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VIA ELECTRONIC SUBMISSION
FEDERAL E-RULEMAKING PORTAL

Jennifer Kennedy Gellie
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National Security Division
U.S. Department of Justice
175 N. Street NE, Constitution Square
Building 3, Room 1.100
Washington, DC 20002

Re: ***Public comments on NSD Docket No. 102 (RIN 1105–AB67)***

Dear Ms. Gellie:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we write to provide comments in response to the Department of Justice's (DOJ) request for comments on an Advance Notice of Proposed Rulemaking concerning the Foreign Agents Registration Act (FARA) and its implementing regulations.[1] NACDL's mission is to serve as a leader in identifying and reforming flaws and inequities in the criminal legal system, and to ensure that its members and others in the criminal-defense bar are fully equipped to serve all accused persons at the highest level.[2] To that end, NACDL, together with its members, advocates for policy and practice improvements in the criminal legal system.

NACDL believes that this Advance Notice of Proposed Rulemaking provides DOJ with an opportunity both to narrow the scope of FARA consistent with the statute's goals and to provide much needed clarity concerning FARA compliance. FARA is a broad and loosely worded statute that can easily become a trap for the unwary. Eliminating that uncertainty and narrowing the scope

[1] Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations, 86 Fed. Reg. 70787 (proposed Dec. 13, 2021) (to be codified at 28 C.F.R. pt. 5).

[2] NACDL, *Mission and Vision*, https://www.nacdl.org/Landing/Mission-and-Vision (last accessed Jan. 30, 2022).

of the statute is of the utmost importance now that DOJ is becoming more vigilant about enforcing FARA.

NACDL believes that DOJ should be mindful of the fact that FARA is poorly understood, both because DOJ has failed to provide clear guidance as to what is required and, as Senator Grassley explained following his review of an Office of the Inspector General audit of DOJ's FARA enforcement,[3] because "it appears that the Justice Department and FBI have been seriously lax in enforcing FARA for a long time."[4] Historically, if a failure to register was discovered, the consequence was fairly minor, the FARA Unit would send a letter of inquiry and then permit a late registration.[5] Consequently, FARA registrations are far lower than they otherwise would be.[6]

It would be unfair, though, to blame that consequence solely on the fault of a public that was unwilling to follow the law. On its face, FARA can appear implausibly broad in requiring registration even when doing so would serve no purpose, and DOJ seemed to be signaling that it agreed by looking the other way. Many who would fall within the literal scope of FARA understandably did not want to be subject to FARA's burdensome regime, and it seemed that DOJ did not want to be burdened with a flood of additional registrations that would be of little value to it.

It certainly is within DOJ's rights to begin enforcing FARA more vigilantly, but it owes it to the public to clearly delineate what is expected from it. That sort of clarity is lacking in DOJ's regulations, the case law, DOJ's enforcement history, and its guidance.

The touchstone of FARA registration is whether someone falls within an overbroad definition of "agent of a foreign principal" or is subject to a host of often ambiguous exceptions. There is fair criticism that "DOJ regulations have not provided further clarification on the scope

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[3] DOJ, *Audit of the National Security Division's Enforcement of the Foreign Agent's Registration Act* 24 (Sept. 2016), https://oig.justice.gov/reports/2016/a1624.pdf [hereinafter *OIG Audit*].

[4] *Grassley Statement at Hearing on Enforcement of the Foreign Agents Registration Act: Hearing on "Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations" Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary), https://www.judiciary.senate.gov/grassley-statement-at-hearing-on-enforcement-of-the-foreign-agents-registration-act [hereinafter *Grassley Statement*].

[5] *OIG Audit* at 13.

[6] *Grassley Statement* at 2.

of the agency requirement under FARA, resulting in some confusion about the requirements by the few courts that have interpreted what agency requires under the Act."[7]

The guidance that DOJ does provide is scattered across literally dozens of Advisory Opinions, which offer limited utility because DOJ emphasizes that whether someone is required to register turns upon a multitude of highly fact-dependent factors, and yet the Advisory Opinions are typically redacted so that the specific facts are not readily discernable. Consequently, even when someone is able to find a seemingly relevant Advisory Opinion among the poorly organized set of opinions that DOJ makes available, it is difficult to know whether DOJ will find the Advisory Opinion sufficiently analogous to be controlling.[8]

NACDL believes that DOJ should clarify what is required by FARA through regulations rather than rely as heavily as it does on Advisory Opinions. Before holding people accountable for compliance with FARA, DOJ's regulations should provide people of ordinary intelligence adequate guidance as to what the law expects from them. It is not reasonable to expect people to review dozens of Advisory Opinions that are so heavily redacted and abstract that deciphering them can feel like looking for meaning in the advice from a fortune cookie.

