INSTITUTE FOR FREE SPEECH

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Ms. Jennifer Kennedy Gellie
Chief, Counterintelligence and Export Control Section
National Security Division, FARA Unit
U.S. Department of Justice
175 N Street NE
Constitution Square, Building 3 – Room 1.100
Washington, DC 20002

Re: RIN 1124-AA00 / Docket No. NSD 102
Comment on Notice of Proposed Rulemaking Amending and Clarifying Foreign Agents Registration Act Regulations

Dear Ms. Gellie:

The Institute for Free Speech ("IFS")[1] submits this comment in response to the Notice of Proposed Rulemaking – Amending and Clarifying Foreign Agents Registration Act Regulations. 90 Fed. Reg. 40 (Jan. 2, 2025).

I. INTRODUCTION

IFS submitted comments to the Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 70787 (Dec. 13, 2021), and incorporates those comments herein by reference. As explained there, IFS focuses principally on the implications of the Foreign Agents Registration Act of 1938, as amended, codified at 22 U.S.C. § 611 et seq. ("FARA"), for American citizens' free speech, press, and assembly rights. Many American citizens hold strong beliefs regarding foreign affairs and desire to express their opinions, individually and through organizations, free of government regulation, the threat of criminal punishment, and the chilling effects of the FARA registration and disclosure regime.

The policy objectives of FARA, and the means the government employs to achieve those objectives, must be balanced against the First Amendment rights of American citizens to express their opinions on political topics, which necessarily include foreign affairs. These rights include the right of Americans to access information from international sources and associate voluntarily with foreign people and organizations.

FARA has always been intended to target the efforts – i.e., active measures – of foreign interests through the services of "agents" within the United States to influence American public policy to

[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.

benefit foreign interests. Its chosen method is a registration and disclosure scheme designed to inform the government and Americans that foreign interests are responsible for the advocacy disseminated by the United States agent. The law's target has never been – and could not legitimately be – the voluntary speech of an American citizen who expresses her own opinions on her own behalf. The First Amendment would not tolerate the imposition of FARA regulatory burdens (including the stigma) on the expression of American citizens speaking their own opinions. As observed by then-Circuit Judges Bork and Scalia:

> [I]n determining whether any set of facts establishes that someone is acting as an agent for a foreign principal within the meaning of the Act it is important to consider the limitations on types of activity Congress intended to reach. Congress was particularly concerned that registration would not be imposed to stifle internal debate on political issues by citizens sympathetic to the views of foreigners but free from foreign direction or control. In amending the definition of agent in 1966 Congress emphasized that the Act should not require the registration "of persons who are not, in fact, agents of foreign principals but whose acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal course of those persons' own rights of free speech, petition or assembly." H.R. Rep. No. 1470, 89th Cong.2d Sess. 5-6 (1966), *reprinted in* 1966 U.S. Code Cong. Ad. News. 2397, 2401.

Attorney General v. Irish People, 796 F.2d 520, 524 (D.C. Cir. 1986). FARA was enacted in 1938 and amended several times (1939, 1942, 1966, 1995) to update the provisions and adapt them to modern practices of foreign interests to influence public policy in the United States. Over those decades, it has been perhaps convenient to employ broad terms and to implement FARA with a great deal of latitude. Indeed, the current proposed rulemaking admits that FARA employs broad terms and language that require clarification. However, there have been no significant amendments to recalibrate FARA provisions to developments in First Amendment jurisprudence over the past fifty years. Among the most essential calibration needed is clarification of the key provisions triggering registration.

The law assigns responsibility to the Department of Justice ("Department") to implement the statute through regulations that supply necessary details and parameters. 22 U.S.C. § 620. The Department must implement the statute in a manner consistent with First Amendment requirements. That responsibility is most pertinent to the Department's rulemaking because the regulations hold the Department accountable to defined enforcement norms and notify the public of those norms. Both the government and citizens can then be judged according to a clear set of rules.

It is well-established that to the extent the government can restrict First Amendment rights, it must do so only by narrowly tailored means and under clearly articulated standards. Overly broad and vague laws cannot regulate core First Amendment rights because they chill the legitimate exercise of the rights. "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 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." *See Nat'l Ass'n. for the Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963).

