 (1970) (statement of Phillip B. Heymann, Assistant Att'y Gen.)).

[24] A DOJ FARA advisory opinion dated April 4, 2019 discusses the inclusion of "request" in the definition of agent under FARA, and appears to adopt a wide view of mere "requests" that could trigger FARA registration, negating the need for any type of order, direction, or control by the foreign principal. *See* FARA Adv. Op. 4-4-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1180306/download. Under the facts in that advisory opinion, however, it appears that the foreign principal directly subsidized the U.S. person's political activities, triggering the latter clause in the "agent" definition referring to activities subsidized in whole or in major part by a foreign principal. In addition, that advisory opinion predated DOJ's May 2020 White Paper setting forth its guidance that there must be some level of power or obligation on the part of the agent to achieve the principal's interest.

[25] *See* 22 U.S.C. § 611(c)(1) (emphasis added).

[26] *See, e.g., Att'y Gen. of U.S. v. Irish People, Inc.*, 796 F.2d 520 (D.C. Cir. 1986) (holding that evidence, including overlapping personnel, financial support, shared offices and telephones, "an arrangement under which INAC pays [Irish People's] operational budget," and "a coincidence of editorial views" was insufficient to create an "agent"-"foreign principal" relationship); *Michele Amoruso E. Figli v. Fisheries Dev. Corp.*, 499 F. Supp. 1074, 1081-82 (S.D.N.Y.1980) (holding that a foreign government was not a "foreign principal" of a corporation that received financial support from the government and whose lobbying efforts benefited the government).

individual required to register as an agent of the foreign corporation (assuming a commercial or other exemption would not apply) on the theory that the individual's activities are financed or subsidized *in major part* by the foreign corporation? In fact, an amendment to FARA previously proposed in 1991 would have provided clarification on that question.[27]

Moreover, drawing on the same example used above, the statutory language reads as if registration requirements for the individual performing the actions would be triggered by the foreign corporation's 51% equitable ownership over the U.S. corporation, even with the foreign principal having no direct connection to or even awareness of the FARA-registrable activity being undertaken by the individual – *i.e*., the 51% equitable ownership by the foreign principal alone may be all that is needed to require registration for an individual subsequently directed by the U.S. corporation to engage in otherwise FARA-registrable activity where no exemption applies. This result appears at odds with the statute's legislative history, which indicates an explicit link between the foreign principal and the activity should be necessary to trigger registration. Specifically, the 1966 House Report discussing the addition to FARA of the language regarding a person who is financed or subsidized "in major part" by a foreign principal states as follows:

> In situations where subsidies are used as a means of control over an agent, the proposed amendment would provide that a major portion of *the funds of a given undertaking would have to be traceable to the foreign principal* in order for the agent of the recipient to be required to register, unless he was exempt. The proposed amendment would make it clear that mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor. However, the amendment would insure, in order to curtail the use of subsidies as a means of avoiding the act's requirements, that *where the foreign principal subsidizes a domestic person to the extent that the subsidy involves, as outlined above, direction and control of the activities subsidized*, then the domestic person or group as well as any agents employed to carry out the functions subsidized will be treated as acting for the foreign principal.[28]

Thus, Congress expressly intended for the financed or subsidized "in major part" language to cover situations where a foreign principal's financing or subsidy had a direct connection to the FARA-registrable activities, and not to situations where a foreign principal may provide a subsidy but is completely uninvolved in and unaware of activities that may otherwise be within the scope of FARA. Accordingly, the statute or regulations should clearly reflect the legislative intent – that for the financed or subsidized in whole or "in major part" language to trigger registration, some link between the foreign principal and the FARA-registrable activities is necessary.

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[27] *See* H.R. 1725, 102d Cong. (1991) (proposing the following language: "For purposes of clause (1), a foreign principal shall be considered to control a person in major part if the foreign principal holds more than 50 percent equitable ownership in such person or, subject to rebuttal evidence, if the foreign principal holds at least 20 percent but not more than 50 percent equitable ownership in such person").

[28] *See* H.R. Rep. No. 1470, p. 5 (1966) (emphasis added).

2. Recommendations

FARA should be amended by deleting the term "request" or replacing it with more concrete terms that are similar in nature to the others that appear in the "agent" definition (*e.g.*, "instruct," "supervise," "task," and/or "assign").

Additionally, new statutory language that defines "in major part," combined with new statutory language that makes explicit the legislative intent of the link between the financing or subsidization and the FARA-registrable activities, would be beneficial for both regulators and those aiming to comply with the statute. These changes would not compromise the intended coverage of the statute or infringe on enforcement parameters.

Thus, Congress should amend 22 U.S.C. § 611(c)(1) as follows (changes in red and strikeouts marked as such):

> **(c)** Expect [sic] Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means—
>
> **(1)** any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, *request,* or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—
>
> (i) engages within the United States in political activities for or in the interests of such foreign principal;
>
> (iii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
>
> (iv) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
>
> (v) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and
>
> **(2)** any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection. For purposes of clause (c)(1), a foreign principal shall be considered to finance or subsidize a person in major part if the foreign principal (i) holds more than 50 percent equitable ownership in such person; and (ii) supervises, directs, or controls , finances, or subsidizes any registrable activity under FARA.

C. Changing How FARA Applies to News Organizations

1. Background Discussion

Concerns about foreign-supported media efforts in the 1930s originally motivated Congress to enact FARA,[29] and many of the earliest FARA enforcement cases involved book publishers and news services.[30] Congressional amendments to the law passed in 1942, though, excluded from the definition of "agent" certain news organizations for the first time.[31] An amendment passed in 1966 also refined the "agent" definition so that "collecting information for or reporting information to a foreign principal were no longer activities requiring registration," which meant that fewer foreign media correspondents registered.[32] Under current law, a news organization or publication organized under U.S. law is not considered an "agent" if it (a): is "at least 80 per centum beneficially owned by" U.S. citizens; (b) has directors and officers who are all U.S. citizens; and (c) is "not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by" any "agent" or any foreign principal.[33]

The Department has attempted to apply this test several times in recent years to foreign-connected news publications:

- In 2018, the Department found that an unnamed U.S. publication did not act as an "agent" in publishing a special edition periodical about a foreign government official that incorporated that foreign official's suggested input, given that the U.S. publication decided of its own volition to publish the periodical, had no obligation to follow the foreign official's suggestions, had no contractual relationship with any foreign entity, and received no foreign funding for the periodical.[34]

- In 2017, the Department concluded that a U.S. broadcasting company named RTTV America, Inc. was required to register under FARA due to its activities on behalf of media outlet RT and RT's parent company TV-Novosti, which the FARA Unit described as "proxies of the Russian Government." The Department determined that RTTV America served as "an alter ego" for RT in the United States, providing television production services and arranging for distribution of RT content. In describing the arrangement, the Department noted particularly that RT received 99.7% of its funds from the Russian Government, that RT was regarded by the U.S. Intelligence Community as a "principal international propaganda outlet," and that RT

[29] *See generally* H.R. Rep. No 74-153 (1935).

[30] *See* Dep't of Justice, *Cases under the Foreign Agents Registration Act of 1938 from September 8, 1938 to December 31, 1944* (1945), *available at* https://www.justice.gov/nsd-fara/page/file/991971/download#page=532. One of the most prominent FARA-related court cases, in fact, involved the distribution of documentary films from Canada. *Meese v. Keene*, 481 U.S. 165 (1987); *see also DOJ IG Report on FARA* at 2 (noting that "[f]rom its passage in 1938 until amendments made in 1966, FARA primarily focused on propagandists").

[31] Pub. L. 77-532, 56 Stat. 250 (1942).

[32] Gen. Accounting Office, *Effectiveness of the Foreign Agents Registration Act of 1938, as Amended, and Its Administration by the Department of Justice* at 9 (1974), *available at* https://www.gao.gov/products/b-177551.

[33] 22 U.S.C. § 611(d).

[34] FARA Adv. Op. 7-13-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1092521/download.

broadcasts "consistently mirror the opinions of the Kremlin." The Department therefore found that RTTV America met the statutory definitions of "publicity agent" and "information-service employee" and was not eligible for any exemptions.[35]

- In 2017, the Department determined that a U.S. radio broadcasting entity named Reston Translator, LLC was required to register.[36] Reston Translator held a contract to broadcast programming on FM radio in the Washington, D.C. area on "a 24-hour, 7 days a week basis" from Rossiya Segodnya, a foreign media entity behind the Sputnik radio network that was "part of the Russian government." The Department concluded that Reston Translator's work to transmit broadcasts in the U.S. qualified it to fit the FARA statutory definitions of "publicity agent" and "information-service employee" for Rossiya Segodnya.[37] The Department made a similar determination in 2018 with respect to RM Broadcasting, LLC, which held a contract to broadcast programming on AM radio in the Washington, D.C. area on "a 24-hour, 7 days a week basis" from Rossiya Segodnya.[38] RM Broadcasting subsequently responded by filing for a declaratory judgment in federal district court; the Department counterclaimed, exercising its statutory authority to seek a court order compelling RM Broadcasting to register, and the court ruled in the Department's favor.[39]

- In 2018, the Department found that CGTN America, a U.S. company, was the Washington, D.C. bureau of the state-run media entity China Media Group, which worked "under the guidance of the Publicity Department of the CPCP Central Committee." CGTN America produced six hours of English-language content each day and distributed this programing in the United States. The Department found that CGTN America was required to register under FARA because it engaged in "political activities" and acted as a "publicity agent" and "information service employee" at the direction and control of the Chinese Government, Chinese Communist Party, and China Media Group. The Department cited style guides and public statements by CGTN America personnel, scholarly research, and Chinese officials to find that CGTN America was meant to serve as China's "mouthpiece." The Department also engaged in an extensive analysis of CGTN's news programs, concluding that the programs mirrored official Chinese policy positions.[40]

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[35] FARA Letter of Determination 8-17-2017 (RTTV America), *available at* https://www.justice.gov/nsd-fara/page/file/1282086/download. The Department made similar determinations with regard to T&R Productions, a U.S. media production company connected to RT and TV-Novosti. FARA Letter of Determination 8-17-2017 (T&R Productions), *available at* https://www.justice.gov/nsd-fara/page/file/1282091/download.

[36] FARA Letter of Determination 9-12-2017 (Reston Translator), *available at* https://www.justice.gov/nsd-fara/page/file/1282096/download.

[37] *Id.* The Department made similar determinations with regard to RIA Global, a U.S. media company. FARA Letter of Determination 1-1-2018 (RIA Global), *available at* https://www.justice.gov/nsd-fara/page/file/1282141/download.

[38] FARA Letter of Determination 6-21-2018 (RM Broadcasting), *available at* https://www.justice.gov/nsd-fara/page/file/1282126/download.

[39] *RM Broadcasting LLC v. U.S. Dep't of Justice*, 379 F. Supp. 3d 1256 (S.D. Fla. 2019).

[40] FARA Letter of Determination 12-20-2018 (CGTN America), *available at* https://www.justice.gov/nsd-fara/page/file/1282146/download. Correspondingly, DOJ also imposed a registration obligation on Xinhua News Agency North America, which ultimately registered in May 2021. *See* Masood Farivar, *China TV Network Accounts*

- In 2019, the Department imposed a registration obligation on Turkish Radio & Television Corporation ("TRTC"), the U.S. Branch of the national public broadcaster of Turkey.[41] The Department found that TRTC was indirectly governed by a governmental regulatory body established by Turkish statute and composed of Turkish Parliament members. The Department reasoned that TRTC was directed and controlled by the Government of Turkey through "regulation and oversight" and by "controlling its leadership, budget, and content," since the Government funded TRTC, appointed part of the board of TRTC's umbrella entity and approved "agreements, contracts, and protocols with international radio and television institutions." The Department also noted that the general broadcasting principles set forth in Turkish law called for compliance "with the State's national security politics, national and economic interest requirements," among other things. Finally, the Department noted that TRTC's "content consistently mirrors the policy positions expressed by the Government of Turkey."[42]

Additionally, in 2020 the Department reportedly directed AJ+, a U.S. digital news network owned by the Qatari-funded media company Al Jazeera, to register under FARA because "journalism designed to influence American perceptions of a domestic policy issue or a foreign nation's activities or its leadership qualifies as 'political activities' under the statutory definition even if it views itself as 'balanced.'"[43] As of the date of this report, Al Jazeera has not yet registered, reportedly asserting that AJ+ is a legitimate and independent news organization and that the Department's determination was politically motivated.[44]

The need to identify and publicize the role of foreign governments in disseminating information in the United States is as important today as it was when FARA was originally enacted in 1938 as protection against foreign-sourced propaganda from fascist and communist governments. At the same time, the statute's breadth and the Department's application of FARA to some news organizations has raised concerns that the application of FARA to news organizations will chill news organizations' First Amendment freedoms.[45] In particular, it is unclear how far the Department might go in determining that a news organization must register

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for Bulk of Beijing's Influence Spending in US, VOA News (May 13, 2021), *available at* https://www.voanews.com/east-asia-pacific/voa-news-china/china-tv-network-accounts-bulk-beijings-influence-spending-us.

[41] FARA Letter of Determination 8-1-2019 (Turkish Radio & Television Corp.), *available at* https://www.justice.gov/nsd-fara/page/file/1282151/download.

[42] *Id.*

[43] Marc Tracy & Lara Jakes, *U.S. Orders Al Jazeera Affiliate to Register as Foreign Agent*, N.Y. Times (Sept. 15, 2020), *available at* https://www.nytimes.com/2020/09/15/business/media/aj-al-jazeera-fara.html.

[44] Lachlan Markay, *DOJ Pressed to Enforce Al Jazeera Foreign Agent Ruling*, Axios (Mar. 3, 2021), *available at* https://www.axios.com/doj-enforce-al-jazeera-foreign-agent-ruling-a5a58129-5a12-4aee-8a2b-cbfbb7d8f900.html. It is unclear why the Department, as in the case of RM Broadcasting, has not exercised its civil injunctive authority to seek a court order compelling Al Jazeera to register under FARA.

[45] *See, e.g.*, Alexandra Ellerbeck & Avi Asher-Schapiro, *Everything to know about FARA, and why it shouldn't be used against the press*, Columbia Journalism Rev. (Jun. 11, 2018), *available at* https://www.cjr.org/analysis/fara-press.php.

because it is "directed, supervised, [or] controlled" by an "agent" or by a foreign principal. The Department has thus far suggested that a foreign principal's general funding of operations, a foreign principal's dormant contractual right to control news operations, or a close alignment of views between the news organization and a foreign principal (in combination with other factors) are sufficient to demonstrate foreign "control." This interpretation might give the Department maximum flexibility to apply FARA in the future to news organizations, but it also does little to draw clear distinctions between media entities which disseminate political propaganda and organizations like the BBC, primarily funded by license fees charged to the public, which ostensibly exercise independent editorial control.

