INSTITUTE FOR
FREE SPEECH

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RE: Comment on Advance Notice of Proposed Rulemaking – Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations

The Institute for Free Speech[1] submits this comment in response to the Advance Notice of Proposed Rulemaking – Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations, 86 Fed. Reg. 70787 (Dec. 13, 2021).

I. Introduction

On August 15, 2021, Taliban fighters seized the presidential palace in Kabul, Afghanistan, marking the effective collapse of the U.S.-backed government. *See Afghan Conflict: Kabul Falls to Taliban as President Flees*, BBC (Aug. 16, 2021), https://www.bbc.com/news/world-asia-58223231. The speed of the collapse left thousands of people trapped and desperate to flee the country, including many Afghan citizens fearful of what would happen to them under Taliban rule. In their hour of desperation, many of them reached out to whatever friends they had in the United States, seeking help getting visas approved and getting on flights out of the country. Many of their friends answered the call without stopping to ask for permission: pleading with their congressman or other government officials, going on television, giving print interviews, doing whatever they could to get their government to help their friends. It was in many ways, a reflection of the best of the American can-do spirit in the midst of a terrible tragedy and policy failure.

It was also likely illegal, at least under the plain text of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq*. ("FARA"). And that is the problem.

By its plain terms, FARA is an exceptionally broad and vague law that chills free speech and free association by American citizens and sets snares for the unwary, even capturing some of the most sophisticated of Washington players. The Department of Justice should use the opportunity

[1] The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government.

presented by this ANPRM to draft and adopt regulations that set bright line standards and limit the scope of FARA-regulated activity to conform to the First Amendment.

II. Background

While courts have recognized that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and thereby preventing foreign influence over the U.S. political process," *Bluman v. Fed. Election Comm'n.*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *summary aff'd*, 565 U.S. 1104 (2012), it is important to recognize that it is not just the rights of foreign principals that are implicated by FARA. Rather, FARA's broad scope implicates the speech, press, assembly, and petition rights of American citizens.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Restrictions on political speech are properly considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). To that end, "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Fed. Election Comm'n. v. Wis. Right to Life*, 551 U.S. 449, 469 (2007) (quoting *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765, 776 (1978)).

Laws that purport to regulate freedom of expression must be carefully crafted and permit the public to comply without special effort. "The First Amendment does not permit laws that force speakers to retain a[n] . . . attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010).

The compliance and enforcement history of FARA suggests the law and regulatory guidance falls short of the clarity required for First Amendment activity and may be getting worse instead of better. The Department of Justice Office of the Inspector General ("OIG") identified fourteen advisory opinion requests from 2013 into 2016. Office of the Inspector General, Department of Justice, Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act at 3 (Sept. 2016), https://oig.justice.gov/reports/2016/a1624.pdf ("OIG Report"). Following renewed interest in FARA prosecutions, encouraged in part by criticism of purported lax enforcement by the OIG, the Department received over ninety advisory opinion requests from 2017-2021. *See* Department of Justice, Advisory Opinions, https://www.justice.gov/nsd-fara/advisory-opinions#.

Without changes in regulation, FARA and the Department's approach to enforcement have created a legal environment that is highly unsettled. The result is that "[a]s a practical matter . . . given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against [government] enforcement must ask a governmental agency for

prior permission to speak. . . . These onerous restrictions thus function as the equivalent of prior restraint by giving the [government] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Citizens United*, 558 U.S. at 895-896 (citations omitted).

This is hardly a surprise given the plain text of FARA: it is far too broad and vague. Even outside of the context of protected First Amendment activities, the government has a basic due process obligation to ensure that laws are clear enough that people can follow them. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Fed. Comm. Comm'n. v. Fox Television Station*, 567 U.S. 239, 253 (2012) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."); *Dunn v. United States*, 442 U.S. 100, 112 (1979) ("[F]undamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.").

As one group of practitioners noted, "FARA is written so broadly that, if read literally, it could potentially require registration for even routine business activities of law firms, lobbying and public relations firms, consulting firms, nonprofit advocacy groups, charitable organizations, ethnic affinity organizations, regional trade promotion groups, think tanks, universities, media organizations, trade associations, U.S. subsidiaries of foreign companies, and other commercial enterprises." Robert Kelner, Brian D. Smith, Zachary G. Parks, & Derek Lawlor, *The Foreign Agents Registration Act ("FARA"): A Guide for the Perplexed*, The Nat'l L. Rev. (Jan. 11, 2018), https://www.natlawreview.com/article/foreign-agents-registration-act-fara-guide-perplexed.