These First Amendment concerns also implicate the Due Process Clause of the Fifth Amendment. "Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011). In addition, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253-54 (2012).

The government's resort to "case-by-case" determinations and the advisory opinion process is not a legally permissible approach to regulation and enforcement of facially vague laws. "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). Accordingly, the Department's proposal to enforce FARA as a "fact-intensive exercise better suited to the advisory opinion process" (NPRM at 9) is an explicit admission that the law is vague, an abrogation of responsibility to clarify the law, and a patently improper approach to discretionary criminal law enforcement.

In many respects, the proposed rules grant the government greater discretion and the public less guidance or accountability. The NPRM should be understood as a vast expansion of FARA regulation in the name of "clarification" because, at virtually every turn, the proposed rules decline to define terms that might constrain the Department's enforcement discretion and minimize exemptions provided in Sec. 613(d)(2).

In light of the profound First Amendment rights at stake, these comments focus on the shortcomings of the proposed regulations for the fundamental right of American citizens to inform and express their opinions on public policy and foreign affairs – voluntarily and freely.

II. DEFINITIONS

1. No Definition of "Agent"

Nowhere are the First Amendment principles discussed above more pronounced than the Department's decision not to clarify the definition of "agent." The concept of "agency" in the dissemination of advocacy and propaganda has been the critical trigger to FARA registration burdens since the law's inception. Over many decades, the concept of "agency" has been expounded upon in numerous legislative debates, prosecutions, court decisions, rulemakings, advisory opinions, and legal commentaries.

Congress has recognized the need for the term "agent" to be narrowly implemented in order to respect the free speech rights of American citizens:

> Under existing law it is possible because of the broad scope of the definitions contained in section 1(c) to find an agency relationship (and thus the possibility of

> registration) of persons who are not, in fact, agents of foreign principals but whose acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal exercise of those persons' own rights of free speech, petition, or assembly. This may have been desirable when the Foreign Agents Registration Act was amended in 1942, but does not appear warranted in present circumstances.

H.R. Rep. No. 1470, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. Ad. News 2397, 2401.

Yet, here we are, some eighty-seven years after the enactment of FARA, and the Department is proposing to clarify FARA regulations without any clarification of the most problematic term in the statute for exercising free speech rights.

The Department's proposed course – to leave the term "agent" undefined and without any further clarification – underscores several shortcomings of the law. First, if the Department cannot clarify the definition after decades of experience, the term is hopelessly vague, and courts should find the law void for vagueness. Second, if the Department is unwilling to clarify the definition because to do so would be inconvenient or limit prosecutorial discretion, then the new Administration, no stranger to the ills of prosecutions under vague standards, should instruct the Department to draft a principled and precise definition. Third, the Department's resort to case-by-case determinations and advisory opinions is simply a way to free the government from holding itself to a definitive standard, thereby shifting the burden of a vague standard on American citizens.

Accordingly, FARA and its implementing regulations should clarify the fundamental distinction between a citizen's **voluntary choice** to express her own views and a citizen's obligatory expressions on behalf of a foreign principal. There must be some demonstrable **obligation** to represent the foreign interest or **non-voluntary control** by the foreign interest. This distinction was critical in *Michele Amoruso E. Figli v. Fisheries Dev. Corp.*, which concluded that a corporation receiving financial support from a foreign principal **without being subject to its control** and whose lobbying efforts benefit a foreign government but are **not subject to the foreign government's control** is not an "agent" under FARA. 499 F.Supp. 1074, 1081-82 (S.D.N.Y. 1980). The "agency" could arise from a contractual, financial, fiduciary, or coercive obligation, but it must be an obligatory representation of the foreign principal's interests, rather than a wholly voluntary opinion held and expressed by the American citizen.

The Department has eschewed a Restatement definition of "agent" based on the rationale that it is not tailored to FARA objectives. However, other definitions are available that get precisely at the line between an American citizen's voluntary expression of her own opinions versus her obligatory or non-voluntary representation of a foreign principal. The Department should write a regulation to provide guidance for FARA so that the definition complies with the First Amendment.