A chilling effect on press freedoms can be avoided only through a clarification of the Department's strategically vague approach here. Although FARA registration itself is not a direct imposition on First Amendment rights of the press because registration does not impact the content of speech, registration may still entail the loss of congressional press credentials as well as stigma that may serve to discredit the work of any organization so situated. Effective FARA reform must therefore seek to clarify the statue's application to news organizations in a way that balances constitutional freedoms of news organizations against the need to identify foreign influence operations in the United States.

2. Recommendation

As discussed above, under current law a news organization that is 80 percent or more owned by U.S. citizens is nonetheless potentially covered by FARA if it is "owned, directed, supervised, controlled, subsidized, or financed," or "its policies are determined," either by any "agent" or by any foreign principal. This legal standard should be amended to focus on foreign government control of content distributed in the United States. The statutory test, then, should be simplified to cover only news organizations whose communications and content are directly or indirectly controlled and/or directed by a foreign government or a foreign political party. Percentages of U.S. versus foreign ownership, and the citizenship of a media organization's officers and directors, should be *considered* by the Department in evaluating whether the media organization is subject to foreign direction or control warranting registration, but there would no longer be statutory criteria *governing* the government's assessment. This approach would not eliminate the potential subjectivity of the government's enforcement considerations, but it would focus the standard governing the exemption of media organizations on the core policy and national security principles underlying FARA.

D. Harmonizing the FARA and LDA Disclosure Regimes

1. Background Discussion

FARA exempts from registration any "agent" that "has engaged in lobbying activities" and properly registered under the Lobbying Disclosure Act ("LDA"), which is the general statute that regulates direct lobbying activity of federal government officials.[46]

[46] 22 U.S.C. § 613(h).

A prospective FARA "agent" establishes eligibility for this exemption under Department rules by submitting a "duly executed registration statement filed pursuant to the LDA," which the Department of Justice accepts as "prima facie evidence" that the exemption applies.[47] The Department may ultimately decide to refuse to "recognize" the application of the exemption "where a foreign government or foreign political party is the principal beneficiary."[48] Department staff generally review LDA filings "typically once a month, looking for potential FARA registrants," [49] but it is unclear on the face of the LDA filings themselves which LDA filers are availing themselves of the FARA exemption for LDA registrants because the Department has never implemented a longtime recommendation from the Government Accountability Office ("GAO") to require those claiming a FARA exemption to formally notify the Department.[50] Department staff must therefore sift through all the various LDA filings to identify potential representations that should be registered under FARA, without any affirmative self-identification and clarification from the filers themselves as to their intentions. The Deputy Assistant Attorney General responsible for overseeing FARA enforcement has described this sifting effort as a "challenge" for FARA staff.[51]

Commentators, and even the Department's staff, have also observed that the LDA's disclosure requirements "are less stringent and result in less transparency than FARA, specifically with respect to funds transacted and activities performed."[52] The LDA, for example, requires the disclosure of payments received to the nearest $10,000 and allows disclosure of a House of Congress or agency rather than the name of the specific official contacted.[53] This has contributed to concerns that the LDA exemption is being used as "a loophole to avoid FARA

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[47] 28 C.F.R. § 5.307.

[48] *Id*.

[49] *DOJ IG Report on FARA* at 2; *see also id.* at 13 (indicating that the Department reviews "LDA filings for indications of a connection between a potential agent and a foreign principal").

[50] Gov't Accountability Office, *Post-Government Employment Restrictions and Foreign Agent Registration: Additional Action Needed to Enhance Implementation of Requirements* at 2 (2008), *available at* https://www.gao.gov/products/gao-08-855; Gov't Accountability Office, *Foreign Agents Registration: Former Federal Officials Representing Foreign Interests Before the U.S. Government* at 4 (1992), *available at* https://www.gao.gov/products/nsiad-92-113; Gen. Accounting Office, *Administration of Foreign Agent Registration* at 6 (1980), *available at* https://www.gao.gov/products/112952.

[51] Video, Testimony of Deputy Asst. Atty. General for National Security Adam Hickey, *Senate Committee on the Judiciary, Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations* at 1:15:25 (Jul. 26, 2017) ("One of the challenges we face is that the companies may not even be controlled, or at least not on paper, by the government. They may in fact be just a well-connected corporate enterprise, not under the direction or control of a foreign government, but whose interests overlap and who . . . are doing work the principal beneficiary for whom is the foreign government. Those folks are still obligated to register, so we search the LDA database and try to find those potential registrants and ferret out whether the principal beneficiary is really the government or political party, but it's a challenge for us."), *available at* https://www.judiciary.senate.gov/meetings/oversight-of-the-foreign-agents-registration-act-and-attempts-to-influence-us-elections-lessons-learned-from-current-and-prior-administrations.

[52] *DOJ IG Report on FARA* at 18; *see also* Sunlight Foundation, *Recommendations from the Sunlight Foundation to the Department of Justice Regarding the Foreign Agents Registration Act* (Apr. 8, 2014), *available at* https://www.scribd.com/document/217531733/Sunlight-Foundation-Recommendations-to-the-Dept-of-Justice-Regarding-the-Foreign-Agents-Registration-Act.

[53] 2 U.S.C. § 1604(b).

registration and disclosure" because prospective "agents" and foreign principals want to file under the least burdensome and comprehensive disclosure regime available.[54]

2. Recommendations

It is currently unclear whether a particular LDA registrant is claiming the LDA exemption to avoid registration under FARA. Congress should amend the LDA form to include a specific line that requires a filer to indicate affirmatively that the filer is claiming the application of the LDA exemption under FARA. If the prospective "agent" checks that box on the LDA form, then Department's review of that exemption should be automatic. If the prospective "agent" fails to check that box on the LDA form, the person or entity should be foreclosed from claiming the application of the LDA exemption. This will make the Department's monitoring of use of the LDA exemption more efficient and enhance the Department's enforcement efforts overall.

Moreover, many commentators have observed that filers are more likely to seek to register under the LDA due to its more relaxed filing requirements. The proposed solution in some reform circles has been a repeal of the LDA exemption, but as discussed in Section IV of this Report, there are several policy reasons to leave the LDA exemption in place as a mechanism for differentiating between engagements of behalf of foreign governmental versus nongovernmental entities. If those who should be registering under FARA are actually submitting LDA registrations as a way to avoid FARA's more stringent disclosure rules, Congress should instead make an effort to more closely harmonize the FARA and LDA disclosure requirements so that prospective "agents" have less of an incentive to exploit any potential disclosure "arbitrage" opportunities. The American Bar Association produced a report in 2011 that suggested particular improvements that would strengthen the LDA's disclosure requirements, which would close the actual and perceived gap between the two filing regimes.[55] That report is still timely, and Congress should implement the recommendations that it contains.

SECTION V: THE DEPARTMENT OF JUSTICE SHOULD CLARIFY THE MEANING OF KEY FARA TERMS AND EXEMPTIONS

FARA contains key terms and exemptions that determine how the law applies to a particular factual scenario and potential registrant. Many of these terms and exemptions are vaguely defined under the statute, leading to confusion about their meaning and scope among the regulated community. Particularly in an era of heightened FARA enforcement, DOJ should clarify the law's application by: (A) explaining certain FARA definitional terms through regulation or generally applicable policy guidance; (B) interpreting FARA's main exemptions in a more detailed and complete manner; and (C) providing more robust guidance to the public about other aspects of FARA.

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[54] *DOJ IG Report on FARA* at 18.

[55] Am. Bar Assoc., *ABA Task Force Report Recommends Changes to Federal Lobbying Laws* (2011), *available at* http://abanow.org/2011/01/aba-task-force-report-recommends-changes-to-federal-lobbying-laws/.

A. Explaining FARA's Key Terms – the "Political Consultant" Trigger

Among the statutory categories of conduct that require FARA registration, in the absence of an applicable exemption, is acting within the United States as a "political consultant for or in the interests of [a] foreign principal." Given how broadly the term can apply as defined, the FARA Unit should publish generally applicable policy guidance, similar to the May 2020 White Paper on the Scope of Agency, clarifying how it construes the definition of "political consultant." DOJ also should support an amendment to FARA which would eliminate the definition from FARA, relying on the definition of "political activities" to capture activities intended to influence U.S. government officials and the American public.

1. Background Discussion

The term "political consultant" is defined as "any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party."[56] Thus, on its face, this definition is extremely broad, and could apply to a myriad of services rendered to a foreign principal.

FARA regulations do not refine the applicability of this definition. The regulations state only that, for purposes of this definition, the term "domestic or foreign policies of the United States" is "deemed to relate to existing and proposed legislation, or legislative action generally; treaties; executive agreements, proclamations, and orders; decisions relating to or affecting departmental or agency policy, and the like."[57]

The legislative history of the "political consultant" definition, however, demonstrates that Congress expressly intended to cabin its application. This term was not among the statutory conduct triggers for FARA registration when FARA was first enacted in 1938.[58] It was added to the definition of "agent of a foreign principal," along with the term "political activities," when FARA was amended in 1966.[59]

The 1966 amendments resulted from a study by the Committee on Foreign Relations of the U.S. Senate into foreign influence activities in the United States. The Committee stated that it had become "aware of persistent efforts by numerous agents of foreign principals to influence the conduct of U.S. foreign and domestic policies using techniques outside the normal diplomatic channels. This trend has been accompanied by an upsurge in the hiring within this country of public relations men, economic advisers, lawyers, and consultants by foreign interests."[60] The Committee explained that "[o]ne of the major purposes of this bill is . . . to place primary

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[56] 22 U.S.C. § 611(p).

[57] 28 C.F.R. § 5.100(f).

[58] *See generally* Pub. L. 75-583 (1938).

[59] Pub. L. 89-486 (1966).

[60] S. Rep. No. 89-143 at 2 (1965).

emphasis on protecting the integrity of the decision-making process of our Government and the public's right to know the source of the foreign propaganda to which they are subjected."[61]

Notwithstanding its expansion of FARA's scope to encompass "political consultants," Congress explicitly communicated its intent that this new category should be construed narrowly. Although the legislation did not include an accompanying statutory exemption for parties satisfying the statutory definition of a political consultant, Congress made it clear that only efforts that include political activities – *i.e.*, work to influence U.S. policy or public opinion – should require registration. In its report on the legislation, for example, the Senate Committee on Foreign Relations stated that "the activities of a 'political consultant' could be nonpolitical in nature and he would be exempt from registration."[62] The Committee further elaborated that "[t]he definition of the term 'political consultant' would apply to persons engaged in advising their foreign principals with respect to political matters. However, a 'political consultant' would not be required to register as an agent unless he is engaged in political activities, as defined, for his foreign principal. A lawyer who advised his foreign client concerning the construction or application of an existing statute or regulation would be a 'political consultant' under the definition, but unless the purpose of the advice was to effect a change in U.S. policy he would not be engaged in 'political activities' and would be exempt from registering with the Department of Justice."[63] Accordingly, in explaining the new definitions of "political activities" and "political consultant," the Committee stated that "[u]nder the bill, persons engaging in political activities as agents of a foreign principal would be required to register with the Department of Justice."[64]

Certain recent advisory opinions indicate that the FARA Unit is, consistent with congressional intent, construing "political consultant" to be substantially limited to those who conduct "political activities" as defined in the statute. In an advisory opinion dated December 2018, the FARA Unit considered the activities of an individual who was serving as "an Officer, Advisor, and/or Political Advisor" for a foreign political party. The FARA Unit focused on activities in which the individual "provided counsel and follow up to the [foreign political party] regarding invitations sent to Members of the U.S. Congress to attend [text deleted]." The individual had "drafted two resolutions for [text deleted], the subject of which would be of

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[61] Dep't of Justice, *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938* at 3 (1967).

[62] S. Rep. No. 89-143 at 7 (1965).

[63] S. Rep. No. 89-143 at 9 (1965).

[64] *Id.* at 8. The conference committee reiterated the Senate Foreign Relations Committee's intent that the applicability of the new "political consultant" category be limited. In noting that a person may be exempt from registration even if the person's activities came within the definition of "agent of a foreign principal," the conference committee illustrated its point by citing the new "political consultant" category. "For example," the conference committee explained, "the activities of a 'political consultant' on behalf of his foreign principal could be nonpolitical in nature and he would be exempt from registering." *Id.* at 7. Acknowledging the intersecting applicability of an exemption for legal representation, the conference committee observed that "the day-to-day routine activities of attorneys in advising and counseling with foreign clients will continue to be exempt . . . ." *Id.* at 11. Nonetheless, Congress did not add a statutory exemption corresponding to its stated, limited view on the registration obligations of a person meeting the new definition of a "political consultant." So, too, the Department of Justice, in promulgating implementing regulations for the new amendments, did not issue regulations that limit the applicability of the term "political consultant."

political interest to the United States as well as [foreign region]." In the FARA Unit's view, the individual was a "political consultant" precisely because he "engaged in political activities that reached the United States."[65] Similarly, in a December 2019 advisory opinion to a party that was "exploring an opportunity to assist [a foreign government entity] in modernizing its [text deleted] certification standards by aligning with and emulating the standards of the United States' [US Government entity], the FARA Unit determined that the requesting party did not have an obligation to register. In language consistent with the definition of "political activities," the FARA Unit said the requestor would not have an obligation to register "[s]o long as your activities remain focused on modernizing the [text deleted] standards in [foreign country] and do not become an effort to influence U.S. domestic or foreign policy . . . ." The FARA Unit did not separately discuss whether the requester was engaging in registrable conduct as a "political consultant," even though the requester would be advising a foreign government on matters of public interest to that government.

Other advisory opinions raise questions about whether the FARA Unit would require registration of parties (including law firms) for acting as a "political consultant" even where the specific conduct at issue appears to be private in nature. In an advisory opinion dated April 21, 2020, the FARA Unit stated that among the grounds for requiring a law firm to register was its representation of a foreign government with respect to "providing legal advice and analysis on law and policy regarding matters and developments that concern and affect US-[foreign country] relations, such as. . .pending legislation, and executive decisions and policy. . .." It is unclear from the advisory opinion whether the FARA Unit concluded that this conduct in isolation would constitute registrable political consulting.

