REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Submitted via *regulations.gov* March 3, 2025

Jennifer Kennedy Gellie
Chief, Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice
175 N Street NE,
Constitution Square, Building 3 - Room 1.100,
Washington, D.C. 20002

Re: Notice of Proposed Rulemaking on Implementation of the Foreign Agents Registration Act, Docket ID No. NSD 102 / RIN 1124-AA00.

Dear Chief Gellie:

The Reporters Committee for Freedom of the Press submits these comments on the proposed updates to the Attorney General's Foreign Agents Registration Act ("FARA") implementing regulations (hereinafter, the "Proposed Rule").

Were FARA enforced consistent with its expansive and ambiguous text, those actions would flatly violate the First Amendment. And certain provisions in the Proposed Rule would significantly add to the overbreadth and vagueness in the law. The proposed changes to the implementing regulations narrowing the scope of the exemption for "activities not serving predominantly a foreign interest" under 22 U.S.C. § 613(d)(2) are of particular concern. The most notable is the proposed "totality of the circumstances" test whereby the Department could demand registration for activities it finds are in the predominant interest of any foreign principal, not just a foreign government or political party. That change would expand the Department's ability to enforce FARA in a manner which, if not carefully supervised, could be selective and politicized, and therefore unconstitutional under longstanding First Amendment precedent.

I. FARA's implications for the First Amendment.

The language of FARA is famously expansive. "Foreign principal" includes not just foreign governments or political parties, but foreign corporations and persons domiciled abroad, even if those persons are U.S. citizens. 22 U.S.C. § 611. A person or entity becomes an "agent of a foreign principal" when they engage in covered activities "at the order, *request*, or under the direction or control" of a foreign principal. *Id.* (emphasis added). Once they do so, they technically trigger FARA registration obligations and, if they "willfully" fail to comply, could be subject to criminal investigation and prosecution. *Id.* § 618. Informational

materials disseminated by registrants are subject to labeling and disclosure requirements. *Id.* § 614.

Moreover, covered activities under FARA include "political activities" or acting as a "publicity agent," terms that are also broadly defined. *Id.* § 611(c).

"Political activities" means any activity that will, or is intended to, "influence any agency or official of the Government of the United States or any section of the public within the United States with reference to the formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party." *Id.* § 611(o). On its face, that definition could embrace First Amendment-protected activity that is perceived by the FARA enforcer as potentially influential on public opinion.

The definition of "publicity agent" is likewise broad and includes "any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind, including by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise." *Id.* § 611(h). Again, that definition, if applied literally, would encompass core First Amendment-protected activity like news reporting or publishing.

Further, while the statute does include a carve-out for certain news media entities, it is limited to "bona fide news or journalistic activities" and does not apply to entities with substantial foreign ownership or with non-U.S. citizens on their boards of directors. *Id.* § 611(d). This means that some media organizations may need to rely on the "commercial exemption" in 22 U.S.C. § 613(d) and especially for "other activities not serving predominantly a foreign interest" rather than the media carve-out. The Department has never issued guidance on the scope of what it considers to be "bona fide news or journalistic activities."

It is true that FARA's application to journalistic activity has historically been rare, though in recent years the Department has requested that certain outlets register. *See, e.g.*, Alexandra Ellerbeck & Avi Asher-Schapiro, *Everything to know about FARA, and why it shouldn't be used against the press*, Columbia Journalism Rev. (June 11, 2018), https://perma.cc/4Y4V-N7P8. Members of Congress have also pressured the Department to enforce FARA against other foreign news organizations. *Id*. And, textually, FARA could be applied to require registration not just by virtue of ownership structure but potentially based on relationships with foreign sources, journalists, and outlets.

Such applications would be unconstitutional and could chill reporting on matters of substantial public interest, including war-time reporting, reporting on policy choices by both U.S. allies and adversaries, and reporting about the conduct of multi-national corporations that do business in the United States. After all, reporting on these foreign affairs issues requires developing relationships with foreign sources, utilizing foreign journalists, or carrying content by foreign outlets. That reporting can be at the "request"

of a foreign principal, as in a story tip by a source in a foreign government or foreign political party, or by any other entity or individual domiciled abroad.

To give just one example, in 2019, the *New York Times* reported on China's treatment of ethnic minorities based on documents provided by a source who the *Times* described as "a member of the Chinese political establishment who requested anonymity and expressed hope that their disclosure would prevent party leaders, including Mr. Xi, from escaping culpability for the mass detentions." Austin Ramzy & Chris Buckley, *'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. Times (Nov. 16, 2019), https://perma.cc/X2UF-CYDS.

Furthermore, recent enforcement efforts suggest the Department's understanding of FARA may be evolving to cover activity implicating basic journalistic activity. For example, Gregory Craig, the former White House counsel, was tried and acquitted of making false statements to the FARA Unit in connection, in part, with serving as a journalistic source. That is, certain allegations against him were based on him providing a copy of a report that his law firm had prepared to a U.S.-based journalist, allegedly at Ukraine's behest. Ryan Lucas, *Jury Finds Ex-White House Counsel Craig Not Guilty Of Lying To Government*, NPR (Sept. 4, 2019), https://perma.cc/B9WN-C7UL.

Similarly, in July 2024, Sue Mi Terry, a think tank analyst, was indicted under FARA. *United States v. Terry*, 1:24-cr-00427-LGS, ECF No. 2 (S.D.N.Y. July 15, 2024). Many of the allegations in Terry's indictment relate to her receiving information from South Korean officials and then writing op-eds and making media appearances based on that information. *Id.* at ¶¶ 39–42, 48–51; *see also* Gabe Rottman, *New FARA Prosecution Sweeps in Op-Ed Writing*, Reporters Comm. for Freedom of the Press (Aug. 19, 2024), https://perma.cc/ZV3E-MQUJ.