The statutory terms "agent" and "principal" clearly require a formal representational relationship.

The definition of "principal" means:

> Someone who authorizes another to act on his or her behalf as an agent; more broadly, any person to whom a fiduciary obligation is owed.[2]

The legal definition of "agent" likewise requires an affirmative authorization of another person to represent the principal:

> Someone who is authorized to act for or in place of another.[3]

The Department can and should contrast this kind of relationship with voluntary speech by reference to the definition of "voluntary" found in any dictionary:

> 2. Unconstrained by interference; not impelled by outside influence. 3. Without valuable consideration or legal obligation; gratuitous.[4]

It could then limit that definition with a combination of definitions of the key concepts reasonably within the confined regulatory concern of FARA, such as an "obligation" to "represent" a foreign principal arising from a contractual, financial, fiduciary, or coercive "duty." The definition of "represent" captures precisely the relationship which is the subject of FARA:

> 7. to act or stand in place of; be an agent, proxy, or substitute for. 8. to speak and act for by duly conferred authority, as an ambassador for his country or a legislator for his constituents.[5]

The point is that the Department's implementation of the statute with clarity is not a problematic drafting task. The Department must clearly distinguish between a citizen (or group of citizens or organization) speaking on her own behalf, without any obligation or conferred authority, versus a citizen speaking on behalf of a foreign principal under obligation or conferred authority. It can do so in a regulation that prescribes the precise elements that must be present to constitute an "agent" under FARA. Citizens then can know whether they are acting lawfully or criminally when they speak about public policy.

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[2] Black's Law Dictionary (12th ed. 2024) (definition of "principal"); *see also,* Webster's New World Dictionary of the American Language (The World Publishing Company 1954) at 1158 (definition of "principal" is "4. *in law*, a) a person who employs another to act as his agent").

[3] Black's Law Dictionary (12th ed. 2024) (definition of "agent"); *see also,* Webster's New World Dictionary of the American Language (The World Publishing Company 1954) at 27 (definition of "agent" is "3. a person, firm, etc. empowered to act for another").

[4] Black's Law Dictionary (12th ed. 2024) (definition of "voluntary"); *see also,* Webster's New World Dictionary of the American Language (The World Publishing Company 1954) at 1636 (definition of "voluntary" is 1".brought about by one's own free choice; given or done of one's own free will; freely chosen or undertaken. 2. acting in a specified capacity willingly or of one's own accord").

[5] Webster's New World Dictionary of the American Language (The World Publishing Company 1954) at 1235 (definition of "represent").

It should not matter whether the American citizen or organization came to their opinion due to learning information from a foreign source. The Internet has afforded American citizens access to information and views worldwide. Nor should it matter that a citizen has voluntarily associated herself with a foreign organization, such as a foreign church, labor union, aid society, or political group. Mere voluntary association with an organization, absent any obligation to speak for the organization, is not an "agency" relationship. Thus, the fact that her opinions have been "influenced" by a foreign interest, or she has taken "cues" or "suggestions" from a foreign source, does not make her an "agent." All Americans learn information and opinions from various sources and the government cannot police a citizen's thoughts in the name of regulating foreign affirmative efforts.

The Department has recognized this distinction on several occasions. For example, in DOJ Advisory Opinion (July 13, 2018), the Department concluded that an American publisher was not an "agent" of a foreign government under two provisions of the statute (sections 611(c)(1) & 611(d)) because the "**the decision to publish [publication] was solely"** the American publisher's editorial decision. It did not matter that the foreign government's advisor had "suggested" (i.e., "requested" or "influenced") certain content to appear in the publisher's materials because the American publisher "**was not obligated, but chose, to accept the changes suggested by [the advisor]."** The Department found that the American publisher was not an "agent" because:

> **The origination of [other publication], appears to be a product of [U.S. corporation] alone**, and while [U.S. corporation] sought out comments from an advisor to [a foreign government leader], **[U.S. corporation] was not under any obligation to follow any suggestions made by the advisor**, and there is **no evidence of any contractual relationship** between [U.S. corporation] and any [foreign government] entity. You have further stated that no [foreign government] entity provided any financing to the publication of [other publication]. Accordingly, we agree that [U.S. corporation], in this instance, **is not an "agent of a foreign principal" under FARA** and does not have an obligation to register under the Act.[6]

The Department should be willing to codify those standards in its regulations for consistency, clear notice to all citizens and organizations, and delineating the free speech zone when citizens speak about foreign affairs.