2. Recommendation

The regulated community deserves clarity with respect to what activities the FARA Unit deems to constitute registrable political consulting. DOJ should therefore publish generally applicable policy guidance, similar to the May 2020 White Paper on the Scope of Agency, to afford greater understanding and predictability, and include such guidance on the FARA Unit's website. DOJ may issue such guidance in its own discretion and without promulgating new regulations. To the extent that the FARA Unit does not construe conduct to constitute registrable political consulting unless it also consists of political activities – as Congress intended – the new guidance should confirm that interpretation explicitly, rather than leaving the matter open to interpretation from a hodgepodge of various advisory opinions.

B. Interpreting FARA's Exemptions

FARA features many exemptions, the application of which often determine whether a prospective "agent" must register and report under the statute. The broadly worded nature of several important exemptions make registration determinations challenging for the regulated community[66] and, according to even the Department itself, "make criminal or civil enforcement

[65] FARA Adv. Op. 12-13-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1179721/download.

[66] *DOJ IG Report on FARA* at iii ("Another difficulty NSD cited relates to the breadth and scope of existing exemptions to the FARA registration requirement and determining whether activities performed by certain groups, such as think tanks, nongovernmental organizations, university and college campus groups, foreign media entities,

difficult."[67] Accordingly, the Department should endeavor to more clearly interpret exemptions for: (1) "bona fide trade or commerce" and "other activities not serving predominantly a foreign interest; (2) "activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts"; (3) lawyers "engage[d] in the legal representation of a disclosed foreign principal" before a court or agency; and (4) Lobbying Disclosure Act registrants. Each of these exemptions is discussed below.

1. Exemptions for "Bona Fide Trade or Commerce" and for "Other Activities Not Serving Predominantly a Foreign Interest"

a. Background Discussion

FARA began as a statute that covered activities within the United States on behalf of all manner of foreign interests, but Congress later manifested its intent that the law's scope be "limited to agents of foreign governments and political parties."[68] One of FARA's current primary mechanisms for differentiating between "agents" of foreign government and political parties that must register and "agents" of other foreign interests that need not register is a set of statutory exemptions at 22 U.S.C. § 613(d)(1) and (d)(2). There, FARA exempts from registration any "agent" that engages only: (1) "in private and nonpolitical activities in furtherance of the bona fide trade or commerce of [a] foreign principal"; or (2) "in other activities not serving predominantly a foreign interest."[69]

In an attempt[70] to implement congressional intent to "narrow[ ] the scope of FARA to agents of foreign governments and foreign political parties," the Department ultimately promulgated regulatory provisions applying these two exemptions in the context of state-owned enterprises ("SOEs").[71] For "agents" engaged only "in private and nonpolitical activities in furtherance of . . . bona fide trade or commerce," the Department regulation states that activities "shall be considered 'private,' even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political

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and grassroots organizations that may receive funding and direction from foreign governments fall within or outside those exemptions. According to the FARA Unit, these types of organizations generally claim that they act independently of foreign control or are not serving a foreign interest and are not required to register.").

[67] *Id*. at 17.

[68] H.R. Rep. No. 104-399, pt. 1 at 21 (1995). Legislative history indicates that activities "in furtherance" of commerce are "*all* private and nonpolitical activities with a bona fide commercial purpose," including "the normal professional activities of ... professional people with foreign clients, including foreign governments, so long as those activities do not constitute 'political activities' as the term is used in the bill." S. Rep. No. 89-143 at 11 (1964) (emphasis added); *see also* S. Rep. No. 89-143 at 12 (1965) (explaining that this exemption was added to "further assure" commercial interests of the narrow application of FARA).

[69] 22 U.S.C. § 613(d)(1)-(2).

[70] The Department's rulemaking process applying the exemption for "activities not serving predominantly a foreign interest" in the context of state-owned enterprises was irregular, as four years elapsed between the single rulemaking notice (which was not met with any public comment) and the final issuance of the rule. 68 Fed. Reg. 33629 (Jun. 5, 2003).

[71] *Id.* (issuing rule interpreting 22 U.S.C. § 613(d)(2)); *see also* 32 Fed. Reg. 6364 (Apr. 22, 1967) (issuing rule interpreting 22 U.S.C. § 613(d)).

interests of the foreign government."[72] Similarly, for "agents" engaged only "in other activities not serving predominantly a foreign interest" on behalf of a foreign corporation, "even if [the foreign corporation is] owned in whole or in part by a foreign government," the Department regulation stipulates that activities "will not be serving predominantly a foreign interest" where the activities:

- Are "directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation";
- Are not "directed by a foreign government or foreign political party"; and
- Do not "directly promote the public or political interests of a foreign government or of a foreign political party."[73]

The Department's effort to address the application of these exemptions for those acting as "agents" of SOEs, though, has exhibited at least two main flaws: (i) it is unclear when an "agent" works to "directly promote the public or political interests of a foreign government or foreign political party," which is the Department's primary caveat in describing the contours of both exemptions; and (ii) it is not apparent whether or how the Department's articulation of these exemptions in the context of SOEs applies to other common scenarios, such as work on behalf of individuals, privately held for-profit companies, or nonprofit organizations.

i. Unclear Meaning of "Directly Promote the Public or Political Interests of a Foreign Government"

Congress has recognized that it could "prove difficult to decide whether [FARA], or the registration provisions, apply in a given situation," but it initially anticipated that the Department of Justice would "advise on hypothetical situations in order to help to resolve uncertainties."[74] Department efforts to interpret and apply the exemptions for "private and nonpolitical activities in furtherance of . . . bona fide trade or commerce" and for "other not serving predominantly a foreign interest" have unfortunately not met this congressional expectation.[75]

As noted above, Department regulations condition the availability of both exemptions on whether activities "directly promote the public or political interests of a foreign government or of a foreign political party."[76] The Department's inclusion of this caveat in both exemptions seems to connote that there are potential circumstances when work for an SOE is legitimately "in furtherance of . . . bona fide trade or commerce"—or even "*directly* in furtherance of . . . bona

[72] 28 C.F.R. § 5.304(b).

[73] *Id.* § 5.304(c).

[74] S. Rep. No. 89-143 at 12 (1965).

[75] *See* H.R. Rep. No. 104-399, pt. 1 at 7 (1995) ("The Justice Department's test for this provision is whether the presence of the domestic entity is real or ephemeral. In short, their test asks whether the domestic entity is a viable working entity, or a so-called 'front' or 'shell.' The lack of clear written guidance from the Justice Department and the confusion over the proper application of FARA exemptions has allowed representatives of foreign principals to reach their own conclusions as to whether registration is required.").

[76] 28 C.F.R. § 5.304(b)-(c).

fide commercial, industrial, or financial operations" without any direction from a foreign government or foreign political party—that would nonetheless require registration because the work "directly promote[s] the public or political interests of a foreign government or of a foreign political party." Conversely, this feature of the Department's regulations expressly recognizes that an SOE's "agents" can engage in certain commercial activity that does not trigger FARA registration because it does not "directly" serve "public or political interests."

The Department has tried to define this distinction through Advisory Opinions, but has instead created a jumble of results that do not provide consistent guidelines on what it means to "directly promote . . . public or political interests," such as the following examples:

- In 1984, the Department advised a firm creating tourism bureau advertisements to register because "tourism creates an influx of capital and a host of jobs for the indigenous population, both of which are obviously in the political and public interests of [foreign country]."[77] Similarly, in 2019 the Department instructed a firm engaged by a foreign investment vehicle to register for appearing before U.S. government officials, since the work "directly promoted the public or political interests of a foreign government" because the investment vehicle's commercial interests were "inextricably connected to the public interest of the [foreign government] because . . . its core function [was] to generate funds for the [foreign government]."[78] On the other hand, in 2018 the Department exempted the "agents" of two joint ventures involving SOEs—one a technology company[79] and one a manufacturer[80]—from registration even though the SOEs' commercial activities would undoubtedly create capital and jobs in the foreign country and generate funds for the foreign government. It is unclear at which point the creation of jobs and capital through commercial transactions stops being exempted "trade or commerce" and becomes the registrable promotion of "public or political interests."

- In 2019, the Department instructed a firm to register that was hired to initiate commercial discussions with U.S. media, wireless, and renewable energy companies,[81] but in 2017 it declared as exempt a firm working for a foreign government to facilitate meetings with "private industry leaders in the defense and cybersecurity markets."[82] Of those two factual circumstances, one would suppose that meetings with defense and cybersecurity leaders in the United States would be more likely to "directly promote . . . public or political interests" than commercial meetings with U.S. media, wireless, and renewable energy companies, but the Department held otherwise.

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[77] FARA Adv. Op. 1-20-1984, *available at* https://www.justice.gov/nsd-fara/page/file/1046156/download.

[78] FARA Adv. Op 9-18-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1213271/download.

[79] FARA Adv. Op. 8-10-2017, *available at* https://www.justice.gov/nsd-fara/page/file/1036086/download.

[80] FARA Adv. Op. 7-26-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1092526/download

[81] FARA Adv. Op. 4-11-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1180311/download

[82] FARA Adv. Op. 12-21-2017, *available at* https://www.justice.gov/nsd-fara/page/file/1036096/download.

- In 2011, the Department exempted from registration an SOE effectuating the multibillion-dollar sale of a U.S. company that required permission from the U.S. government,[83] but in 2013 it required registration for the "agents" of an SOE owned by a foreign municipal government that sought to acquire a U.S. business because the foreign country "and its banking system [are] bound together."[84] This reference to the banking system may be unique to the foreign country at issue or it may be a statement on banking systems generally, but it is not apparent when any industry and a foreign country's interests are sufficiently "bound together" such that advancing the industry's commercial goals becomes the equivalent of "directly promot[ing] . . . public or political interests" of a foreign government, particularly when a foreign government has an interest in the commercial success of *all* its SOEs and even privately owned companies succeeding.

- In 2018, the Department exempted from registration a consultancy retained to promote an industry conference that was held in a foreign country, hosted by a foreign state-owned enterprise, and sponsored by a mix of private companies, SOEs, and foreign government agencies. As part of its conference promotion, the consultancy distributed materials that "were inherently political in nature and . . . also serve[d] the interests of" the foreign country and government, such as issuing statements "regarding foreign government industry leadership" and authoring "op-eds on behalf of a foreign government." The Department concluded that these activities did not "directly promote . . . public or political interests" and that the Department would "consider the benefits to be indirect and incidental . . . as long as [foreign government] and [foreign country] refrain from directing" the consultancy's activities.[85] The Department, in other words, said that even overt promotional acts, such as issuing statements that highlight a foreign government's industry leadership and drafting industry op-eds authored by foreign government officials, would not "*directly* promote . . . public or political interests" in instances where the foreign government avoided direction of those activities. Given the other opinions in this area, though, it is uncertain whether this bright line would hold in different circumstances.

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[83] FARA Adv. Op. 7-27-2011, *available at* https://www.justice.gov/nsd-fara/page/file/1036101/download.

[84] FARA Adv. Op. 4-9-2013, *available at* https://www.justice.gov/nsd-fara/page/file/1038291/download; *see also* FARA Adv. Op. 12-3-2012, *available at* https://www.justice.gov/nsd-fara/page/file/1038226/download; *cf.* FARA Adv. Op. 2-9-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1068636/download (requiring registration from a U.S. compliance consulting firm proposed a contract with a U.S. law firm to provide services to the law firm's client, a foreign country's central bank; the U.S. consulting firm would assist the U.S. law firm in the "rendering of legal advice and provision of legal services" by: (1) assessing the foreign central bank's cyber security programs; (2) evaluating the foreign central bank's policies and programs concerning anti-money laundering and terrorism finance; (3) communicating, under the direction of the U.S. law firm, with U.S. banks, financial institutions, and government agencies; (4) contacting U.S. banks, financial institutions, and government agencies to demonstrate the foreign central bank's "suitability for establishing commercial relationships with U.S. financial institutions.").

[85] FARA. Adv. Op. 11-6-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1112151/download.

The consequence of these disparate Advisory Opinions is that prospective FARA registrants are left with insufficient or inconsistent guidance as to when activities "directly promote the public or political interests of a foreign government or of a foreign political party" and therefore make the exemptions at 22 U.S.C. § 613(d)(1) and (d)(2) unavailable. This impedes the ability of the regulated community to differentiate between exempt and registrable conduct, frustrating both industry compliance and the Department's administration of FARA.

ii. Uncertainty in How the Department's Exemption Criteria in the Context of SOEs Applies to Other Common Scenarios

Although the Department's attempt to clarify the scope of the statutory exemptions at 22 U.S.C. § 613(d)(1) and (d)(2) has been inconsistent and unclear at times, it should still be recognized as an ambitious and laudable initial effort. Regulators often gravitate toward issuing rules that pertain to the "easy cases" – factual scenarios where the application of the law is neatly explained. But the Department, in attempting to differentiate between the "agents" of foreign governments and political parties that must register and the "agents" of other foreign interests that need not register, promulgated a regulatory test that expressly attempts to tackle the more difficult scenario of SOEs, which categorically involves a blend of governmental and commercial interests. Department rules, such as they are, ultimately show that the statutory exemptions can apply "even though the foreign principal is owned or controlled by a foreign government" and "even if [the foreign corporation is] owned in whole or in part by a foreign government."[86] SOEs are exactly where one would expect the Department to most closely scrutinize the activities of an ostensibly commercial entity for ulterior governmental or political motives that could trigger FARA registration.

The Department has unfortunately not issued any subsequent rules applying the statutory exemptions at 22 U.S.C. § 613(d)(1) and (d)(2) to other contexts outside of SOEs, though it has episodically attempted to apply these exemptions in a cursory manner to purely private enterprises in Advisory Opinions.[87] This has led to some confusion on how to read the statutory exemptions as applied to work on behalf of many private individuals, for-profit corporations, and nonprofit entities, with some under the impression that the rules that apply the exemptions in the context of SOEs apply even in scenarios of lesser regulatory concern. A privately held and controlled business may feel the need to analyze, for example, whether its efforts to advance its own commercial interests could "directly promote . . . public or political interests" if they simply coincide in even a limited fashion with the stated views of a foreign government. A nonprofit organization could be apprehensive to receive a project grant from a foreign NGO because the grant does not support activities that further "commercial, industrial, or financial operations." These activities plainly fall outside of FARA's intended goal of disclosure for "agents of foreign governments and political parties,"[88] but they are chilled by the Department's decision to

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[86] 28 C.F.R. § 5.304(b)-(c).

[87] *See, e.g.*, FARA Adv. Op. 7-30-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1366661/download (applying exemption to a privately held life sciences company); FARA Adv. Op. 12-6-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1232931/download (applying exemption to firm working on behalf of a foreign chamber of commerce).