But most alarming is the possibility that FARA could be used selectively to target news reporting or other speech perceived as critical or unfavorable. Historical examples involving the suppression of disfavored views do exist. In the 1950s, for instance, W.E.B. Du Bois and an organization he chaired, the Peace Information Center, were prosecuted for serving as Soviet agents for circulating a petition protesting nuclear weapons. *See* Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 Duke L. J. 1075, 1118–19 (2020). And although Du Bois was eventually acquitted, the prosecution irreparably damaged his reputation and career and led to the shuttering of the Peace Information Center. *See id.* at 1119–21. Were the type of selective enforcement at play in the Du Bois case to extend to news reporting, the ramifications for press freedom could be severe.

II. The broad exclusions to the exemption in 22 U.S.C. § 613(d)(2) fail to carve-out First Amendment-protected activity from FARA's sweep.

In light of FARA's expansive textual sweep, and the possibility it could be deployed based on news reporting perceived by officials as unfavorable, the Department must ensure that its implementing regulations have adequate guardrails in place to prevent its application to First Amendment-protected speech. Unfortunately, the

Proposed Rule both fails to present a narrowing construction of the statute's definition of agency and proposes narrowing the exemption in 22 U.S.C. § 613(d)(2) in a manner that could significantly expand the universe of the entities or individuals required to register.[1] Narrowing the exemption in that way exacerbates FARA's imprecision as to media entities who are ineligible for the media carve-out in several ways.

First, the proposed categorical exclusions to the exemption in 28 CFR § 5.304(d)(1) – meaning that registration would be required – are broad. In particular, the exclusion for when a foreign government or foreign political party merely "influences" the activities of an entity or person represents a dramatic expansion of the circumstances in which FARA might apply to media not eligible for the media exemption. Sources in foreign governments regularly engage in activities that could be characterized in common parlance as "influencing" the press. These include sending newsworthy material or information and requesting that it be covered, or even by writing op-eds or articles for publication. The Proposed Rule fails to define what kinds of "influence" will be considered in evaluating this exclusion. This is apparently deliberate, in light of the Department's stated desire in the Proposed Rule to give itself the "flexibility to determine if such influence is present in any form." Again, were FARA to be applied in this manner, it would violate the First Amendment.

Second, the addition of a totality-of-the-circumstances test in 28 CFR § 5.304(d)(2) to determine whether activities predominantly serve a foreign interest, and therefore require registration, expands FARA's scope to activities that relate to any foreign interest, rather than just that of foreign governments and political parties. This heightens the possibility that FARA could be used to force journalists or news organizations who are editorially independent but have some tie to foreign principals to register. The Department has not provided guidance on how the factors will be weighed or how many need to be present to trigger an exclusion. Indeed, it is unclear from the face of the regulations how some factors affect the analysis at all. The Proposed Rule does not specify, for example, whether making one's relationship with the foreign principal "open and obvious" to the public reinforces application of the exemption or militates against it.

The Reporters Committee recognizes that the Proposed Rule does not, on its face, expand FARA to journalistic activity, and emphasizes that the use of FARA against media organizations based on their reporting would be improper and would present serious constitutional problems. In expanding the Department's enforcement discretion, however, the Proposed Rule would heighten the possibility that FARA could be applied in the future in an arbitrary and unconstitutional way, based on news coverage that the government perceives as critical or unfavorable.

[1] The Reporters Committee does not take a position on other provisions in the Proposed Rule and supports the clarifications around the promotion of recreational or business tourism and to the exemption in § 613(d)(2) that would make it explicit that the exemption applies to noncommercial interests as well as commercial interests.

Additionally, funneling individuals or entities unsure about their registration obligations to the advisory opinion process compounds rather than mitigates the concern over arbitrary or selective enforcement. In addition to the potential for chilling speech because of the burden and expense of going through the process, the fact-specific analysis in the advisory notices themselves could inject uncertainty. At base, it would "impermissibly delegate[] basic policy matters" to the Department "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Finally, the Reporters Committee notes that, were the scope of FARA expanded through the new exclusions in the Proposed Rule, the labeling and disclosure requirements would pose heightened constitutional concerns. Constitutional protections for the exercise of editorial discretion by the press are so high as to sometimes be described as "absolute." *See, e.g.*, *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557 (D.C. Cir. 1984) ("The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers."); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[A]ny such compulsion to publish that which reason tells [an editor] should not be published is unconstitutional."). But requiring informational materials to bear a label that associates the publisher with a foreign principal would in practice compel press to associate their message with that foreign principal. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (explaining law "compelling individuals to speak a particular message" was presumptively unconstitutional content-based regulation of speech). By expanding the universe of individuals or entities that must register, the Proposed Rule risks exacerbating the facial overbreadth inherent in FARA's broad text. And the more overbroad FARA's application, the more the compelled disclosure and labeling requirements could apply to protected speech.

For all the reasons above, we urge the Department to reconsider the Proposed Rule's significant narrowing of the exemption in 22 U.S.C. § 613(d)(2), and to include express protections in any proposed regulation to ensure that First Amendment-protected activity, including newsgathering and reporting, is not swept up in FARA enforcement.

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The Reporters Committee appreciates the opportunity to present these views. Please feel free to contact Gabe Rottman, the Reporters Committee's Vice President of Policy, at grottman@rcfp.org with any questions you may have.

Sincerely,

The Reporters Committee
for Freedom of the Press