Further, it should not matter if an American speaks voluntarily at the suggestion or even a foreigner's explicit "request" – so long as the American decides whether to speak and the content of her own speech. That point also is underscored in the Advisory Opinion summarized above. However, the Department has confused the significance of a "request" by a foreign interest. The

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[6] DOJ Advisory Opinion (July 13, 2018) (emphasis added); *See also*, DOJ Advisory Opinion (March 13, 2020) ("[US organization] is acting as an agent of this foreign principal **because**, pursuant to the **grant agreement** with [foreign government agency], [US organization] **is obligated** to engage in activities to advance the deforestation priorities of the [foreign government].") (emphasis added).

Department is fond of invoking the mere "request" prong of the statute with little analysis to tie a "request" to the American citizen's obligation to act on the "request." For example, in DOJ Advisory Opinion (Mar. 19, 2021), the Department casually stated that "you are intending to act **at the 'request'** of [Foreign Advisor], though there is **no contract or compensation you will receive**. **Acting at the 'request' of a foreign principal is sufficient to establish the requisite agency relationship under FARA**." (emphasis added). The Department supplied no analysis of why the citizen might be obligated to act on the request.

Instead of analysis or explanation, the Department cited, without any discussion of the relevant facts, *Attorney General of U.S. v. Irish N. Aid Comm*., 668 F.2d 159, 161 (2d Cir. 1982), as it does on page 8 of the NPRM. However, that Court observed that a mere "plea" is insufficient to establish an "agency" relationship under FARA. "[W]e caution that this word ["request"] is not to be understood in its most precatory sense. Such an interpretation would sweep within the statute's scope many forms of conduct that Congress did not intend to regulate. The exact perimeters of a 'request' under the Act are difficult to locate, falling somewhere between a command and a plea." *Id.* The Court reasoned that to constitute "agency" under FARA, "those 'requested' are in some way **authorized to act for or to represent** the foreign principal." *Id.* (emphasis added). The mere "request" is not enough. The facts in that case documented a decades-long close affiliation between the Irish Northern Aid Committee in the United States and the Provisional IRA in Ireland that showed the IRA in fact authorized the Irish Northern Aid Committee to represent exclusively its interests in fundraising and politics within the United States. *See Attorney General v. Irish Northern Aid Comm.,* 530 F.Supp. 241 (S.D.N.Y. 1981). Yet the Department is fond of citing the case for the superficial point that a mere plea by a foreign interest to an American citizen triggers "agency." That is an oversimplification and is not accurate.

In any event, the Second Circuit's 1982 decision marks the outer boundary of a relationship that could be deemed "principal" and "agent," and it might not withstand a disciplined legal challenge under more recent Supreme Court decisions. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court considered a First Amendment challenge to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and specifically its prohibition against providing "material support and resources" to foreign terrorist organizations. Several plaintiffs sought to provide non-violent advocacy and other communicative services to two foreign terrorist organizations. The Court held that AEDPA's prohibition was unconstitutional as applied to "any restriction on independent advocacy" by an American interest group favoring the terrorist organization. Likewise, the First Amendment protects a citizen's independent choice to speak in favor of a foreign interest.

Moreover, the Department compounds the vagueness problems by defaulting to what it terms "the non-exhaustive factors identified in [Department] guidance," which is "not well suited to adaptation as a test in a regulation intended to capture the full scope of the statute's broad concept of agency." NPRM at 9. The fact that the factors the Department has published are "non-exhaustive" means that citizens are subject to secret factors and tests only the Department knows when it applies them. It also means the Department will not bind itself to a constitutional definition. The Department admits as much in concluding that "it would not be feasible to codify the broad range of factors that may inform [the Department or American citizens] whether a person qualifies

as an agent of a foreign principal under FARA." NPRM at 9. This is unacceptable and a clear violation of the First Amendment.