[88] H.R. Rep. No. 104-399, pt. 1 at 21 (1995).

articulate a position on how statutory exemptions apply to SOEs while remaining silent on how the exemptions apply in other situations.

b. Recommendations

i. The Department of Justice Should Resolve Uncertainty Associated with the Meaning of "Directly Promote the Public or Political Interests of a Foreign Government"

The Department should attempt to resolve the uncertainty associated with the meaning of the phrase "directly promote the public or political interests of a foreign government." Given the centrality of these two exemptions to business activities, the Department should reconcile its disparate Advisory Opinion conclusions, and provide clearer public guidance, in a generally applicable policy statement such as the 2020 White Paper on the Scope of Agency. DOJ also should consider replacing the "directly promote" provision with a purpose test, where activities are ineligible for the exemptions if they are undertaken by the "agent" for the purpose of promoting the public or political interests of a foreign government or foreign political party. A rebuttable presumption of that purpose could be established by the presence of certain factors (*e.g.*, any involvement by, or coordination with, a foreign government official) to make the exemption simpler to apply.

ii. The Department of Justice Should Issue New Regulations that Apply the Statutory Exemptions at 22 U.S.C. § 613(d)(1) and (d)(2) to Situations Outside of SOEs

Confusion persists in the regulated community regarding the applicability of current FARA regulations applying the exemptions for "private and nonpolitical activities in furtherance of . . . bona fide trade or commerce" and for "other activities not serving predominantly a foreign interest" even in the context of SOEs, coupled with the absence of corresponding rules addressing other contexts. The Department should, at its earliest opportunity, issue new regulations that address how these statutory exemptions apply in the context of private for-profit corporations, nonprofit organizations, and other common entities.

2. Exemption for "Activities in Furtherance of Bona Fide Religious, Scholastic, Academic, or Scientific Pursuits or of the Fine Arts"

a. Background Discussion

FARA exempts from registration any "agent" engaging "*only* in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts."[89] This exemption is available to an "agent" working for any type of foreign principal, including a foreign government or foreign political party, but does not cover the performance of "political

[89] 22 U.S.C. § 613(e) (emphasis added).

activities."[90] The Department has interpreted this exemption narrowly. In 2020, for example, DOJ determined that the exemption applied to "lectures, seminars, discussion groups and conferences" about a foreign country's art, culture, literature and performing arts, including the sponsorship of an annual cultural festival and literary award.[91] In 2019, however, the Department rejected the exemption's availability to a U.S. firm organizing an international religious organization's conference to "bring together the world's religious leaders to agree on measures to overcome important social challenges" because a foreign government's ministry paid for the firm's work and the conference involved social issues that "could also be in the public interests of a foreign government."[92] In 2016, the Department also disallowed the exemption where a foreign nonprofit working at the direction of a foreign government planned to sponsor exhibits at a U.S. museum "to educate the American public about the strong bonds that have existed between the two nations."[93]

This exemption is increasingly important due to the growth of the nonprofit sector, as well as the prevalence of cross-border fundraising and activity in that sector. The overall effect of FARA's broad scope and the Department's narrow interpretation of the exemption for "bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts" is that many organizations that are not, in reality, "agents" of a foreign principal, nonetheless must consider whether they have a potential obligation to register. This regulatory and enforcement environment can chill legitimate religious, charitable, scholarly, and other activities if nonprofit organizations avoid activity due to uncertainty surrounding their potential FARA obligations.[94] Moreover, nonprofits across the world are increasingly under international scrutiny, including from authoritarian governments, lending greater urgency to the need for a regulatory enforcement regime that distinguishes between legitimate nonprofit activity and propaganda activity requiring registration.

b. Recommendation

The Department should issue more detailed interpretive guidance regarding the exemption for "activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts." That guidance should re-focus FARA enforcement on influence operations conducted in the United States at the direction or control of a foreign government

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[90] 28 C.F.R. § 5.304(d); *see also* FARA Adv. Op. 11-19-2019 (rejecting U.S. foundation's claim of the exemption for "bona fide religious" work at Section 613(e) because the activities would include "political activities"), *available at* https://www.justice.gov/nsd-fara/page/file/1232921/download.

[91] FARA Adv. Op. 1-31-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287606/download; *see also* FARA Adv. Op. 11-24-2015, *available at* https://www.justice.gov/nsd-fara/page/file/1038206/download (applying exemption to U.S. foundation that received funds from a foreign government without specifying the underlying facts about the grant or grant agreement).

[92] FARA Adv. Op. 11-12-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1234516/download.

[93] FARA Adv. Op. 7-12-2016, *available at* https://www.justice.gov/nsd-fara/page/file/1038211/download.

[94] Nick Robinson, *Foreign Agents in an Interconnected World: FARA and the Weaponization of Transparency*, 69 Duke L.J. 1075 (2019-2020), *available at* https://dlj.law.duke.edu/article/foreign-agents-in-an-interconnected-world-robinson-vol69-iss5/ ("FARA's overbreadth not only can lead to politicized targeting, but also create confusion about who should register. This can chill transnational cooperation, as nonprofits, the media, and others avoid a broad range of relationships across borders that may make them vulnerable to potentially being tarred a 'foreign agent.'").

based on a set of multiple factors. The guidance also should indicate that the receipt of funding from a foreign government, while probative of potential direction or control by a foreign government, is not singularly dispositive and should be considered among a range of factors.

3. Exemption for Lawyers Engaged in a Legal Representation

a. Background Discussion

FARA's initial definition of "agent" specifically covered any person "who acts or engages or agrees to act as . . . attorney for a foreign principal,"[95] and attorneys were commonly registrants under that iteration of the law.[96] A U.S. Supreme Court ruling[97] in the 1960s that required attorneys retained by the Government of Cuba to register, though, subsequently spurred Congress[98] to enact reform legislation that eliminated the statue's "attorney" reference and created a new exemption for legal representations under certain circumstances.[99] FARA currently provides that a person otherwise obligated to register is exempt from doing so if the person is "qualified to practice law" and "engage[s] in the legal representation of a disclosed foreign principal before any court of law or agency of the Government of the United States . . . ."[100] The statute further states that this exemption is not available to attorneys who "attempt[] to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record."[101] Thus, the statute awkwardly describes conduct qualifying for the exemption within language specifying when the exemption is not unavailable.

FARA regulations add only that "attempts to influence or persuade" agency personnel or officials to which the statutory exemption refers are those "attempts to influence or persuade with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests of a government of a foreign country or a foreign political party. . . ."[102]

A clear understanding regarding the applicability and scope of this obliquely worded exemption is frustrated by the sparse policy guidance that is publicly available and Advisory Opinions that are often too heavily redacted to fully discern their relevance to a given scenario.

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[95] Pub. L. 75-583, 52 Stat. 632 (1938).

[96] Gen. Accounting Office, *Effectiveness of the Foreign Agents Registration Act of 1938, as Amended, and Its Administration by the Department of Justice* at 11-12 (1974), *available at* https://www.gao.gov/products/b-177551.

[97] *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964).

[98] H. Rep. No. 89-1470 at 10-13 (1966).

[99] Pub. L. 89-486, 80 Stat. 244 (1966); *see also* Gen. Accounting Office, *Effectiveness of the Foreign Agents Registration Act of 1938, as Amended, and Its Administration by the Department of Justice* at 10 (1974), *available at* https://www.gao.gov/products/b-177551.

[100] 22 U.S.C. § 613(g).

[101] *Id.*

[102] 28 C.F.R. § 5.306(a).

i. Sparse Policy Guidance

General policy guidance regarding this exemption remains limited. Currently, such guidance (as revised in 2020) consists solely of a brief Frequently Asked Questions ("FAQ") entry on the FARA Unit's website (www.fara.gov), which states:

> The legal exemption is triggered once a person, qualified to practice law, engages or agrees to engage in the legal representation of a disclosed foreign principal before any court or agency of the Government of the United States. The exemption is not triggered by an agreement to provide legal representation to further political activities, as defined by FARA, to influence or persuade agency personnel or officials, other than in the course of either judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or other agency proceedings required by law to be conducted on the record. The scope of the exemption, once triggered, may include an attorney's activities outside those proceedings so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter.[103]

This FAQ guidance essentially replicates the statutory and regulatory language. But in an apparent recognition of the breadth and realities of the practice of law, it now also includes language that exempts from registration an attorney's activities outside those proceedings so long as those activities "do not go beyond the bounds of normal legal representation of a client within the scope of that matter." The FAQ does not provide any examples, however, of what type of activities would be "beyond the bounds of normal legal representation." Hence, while the revised guidance is welcome, it still falls short of what DOJ could offer attorneys to inform their FARA compliance analysis.

ii. Unclear Advisory Opinions

FARA Advisory Opinions published on www.fara.gov shed some light on how the Department interprets the exemption for legal representation, indicating that the following activities by lawyers qualify for the legal representation exemption:

- Evaluating the merits of initiating or defending against particular litigation, even for a foreign government.[104]
- Conducting litigation for a foreign government in the United States.[105]
- Representation of foreign companies consisting of preparing attorney opinions, legal analyses, and litigation strategy, civil litigation in federal courts against a U.S. Government agency, representation in administrative proceedings before a U.S.

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[103] Dep't of Justice, *FARA Frequently Asked Questions* at Sec. IV (Dec. 3, 2020), https://www.justice.gov/nsd-fara/frequently-asked-questions#21; *see also* FARA Adv. Op. 1-5-2021, *available at* https://www.justice.gov/nsd-fara/page/file/1351401/download.

[104] FARA Adv. Op. 4-22-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287661/download.

[105] *Id.*; FARA Adv. Op. 1-5-2021, *available at* https://www.justice.gov/nsd-fara/page/file/1351401/download.

Government agency, preparing regulatory applications and supplementary documents to obtain regulatory approval for transactions involving the companies, and otherwise corresponding with officials of U.S. Government agencies.[106]

- Representation of a foreign corporation to remove it from the Department of Commerce's Entity List, where the law firm proceeded strictly according to the civil administrative procedures prescribed in the Export Administration Regulations, the matter did not "involve[] attempts to influence federal officials outside of established agency proceedings," and the firm did not otherwise engage in "political activities," as defined in FARA.[107]

- Attending meetings at DOJ on behalf of a foreign government to discuss a pending extradition request by that government.[108]

- Participating in requests by a foreign government for legal assistance from the U.S. Government, if made pursuant to an official bilateral treaty on extradition and mutual legal assistance.[109]

- Representation of a foreign state-owned company and foreign person before the Office of Foreign Assets Control ("OFAC") at the U.S. Department of the Treasury with respect to investigative or enforcement proceedings undertaken by OFAC or another U.S. Government agency, and with respect to a letter request to OFAC to stay designation of the firm's clients until the firm had "an opportunity to present responsive information and documents to address the allegations leading to the [potential] designation by OFAC." (Importantly, the FARA Unit observed that the law firm's letter to OFAC "appear[ed] to stop short of an attempt to influence OFAC's policies regarding its sanctions regime beyond its specific application to [the firm's] two clients.")[110]

- Pursuant to an engagement agreement with a foreign government, conducting litigation on behalf of foreign nationals in the United States, funded by – and at the direction and control of – the foreign government, where no facts were presented indicating that the law firm was engaged in "political activities" or other activities in the United States within the scope of FARA.[111]

- Pre-litigation discussions with federal, state, or local officials on behalf of a foreign government and foreign nationals with the goal of persuading government officials to enforce existing policies, or to change existing policies or practices, affecting the

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106 FARA Adv. Op. 5-29-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287666/download.

107 FARA Adv. Op. 9-10-2013, *available at* https://www.justice.gov/nsd-fara/page/file/1038231/download.

108 FARA Adv. Op. 4-21-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287671/download.

109 *Id.*

110 FARA Adv. Op. 5-3-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1068551/download; FARA Adv. Op. 5-3-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1068546/download.

111 FARA Adv. Op. 7-27-2011, *available at* https://www.justice.gov/nsd-fara/page/file/1038221/download.

rights of foreign nationals. (The FARA Unit agreed that these activities, since "limited to litigating cases" for the foreign government and foreign nationals, qualified for the exemption because the advocacy contemplated by the law firm was within the "course of judicial proceedings.")[112]

Conversely, Advisory Opinions indicate that the following activities are ineligible[113] for the exemption for legal representation:

- Providing factual responses to media inquiries about civil litigation on behalf of a foreign government, issuing press releases regarding the litigation, and engaging in press conferences regarding the legal representation – where conducting the litigation itself would be exempt from registration.[114]

- Plans to seek a waiver from the Department of State of a rule precluding U.S. courts from enforcing the tax laws of another country, in connection with pending civil litigation on behalf of a foreign country. (While the litigation itself qualified for the exemption, outreach to the Department of State was deemed to constitute registrable "political activities.")[115]

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112 FARA Adv. Op. 2-16-2011, *available at* https://www.justice.gov/nsd-fara/page/file/1038241/download.

113 The FARA Unit also has published a redacted determination letter regarding the availability of the exemption for legal representation. In that letter, the FARA Unit determined that a U.S. law firm representing the government of Turkey had engaged in registrable political activities where a partner had written a letter to a senior DOJ official (and had also initiated contact with a U.S. Attorney's Office), relating to a pending criminal prosecution of other parties, that was "intended to influence DOJ officials with reference to the foreign policy of the United States and its political and public relations with Turkey, to wit, U.S.-Turkey law enforcement cooperation concerning sanctions on Iran." Letter from Dep't of Justice, Nat'l Sec. Div., Counterintelligence and Export Control Section, to King & Spalding, Dec. 7, 2017, *available at* https://www.justice.gov/nsd-fara/page/file/1282106/download. The FARA Unit observed that Turkey, the law firm's client, was not a party to a pending criminal prosecution in which the firm urged DOJ "to take certain action," and that the firm's "attempts to influence concerned foreign policy and relations matters well beyond the scope of that criminal case." *Id.*

114 FARA Adv. Op. 1-5-2021 (reaffirming the legal conclusion of a now-unpublished December 31, 2019 advisory opinion), *available at* https://www.justice.gov/nsd-fara/page/file/1351401/download. A civil settlement that the Department of Justice reached in January 2019 with the law firm Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") also illustrates the unavailability of the exemption when lawyers engage in media relations on behalf of foreign principal. In that case, Skadden's lead partner in an engagement with the government of Ukraine took steps to advance a public relations campaign in the United States concerning a report it had prepared on the 2011 prosecution of former Prime Minister Yulia Tymoshenko. *See* Press Release, Dep't of Justice, Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal (Jan. 17, 2019), *available at* https://www.justice.gov/opa/pr/prominent-global-law-firm-agrees-register-agent-foreign-principal. Prior to the report's release, the Skadden partner engaged in direct outreach to a journalist at a U.S. newspaper, arranged for delivery of the report to the journalist, and provided a quotation to the journalist for attribution. *Id*. In the settlement agreement, Skadden acknowledged that these activities required FARA registration, and the firm subsequently registered.