This likely understates the potential problem. For example, while much of the public discussion around FARA centers on activity by foreign governments or quasi-governmental groups, the term "foreign principal" is much broader, and includes any individual outside of the United States who is not a U.S. citizen domiciled in the United States. 22 U.S.C. § 611(b)(2). This means that every foreign national a person meets overseas is a potential foreign principal, no matter how attenuated their relationship with their own government.

Worse, this statutory scheme veers into absurd territory when applied to U.S. citizens and lawful permanent residents abroad. Under the plain text of FARA, if a U.S. citizen is "outside of the United States" and not domiciled in the United States, they are a potential danger to the U.S. political system and must be labeled a "foreign principal" if they try to influence U.S. policy. At the same time, that same U.S. citizen can vote in American elections, directly make campaign contributions, and actively participate in the management of U.S. political campaigns. *See* 52 U.S.C. § 30121(b)(1); *see also* U.S. Dep't. of State, Absentee Voting Information for U.S. Citizens Abroad, https://travel.state.gov/content/travel/en/international-travel/while-abroad/voting.html ("Most U.S. citizens 18 years or older who reside outside the United States are eligible to vote absentee for federal office candidates in U.S. primary and general election. . . . . In some states, U.S. citizens who are 18 years or older and were born abroad but who have never resided in the United States are eligible to vote absentee."). Similarly, a lawful permanent

resident of the United States may directly make campaign contributions and participate in the management of Federal election campaigns, but instantly transforms into a "foreign principal" the moment they step outside of the United States. *Id*. at (b)(2).

The problems associated with a broad definition of "foreign principal" are compounded by the broad and vague definition of "agent of a foreign principal." Of particular concern is the inclusion of the word "request." 22 U.S.C. § 611(c)(1). As the Court of Appeals for the Second Circuit cautioned, "[t]he exact parameters of a 'request' under the Act are difficult to locate, falling somewhere between a command and a plea." *Attorney General of the United States v. Irish Northern Aid*, 668 F.2d 159, 161 (2d Cir. 1982). Nevertheless, if "request" were "understood in its most precatory sense," it "would sweep within the statute's scope many forms of conduct that Congress did not intend to regulate." *Id*.

In addition, there does not need to be a direct relationship between the agent and the "foreign principal." For example, in one of the more extreme constructions, a person may become an agent of a foreign principal by accepting a request from another person who is indirectly subsidized by a foreign principal. The result is a manifestly vague term that has the potential to sweep up a wide array of innocuous or attenuated conduct.

Another issue of particular concern is that the definition includes "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." 22 U.S.C. § 611(c)(1). There is far too much discretion in the interpretation of words such as "directly or indirectly" or "in whole or in major part." Regarding the financing issue, it is not clear what would go in the denominator, or what fraction of overall activities would constitute "in major part."

In practice, the relatively low number of current registrations and prosecutions suggests that the Department has generally approached these issues with a fair degree of appropriate caution. However, as the Supreme Court has stated, "[i]t will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions." *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). "It is well settled that courts will not rely on 'prosecutorial discretion' to ensure that a statute does not ensnare those beyond its proper confines. . . . Prosecutors necessarily enjoy much discretion and generally use it wisely. But the liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgement." *United States v. Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J. dissenting).

The mere existence of a broad and vague law discourages potentially regulated activity. *See Nat'l Ass'n. for the Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963) ("The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). This chilling effect is particularly problematic when talking about potentially protected speech by U.S. citizens.

Moreover, the risk from a broad and vague statute is not just that it will be applied injudiciously as a matter of course, but also that it will be applied selectively against disfavored persons. On these points, representations from the FBI to the OIG are highly disturbing. According to the OIG Report, "FBI personnel with whom we spoke believed that FARA carries a penalty sufficient enough to serve as a deterrent to both the agent and his foreign principal or to induce the target of an investigation to become a cooperating source." OIG Report at 16. In other words, some in the FBI tasked with policing FARA violations openly admit and view it as a positive thing that FARA deters lawful political speech and is susceptible to use a cudgel against people they want to target for other reasons.