2. No Clarification of "Political Consultant" and "Political Activities"

The NPRM also declines to clarify or limit the statutory definitions of the terms "political consultant" and "political activities" as set forth in Sec. 611(o) & (p), again defaulting to advisory opinions. NPRM at 10. The problem is that many Americans communicate regularly with foreign citizens, foreign organizations, and foreign public officials about public policy and foreign affairs. The First Amendment protects the right to do so. However, the FARA definitions of "political consultant" and "political activities" are so broad that even anodyne political conversations risk FARA violations. It simply cannot be that every political discussion between an American and foreign official constitutes "political activities" because it exchanges useful information. The advisory opinion process preferred by the Department is an inadequate approach to clarification.

IFS urges the Department to list specific political activities it deems critical to FARA regulation. Since influencing elections using foreign funds or by direction of a foreign decisionmaker is unlawful under the Federal Election Campaign Act, *see* 52 U.S.C, § 30121, FARA should be focused on a narrow range of political activities and consulting. Examples include federal, state, and local lobbying, which are relatively well-defined by reference to several bodies of law (lobbying laws, IRS rules, and state laws). Ballot measure advocacy might also be a legitimate focus of FARA attention. And clearly defined election campaign-related or election-related activities that the Federal Election Campaign Act does not cover might also be included. The point is that the Department must provide clarity, and do so in a reasonable manner.

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It is the Department's responsibility to distill the key, definitive criteria that constitute "agent" and the characteristics of a relationship with a foreign principal that will be regulated and potentially criminalized. It should also clarify that the term "principal" under FARA (a) does not cover any entities other than those listed in Sec. 611(b) and (b) covers only those entities or persons who actually authorize or control the conduct of the American agent who speaks on the principal's behalf. The Department's decision not to define "agent" in this rulemaking leaves these profound principles buried in old court decisions and cursory advisory opinions. It leaves American citizens and organizations guessing at a clear standard for their own speech. The Department should withdraw the NPRM and draft a proposed regulation that provides a clear definition of "agent" that comports with the First Amendment and cabin the term "principal" to the statutory definition.

III. EXEMPTIONS

The Department's proposed changes to its regulations implementing the statutory exemptions also implicate American citizens' and organizations' First Amendment rights. These comments will focus on what IFS views as the most significant implications.

1. Clarifying the Sec. 613(d)(2) Exemption Applies to Non-Commercial Entities

The NPRM proposes to amend the current regulation to clarify that the FARA exemption set forth in Sec. 613(d)(2) "applies to commercial and non-commercial entities alike." NPRM at 14. IFS supports this clarification.

This clarification is necessitated by the plain statutory language, which states:

> The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals: … Any person engaging or agreeing to engage only … in other activities not serving predominantly a foreign interest ….

22 U.S.C. § 613(d)(2).

The statutory exemption is broad. It exempts "any person" engaging "in other activities." The person can be a for-profit or non-profit organization. The activities are not restricted to commercial or business activities.

As observed in IFS's comment in response to the ANPRM, this clarification will protect the associational and speech rights of American non-profit organizations with foreign donors who focus on foreign affairs but pursue their own philosophical interests and opinions.

2. New Exclusions to the Sec. 613(d)(2) Exemption

By contrast to the Department's inability to articulate a clear definition of "agent" to free voluntary speech from regulation, the Department demonstrates great facility with language when it comes to closing the statute's free speech exemption set forth in Sec. 613(d)(2). Any effort in clarity is a constructive exercise. Still, the proposed rules clawing back free speech exemptions are problematic for several reasons, not the least of which is that they exceed the bounds of the statute by adding limiting conditions from whole cloth.

First, the NPRM proposes to deny the exemption if the Department, in its judgment, deems an American citizen to have an "intent or purpose … to benefit the political or public interests of the foreign government or political party." NPRM at 15. This proposed restriction of the statutory exemption directly contradicts the Department's analysis two pages earlier in the NPRM (at 13) that Sec. 613(d)(2) does not permit a subjective "intent or purpose" test. In the Department's own words, a subjective intent or purpose "test is inconsistent with the statutory text of the [Sec. 613(d)(2)] exemption, which makes no express reference to intent. Instead, the exemption requires that the activities not serve (whether intentionally or not) 'predominantly a foreign interest.'" NPRM at 13. The test under the statute must be objective – both the exemption and any exception to the exemption.