115 FARA Adv. Op. 12-7-2010, *available at* https://www.justice.gov/nsd-fara/page/file/1038236/download.

- Providing legal advice and analysis to a foreign government regarding matters that concern bilateral relations between that government and the United States, including pending legislation in the United States and potential policy and action by the Executive Branch of the U.S. Government.[116]

- Attending regular meetings with U.S. lobbyists retained by a foreign government where proposed legislation and legislative strategy are discussed.[117]

- Sharing legal memoranda regarding pending congressional legislation with a foreign government's lobbyists and public relations firm.[118]

- Providing a foreign government with arguments to advance in opposition to legislation pending before the United States Congress.[119]

- Involvement in potential responses by the U.S. embassy of a foreign government to media inquiries concerning litigation in which the law firm is counsel of record, even where the litigation itself is exempt from registration.[120]

Considered collectively, the published Advisory Opinions provide data points that are useful to lawyers in gauging whether the exemption would apply to their activities on behalf of a foreign principal. Still, these Opinions collectively represent a patchwork of guidance and apply by their express terms only to the specific facts at issue in each case, meaning that they categorically do not constitute generally applicable policy guidance. In addition, Advisory Opinions are sometimes too redacted to afford a sufficient understanding of the underlying facts on which to base an informed evaluation regarding the exemption's availability to a given client engagement.

Furthermore, certain Advisory Opinions impacting lawyers appear to be inconsistent. In a redacted Advisory Opinion dated November 1, 2019, the Department considered the activities of a U.S. consulting firm retained by a U.S. subsidiary of a foreign corporation, where the consulting firm provided reports "about the domestic and foreign policies of the U.S. such as the United States' relationship with [foreign countries], and the U.S. foreign and trade policy." The consulting firm maintained that it was not required to register as a "political consultant"[121] because its activities were "'designed to educate [foreign corporation] on U.S. investment and financial opportunities for the ultimate purpose of maximizing their financial gain.'" The Department told the consulting firm that it would "not contest" the firm's assertion that it was not engaged in registrable work as a "political consultant."[122]

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116 FARA Adv. Op. 4-21-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287671/download.

117 FARA Adv. Op. 4-21-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287671/download.

118 *Id.*

119 *Id.*

120 *Id.*

121 *See* 22 U.S.C. §§ 611(c)(1)(ii), (p).

122 FARA Adv. Op. 11-1-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1232936/download.

Conversely, in an April 21, 2020 Advisory Opinion issued to a law firm, the Department considered multiple forms of assistance the firm provided to a foreign government through the government's embassy in the United States, some of which – like "[e]valuating the merits of initiating or defending against particular litigation" and conducting litigation – the FARA Unit found to be exempt from registration. But the Department found registrable the law firm's provision of "legal advice and analysis on law and policy regarding matters and development[s] that concern and affect US-[foreign country] relations, such as . . . pending legislation, and executive decisions and policy." It is unclear whether the Department found this part of the firm's work, standing alone, to be registrable, or considered it to be registrable only in the broader context of other registrable work, such as efforts to influence U.S. policy and public opinion.[123]

b. Recommendations

i. The Department of Justice Should Augment Its Existing General Policy Guidance Concerning Legal Representations

The Department should significantly expand upon the general policy guidance currently available regarding the exemption for legal representation. The Department should issue generally applicable policy guidance regarding the exemption for legal representation, similar to the white paper on The Scope of Agency issued in May 2020. It can issue this guidance on its own authority, without the need for a rulemaking or other approval.

At a threshold matter, such guidance should set forth the statutory and regulatory provisions of the legal exemption – *i.e.*, what general categories of activity are exempt and non-exempt – in as clear a manner as possible. More importantly, the guidance should provide concrete examples of activities by lawyers that can "cross the line" into non-exempt conduct – such as proactive involvement in media outreach or public relations – while describing other conduct that, without more, falls within the exemption. This guidance would not provide the insulation from possible liability accorded by obtaining an advisory opinion in a given case, but it would facilitate greater clarity, predictability, and confidence for attorneys evaluating whether engaging in certain activities would require registration.

ii. The Department of Justice Should Revise Its Regulations to More Clearly Interpret the Statutory Exemption

As indicated above, part of the difficulty and uncertainty in interpreting the scope of the exemption for legal representation is attributable to the cumbersome nature of the statutory language. FARA regulations could be revised to state that "The exemption provided by section 3(g) of the Act shall not be available to any person who attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or agency proceedings, if such attempts to influence or persuade are with reference to formulating adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party." If DOJ does not

[123] FARA Adv. Op. 4-21-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287671/download.

feel that it can issue such a regulation to interpret the existing statutory language, it should support legislation to amend 22 U.S.C. § 613(g) to articulate the exemption in a more straightforward, intelligible manner. In that case, for example, the statutory exemption could be revised to apply to: "Any person qualified to practice law who engages in disclosed legal representation of a foreign principal in judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or agency inquiries, investigations, or proceedings, and activities routinely attendant to such disclosed legal representation."

4. Exemption for Lobbying Disclosure Act Registrants

a. Background Discussion

FARA exempts from its registration requirement an "agent" that "has engaged in lobbying activities" and has properly registered under the Lobbying Disclosure Act ("LDA"), the statute that regulates direct lobbying activity of federal government officials.[124] This exemption for LDA registrants is, by its express statutory terms, available to any "agent" of "a person outside of the United States" or "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[125] An "agent" of a foreign government or foreign political party is ineligible for this LDA exemption.[126] Congress enacted the LDA exemption in 1995 to "reaffirm the bright line distinction between governmental and nongovernmental representations,"[127] with the "disclosure of foreign nongovernment representation under the LDA and disclosure of foreign government representations under the Foreign Agents Registration Act."[128]

In 1999, the Department proposed a regulation to implement the LDA exemption that would have made the exemption unavailable "where a foreign government or foreign political party is the ultimate foreign principal" to account for the potential use of intermediaries by these actors, while recognizing expressly that "Congress generally narrowed the scope of FARA to agents of foreign governments and foreign political parties."[129] No written comments were

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124 22 U.S.C. § 613(h).

125 *Id.* (exemption is available to any "agent of a person described in section 611(b)(2) . . . or an entity described in section 611(b)(3)"); *see also id.* § 611(b)(2) (referencing "a person outside of the United States"; 22 U.S.C. § 611(b)(3) (referencing foreign partnerships, associations, corporations, organizations and other combinations of persons).

126 Dep't of Justice, *FARA Frequently Asked Questions* at Sec. IV (updated Dec. 3, 2020) (LDA exemption is available only where the work "is not on behalf of a foreign government or foreign political party"), *available at* https://www.justice.gov/nsd-fara/frequently-asked-questions#22.

127 S. Rep. No. 105-147, at 4 (1997).

128 Cong. Rec. H.1258 (Mar. 18, 1998) (statement by Rep. Charles Canady) ("This change reaffirms the congressional intent of requiring disclosure of foreign nongovernment representations under the Lobbying Disclosure Act and disclosure of foreign government representations under the Foreign Agents Registration Act."); *see also* H.R. Rep. No. 104-399, pt. 1 at 21 (1997) ("FARA is limited to agents of foreign governments and political parties. Lobbyists of foreign corporations, partnerships, associations, and individuals are required to register under the Lobbying Disclosure Act, where applicable, but not under FARA.").

129 64 Fed. Reg. 37065, 37066 (Jul. 9, 1999) ("Under new section 3(h) of FARA, 22 U.S.C. § 613(h), agents of foreign principals other than foreign governments or foreign political parties need not register under FARA if such agents engage in lobbying activities and register under the LDA.").

received on that regulatory proposal, but the draft regulation was not adopted at that time for unstated reasons.[130] The Department subsequently revisited the LDA exemption in 2003 with a new proposed rulemaking, restating again that "Congress generally narrowed the scope of FARA to agents of foreign governments and foreign political parties" and characterizing the newly proposed regulatory provision as a mere "minor clarifying adjustment[ ]" to the proposal four years earlier.[131]

The 1999 and 2003 proposals differed significantly, though. Whereas the 1999 proposal made the LDA exemption unavailable "where a foreign government or foreign political party is the ultimate foreign principal," the 2003 proposal stated that the Department would not recognize the LDA exemption "where a foreign government or foreign political party is the principal beneficiary."[132] The Department adopted this new regulatory standard without explaining the Department's departure from congressional intent to set a "bright line distinction" between governmental and nongovernmental representations under the FARA and LDA filing regimes, and without clarifying the purpose or meaning of "the principal beneficiary" standard.[133]

Since then, the Department's articulation of "the principal beneficiary" standard in allowing or disallowing the LDA exemption has been uneven and unclear at times:

- In 2020, the Department concluded that a foreign government was not "the principal beneficiary" of a U.S. firm's work for a foreign corporation based on the mere representation that most of the corporation's shares were "publicly traded."[134]

- In 2012, the Department vacillated on whether a foreign government was "the principal beneficiary" of two U.S. firms' work for a foreign company that was minority-owned by foreign municipal governments, at first disallowing the LDA exemption[135] but, three years later, permitting its application after additional information certifying that the national-level foreign government did not own or control the company.[136]

- In 2019, the Department found a foreign government was not "the principal beneficiary" of a U.S. company wholly owned by a foreign government where "all direction and control" for the work would be exercised by U.S. executives and employees.[137]

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130 68 Fed. Reg. 33629 (Jun. 5, 2003) ("On July 9, 1999, a proposed rule was published in the Federal Register (64 FR 37065). Interested persons were afforded the opportunity to participate in the regulatory process. The comment period ended on September 7, 1999. No written comments were received on the proposed rule.").

131 68 Fed. Reg. 33629 (Jun. 5, 2003).

132 *Id.* at 33629, 33631.

133 28 C.F.R. § 5.307.

134 FARA Adv. Op. 1-29-2020, *available at* https://www.justice.gov/nsd-fara/page/file/1287656/download.

135 FARA Adv. Op. 12-3-2012, *available at* https://www.justice.gov/nsd-fara/page/file/1038226/download.

136 FARA Adv. Op. 11-10-2015, *available at* https://www.justice.gov/nsd-fara/page/file/1038296/download.

137 FARA Adv. Op. 3-22-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1180271/download.

- In 2018, the Department held that a foreign government was not "the principal beneficiary" of a U.S. firm's work for a U.S. company that was majority-owned by a foreign government, but cautioned that this determination would change if the foreign government "directed [the firm] to engage in political activities . . . that directly promote the public of political interests" of the foreign government.[138]

- In 2019, the Department concluded that a foreign government was not "the principal beneficiary" of a U.S. firm's work for a foreign pension plan board appointed by foreign government officials and created by a foreign government's law because the pension plan benefited foreign individual pensioners and because the board operated independently from the foreign government.[139]

- In 2013, the Department concluded that a foreign government was "the principal beneficiary" of a U.S. firm's work for a privately held bank (making the LDA exemption unavailable) because a foreign nation and its banking system are "bound together."[140]

The Department's advisory opinions regarding the LDA exemption are a jumble, failing to articulate which activities confer a cognizable benefit on a foreign government and which threshold should be used to decide when those benefits accrue to a foreign government to the point of making it "the principal beneficiary." Put differently, it is not apparent how and whether "the principal beneficiary" standard (and therefore the availability of the LDA exemption) turns on the extent of a foreign government's ownership share, formal direction and control, informal direction and control, overlapping interests with a private company, or a combination of these factors. The Department has even recently signaled – without explanation -- that it could depart in unspecified situations from the "*the* principal beneficiary" standard set forth in its own regulation and disallow the LDA exemption where a foreign government or foreign political party is merely "*a* principal beneficiary" of activities.[141]

This lack of clarity simultaneously creates difficulty for compliance-minded members of the regulated community and opportunity for those who seek to stretch its intent to accommodate their own goal of reduced disclosure of information to the public.

b. Recommendation

After the enactment of the LDA exemption by Congress in 1995, many "agents" that were previously registered for foreign nongovernmental interests chose to terminate their FARA registrations and instead disclose their representations on LDA forms.[142] As the Department and

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138 FARA Adv. Op. 1-5-2018, *available at* https://www.justice.gov/nsd-fara/page/file/1038301/download.

139 FARA Adv. Op. 3-20-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1180281/download.

140 FARA Adv. Op. 4-9-2013, *available at* https://www.justice.gov/nsd-fara/page/file/1038291/download; *see also* FARA Adv. Op. 12-3-2012, *available at* https://www.justice.gov/nsd-fara/page/file/1038286/download.

141 FARA Adv. Op. 3-20-2019, *available at* https://www.justice.gov/nsd-fara/page/file/1180281/download ("While not the case here, there are situations in which a foreign government or political party may not be the principal beneficiary, but a principal beneficiary of lobbying activities in which the LDA exemption would not apply.").

142 *DOJ IG Report on FARA* at 5.

public has focused their attention more intently on FARA and FARA enforcement in recent years, the high number of LDA registrations relative to the number of FARA registrations has led some to express concern that the LDA exemption is "a loophole to avoid FARA registration and disclosure,"[143] as LDA registration requires far fewer disclosures than FARA registration.

Many solutions have been proposed in order to eliminate this perceived loophole, including the elimination of the LDA exemption altogether, which would require all persons lobbying on behalf of *any* category of foreign principal, governmental or otherwise, to register and report under FARA. Although the proponents of this option claim that it would increase transparency, the underlying policy implications would impose substantial and unnecessary costs on both regulators and the regulated community without a commensurate benefit in terms of FARA's national security goals.

In drafting the LDA exemption, Congress sought to balance the optimal level of disclosure for national security purposes against the practical realities of subjecting commercial interests to complying with an ongoing, more intrusive and burdensome, reporting regime. Accordingly, removing the exemption would require FARA registration for a broad swath of activity that Congress clearly decided was sufficiently addressed by the LDA. Furthermore, such a dramatic shift in this balance would carry significant costs for both the regulated community and the public. Requiring private foreign companies and their representatives to comply with FARA's comparatively rigorous disclosure requirements would significantly increase the burden of engaging in legitimate and productive communications with the U.S. government on their own behalf, even when no foreign government or political party is involved. This would lead to increased compliance costs for the foreign company and a drag on cooperative engagement between industry and government, with little or no discernable effect on national security. Additionally, elimination of the LDA exemption would result in a dramatic expansion in the number of FARA registrants and substantially burden the Department with a deluge of new filings to process and review, when it is not clear that the Department has the resources to handle such an increase. The heightened volume of filings would hamper the Department's ability to enforce FARA efficiently, thereby making the wholesale repeal of the LDA exemption a counterproductive step.