As written, FARA is extremely broad and vague, creating serious due process and First Amendment concerns. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 484 U.S. 568, 575 (1988). "The practice of the executive branch is and should be the same." Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. Off. Legal Counsel 253, 265 (1996), https://www.justice.gov/file/20006/download.

Fortunately, FARA provides a potential regulatory off ramp. FARA provides the Attorney General authority to adopt regulatory exemptions to the registration requirements "where by reason of the nature of the functions or activities of such person the Attorney General, having due regard for the national security and the public interest, determines that such registration, or the furnishing of such information, as the case may be, is not necessary to carry out the purposes of this subchapter." ." 22 U.S.C. § 612. The Department should draw on this authority, as well its authority to interpret ambiguous language in FARA more generally, to set clear, bright line standards that limit the sweeping potential reach of FARA.

III. Questions and Responses

A. Agency

Question 1: Should the Department incorporate into its regulations some or all of its guidance addressing the scope of agency, which is currently published as part of the FARA Unit's FAQs on its website? See https://www.justice.gov/nsd-fara/page/file/1279836/download. If so, which aspects of that guidance should be incorporated? Should any additional guidance currently included in the FAQs, or any other guidance, be incorporated into the regulations?

The Department's FAQs identify six non-exclusive "relevant factors" the Department will consider in evaluating agency:

- Whether those requested to act were identified with specificity by the principal;
- The specificity of the action requested;
- Whether the request is compensated or coerced;
- Whether the political activities align with the person's own interests;

- Whether the position advocated aligns with the person's subjective viewpoint; and
- The nature of the relationship between the person and the foreign principal.

While the Department's FAQs are a good starting place, and represent significant progress over the regulations as they currently stand, the Department would be better served by taking a different approach. Rather than reinventing the wheel, the Department should draw upon preexisting legal schemas and limit the agency to contractual, common law agency, and quid pro quo arrangements. This would allow the Department and the regulated community to draw on extensive case law and guidance defining the scope of quid pro quo deals under other Federal statutes, while meeting the intent of FARA to require registration of persons acting on behalf of foreign principals. *See*, *e.g.*, *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (defining "quid pro quo" to require "a specific intent to give or receive something of value *in exchange* for an official act.") (emphasis in the original).

This approach would largely align with the first three factors identified by the Department, while tapping into a larger preexisting legal framework in evaluating specificity. A quid pro quo framework would necessarily require both the requested person and the requested action be identified with sufficient specificity and would account for the need for the action to be compensated or coerced.

The fourth and fifth factors identified in the Department's FAQs are inherently problematic because they are necessarily subjective. The Department has no objective basis for assessing whether certain activities align with a person's own interests and any attempt to do so necessarily involves the Department in second guessing a person's personal and professional value judgments.

The Department's ability to assess whether advocacy aligns with a person's subjective viewpoint is even worse, and necessarily places the Department in the position imposing content-based restrictions on political speech. For example, what grounds would the Department have to second guess a last-minute conversion on the literal road to Damascus before advocating changes in the United States' posture in the Middle East? Furthermore, a focus on the subjective viewpoint of the speaker risks treating similar conduct differently based on prior advocacy.

While the nature of the relationship between the person and the foreign principal may be relevant to establishing a quid pro quo arrangement, we do not think it should be a free-floating factor for consideration. The examples providing in the FAQs illustrate the limitations. For example, the FAQs cite "whether the person seeks (or receives) feedback on his performance [and] the frequency of meetings between the foreign principal." It is easy to imagine many forms of personal relationships that would likely rate poorly under these factors that would not be reasonably described as akin to a principal/agent relationship, including, but not limited to, a professional or academic mentor/mentee relationship or a genuine romantic relationship. In short, as explained by the Department in its FAQs, this factor appears to be a catch-all that does more to obfuscate than illuminate.

> *Question 2: Should the Department issue new regulations to clarify the meaning of the term "political consultant," including, for example, by providing that this*

term is generally limited to those who conduct "political activities," as defined in 22 U.S.C. 611(o)?