In addition to providing clarity, DOJ should narrow FARA's scope by limiting the scope of FARA's definition of "agent of a foreign principal" and by construing its exemptions broadly. FARA compliance is burdensome and regulation in this area impinges upon First Amendment freedoms of association and speech, so FARA should not be construed to compel disclosure unless doing so is necessary.[9]

These sorts of clarifications should take place by regulation. A recent Advisory Opinion issued on July 19, 2021, for example, acknowledged that the definition of "political consultant," who would be required to register under FARA, is facially overbroad. DOJ recognized that "the

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[7] Congressional Research Service, *The Foreign Agent Registration Act (FARA): A Legal Overview* 3 (Dec. 4, 2017), https://sgp.fas.org/crs/misc/R45037.pdf [hereinafter *CRS Legal Overview*].

[8] Not all of DOJ's Advisory Opinions regarding FARA are publicly available, and those that are available are poorly organized and not contained in a searchable database. This makes it nearly impossible for parties to find applicable scenarios and requires searching through more than 100 Advisory Opinions to evaluate whether the conduct at issue has been addressed by DOJ. *See generally* DOJ, *Foreign Agents Registration Act – Advisory Opinions*, https://www.justice.gov/nsd-fara/advisory-opinions (last updated Sept. 13, 2021) (listing by general topic only).

[9] At times, even DOJ has expressed the same opinion: "Particularly because FARA regulates expressive activities by U.S. persons that implicate the rights protected under the First Amendment, it is important that the standards governing its application be clear." DOJ, *The Scope of Agency under FARA* 1 (2020), https://www.justice.gov/nsd-fara/page/file/1279836/download [hereinafter *Scope of Agency*].

seemingly wide breadth of the statutory definition to include the mere provision of advice or information to a foreign principal about political or policy matter" was more expansive than necessary, so DOJ chose to "follow Congress's intent as reflected in the legislative history to the 1966 FARA Amendments" and found that a political consultant was "not [] required to register as an agent unless he engaged in political activities, as defined, for his foreign principal."[10] These sorts of clarifications are important, and they should be made explicitly in the regulations so that they can readily be identified. It asks too much of the public that they hunt these clarifications down in the various Advisory Opinions.

Clarifying FARA's "Agency" Definition

FARA prohibits a "person" from acting as an "agent of a foreign principal" without first registering with DOJ.[11] Even so, the scope of covered activities under FARA's registration requirement is far too expansive. Under FARA, a "foreign principal" includes a foreign government or political party; any entity organized under the laws of a foreign country or having its principal place of business there; or any person outside the United States, unless they are a domiciled U.S. citizen.[12] Thus, FARA has no de minimis threshold. It can be triggered by even the slightest activity that meets any one of the statutory triggers. For instance, a single meeting with a U.S. official by an executive whose company is headquartered outside the United States, or by its U.S. subsidiary on behalf of the foreign parent, might trigger the requirement to register. This expansive definition means that a broad range of actors are subject to, and fall within the scope of, the definition of "foreign principal," including corporations, nonprofits, foundations, public-relations firms, tourism bureaus, economic-development organizations, and most persons based outside the United States.[13]

The definition of who constitutes an "agent of a foreign principal" under FARA is both confusing and overbroad and should be clarified. DOJ has not yet issued clarification on the scope of the agency requirement under FARA, and the implementing regulations do not expressly identify the necessary elements of an agent's relationship with the foreign principal.[14] DOJ's

[10] DOJ, Request for Advisory Opinion Pursuant to 28 C.F.R. § 5.2 (2021), https://www.justice.gov/nsd-fara/page/file/1431306/download.

[11] 22 U.S.C. § 612(a) (2021).

[12] *Id.* § 611(b).

[13] For example, the simple act of hosting a conference, disseminating a policy report, requesting a meeting, or reaching out to opinion leaders on behalf of a foreign principal could satisfy the "political activities" threshold. For a further discussion of FARA's practical implications, *see* Covington & Burling LLP, *The Foreign Agents Registration Act ("FARA"): A Guide for the Perplexed* 5–6 (Jan. 11, 2018), https://www.law.upenn.edu/live/files/9251.