Instead of discarding the LDA exemption altogether,[144] the Department should sharpen its interpretation of the exemption by eliminating "the principal beneficiary" standard from its regulations replacing it with a purpose-based test. This would provide clearer guidance for the regulated community and a more enforceable standard for the Department to use to advance the national security goals of the statute. Below is recommended regulatory language to implement this change, redlined against the current regulation:

28 CFR 5.307 Exemption under 3(h) of the Act.

For the purpose of section 3(h) of the Act—

(a) The burden of establishing that registration under the Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 et seq. (LDA), has been made shall fall upon the person claiming the exemption. The Department of Justice will accept as prima facie

143 *DOJ IG Report on FARA* at 18.

144 One member of the Task Force supported the elimination of the LDA exemption in its entirety.

evidence of registration a duly executed registration statement filed pursuant to the LDA.
(b) In no case where the political activities of an agent of a foreign principal are undertaken for the purpose of promoting the interests of a foreign government or of a foreign political party is the principal beneficiary will the exemption under 3(h) be recognized.
(c) There shall be a presumption that any political activities of an agent of a foreign principal: (i) that would not be undertaken but for the interests of a foreign government or political party in such activities or (ii) conducted at the request, direction, suggestion, or under the control of a foreign government, are for the purpose of promoting the interests of a foreign government or political party.

Shifting to a purpose-based standard would mean that the relevant analysis concerning the availability of the LDA exemption would depend on objective factors likely subject to corroboration by documentary and other evidence manifesting the purpose of the activity. The current LDA exemption's availability, in contrast, depends on a subjective, nebulous, and shifting determination of who may benefit most from a certain activity, which often proves difficult to know with any degree of certainty or to enforce as a legal standard. The establishment of a presumption that activity motivated or requested by a governmental entity is for the purpose of advancing its interests should ensure that the regulation is sufficiently clear for the regulated community and strict enough to alleviate concerns that the LDA exemption creates a loophole in FARA's disclosure regime.

C. Providing More Robust Guidance to the Public Generally

1. Background Discussion

A report on FARA issued in 1980 by the General Accounting Office recommended that the Department "provide specific guidance to agents and agency personnel on their responsibilities under the Act," [147] given that the "present vagueness concerning the agencies' role and the agents' reporting responsibilities allows agents to operate with a degree of immunity not intended by the Act."[148] That same recommendation was renewed again in 1990 and 1992 reports by the Government Accountability Office (the successor to the General Accounting Office).[149] And recommendations published by the Department's own Inspector General in 2016 added the additional suggestion that the guidance in FARA Advisory Opinions be made "publicly available as an informational resource" to the regulated community.[150]

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147 Gen. Accounting Office, *Administration of Foreign Agent Registration* at 2 (1980), *available at* https://www.gao.gov/products/112952.

148 *Id.* at 9.

149 Gov't Accountability Office, *Foreign Agent Registration: Justice Needs to Improve Program Administration* at 7 (1990), *available at* https://www.gao.gov/products/nsiad-90-250; Gov't Accountability Office, *Foreign Agents Registration: Former Federal Officials Representing Foreign Interests Before the U.S. Government* at 4 (1992), *available at* https://www.gao.gov/products/nsiad-92-113.

150 *DOJ IG Report on FARA* at 3.

The Task Force commends the Department for making significant strides in recent years in improving transparency regarding how the Department interprets and enforces FARA. The Department, for example, now posts selected Letters of Determination[151] as well as redacted FARA Advisory Opinions[152] on its public website. As noted above, the Department has also published a substantial guidance document about the "The Scope of Agency under FARA"[153] and revamped the Frequently Asked Questions section of the website.[154]

But considerably greater public guidance is needed, particularly given the marked increase in FARA enforcement in recent years. The regulated community (and attorneys who advise the regulated community) must be able to better understand how FARA applies and what is necessary to comply with registration and disclosure obligations under the statute and its implementing regulations. Enhanced public guidance promotes greater compliance with the statute and improves the accuracy and consistency of FARA registrations and disclosure filings.

2. Recommendations

The Department should take the following steps to improve its public guidance related to FARA: (a) expand its formal FARA guidance; and (b) resume the inclusion of updates about its enforcement activities in Department reports to Congress.

a. Expand Formal FARA Guidance

The Department should expand its formal FARA-related guidance by: (i) enhancing its practices with respect to Advisory Opinions and Letters of Determination; (ii) issuing more generally applicable policy guidance and detailed instructions for all FARA forms.

i. Enhance Practices with Respect to Advisory Opinions and Letters of Determination

Advisory Opinions issued by the Department are sometimes cursory in nature and offer little guidance to the regulated community. The Department should include in all Advisory Opinions more extensive legal analysis, which would help illustrate for the regulated community the factors that are important to the Department in determining whether FARA registration is necessary. In addition, the Department should include with published Advisory Opinions the corresponding Advisory Opinion Requests (even if partially redacted) so that readers can better understand the factual context of the opinion and its potential relevance to other real-world scenarios.

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151 Dep't of Justice, *FARA: Letters of Determination* (updated May 14, 2021), https://www.justice.gov/nsd-fara/letters-determination.

152 Dep't of Justice, *FARA: Advisory Opinions* (updated May 28, 2021), https://www.justice.gov/nsd-fara/advisory-opinions.

153 Dep't of Justice, *The Scope of Agency Under FARA* (May 2020), *available at* https://www.justice.gov/nsd-fara/page/file/1279836/download.

154 *See* Dep't of Justice, *FARA Frequently Asked Questions* (updated Dec. 3, 2020), https://www.justice.gov/nsd-fara/frequently-asked-questions

Additionally, although the Department is required under FARA regulations to respond to a request for an advisory opinion within 30 days, the Department frequently takes considerably longer to issue Advisory Opinions.[155] If it is generally impracticable for the Department to respond within the 30-day period, it should revise FARA regulations to extend the deadline for a response to allow for uniform adherence and set consistent expectations for all members of the regulated community.

Finally, the Department currently posts Advisory Opinions online based on no discernable schedule and publishes only selected Letters of Determination based on no announced criteria. The Department should set a schedule for regularly posting Advisory Opinions and publish all Letters of Determination where the recipients have subsequently registered. Moreover, the Department should post a notice on the FARA Unit's website alerting the public when additional advisory opinions and determination letters have been published.

ii. Issue More Generally Applicable Policy Guidance

As discussed throughout this Report, the meaning and scope of certain FARA terms and exemptions are unclear, frustrating compliance with the statute. The Department should issue more generally applicable policy guidance providing broader interpretation of key issues concerning the applicability of FARA. The Department's May 2020 white paper on "The Scope of Agency" was a useful first step in this direction, particularly with respect to how the Department interprets the term "request" in the definition of "agent of a foreign principal." Additional publications, addressing core subjects that present repetitive challenges, should address the applicability of the two exemptions at 22 U.S.C. § 613(d)(1) and (d)(1), as well as the exemption for legal representation at 22 U.S.C. § 613(g) and the registration obligation, if any, of a party acting in the United States on behalf of a nongovernmental entity that is not a "foreign political party" but that engages in some election-related activities in foreign countries. The Department also should add formal guidance on best practices for prospective "agents" concerning the due diligence they should perform to make a good faith determination whether FARA registration is necessary (*e.g.*, research that a U.S. firm should undertake when initiating a relationship with a foreign business or organization), along with guidance on the essential elements for a model FARA training program for potential and current registrants.[156]

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155 28 C.F.R. § 5.2(i).

156 In this regard, we recommend the issuance of a framework addressing core elements of a sound FARA compliance program. A framework published by the Office of Foreign Assets Control for establishing and maintaining an effective sanctions compliance program could be a useful model for the Department. *See* Dep't of the Treasury , *Publication of "A Framework for OFAC Compliance Commitments"* (May 2, 2019), *available at* https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20190502_33. DOJ's Office of Information Policy also has a robust website on the Freedom of Information Act (FOIA) that has advice, interpretations, discussion of cases, etc., *available at* https://www.justice.gov/oip.

The Department also should consider reorganizing[157] and enlarging[158] the Frequently Asked Questions page on its www.fara.gov website, providing more comprehensive and detailed instructions for all FARA forms,[159] and embedding fact-specific hypothetical examples within FARA regulations themselves to illustrate the meaning of particular terms.[160]

b. Resume Inclusion of Updates about Enforcement Activities in the Department's Semi-Annual Reports to Congress

The Department is required by law to submit a written report to Congress every six months on its efforts to administer FARA.[161] The Department has duly provided written FARA reports to Congress since 1945.[162] Prior versions of these written reports, in the 1960s and 1970s, included substantive and statistical information related to the Department's enforcement activities, including the number of inspections initiated, the number of inspections completed, the number of Letters of Inquiry generated, the number of responses to Letters of Inquiry received that the Department deemed adequate, statistical and narrative description of all legal settlements reached, and statistical and narrative description of all civil and criminal enforcement cases initiated and/or resolved. The Department unfortunately stopped providing that information to Congress and the public in the 1990s, though, and now these reports are merely reprinted listings of registrants and foreign principals that are already available through the online database at www.fara.gov. The Department's reports to Congress no longer provide useful information about its FARA-related activities. The Department should revert to earlier

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157 The FAQs section of the website of the Alcohol and Tobacco Tax and Trade Bureau under the Department of the Treasury provides an example of FAQs with subordinated questions concerning subtopics. *See* https://www.atf.gov/questions-and-answers. To improve the utility of the FARA website to practitioners and potential or current registrants, the Department could reorganize the site's FAQs page. As a threshold matter, certain topics should be subordinated so that readers can readily explore both broader areas of inquiry as well as more detailed subtopics within an FAQ. For example, the question, "What are the exemptions to FARA?" could be subordinated under "Which individuals and organizations are required to register under FARA?"; the question, "What activities are covered by the practice of law exemption?" could, in turn, be subordinated under the question concerning exemptions.

158 The Department could also expand the content available on the FAQs section of the FARA website. For example, the "Definitions" section of the website should be broadened to cover, more generally, the scope of FARA, including its applicability to newer communications technologies and its potential application, as DOJ construes it, to conduct predominantly occurring outside of the United States. The Department also could create a new section concerning the ongoing obligations of registrants, and there include existing FAQs about supplemental statement filings, changes to registrants' staffing, informational materials, and books and records requirements. Finally, the FAQs could also include concrete examples where appropriate, as are currently available on the FAQs section of the Office of Foreign Assets Control website at https://home.treasury.gov/policy-issues/financial-sanctions/faqs.

159 Instructions should include, where appropriate, model answers. The Security and Exchange Commission's online *Guide to Broker-Dealer Registrations* provides a helpful model for instructions on filling out registration forms. *See* https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html.

160 Examples may be found in federal ethics regulations and in the approach taken by the Committee on Foreign Investments in the United States ("CFIUS"). *See, e.g.*, 5 C.F.R. § 2641.201 ("Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially"); *id.* § 2641.202 ("Two-year restriction on any former employees' representations to United States concerning particular matter for which the employee had official responsibility").

161 22 U.S.C. § 621.

162 Reports are posted publicly on the Department's FARA.gov website. Dep't of Justice, *FARA: FARA Reports to Congress* (updated Feb. 8, 2021), *available at* https://www.justice.gov/nsd-fara/fara-reports-congress.

practice and disclose detailed statistical and narrative information about its efforts to administrate and enforce FARA.

SECTION VI: CONGRESS AND THE DEPARTMENT OF JUSTICE SHOULD REFORM THE OBLIGATIONS IMPOSED ON REGISTERED "AGENTS"

FARA imposes several significant obligations on those that are required to register under the law. Congress and the Department should reform certain aspects of those obligations to further FARA's underlying public policy goals, ease administrative burdens on the regulated community, and facilitate more effective implementation of the statute. Specifically, Congress and the Department of Justice should: (A) require foreign principals to certify FARA filings' accuracy and completeness; (B) modernize the definition of "informational materials"; (C) protect personal information of individuals; and (D) repeal FARA's filing fees. Each of these proposed reforms is discussed in greater detail in this Section.

A. Requiring Foreign Principals to Certify Filings' Accuracy and Completeness

1. Background Discussion

FARA stipulates that the "agent" must file all required forms, which include factual representations about the foreign principal's contact information, ownership, control structure, and affiliations with other entities.[163] The foreign principal itself has no such obligations, even though it is arguably in a better position to make factual representations about itself than an "agent" working remotely and potentially encountering the foreign principal for the first time. As the filer of FARA forms, only an "agent" bears direct legal responsibility for any false statements or willful omissions.[164] A foreign principal has never been prosecuted for an omission or false statement on a FARA filing. Under the existing regime, then, the foreign principal does not have any "skin in the game" when factual representations are made to the Department, which means that there is little or no disincentive for foreign principals to omit information or mislead their "agents."

Other disclosure regimes take a different approach. Lobbying disclosure laws in many U.S. states, for example, require organizations to submit their own lobbying disclosure forms, separate and apart from the filings submitted by the lobbyists they hire.[165] Other U.S. states mandate that organizations simply authorize the filings submitted by their lobbyists through a

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163 22 U.S.C. § 612(a)-(b); *see also* Dep't of Justice, Exhibit A to Registration Statement (revised May 2017), *available at* https://www.justice.gov/file/991276/download.

164 22 U.S.C. § 618(a).

165 *See, e.g.*, Ariz. Rev. Stat. §§ 41-1232, 41-1232.02; Cal. Gov't Code §§ 86105, 86115; Mass. Gen. L. ch. 3 §§41, 43; 65 Pa. Cons. Stat. §§ 13A04, 13A05; Tenn. Code Ann. §§ 3-6-302, 3-6-303.

signed statement.[166] These models ensure that the organization bears legal responsibility for the factual representations made to the government.

2. Recommendation

Congress should institute a new requirement under FARA for each foreign principal to certify, via signature under penalty of perjury, that the information submitted by the foreign principal's "agent" on Exhibit A and Exhibit B (and any amendment to these forms) is correct. The addition of this foreign principal certification, which only requires an additional line on the existing FARA forms, would make foreign principals directly responsible and accountable for ensuring that the factual representations made about them are complete and accurate. This reform would more strongly deter foreign principals from omitting information or misleading their "agents" at the time of registration and therefore promote FARA's goal of transparency.