Yes, the Department should issue new regulations to clarify and limit the definition of "political consultant." The use of the term "with reference" in section 611(p) is vague and potentially very broad. The Department should take this opportunity to narrow the scope of "political consultant" to persons who are informing or advising a foreign principal on how to influence the foreign or domestic policies of the United States. This more limited approach would focus registration on this provision on activity that is colloquially understood to be "political consulting." It would also functionally exempt activities that have less of a nexus to U.S. national security concerns, such as persons advising a foreign principal on how to impact the domestic or foreign relations of their own or a third country.

B. Exemptions

1. Commercial Exemptions

Question 3: Should the Department issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises? If so, how should the Department amend the regulation to address when such activities do not serve "predominantly a foreign interest"?

Question 4: Is the language in 28 CFR 5.304(b), (c), which provides that the exemptions in sections 613(d)(1) and (d)(2) do not apply to activities that "directly promote" the public or political interests of a foreign government or political party, sufficiently clear? And does that language appropriately describe the full range of activities that are outside the scope of the exemptions because they promote such interests, including indirectly? Should the language be clarified, and, if so, how?

Question 5: What other changes, if any, should the Department make to the current regulations at 28 CFR 5.304(b) and (c) relating to the exemptions in 22 U.S.C. 613(d)(1) and (2)?

The statute gives an exemption for "Any person engaging or agreeing to engage only … in other activities not serving predominantly a foreign interest." While there are alternative interpretations of this phrase, we believe the best one is as the statute is written. If the activity does not serve "predominantly a foreign interest," then it is exempt. This reading also best comports with the First Amendment.

In interpreting whether an activity predominately serves a foreign interest, we recommend that the Department draw inspiration from the campaign finance world and look to the major purpose test adopted by the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Such an approach would look to whether the major purpose of an activity is to promote a foreign interest. This approach would protect the associational rights of U.S. nonprofit organizations that have foreign donors but are not controlled by foreign principals.

This approach would also have the benefit of further protecting U.S. citizens engaging with civil society organizations abroad. The United States is still, as John Winthrop said, "a city upon a hill" with the eyes of the world upon it. Like the teenager in the famous public service announcement, many nations' response to U.S. criticism when they crack down on independent political association is "I learned it from watching you!"

For example, in 2012, the Russian Federation adopted a foreign agent registration law "that required nonprofits that receive any foreign funding and engage in broadly defined 'political activity' to register as 'foreign agents.'" Nick Robinson, "*Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 Duke L. J. 1075, 1086 (2020). As a result, "many nonprofits have chosen either to shut down or to stop receiving foreign funding—and thereby dramatically curtail their operations." *Id*. More recently, Russia has designated organizations like Voice of America and Radio Free Europe as "foreign agents." *Id*. at 1087. When criticized for this law and its consequences, "Russia has repeatedly claimed that it[s law] is designed to achieve the same purposes as FARA." *Id*.

"First Amendment freedoms need breathing space to survive." *Button*, 371 U.S. at 433. In order to preserve appropriate breathing space, the Department should amend its regulations to extend the exemption at section 613(d)(2) to organizations, including nonprofit organizations, that do not promote foreign interests as a major purpose of their activity.

2. Exemption for Religious, Scholastic, or Scientific Pursuits

Question 6: Should the Department issue additional or clarified regulations regarding this exemption to clarify the circumstances in which this exemption applies? If so, how should those additional regulations clarify the scope of the exemption?

Yes, the Department should clarify regulations regarding the exemption for religious, scholastic, or scientific pursuits. As written, section 5.304(d) goes beyond the scope of the statute and regulates expression protected by the First Amendment. Section 613(e) reads, in its entirety, "Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts." By categorically denying the protections of this exemption to relevant persons who engage in political activity under section 611(o), the Department appears to go beyond its statutory authority.

It may be argued that the language of the regulation is intended to delineate "bona fide" activities. If that is the intent, the language is far too broad, particularly in the religious context. For example, the Roman Catholic Bishop of Rome is a foreign principal for FARA purposes. In his role as head of the Roman Catholic Church, he periodically issues pastoral statements that touch on current events. Imagine the Pope were to issue a statement in his capacity as a religious leader on a broad issue, such as the death penalty or abortion, and ask that it be read at Sunday mass. Would doing so transform every priest and parish that complied into agents of a foreign power? To ask the question is to answer it. An answer in the affirmative would harken back to the worst forms of anti-Catholic bigotry and be anathema to the American tradition of religious liberty. A similar approach should not be adopted with respect to other faiths.