[14] 28 C.F.R. § 5.100 (2021).

failure to define the floor of who constitutes a foreign agent, and the conduct that triggers registration, has "result[ed] in some confusion about the requirements by the few courts that have interpreted what agency requires under the Act."[15]

Moreover, the principal–agent relationship in FARA is much broader than how principal–agent relationships are traditionally defined under agency law. For instance, under the Restatement (Third) of Agency, an agent and his or her principal must agree that the agent will act on the behalf of, and be subject to the control of, the principal.[16] FARA's "agency" relationship, by contrast, is much wider and more ambiguous. An "agent" is defined under the Act as "*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* [*engages in covered activities in the Act*]."[17]

While this definition is clear enough where it is consistent with traditional agency principles, it is unclear at its margins. The statute differentiates between following a foreign principal's "order" and following foreign principal's "request," but what is a request? The Second Circuit cautions that "[t]he exact perimeters of a 'request' under the Act are difficult to locate, falling somewhere between a command and a plea," but it "caution[ed] that this word 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."[18] The Second Circuit construed this word narrowly to avoid a situation where "[w]hen members of a large religious, racial, or ethic group respond to pleas for contributions or generalized political support, they do not thereby become "agents" under the Act. To so hold would make all Americans who sent money, food, and clothing to the Italian earthquake victims 'agents' of the Italian Government."[19] DOJ subsequently agreed with the Second Circuit that "request" "should be read to fall 'somewhere between a command and a plea,'"[20] but there is no DOJ guidance or regulation that suggests where that line should be drawn. If the best that DOJ can say is that the line separating

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[15] *CRS Legal Overview* at 3.

[16] Restatement (Third) of Agency § 1.01 (Am. L. Inst. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

[17] 22 U.S.C. § 611(c)(1) (2021).

[18] *Att'y Gen. of United States v. Irish N. Aid. Comm.*, 668 F.2d 159, 161 (2d Cir. 1982).

[19] *Id.*

[20] *Scope of Agency* at 3.

innocent conduct from a criminal failure to register is "somewhere" over there, then the law seems to be a textbook example of a law that is unconstitutionally vague.

Additionally, DOJ recognizes that "[t]he second clause of the definition broadens FARA's concept of agency to reach less formally defined (and more episodic) behavior" such that a person can become an agent of a "foreign principal even without a formal relationship, and it therefore goes beyond the common-law definition of agency."[21] Despite the lack of a formal relationship, DOJ explains that "some form of authority by the principal over the agent" is required.[22] Again, though, DOJ does not provide any meaningful guidance as to who is covered by this definition.

Instead, DOJ identifies six amorphous factors to consider: (1) whether those requested to act were identified specifically, (2) the specificity of the requested action, (3) whether the action was compensated or coerced, (4) whether the action requested aligned with the actor's interests, (5) whether the advocacy requested aligned with the speaker's subjective viewpoint, and (6) the nature of the relationship between the actor and the foreign principal.[23] This guidance is utterly unhelpful. The guidance really only makes sense when these factors redirect someone into the first clause of the definition, where there is a formal relationship. The last factor concerning the nature of the relationship essentially suggests that agency is more likely where there is a formal relationship, and it is difficult to imagine a situation where compensation is being paid from a principal to an agent where there is not some degree of formality.

But going back to the situation this second clause is designed to address, where there is no formal relationship and yet the foreign principal has some control, this guidance is useless. In fact, the guidance further complicates the problem by giving the example, "A foreign government's explanation of its point of view, for example, may persuade a policymaker to adopt that position as his own," such that there is no agency.[24] Where nobody is compensated or coerced to take an action, it seems that their action would always be because they subjectively supported the action or were persuaded to adopt that view. Why else would they be acting?

Consider an example: imagine there are calls from members of Congress to declare war on a foreign country, and the foreign government issues a plea to all American citizens with ancestral roots in that country to hold a vigil across the street from the White House calling for peace every day until the threat of war abates. That is a specific request made of a specific group of people and the nature of the relationship is ongoing and being coordinated by a foreign principal, but there does not appear to be any payment or coercion and people presumably show up because they were

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 3–4.