B. Clarifying and Modernizing the Definition of "Informational Materials"

1. Background Discussion

Since its inception, FARA has required disclosure of efforts to distribute materials and information to the American public, with Congress describing it in 1938 specifically as a law to "require the registration of certain persons employed by agencies to disseminate propaganda in the United States and for other purposes."[167] Congress subsequently amended FARA in 1942 to impose particular labeling and filing requirements on "political propaganda" for the first time, mandating that registrants place disclaimer language on "political propaganda" that was "disseminated or circulated among two or more persons" and send copies of such propaganda to the Librarian of Congress and the Attorney General within 48 hours.[168] "Political propaganda" was initially defined to include any communication that is "reasonably adapted" or intended to:

> [P]revail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or . . . which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.[169]

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166 *See, e.g.*, Ga. Code Ann. § 21-5-71; Md. Code Ann., Gen. Prov. § 5-704; N.J. Stat. Ann. § 52-13C-21; N.C. Gen. Stat. § 120C-206; Ohio Rev. Code Ann. §§ 101.72, 121.62.

167 Pub. L. 75-538, 52 Stat. 631-633 (1938).

168 Pub. L. 77-532, 56 Stat. 255 (1942). These labeling and filing requirements were later refined in the 1966 amendments to FARA. *See* Pub. L. 89-486, 80 Stat. 244 (1966) (clarifying, among other things, that labeling and filing requirements applied only to propaganda disseminated "for or in the interests of such foreign principal").

169 Pub. L. 77-532, 56 Stat. 251 (1942).

Congress deleted most references to the term "political propaganda" that appeared in FARA's text, along with the term's definition, in 1995.[170] The term "informational materials" replaced "political propaganda" as the operative statutory trigger for FARA's labeling and filing requirements, but Congress failed to add a corresponding definition of "informational materials."

Today, a FARA registrant must properly label all "informational materials" that are "disseminated or circulated to two or more persons" and then submit them to the Department of Justice within 48 hours after their dissemination.[171] As currently constituted, this requirement suffers from several shortcomings, including:

- A lack of definition for "informational materials." FARA once contained an extensive definition for the term "political propaganda" to help registrants understand when they must label and file distributed materials. But there currently exists no definition of this key term, in statute or regulation, leaving the regulated community with inadequate guidance as to which written and electronic communications must be labeled and filed under FARA.[172] Based on the plain meaning of the words that comprise the term, "informational materials" conceivably could include any "materials that contain information," but such a reading would be a drastic departure from the statute's prior scope. This uncertainty leaves FARA registrants in an unclear situation when, for example, sending informational emails internally or to likeminded groups that would not have been disclosed historically under FARA as "propaganda" but could nonetheless be deemed "informational materials" in the most expansive sense.

- A "two or more persons" threshold that is outdated. FARA's labeling and filing requirements arise when "informational materials" are distributed to "two or more persons." This threshold was established in 1942, long before the advent of communication methods like email and messaging that make communication with multiple persons a regular feature of everyday life. A communication sent to just two persons is unlikely to have any marked impact on U.S. government or public opinion, and yet – 79 years later – it is still the statutory threshold for FARA's labeling and filing requirements. While it may seem ideal in this context to cast the regulatory net as wide as possible, this can create a heavy administrative burden for the Department of Justice and for the regulated community. And a disclosure system overloaded with a significant volume of inconsequential materials can even obscure from public view efforts that actually influence U.S. lawmakers or public opinion. An overly expansive approach is also out of step with federal campaign finance rules, which

170 Publ. L. 104-65, 109 Stat. 699-700 (1995).

171 22 U.S.C. § 614(a)-(b).

172 *DOJ IG Report on FARA* at 19 (remarking that "without a statutory definition of the term 'informational materials,' the FARA Unit cannot be certain it is satisfying Congressional intent for FARA"). The Department recently updated FAQs on the FARA website to provide that "[i]nformational materials are items, in both physical and electronic form, that an agent disseminates in interstate commerce on behalf of the foreign principal." Dep't of Justice, FARA Frequently Asked Questions at Sec. VIII (updated Dec. 3, 2020), *available at* https://www.justice.gov/nsd-fara/frequently-asked-questions#44. But this revised FAQ does not provide the requisite additional guidance which the regulated community deserves.

apply disclosure provisions to television, radio, printed publications, billboards, mass mailings, telephone banks, and "other form[s] of general public political advertising,"[173] with a threshold set at more than 500 recipients for most forms of campaign finance labeling and filing.[174] FARA's "two or more persons" threshold is drastically lower than a federal campaign finance regime that has similar goals to disclose efforts to influence the public.

- A "two or more persons" threshold that is unclear. Aside from being outdated, FARA's "two or more persons" threshold is unclear as to whether it would cover instances where "informational materials" are sent to multiple individuals within a single organization, since the statute defines "person" to refer to both "an individual" as well as a "partnership, association, corporation, [and] organization." An email sent to multiple individuals in this instance could be read, then, to either be disseminated to multiple "persons" (*i.e.*, more than one individual) or to a single "person" (*i.e.*, the organization), which in the latter case would make the communication fall below the labeling and filing threshold.

- A 48-hour filing deadline that is too stringent. FARA registrants must submit "informational materials" to the Department within 48 hours of distribution among two or more persons. This 48-hour deadline imposes a substantial administrative burden on the regulated community, requiring FARA registrants to establish administrative protocols to immediately determine whether materials qualify as "informational materials" and then prepare them for submission to the Department. A review of the online database of "informational materials" by the Department's Office of the Inspector General indicated that the regulated community has substantial difficulty meeting this burden, since materials are often not filed within 48 hours of distribution.[175] The Inspector General also noted that the Department's FARA Unit staff itself "believes that advances in information technology have made the 48-hour rule outdated" because it "creates a constant and unrealistic burden on registrants" that are sending out "informational materials" on a near-continuous basis.[176]

- Uncodified special treatment for certain categories of "informational materials." The Department has, by convention and by ad hoc determination, extended special treatment to certain categories of "informational materials." The statute's text requires all types of "informational materials" to be labeled and filed, and yet certain categories of these materials have been treated as exempt from these FARA provisions. The Department, for example, has consistently required foreign tourism

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173 11 C.F.R. § 100.26 (defining "public communication").

174 11 C.F.R. §§ 100.27 (defining "mass mailing" as mail "of more than 500 pieces"), 100.28 (defining "telephone bank" as "more than 500 telephone calls of an identical or substantially similar nature within any 30-day period"), 110.11 (setting disclaimer requirements for "electronic mail of more than 500 substantially similar communications when sent by a political committee").

175 *DOJ IG Report on FARA* at 19 (noting substantial non-compliance with the 48-hour requirement for filing "informational materials").

176 *Id.*

bureaus to register under FARA.[177] One would expect, then, that tourism bureaus would label and file "informational materials" in the same manner as any other registrant, since no statutory or regulatory exemption offers them reprieve. The Department has, in fact, stated in an Advisory Opinion that "tourism advertisements are technically political propaganda."[178] Despite this finding, the Department also declared in the same Advisory Opinion, without any legal analysis, that "for administrative purposes we do not require the labeling of tourism ads as political propaganda." The Department never followed up on this Advisory Opinion statement with a rulemaking, but as a practical matter it has somehow not required foreign tourism bureaus to observe FARA's labeling or filing requirements. The Department has made similar accommodations for websites available to the general public that are created and/or maintained by FARA "agents." As an "informational material" potentially distributed to and inevitably available to two or more persons, any substantive update to such a website would, by operation of FARA's statutory text, require submission to the Department of Justice. As a matter of convention, though, the Department has instead allowed FARA registrants simply to list their websites' Internet URLs on Supplemental Statements in lieu of observing the filing requirement. All of this is not to say that the Department erred in allowing special accommodations for certain types of "informational materials," as there may be good policy justification for the positions that the Department reached, and rote application of the statute is not desirable in many instances. The Department has, in fact, already announced and explained its departure from statutory requirements for motion pictures that an "agent" distributes, which are exempt under Department rules from FARA's normal filing requirement.[179] It is unclear why it has not done so for other categories of "informational materials" that receive similar treatment from the Department.

2. Recommendations

FARA's core policy goal of public disclosure would be better served by providing the regulated community with more certainty and flexibility, particularly given that the law carries such heavy sanctions for violations. The following reforms would modernize and improve FARA's labeling and filing regime for "informational materials":

- The Department of Justice should define the term "informational materials" through regulation. A key statutory term like "informational materials" should not be left wholly undefined. The regulated community deserves assistance and guidance in determining which communications and writings constitute "informational materials" subject to FARA's labeling and filing requirements. The Department should use its rulemaking authority to promulgate a regulation that defines "informational materials" under FARA.

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177 *See* FARA Adv. Op. 10-13-2011, *available at* https://www.justice.gov/nsd-fara/page/file/1070151/download; FARA Adv. Op. 1-20-1984, *available at* https://www.justice.gov/nsd-fara/page/file/1046156/download.

178 FARA Adv. Op. 1-20-1984, *available at* https://www.justice.gov/nsd-fara/page/file/1046156/download.

179 28 C.F.R. § 5.401(c).

- Congress or the Department of Justice should update and clarify the "two or more persons" threshold. Congress should modernize the "two or more persons" threshold for "informational materials" to account for the ubiquity of communications with multiple individuals. In lieu of Congressional action, the Department could also issue a regulation or generally applicable policy statement to declare that it will not consider email communications sent to relatively few persons (*e.g.*, 10 or fewer individuals) to be "informational materials." Additionally, the Department should clarify through regulation or generally applicable policy statement how "person" should be read with respect to "informational materials" so that it is simpler for the regulated community to determine how different categories of "persons" count toward the "two or more persons" threshold.

- Congress should extend the 48-hour deadline for filing "informational materials." FARA registrants should have a reasonable amount of time to make determinations as to which materials should be filed as "informational materials" and then submit them to the Department of Justice. The current 48-hour deadline is overly burdensome. Congress should extend the deadline for submitting "informational materials" to the Department to allow for more time – ideally at least seven calendar days.[180]

- The Department should explain any special treatment that it extends to specific categories of "informational materials." The Department should make an effort to explain and ultimately codify through a regulation or generally applicable policy statement its treatment of any category of "informational materials" where it departs from statutory labeling and filing requirements. The Department should provide guidance to the regulated community by undertaking a comprehensive rulemaking that attempts to memorialize the actual requirements for any category of "informational materials" that presently receives special, exempt treatment.

E. Protecting Personal Information in the Digital Age

1. Background Discussion

FARA filings must include the personal residence address of each individual foreign principal,[181] the personal residence address of each individual registrant,[182] and, if the registrant is an organization, the personal residence address of each partner, director, member, or officer, regardless of whether they are themselves involved in FARA-registrable activity.[183] A FARA registrant must give notice of any change of information, including any personal residence

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180 The Department's FARA Unit staff has suggested that the "statute should be amended to allow registrants to compile informational materials and submit them semi-annually with each supplemental statement." *DOJ IG Report on FARA* at 19.

181 22 U.S.C. § 612(a)(7).

182 22 U.S.C. § 612(a)(1).

183 22 U.S.C. § 612(a)(2). Overall, personal residential information is requested in five unique locations of the Registration Statement. *See* Dep't of Justice, Registration Statement at Sec. I, items 4-6; Sec. II, item 7; Sec. V, item 14 (revised May 2017), *available at* https://www.justice.gov/file/991281/download.

address listed on a registration or other filing, within 10 days after the change occurs.[184] FARA's statutory language requires that the Department consider all filings to "be public records and open to public examination and inspection."[185] The Department's current practice in fulfilling that statutory obligation is to make all FARA filings and all their contents, including personal residence addresses, available to the general public on its FARA.gov website and through a public records office located in Washington, D.C. that is open from 11 a.m. to 3 p.m. on weekdays.[186]

In any circumstance where the law requires the public disclosure of otherwise private information, the governmental purpose must be "balance[d] against the abridgement of First Amendment rights"[187] and, in particular, the possibility that public disclosure can result in harms to an individual or group whose information is disclosed.[188] FARA's disclosure requirements mandating the submission of information have been constitutionally upheld, with courts finding that the U.S. government's rationale for "requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature" is rooted in an "indisputable power of the Government to conduct its foreign relations and to provide for the national defense" that "outweigh[s] any possible infringement" of the rights of an individual or group whose information is disclosed.[189] Information listed on FARA filings can provide the Department and the public with a means to identify the registered agent and determine the agent's connection with a foreign principal.[190]

Even if constitutionally permitted, though, the current FARA disclosure requirements with respect to residential addresses should be revisited as a policy matter. The online posting of individuals' residential addresses can present acute privacy concerns and even result in safety issues, harassment, or identity theft for those individuals. And it is unclear why the current arrangement – *i.e.*, both the submission *and* the online disclosure of individuals' *residential* addresses – should be required when less invasive alternatives could accomplish the same governmental interests.

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184 22 U.S.C. § 612(b); 28 C.F.R. § 5.800.

185 22 U.S.C. § 616(a).

186 28 C.F.R. §§ 5.600, 5.601. Dep't of Justice, *FARA Contact Information* (updated Dec. 5, 2019), *available at* https://www.justice.gov/nsd-fara/fara-contact-information. Informally, the FARA Unit has not cited registrants for a deficiency where personal residential information is provided via email for the Department's records, rather than included in official filings available for public inspection.

187 *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir. 1972).

188 *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.").

189 *Irish N. Aid Comm.*, 346 F. Supp. at 1390-92.

190 *Cf.* S. Rep. No. 89-143 at 110 (1965) ("The act is intended to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature or border on the political. Such public disclosures as required by the act will permit the Government and the people of the United States to be informed as to the identities and activities of such persons and so be better able to appraise them and the purpose for which the act.").

2. Recommendation

As an alternative to the current disclosure arrangement for individuals' residential addresses, the Department could continue to require the submission of individuals' residential addresses on FARA filings but choose to redact that same information from its online database. FARA authorizes the Department to exempt the disclosure of "any of the information" submitted under FARA when "the furnishing of such information . . . is not necessary to carry out the purposes of" the law.[191] The Department has already decided that information submitted as part of a FARA Advisory Opinion Request "shall be treated as confidential and shall be exempt from disclosure."[192] The Department should expand its discretionary exemptions to redact individual residential addresses that are submitted on FARA filings from its online FARA database. This would permit the Department to continue to receive all statutorily required information but acknowledge the policy concern posed by the posting of individuals' residential addresses on the Internet.[193]

Additionally, Congress should amend FARA's statutory language to permit the provision of any physical address at which the registrant or a registrant's directors, officers, and partners may be reliably contacted. This would alleviate individuals' legitimate privacy concerns related to residential addresses but still provide the Department pertinent lines of contact and communication information for FARA-listed individuals.