Second, the NPRM proposes to deny the exemption if a foreign government or political party "influences" the American citizen's speech. NPRM at 15. The Department suggests no definition of what constitutes "influence." As noted above, a simple plea or suggestion is insufficient. Beyond that, the Department has suggested a mere "request" might be sufficient, but the court decision the

Department relies upon indicates much more than a simple "request" is necessary. Would the provision of a study or factual information that persuades an American citizen of the rightness of Israel's position in Gaza or Ukraine's resistance to the Russian invasion constitute "influence?" American citizens have the right to seek out and obtain information from anywhere in the world and to form their own opinions. Criminalizing an American citizen's acceptance of information from a foreign government under the rubric of "influence" is overbroad and would violate the First Amendment.

Third, the NPRM proposes to deny the exemption if the Department deems a foreign government to be the "principal beneficiary" of an American citizen's speech. NPRM at 15. This, too, is vague and overbroad. An American citizen might advocate a foreign affairs position that she believes is in the best interests of the United States. Yet under the proposed rule, if the Department deems a foreign government to benefit, the American citizen would lose her freedom to speak her own opinions free of criminal prosecution. This proposal contradicts Congress' stated concern that "acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal exercise of those persons' own rights of free speech, petition, or assembly. This may have been desirable when the Foreign Agents Registration Act was amended in 1942, but does not appear warranted in present circumstances." H.R. Rep. No. 1470, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. Ad. News 2387, 2401.

Fourth, the NPRM proposes a fourth basis for denying the exemption: "the activities are undertaken **on behalf of** an entity that is **directed or supervised by** a foreign government or political party (such as a state-owned enterprise) **and** promote the political or public interests of that foreign government or political party." NPRM at 15 (emphasis added). This is the only proposal that appears to be consistent with the statute and the First Amendment because it is objective and subjects to regulation only the activities an American citizen undertakes expressly "on behalf of" an entity that is "directed or supervised" by the foreign government and the activity in fact "promotes the political or public interests of that foreign government." However, this exclusion appears misplaced in the regulatory scheme. This limitation on the Sec. 613(d)(2) exemption is superfluous because the statute assumes the citizen otherwise qualifies as an "agent" of the "foreign principal." The statute expressly states that the exemption applies to "agents of foreign principals." But the fourth proposed exclusion repeats the standard for serving as an "agent," i.e., that the citizen undertakes activities "on behalf of" an entity "directed or supervised by a foreign government." That describes, in essence, an "agent," but the statute already has exempted that "agent." The proposed exclusion then limits the exemption if the citizen-agent "promote[s] the political or public interests of that foreign government or political party." That limitation appears to focus on the only statutory exclusion – that the agent is "serving predominantly a foreign interest." The NPRM addresses that subject separately at 18-20.

In sum, the proposed exclusions are not well drafted, contradict the statute, and take away free speech rights afforded by the statute by regulatory fiat. The only qualification authorized by Sec. 613(d)(2) is a clear definition of activities that "serv[e] predominantly a foreign interest," which is the subject of the next proposed change in the NPRM and discussed in detail below.

3. Definition of "Serving Predominantly a Foreign Interest" Under Sec. 613(d)(2)

The NPRM next turns to a definition of the only statutory exclusion stated in Sec. 613(d)(2): "serving predominantly a foreign interest." As IFS previously commented at the ANPRM stage, the best approach consistent with the statute's plain language and the First Amendment is an explicit acknowledgment that this is the sole exclusion to the exemption. If the American citizen-agent is not "serving predominantly a foreign interest," then the citizen is exempt from FARA.