[24] *Id.* at 4.

already inclined to go or were persuaded to do so. Thus, some of the factors that DOJ identifies as relevant to determining an agency relationship are present, while others are not. How can anyone tell from this guidance whether DOJ would view those who attend the rally as agents of a foreign government?

Adding to the confusion, DOJ's agency guidance also notes that FARA applies to someone who is the agent of a foreign principal's intermediary if they are "indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal," but its guidance does not address this issue.[25] It is not clear what "indirectly" means in this context or how anyone is supposed to know that they are being "indirectly" supervised, controlled, financed, or subsidized. Typically, agency is defined by an agreement and such an agreement is reached directly between an agent and the principal, so it is unclear how such an agreement would be reached with someone indirectly. Can someone indirectly become an agent for someone indirectly without agreeing to do so? Similarly, it is unclear what "supervised," "financed," or "subsidized" mean in this context, as all of these things could be done passively by someone without any authority to direct another person, as is inherently the case with traditional agency relationships. There also are any number of circumstances where a person may know what their U.S. supervisor is directing them to do, but lack knowledge about whether a foreign principal may be financing or subsidizing the business or exercising some kind of indirect supervision or control.

Simplifying FARA's Exemptions

Given the broad definitions of "foreign principal," "covered activities," and who constitutes an "agent" under FARA, it seems that an almost endless number of persons and entities would need to register under the statute's broad scope. Although FARA contains a number of exceptions to registering, which are intended to exclude many activities of businesses, science, religious institutions, lawyers, and secretaries, these exemptions often are construed too narrowly or they are ambiguous. Making matters worse, having created this uncertainty with respect to whether registration is required, DOJ then puts the burden on a person invoking the exemption to prove that the exemption is applicable.[26]

Legal Exemption

FARA recognizes that the need for disclosure is limited where the agency relationship should be obvious, such as when someone is acting as a diplomat or an attorney for a foreign principal or where disclosure is made elsewhere, as commonly occurs under the Lobbying Disclosure Act. Those exceptions should be construed broadly and realistically. DOJ explains: "The purpose of FARA is not to restrict speech, but rather to identify it as the speech of a foreign

[25] *Id.* at 1 n.1 (quoting 22 U.S.C. § 611(c)(1)).

[26] 28 C.F.R. § 5.300 (2021).

principal (when fairly attributed), and thus to enable American audiences to consider the source in evaluating the message."[27] But DOJ's construction of these exemptions, at times, seems to have more to do with suppressing the speech of some speakers than it has to do with requiring disclosure.

Because an attorney representing a foreign party in judicial proceedings clearly is acting as the agent of a foreign principal, DOJ logically does not require the attorney to register for advancing arguments on behalf of the client in court.[28] Nevertheless, DOJ would seem to require registration for the lawyer repeating those same arguments when responding to a press inquiry on the courthouse steps.[29] In both instances, though, the American audience would recognize that the lawyer is acting as the agent of the client, and the audience can consider that in evaluating the message. FARA registration serves no purpose in this context; it simply imposes a burden on someone exercising their First Amendment rights. Moreover, that burden is not typically imposed on all attorneys in even a single case; only the counsel for a foreign principal is burdened in this way. In a typical criminal case against a foreign principal, for example, the prosecution can speak freely from the courthouse steps, but defense counsel is subject to a prior restraint of not being allowed to speak lawfully from the courthouse steps unless the attorney registers under FARA first. This is both fundamentally unfair and not necessary to achieve the goals FARA seeks to address.

DOJ also should clarify that this legal exemption applies to 18 U.S.C. § 951, which requires notice be provided to the Attorney General by agents of a foreign government. NACDL believes that exemption is implicit in Section 951(d)(4)'s exemption for those who engage in "a legal commercial transaction," which is defined in 28 C.F.R. § 73.1(f) to include a "service." But FARA contains both an explicit legal exemption and a commercial exception that includes a "service" as well, so an explicit legal exemption is warranted under Section 951 as well.[30]

Commercial Exemption

A commercial exemption applies to agents of foreign principals engaged in "private and nonpolitical" activity that furthers "the bona fide trade or commerce of [a] foreign principal."[31] This is a valuable exemption for the business community, as otherwise, a broad swath of purely

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[27] *Id.*

[28] 22 U.S.C. § 213(g) (2021).