F. Repealing FARA Filing Fees

1. Background Discussion

A FARA registrant must pay to the Department of Justice filing fees of $305 for each initial Exhibit A form and $305 per "foreign principal" for each semi-annual Supplemental Statement form.[194] A form is not "deemed to have been filed" unless it is accompanied by the required fee.[195]

Filing fees were first imposed on FARA registrants in the early 1990s, when Congress required the Attorney General to "establish and collect fees to recover necessary expenses of the Registration Unit (to include salaries, supplies, equipment and training)."[196] The Department

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191 22 U.S.C. § 612(f)(2).

192 28 C.F.R. § 5.2(m).

193 This approach would match the federal government's practice of routinely redacting personal identifying information, such as home addresses of individuals, when providing information requested under the Freedom of Information Act. *See* Dep't of Justice, *Department of Justice Guide to the Freedom of Information Act* at 417 (2019), *available at* https://www.justice.gov/archive/oip/foia_guide09/exemption6.pdf.

194 28 C.F.R. § 5.5; *see also* Dep't of Justice, *FARA Fee Schedule* (2017), *available at* https://www.justice.gov/nsd-fara/fara-fee-schedule. The Department also levies fees on submissions of Advisory Opinion requests but has elected not to impose fees on other FARA-related filings at this time. 28 C.F.R. § 5.5(d).

195 *Id.* § 5.5(h). An individual who registers under FARA may have their filing fees waived by the Department upon demonstrating "that he or she is financially unable to pay the fees in their entirety." *Id.* § 5.5(c).

196 Pub. L. 102–395, 106 Stat. 1831 (1992); *see also* 28 C.F.R. § 5.5(g) (stating that filing fees collected are "available for the support of the Registration Unit").

appears to have originally intended FARA filing fees to cover nearly all significant costs associated with administering the statute, noting that the fees "are designed to recover the costs of the Registration Unit from the registrants . . . and relieve taxpayers of the burden of supporting this function" and should be "determined by calculating the costs of the operation and administration of the Registration Unit and allocating those costs" among various FARA-related "filings, copies, and services."[197] Filing fees brought in only $437,370 for the Department in CY 2018 (the latest full-year fee collection information is available), though, which presumably did not cover the agency's FARA-related costs over that period.[198] The Department is authorized to adjust the filing fees "from time to time to reflect and recover the costs of the administration of the Registration Unit under the Act,"[199] but the $305 filing fee amount for FARA registrations and supplemental statements has not been adjusted since its inception in a 1993 rulemaking.[200]

While filing fees have provided a modest subsidy to the Department's FARA-related operations, these fees also impose significant costs. Filing fees, for one, may discourage registration by prospective "agents" who might have otherwise registered (or at least registered out of an abundance of caution). A report by the Department's Office of the Inspector General, for example, noted that "active FARA registrations began falling sharply after the imposition of fees in 1993," with the Department's FARA staff expressing the opinion that new filing fees were a "likely factor[]" in a declining number of FARA registrations.[201] Filing fees may also cause Department personnel who are dedicated to FARA to spend less of their time on administering and enforcing the statute. The Inspector General's report also mentioned that the Department's FARA staff "spends a significant amount of [their] time on the collection and processing of FARA filing fees" and found that "it is possible that the overall cost of the time spent collecting and processing fees may not be justifiable" given limited staffing resources and other priorities in this area.[202] The imposition of FARA fees and related collection efforts, then, appear to undercut the statute's goal of fulsome public disclosure and distract from the Department's overall effort to administrate and enforce the statute effectively.

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197 58 Fed. Reg. 37418 (1993).

198 Dep't of Justice, *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, As Amended, for the Six Months Ending June 30, 2018*, at 3 (2018), *available at* https://www.justice.gov/nsd-fara/page/file/1194051/download; Dep't of Justice, *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, As Amended, for the Six Months Ending December 31, 2018*, at 3 (2018), *available at* https://www.justice.gov/nsd-fara/page/file/1347256/download. The filing fee program yielded a grand total of $10,645,538.30 over its first 25 years. *Id*.

199 28 C.F.R. § 5.5(f).

200 58 Fed. Reg. 37417 (1993). The Department's Office of the Inspector General found that "a proposal to increase FARA fees in 2010 was declined by NSD due to concerns that it would deter registrations." *DOJ IG Report on FARA* at 20.

201 *Id.* at 5-6, 20.

202 *Id.* at 20.

2. Recommendation

Filing fees have yielded only a small amount of government revenue over time to defray the Department's FARA program, while also apparently discouraging FARA registrations and diverting Department resources that could otherwise be dedicated to more meaningful efforts to administer and enforce the provisions of the statute. Congress should therefore repeal FARA filing fees and, if a dedicated funding source is needed, instead consider appropriating funds specifically for FARA-related use or imposing a new civil penalty mechanism that could partially fund the FARA Unit's operations.

SECTION VII: CONGRESS SHOULD EXPAND THE DEPARTMENT OF JUSTICE'S FARA ENFORCEMENT TOOLS

With the Department now assigning higher priority to FARA enforcement, a frequent question is whether the Department has adequate tools at its disposal to optimize its enforcement mission.[203] Although any expansion would have to be carefully balanced to protect against the risk of overreach, an update to DOJ's enforcement tools is long overdue and would serve both the statutory purpose of FARA and the interests of the regulated community. Specifically, Congress should amend FARA to: (A) provide DOJ with civil investigative demand ("CID") authority; (B) provide for civil monetary penalties; and (C) clarify and update criminal penalties.

A. Providing Civil Investigation Demand Authority

1. Background Discussion

Given the dual purpose of FARA – to provide information to the U.S. public about certain specified activities of foreign agents in the U.S. *and* provide the U.S. government with recourse to pursue willful violators of the Act criminally – DOJ is left, at present, with difficult choices to pursue its enforcement mission. If the grand jury process and traditional criminal tools are relied upon extensively or exclusively, even when evaluating whether a registration obligation exists, then DOJ may transform the FARA registration process and every administrative interaction with the FARA Unit into one where potential registrants are concerned primarily with their own criminal liability, rather than complying with the purpose of the Act, which is, of course, meant to foster transparency. On the other hand, if the FARA Unit were to continue to gather information from potential registrants through a voluntary process, as it has historically, then uneven compliance, up to and including outright refusals to comply, could persist. CID authority, if granted with the proper scope and oversight, may be the bridge between those two sub-optimal scenarios.

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[203] The FARA Unit of the Counterintelligence and Export Control Section ("CES") in the National Security Division ("NSD") is responsible for the administration and enforcement of FARA.

Recent legislative proposals[204] have modeled FARA CID authority on existing civil investigative demand authority that DOJ already exercises in False Claims Act cases.[205] Principally, CID authority would allow DOJ to compel production of records, written responses to interrogatories, and oral testimony. Proposed CID authority is also analogous to the administrative subpoena authority enjoyed by other Executive Branch agencies investigating possible national security-related regulatory matters.[206] As with those examples, effective oversight and accountability should be essential components of any FARA CID authority, especially considering that inquiries intended to be primarily administrative or civil in nature, at least at the outset, have the potential to reveal or lead to criminal liability, as well.

2. Recommendations

Congress should authorize DOJ to exercise civil investigative demand authority to more effectively and efficiently fulfill FARA's purpose of ensuring identification of and compliance with FARA registration obligations. CID authority should be coupled with rigorous oversight by DOJ itself, Congress, and, critically, the federal courts to ensure accountability and mitigate the risk of overreach by NSD and the FARA Unit with respect to this new tool. Allowing recipients of civil investigative demands to challenge or limit those demands in a U.S. District Court, just as with a grand jury subpoena, is an important check on DOJ's authority and ensures independent judicial review of such actions. Likewise, DOJ's ability to petition for enforcement of a civil investigative demand in the event of non-compliance is fundamental to the effectiveness of the tool and stands in stark contrast to the purely voluntary nature of the traditional information gathering process currently utilized by the FARA Unit.

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204 *See, e.g.*, S. 1 (2021); H. 1 (2021); S. 1762 (2019); H.R. 1467 (2019).

205 *See* 31 U.S.C. § 3733 (DOJ Civil Division).

206 *See, e.g.*, 31 C.F.R. § 501.602 (setting forth the administrative subpoena authority of the Office of Foreign Assets Controls ("OFAC")). Administrative subpoena authority was first suggested in connection with FARA enforcement by the U.S. General Accounting Office. *See* Gen. Accounting Office, *Administration of Foreign Agent Registration* at 6 (1980), *available at* https://www.gao.gov/assets/112952.pdf. In addition to the Civil Division, DOJ's Antitrust Division has long possessed civil investigative demand authority. *See* 15 U.S.C. § 1312 (Antitrust Division); *see also* 18 U.S.C. § 1968 (Criminal Division authority regarding racketeering investigations). DOJ itself submitted legislative proposals seeking CID authority for the FARA Unit in 1991 and 1999. *See DOJ IG Report on FARA* at 18.

B. Providing Civil Monetary Penalties

1. Background Discussion

Although FARA contains a civil injunctive remedy,[207] civil monetary penalties are not currently authorized under the Act even though they have been proposed and recommended for some time.[208] The absence of civil monetary penalties can put DOJ in a dilemma when potential violations come to light, as the choice may be between criminal enforcement or no enforcement at all. This is particularly challenging in cases where evidence of willfulness is either entirely absent or unsupported. If CID authority were granted to NSD and the FARA Unit, this tension could be amplified because, as discussed above, the focus of that investigative authority is more regulatory compliance-based rather than criminal.

Civil monetary penalties would provide an important enforcement mechanism for DOJ – one that acknowledges and helps regulate a critical middle ground – that it currently lacks. The ability to effectively regulate less serious violations of the Act that never approach the willfulness threshold is a clear enforcement gap. The availability of civil monetary penalties would allow DOJ to pursue more routine, often negligent violations, in a manner akin to other Executive Branch agencies, including those also responsible for national security-related matters, that regularly deploy administrative penalties to police compliance within their respective regulatory spheres.[209]

2. Recommendations

Congress should amend FARA to authorize civil monetary penalties. Under the most recent legislative proposals,[210] civil penalties would be made available for failure to file a timely or complete registration statement ($10,000), failure to file a timely or complete supplement to a registration statement ($1,000), failure to remedy defective filings after receiving notice of such defect ($200,000), and for any other knowing failure to comply with any other provision of the Act upon proof by a preponderance of the evidence ($200,000).

Civil monetary penalties along those lines would serve as a reasonable, proportional penalty that could be imposed to address a wide variety of violations of the Act, from lower-order, more technical violations (*e.g.*, failure to timely file a supplement to a registration) to more serious, knowing violations that may be difficult or impractical to pursue criminally due to deficient evidence of willfulness or other circumstances. From the perspective of the FARA

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207 Current civil injunctive authority under FARA allows DOJ to seek a temporary or permanent injunction, or any other order deemed proper by the court, when violations of the Act are ongoing or are about to occur. *See* 22 U.S.C. § 618(f).

208 Cong. Research Serv., *The Foreign Agents Registration Act* at 16 (1977) ("Congress should also consider the desirability of permitting the Attorney General to assess civil penalties for minor violations as has been done in a number of other administrative context[s].").

209 *See, e.g.*, Dep't of the Treasury, *Civil Penalties and Enforcement Information* (2021), *available at* https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information; Dep't of State, *Penalties & Oversight Agreements* (2021), *available at* https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=384b968adb3cd30044f9ff621f961941

210 *See* S. 1 (2021); H. 1 (2021); S. 1762 (2019); H.R. 1467 (2019).

registrant community, this change would have the considerable benefit of preventing every potential FARA infraction from turning into a criminal matter from the outset. With a potential civil monetary penalty as a likely worst-case scenario in most cases, effectively functioning as both carrot and stick, it could serve as a powerful tool to encourage broader compliance with the Act.[211]

C. Clarifying and Updating Criminal Penalties

1. Background Discussion

FARA's criminal penalties have not been modified since the 1966 Amendments to the Act,[212] and the maximum statutory criminal penalties of five years in prison and a $10,000 fine were established as part of the 1942 Amendments.[213] Notwithstanding the clear language of the Act, however, it is the position of the Department of Justice that the maximum financial penalty for such offenses is $250,000 (the general statutory maximum for a felony set forth at 18 U.S.C. § 3571(a)(3)), rather than $10,000 as specified in FARA.[214] The basis for DOJ's position is as follows: 18 U.S.C. § 3571(e) states, in pertinent part, that "[i]f a law setting forth an offense specifies . . . a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense." Although 22 U.S.C. § 618(a) does specify a fine lower ($10,000) than the fine otherwise applicable ($250,000) under 18 U.S.C. § 3571(a)(3), it does not include a "specific reference" exempting a felony violation of FARA from the penalty otherwise generally applicable to felony violations under 18 U.S.C. § 3571(a)(3). Consequently, it is DOJ's position that 18 U.S.C. § 3571(a)(3) controls and the maximum financial penalty for a felony violation of FARA is $250,000 – not $10,000.

This anomaly, and the basis for DOJ's position, are not well known or understood among the regulated FARA community (and even many members of the FARA bar) or, apparently, in Congress. One recent legislative proposal would have increased the maximum criminal fines allowable under FARA to $200,000, yet there was no "specific reference" to exempt this updated fine amount from 18 U.S.C. § 3571(a)(3).[215] It stands to reason that Congress would not propose such a modification if it understood that it would be nullified by DOJ's reading of the relevant statutory authorities.

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211 Presumably, such civil monetary penalties would typically be agreed to between DOJ and the FARA registrant as part of a settlement, as is typically the case in other Executive Branch agencies.

212 The 1966 Amendments identified a separate category of offenses (*e.g.*, deficient registration statements, unlawful contingent fee arrangements) punishable by a $5,000 fine and six months in prison. *See* Pub. L. No. 89-486, 80 Stat. 244 (1966).

213 *See* Pub. L. No. 77-532, 56 Stat. 248-258 (1942).

214 *See* Dep't of Justice, *FARA Frequently Asked Questions* at Sec. I (updated Dec. 3, 2020), *available at* https://www.justice.gov/nsd-fara/frequently-asked-questions#4.

215 *See* Foreign Agents Disclosure and Registration Enhancement Act of 2019, S. 1762, 116th Congress (2019).

2. Recommendations

Congress should amend FARA to increase criminal fines to an amount commensurate with any newly created civil monetary penalties. Critically, in doing so Congress should include a "specific reference" exempting FARA's criminal fines from the scope of 18 U.S.C. § 3571(a)(3). Moreover, Congress should include such language regardless of the ultimate maximum fine amount it elects, as this will hopefully help avoid any future ambiguity or confusion with respect to this issue.