Furthermore, the clear language of the statute exempts "the fine arts" with no qualifications. We recommend that a regulation exempt all architecture, sculpture, painting, music, performing arts, literature, and fictional films.

Where it applies, the religious, scientific, and scholastic or fine arts exemption applies as much to political activity as any other regulated conduct under FARA. To the extent there is concern that these efforts are serving as fronts for foreign governments, we note that agents of foreign governments are and would still be regulated under 18 U.S.C. § 951. Removing the political activity exclusion under section 5.304(d) would serve to provide more breathing space for civil society, while section 951 may still serve to protect the core interests in preventing such endeavors from being cat's paws for hostile states.

Therefore, the Department should amend its regulations to clarify that the exemption applies to all bona fide religious, scientific, and scholastic activity by removing reference to section 611(o).

3. Exemption for Persons Qualified to Practice Law

Question 7: Should the Department amend 28 CFR 5.306(a) to clarify when activities that relate to criminal, civil, or agency proceedings are "in the course of" such proceedings because they are within the bounds of normal legal representation of a client in the matter for purposes of the exemption in 22 U.S.C. 613(g)? If so, how should the Department amend the regulation to address that issue?

Question 8: What other changes, if any, should the Department make to 28 CFR 5.306 to clarify the scope of the exemption in 22 U.S.C. 613(g)?

The Department should expand the exemption for persons qualified to practice law to include representation in informal administrative adjudications, particularly adversarial informal adjudications. As the Congressional Research Service ("CRS") notes, "Although the formal adjudication requirements of the Administrative Procedure Act (APA) establish an adversarial, trial-type process for federal agency adjudication, the vast majority of federal agency adjudications deviate from this formal model." Ben Harrington & Daniel J. Sheffner, Informal Administrative Adjudication: An Overview at 1, Cong. Research. Serv. (Oct. 1, 2021), https://crsreports.congress.gov/product/pdf/R/R46930. Representation related to informal adjudication has been a frequent topic of inquiries to the Department; An approach that specifically exempts informal adjudication would be consistent with the position of the Department in several recent Advisory Opinions. *See, e.g.*, Advisory Opinion of May 24, 2021, https://www.justice.gov/nsd-fara/page/file/1431316/download; Advisory Opinion of May 29, 2020, https://www.justice.gov/nsd-fara/page/file/1287666/download; Advisory Opinion of April 22, 2020, https://www.justice.gov/nsd-fara/page/file/1287661/download; Advisory Opinion of May 3, 2018, https://www.justice.gov/nsd-fara/page/file/1068546/download. The distinguishing feature in many of these opinions is that the legal representation relates to the application of existing law or policy to a specific client, rather than an effort to change a generally applicable law. In view of the prevalence of informal adjudication and the Department's past positions, the Department should adopt regulations explicitly applying the legal exemption to informal adjudications involving specific parties.

C. Inquiries Concerning the Application of the Act

Question 10: Should the Department revise 28 CFR 5.2(i) to allow the National Security Division longer than 30 days to respond to a Rule 2 request, with the time to begin on the date it receives all of the information it needs to evaluate the request? If so, what is a reasonable amount of time?

Question 11: Should the Department include with its published Rule 2 advisory opinions the corresponding request, with appropriate redactions to protect confidential commercial or financial information, so that the public may better understand the factual context of the opinion?

Question 12: What other changes, if any, should the Department make to the current process for using advisory opinions pursuant to 28 CFR 5.2?

The Department should not amend section 5.2(i) to allow the National Security Division more than 30 days to respond to an Advisory Opinion request. While we are mindful of the competing pressures on the Department's time, uncertainty and delays have a chilling effect on regulated or potentially regulated activity. This is particularly pernicious where, as here, the activity at issue implicates the political speech rights of U.S. citizens. Furthermore, as the saying goes, "time is money." Requestors have to make decisions about whether they will undertake a given activity, and delays will incur real costs through foregone advocacy, speech, representations, and other missed opportunities.

In the interest of informing other entities, the Department should include advisory opinion requests with appropriate redactions. This practice will further the goal of voluntary compliance by giving the regulated community additional insight into which factors the Department views as operative and which are superfluous in assessing registration requirements.

The Department should also ask the requestor if it wishes to waive a portion or all of the redactions.

D. Labeling Informational Materials

Question 13: Should the Department define by regulation what constitutes "informational materials"? If so, how should it define the term?