[29] DOJ claims: "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." DOJ, *FARA Frequently Asked Questions* pt. IV ("Exemptions"), https://www.justice.gov/nsd-fara/frequently-asked-questions#21 (last updated Dec. 3, 2020).

[30] 22 U.S.C. § 613(d) (2021); 28 C.F.R. § 5.304(a) (2021).

[31] 22 U.S.C. § 613(d).

commercial activity would fall under FARA's registration requirements. However, this exemption, and the requirement that commercial activity be "private and nonpolitical" in nature, generates confusion, particularly with respect to the commercial activities of foreign governments or state-owned companies.[32] DOJ should resolve this confusion through clarifying regulations.

True, DOJ has issued regulations stating that even if a foreign principal is owned or controlled by a foreign government, its actions will be considered "private" as long as they do not "directly promote the public or political interest of [a] foreign government."[33] But that attempt at clarity with respect to what is "private and non-political" remains ambiguous. For instance, an Advisory Opinion issued on January 20, 1984, explained that an advertising firm hired by a foreign government to promote local tourism in the country *must register* under FARA because tourism fosters economic development.[34] The U.S. firm did not qualify for FARA's commercial exemption because tourism creates capital and jobs in the local economy, "both of which are obviously in the political and public interests" of a foreign country's government. That interpretation appears so broad as to blur any distinction between a private and a public interest such that the promotion of any private industry (tourism) will be deemed in the public interest and require registration.

DOJ's efforts to clarify who must register by drafting Advisory Opinions fails to clarify the statute's reach for the general public. For example, an Advisory Opinion issued on February 9, 2018, concluded that a consulting firm for a foreign, state-owned bank needed to register when undertaking compliance outreach to U.S. financial institutions because such activities "directly promote[d] the public interest of [a] foreign country."[35] By contrast, an Advisory Opinion issued on December 21, 2017, found that a public-relations firm working for a foreign embassy need *not register* for introducing a foreign government official, in Washington, D.C., to "private industry leaders in the defense and cybersecurity markets" because these were "private and non-political activities."[36] How is anyone to discern why being introduced to a defense industry leader is less "in the political interest" of a foreign government than conducting anti–money laundering compliance outreach to U.S. financial institutions? Which side of the line would other industries fall on?

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[32] *Id.*

[33] *See, e.g.*, 28 C.F.R. § 5.304(b) (2021).

[34] DOJ, Advisory Opinion (1984), https://www.justice.gov/nsd-fara/page/file/1046156/download.

[35] DOJ, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 Concerning Application of the Foreign Agents Registration Act (2018), https://www.justice.gov/nsd-fara/page/file/1068636/download.

[36] DOJ, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 Concerning Application of the Foreign Agents Registration Act (2017), https://www.justice.gov/nsd-fara/page/file/1036096/download.

Exemption for Religious, Scholastic, Fine Arts, or Scientific Pursuits

FARA also exempts "[a]ny 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."[37] But DOJ has concluded that this provision *does not* apply to persons engaged in "political activities" defined under the Act.[38] It is not obvious how DOJ generates this distinction from the text of the statute; perhaps it does not consider religious or academic activity of a "political" nature to be "bona fide." Nevertheless, a political angle can be found in virtually anything that is religious, scholastic, scientific, or artistic, so this distinction is unworkable absent greater clarity.

Despite DOJ's more aggressive enforcement of FARA, this appears to be a context in which DOJ is still up to its old ways of construing this exception extremely narrowly but then looking away if anyone comes remotely close to qualifying for the exemption. There seems to be something of a "don't ask, don't tell" policy in which DOJ tells people that they do not qualify for the exception only if they ask.

DOJ's enforcement history and intuition have led many in the religious, scholarly, and artistic fields not to register, but DOJ's guidance would suggest that many of these entities should be registering, even though that would seemingly produce absurd results. For example, if a U.S. Catholic bishop delivered a message to his American congregation on behalf of the Pope that either abortion or the death penalty is morally wrong, would the U.S. bishop have to register as an agent of the Pope for opining on the need to change U.S. laws? Similarly, Damien Hirst is one of the mostly highly regarded English artists in the world, and many of his works are critical of the pharmaceutical and meat industries. If a U.S. museum were to depict these works, would it need to register for delivering his message seeking to influence a segment of the U.S. population to avoid drug addiction and meat consumption? If researchers at a foreign university sought to publish their study on global warming finding that it is a threat to the planet and recommending policy changes associated with reducing carbon emissions, would they have to register under FARA? Would it not seem a bit absurd and contrary to our First Amendment values to ask that the sermon, the artwork, and the scientific study be labeled "political propaganda" under 22 U.S.C. § 614?