At the outset, The Department should endeavor to define each word of the statute in a manner that comports with the First Amendment:

(a) "serving" – this statutory term should be defined to mean that the American citizen is affirmatively working for the foreign government or political party;

(b) "predominantly" – this statutory term should be defined as an interest "[m]ore powerful, more common, or more noticeable than others; having superior strength, influence, and pervasiveness,"[7] or "something greater or superior in power and influence to others with which it is connected or compared."[8] IFS previously suggested that the Department look at the Supreme Court's "major purpose" doctrine in the campaign finance context. There needs to be some objective test that means the American citizen's service of a foreign interest predominates over all other interests when she espouses an opinion; and

(c) "foreign interest" – this term must mean the interests of the "foreign principal" over the domestic, academic, personal, and other interests of the American that are not in the service of a foreign government, entity controlled by a foreign government, or foreign political party.

The NPRM eschews any such disciplined textual approach. Instead, it states that "the Department has identified a non-exhaustive list of factors to determine whether, given the totality of the circumstances, the predominant interest being served is domestic rather than foreign." NPRM at 18. There are several infirmities in this approach.

First, the list of factors is "non-exhaustive." This means citizens may be subject to secret factors known only to the Department. Because they are secret, the Department can spring new factors on unsuspecting citizens at any time.

Second, once again, the Department defaults to a "totality of the circumstances," or case-by-case, approach to criminal law enforcement. This is an improper approach that criminalizes First Amendment rights.

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[7] Black's Law Dictionary (12th ed. 2024) (definition of "predominant").

[8] Black's Law Dictionary (4th ed. Rev. 1968) (definition of "predominant"); *see also*, Webster's New World Dictionary of the American Language (The World Publishing Company 1954) at 1149 (definition of "predominant": "1. having ascendancy, influence, or authority over others; superior; dominating. 2. most frequent, noticeable, etc.; prevailing; preponderant. *SYN. see* dominant.").

Third, several terms used in the non-exhaustive list of factors are vague: "more than," "degree of influence," "influences," among others.

Fourth, several of the proposed factors countermand the statutory exemption. The exemption expressly applies to "agents of foreign principals," 22 U.S.C. § 613 (preface), but the fourth factor states that the exemption will be vitiated (as part of a facts and circumstances analysis) if "the activities are undertaken on behalf of an entity that is directed or supervised by a foreign government or political party…." That is the essence of the agency relationship that is exempted expressly in the preface to Sec. 613. More precise language is needed.

Fifth, the Department's resort to "advisory opinions and enforcement actions" (NPRM at 18) to clarify the factors over time ignores that the statute has been in place for nearly 90 years and the Department should be able to distill a clear, exhaustive set of definitions and standards now.

4. Exemption for Religious, Scholastic, or Scientific Pursuits.

The NPRM proposes no change to regulations implementing the Sec. 613(e) exemption for religious, scholastic, and scientific pursuits. NPRM at 23-24. As IFS commented at the ANPRM stage, the Department should amend its regulation at Sec. 5.304(d) because the current language goes beyond the statute's scope and likely violates the First Amendment. We incorporate by reference the remainder of our ANPRM comments herein.

5. Removal of "Directly Promote" from 28 C.F.R. § 5.304(b) & (c).

The NPRM proposes to delete the qualifier "directly" from the phrase "directly promotes" in Sec. 5.304(b) & (c) of the Department's longstanding regulations. NPRM at 21-22. IFS disagrees with this change because it removes a limiting – and clarifying – condition to FARA regulation. By removing the word "directly," the Department is proposing to **expand** the scope of regulation to any conceivable or attenuated or incidental – as contrasted to "direct" – promotion of a foreign political interest by an American citizen or organization. For many years, the word "directly" has narrowed the scope of activities deemed outside the exemption. That made good sense because it exposed to regulation only "direct promotion" of a foreign interest. Other words might capture the same concept: intentional, advertent, purposeful, immediate, demonstrable. However, "directly" affords American citizens some limiting clarification. Far from clarifying the regulation, removing that limitation here aggrandizes the Department's regulatory discretion at the expense of clarity for American citizens.

6. Exemption for Persons Qualified to Practice Law.

The NPRM proposes to amend the regulation implementing the Sec. 613(g) exemption to encompass "activities commonly considered part of client representation in the underlying proceeding so long as they do not constitute political activities." NPRM at 26. IFS views this change as a constructive change that respects the First Amendment rights implicated in legal representation. IFS also renews its comment at the ANPRM stage that the Department expressly

include representation in informal administrative adjudications as explained more fully in that document.