Question 14: What changes, if any, should the Department make to the current regulation, 22 CFR 5.402, relating to labeling informational materials to account for the numerous ways informational materials may appear online? For example, how should the Department require conspicuous statements on social media accounts or in other communications, particularly where text space is limited?

Question 15: Should the Department amend the current regulation, 22 CFR 5.402(d), relating to "labeling informational materials" that are "televised or broadcast" by

requiring that the conspicuous statement appear at the end of the broadcast (as well as at the beginning), if the broadcast is of sufficient duration, and at least once-per hour for each broadcast with a duration of more than one hour, or are there other ways such information should be labeled?

Question 16: Should any changes to regulations relating to the labeling of "televised or broadcast" informational materials also address audio and/or visual informational materials carried by an online provider? And, if so, should the regulations addressing labeling of such audio and/or visual information materials be the same as for televised broadcasts or should they be tailored to online materials; and, if so, how?

Question 17: Should the Department amend 22 CFR 5.402 to ensure that the reference to the "foreign principal" in the conspicuous statement includes the country in which the foreign principal is located and the foreign principal's relation, if any, to a foreign government or foreign political party; and, if so, how should the regulations be clarified in this regard?

Yes, the Department should define "informational materials." In doing so, the Department should ensure that there is a sufficient U.S. nexus and avoid seeking to regulate political speech by foreign nationals in foreign countries. The United States is blessed to have some of the most robust free speech protections in the world. It is a feature of our political system that citizens can express their opinions about many things, including foreign governments, without fear of arrest or reprisal from their government. People in other countries are not so fortunate. The risk in an increasingly extraterritorial application of FARA is that other countries will use U.S. conduct as an excuse to target U.S.-based dissidents.

The Department should refrain from adding additional disclaimers to televised or broadcast communications and should not compel speakers to add additional information about the foreign principal. FARA already requires that disclaimers inform recipients that additional information is on file with the Department of Justice. *See* 22 U.S.C. § 614. If people would like to know more, the information is available to them.

IV. Miscellaneous Changes

In the Background section above, we noted the incongruity that U.S. citizens domiciled abroad and lawful permanent residents may make direct campaign contributions in the United States, but still be considered foreign principals under FARA. We recommend that the Department harmonize this incongruity by adopting a regulation excluding all U.S. citizens and lawful permanent residents from the definition of "foreign principal."

In addition to the concerns raised above, we recommend eliminating or at least lowering the filing fee to encourage voluntary compliance. First, as a general rule, speakers should not be forced to pay licensing fees before speaking. Second, as a practical matter, fees appear to deter voluntary compliance. To wit, the OIG Report shows that "active FARA registrations began falling sharply after the imposition of fees in 1993 . . . ." OIG Report at 5.

FARA requires short-form registrants to provide a residential address. While there may be a government enforcement interest in knowing where agents of foreign principals reside, there is no justification for making this information public. Such a requirement is constitutionally dubious in the wake of the Supreme Court's holding in *American for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Bonta*, 141 S. Ct. at 2383. Publishing residential addresses puts agents of foreign principals at needless risk. Publishing the home addresses of agents of certain foreign governments needlessly puts those agents at risk of harassment and even acts of violence.

Under the current 28 C.F.R. § 5.307, the exemption from FARA for Lobbying Disclosure Act (LDA) registrants representing foreign commercial entities is not recognized where the "primary beneficiary" of the activity is a foreign government or foreign political party. But imposing this limitation on the "LDA exemption" does not appear anywhere in the statute or even the legislative history. Basing disqualification on who is the primary beneficiary of the activity is not supported by law and has resulted in subjective, confusing interpretations by the Department of Justice.

V. Conclusion

There is general agreement that FARA, on its face, has an immensely broad potential scope and those exercising their First Amendment rights need clarity. We believe that a more specific and targeted approach that narrows the potential scope and reduces the ambiguity in the law will best serve both the speech and associational rights of U.S. citizens and the public policy interest in voluntary compliance and identifying foreign propaganda. Of these changes, the most important is to limit the scope of agency. Clarifying the scope of the term "agent of a foreign power" significantly reduces the potential for FARA to become a trap for the unwary or tool for selective enforcement against persons and viewpoints disfavored by the government.

Respectfully submitted,

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