Most people would intuitively conclude that the answer to these hypotheticals is that registration is not required, but DOJ's Advisory Opinions seem to suggest otherwise. A November 12, 2019 Advisory Opinion stated that registration would be required for a U.S.-based

[37] 22 U.S.C. § 613(e).

[38] 28 C.F.R. § 5.304(d).

PR firm assisting an international organization engaged in religious activities.[39] DOJ seemed to acknowledge that the organization would be engaged in bona fide religious activities, but it emphasized that the exemption applied to an organization that was "*only*" engaged in religious activities. This religious exemption did not apply, in DOJ's view, because part of the organization's "mission is to bring together the world's religious leaders to agree on measures to overcome important social challenges," which DOJ viewed as political.[40] But religion inherently seeks to influence how people live out their lives in accordance with that religion's belief and commonly calls for its members to address perceived social injustices, such as helping the sick and the poor; expressing opinions about the sanctity of life in contexts including abortion, the death penalty, and vegetarianism; or discouraging practices that the religion deems harmful, such as drug and alcohol abuse. Likewise, art often reflects politics or is intended to convey a message, and science often will have political implications or seek to influence how we live. If DOJ now requires that all religious, scholarly, and artistic messages be void of any political content, and places the burden on the registrant to make that demonstration, it seems that few would be capable of avoiding having to register, and the rest would then be required to disparage their own message by labeling it propaganda.

That DOJ would not want to enforce FARA in the context highlighted above is understandable, but the proper way to go about that is not to broadly declare that registration is required and then ignore the failure to register. That does not promote respect for the rule of law or FARA in particular. Rather, DOJ should clarify in its regulations that registration is not required in these circumstances.

Clerical Exception

Lastly, as for FARA's other statutory exemptions, DOJ should also clarify the exclusion for clerical and secretarial activities, which exempts "[a]n employee or agent of a registrant whose services in furtherance of the interests of the foreign principal are rendered in a clerical, secretarial, or in a related or similar capacity."[41] In a December 6, 2017 Advisory Opinion, DOJ concluded that someone who had a contractual relationship with only a U.S. company and whose interactions with foreign government officials were "limited to scheduling, coordinating, and facilitating communications" was *not required* to register under FARA because those interactions did not

[39] DOJ, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 Concerning Application of the Foreign Agents Registration Act (2019), https://www.justice.gov/nsd-fara/page/file/1234516/download.

[40] *Id.* A November 19, 2019 Advisory Opinion for a foreign religious entity also found that registration would be required for political activity, but it is heavily redacted such that there is no way to discern why DOJ reached that conclusion. *See* DOJ, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 Concerning Application of the Foreign Agents Registration Act (2019), https://www.justice.gov/nsd-fara/page/file/1232921/download.

[41] 28 C.F.R. § 5.202(c) (2021).

create an agency relationship, because this did not constitute "any substantive work on behalf of the foreign government."[42] But it is not clear how far this exception goes without becoming substantive. For example, if a foreign CEO gave an American assistant a series of talking points to work into a draft speech that the CEO would then edit and give to the U.S. Chamber of Commerce, would the assistant's preparation of the first draft require the assistant to register? Would a graphic artist who prepares a slide deck for the speech have to register? And how similar to clerical or secretarial work does a job have to be to avoid registration? For example, would a driver or translator qualify and, if not, why not?

DOJ also should make clear that this exception is applicable to Section 951 as well. Just as there is no need for a person undertaking such low-level activities to register under FARA, there is no need for them to provide notice that they are performing those same activities under Section 951 either.

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Now that DOJ is beginning to enforce FARA more aggressively, NACDL supports DOJ's consideration of additional FARA rulemaking. It is NACDL's hope that DOJ will propose clarifying regulations that will narrow FARA's scope, so that the law is clear and its burdens are not imposed more broadly than necessary.

Sincerely,

Martín Antonio Sabelli
President
National Association of Criminal Defense Lawyers

[42] DOJ, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 (2017), https://www.justice.gov/nsd-fara/page/file/1068206/download.