IV. ADVISORY OPINIONS REGARDING APPLICATION OF FARA

The NPRM states that the Department will make several changes to the advisory opinion process while declining to make other changes. NPRM at 29-33.

IFS supports the Department's commitment to continue answering requests for advisory opinions within 30 days. American citizens desiring to exercise First Amendment rights under the Department's admittedly vague regulations at least deserve prompt guidance from the government.

The Department proposes not to publish advisory opinion requests. NPRM at 32. IFS's comment to the ANPRM noted that the publication of advisory opinion requests would promote clarity in the Department's interpretation of FARA and voluntary compliance. It would help build a body of informative and meaningful precedent. Department advisory opinions are often cursory and omit key facts, which limits their usefulness. Citizens could better under FARA advisory opinions with full factual context. Non-disclosure of advisory opinion requests would conceal important facts and circumstances the Department states are essential to compliance. Disclosure would promote consistency and non-discrimination in enforcement, clarity, public notice, sunshine, and compliance. The burdens of administration should be subordinate to these objectives.

The NPRM proposes to require all requestors to disclose to the Department "a list of partners, officers, or directors or persons performing the functions of an officer or director and material information regarding current or past affiliation(s) with a foreign government or foreign political party." NPRM at 33. This would be a new requirement with profound implications for requestors. It may be deemed intrusive for many American citizens and organizations. It might deter some citizens or organizations from seeking an advisory opinion, which would frustrate the goals of the advisory opinion process. For a Department that invokes advisory opinions as the magical solution to admitted vagueness in the statute and regulations, this new compulsory exposure requirement is counterproductive to that proposed solution. The Department springs this proposal on the public without any statutory basis or legislative judgment justifying the disclosures. Nor does the NPRM explain the necessity or tailoring of a blanket requirement for all requestors.

This new requirement might violate the Supreme Court's recent decision in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___, 141 S.Ct. 2373 (2021), holding that government agencies cannot compel organizations to disclose their supporters to the government absent a compelling justification. It is difficult to make that determination without an elaborate record demonstrating the need and narrow tailoring of the requirement. There are less intrusive mechanisms, such as requesting this information where it is pertinent to a specific request rather than a blanket requirement for all requestors. However, the cursory explanation on page 33 of this NPRM does not justify the requirement. Accordingly, IFS opposes this new blanket requirement for all American citizens and organizations who seek compliance guidance from the Department.

V. LABELING INFORMATIONAL MATERIALS

IFS's primary concerns are with clarity in triggers to regulation (e.g., the definition of "agent") and the breadth of the exemptions (e.g., Sec. 613). Unless and until the Department resolves the problems identified throughout the current regulatory scheme and the pending NPRM, the Department should not proceed with the proposals for a new regulation on labeling. The proposed labeling rules would greatly increase the labeling burdens. Perhaps the most onerous thing for American citizens would be potentially labeling thousands of social media posts under the proposed Sec. 5.401(g) that would require "[e]ach individual post to the website for or in the interests of the registrant's foreign principal [to] bear the conspicuous statement." NPRM at 73. A citizen or organization unclear on their "agency" or exemption would be placed into a quandary when speaking on social media and be chilled from expressing their views. IFS urges the Department to clarify FARA before adopting a new labeling regulation.

VI. CONCLUSION

FARA regulates speech on political topics by foreign interests using the services of American agents. It must not regulate the speech of American citizens speaking their own opinions on behalf of themselves. Drawing the line between FARA-regulated speech and free speech is a delicate task. The language of FARA is broad and vague, and it fails to draw precise lines. Absent legislation, the responsibility for drawing that line and protecting the free speech, press, and assembly rights of American citizens falls to the Department of Justice. The proposed NPRM fails in that responsibility in several critical aspects. We urge the Department to return to the drawing board and recalibrate the line between speech on behalf of foreign principals and free speech by American citizens and organizations on their own behalf.

Respectfully submitted,

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President