LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

ALM.

Volume 29, Number 9 • May 2022

Repairing the Foreign Agents Registration Act

By Harry Sandick and George Carotenuto

Until recently, the Foreign Agents Registration Act (FARA or the Act) was a curious historical and legal artifact with little contemporary relevance. Passed in 1938 in order to prevent a "fifth column" of Nazi supporters from secretly advocating on behalf of Hitler's Germany, Congress enacted FARA in order to require "agents of foreign principals who might engage in subversive acts or spreading foreign propaganda" to register with the Department of Justice. *Viereck v. United States*, 318 U.S. 236, 241 (1943). For decades, the statute laid dormant, with only seven criminal FARA cases initiated between 1966 and 2015. *See,* Office of the Inspector General, Department of Justice, Audit Division 16-24, *Audit of the National Security Division's enforcement and Administration of the Foreign Agents Registration Act*, at 8 (September 2016). In recent years, however, mostly due to the well-publicized prosecution of Trump campaign manager Paul Manafort, FARA has become more of a focus for federal prosecutors. As a result, white-collar attorneys have been consulted more often about whether particular conduct requires registration under the Act.

Lawyers and clients alike have been surprised by FARA's breadth and reach, apparently requiring registration in a host of contexts in which there is no real "agency" relationship between the registrant and the so-called "foreign principal." Given the stigma sometimes associated with registration as an agent of a foreign principal and the logistical burden of registering, many clients would prefer to avoid engaging in certain conduct if that conduct would require FARA registration.

FARA and its implementing regulations are broadly written, with vague and undefined terms complicating the analysis of whether registration is required. With limited FARA litigation, there are very few judicial decisions that clarify the distinction between conduct that requires registration and conduct that is outside the Act's reach. The Department of Justice, however, offers some useful guidance. First, DOJ publishes FARA FAQs on its website. Second, DOJ will respond to written requests for advice about whether registration is required in a given case, and, from time to time, it will publish its responses as advisory opinions on its website in redacted form, organized by particular subject area (such as FARA's various exemptions). While these advisory opinions are useful, they contain little factual detail and sometimes seem to offer inconsistent advice based on similar factual narratives.

Against this backdrop, attorneys who practice in this area were interested to see an Advanced Notice of Proposed Rulemaking (ANPRM) issued by DOJ in December 2021. The ANPRM states that DOJ expects to propose significant revisions to FARA's implementing regulations in the near future. 86 Fed. Reg. 70787 (Dec. 13, 2021). The ANPRM offers interested parties an opportunity to comment on 19 specific questions about FARA posed by DOJ as possible areas for future rulemaking. *See id.* In this article, we consider some possible revisions to FARA's implementing regulations that would make the Act fairer.

Clarifying the Meaning of 'Agency'

FARA defines "agent of a foreign principal" in a very broad fashion, going well beyond the common law definition of agency. Subject to some important exemptions, it includes "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" who engages in any of four

Harry Sandick, a member of the *Business Crimes Bulletin*'s Board of Editors, is a partner in the Litigation Department of Patterson Belknap Webb & Tyler LLP and a member of the firm's White Collar Defense and Investigations team. He can be reached at hsandick@pbwt.com. **George Carotenuto** is an Associate in the firm's Litigation department. He can be reached at gcarotenuto@pbwt.com.

types of activities. 22 U.S.C. §611(c)(1). The four types of covered activities include any individual who:

i. engages within the United States in political activities, such as intending to influence a U.S. government official or the American public regarding U.S. domestic or foreign policy or public interests of a foreign government or a foreign political party
ii. acts within the United States as a public relations counsel, publicity agent or political consultant
iii. solicits, collects, disburses, or dispenses money or things of value
iv. represents within the United States the interests of a foreign principal before the U.S. government.

22 U.S.C. §611(c)(1)(i)-(iv).

As the foregoing makes plain, this sweeping statutory language covers a host of activity that would appear to be outside of the central concerns that animated FARA's drafters. For example, by reaching anyone "whose activities are … indirectly … subsidized … in major part" by a foreign principal, FARA requires registration by many entities that who have little or no direct contact with a foreign principal. Worse still, DOJ does not even offer an interpretation of what many of these statutory terms mean. *See,* Department of Justice, *The Scope of Agency Under FARA* (May 2020) (https://bit.ly/394JxYD). DOJ appears to recognize the difficulty of interpreting this statutory text, admitting unhelpfully that "the exact perimeters" of FARA's reach are "difficult to locate." *Id*. at 3 (quotation marks omitted). For a statute with criminal penalties, this is a remarkable admission by the government. *See*, *Kolender v. Lawson*, 461 U. S. 352, 357 (1983) (holding that a penal statute, to avoid a vagueness challenge, must define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

New FARA regulations should offer concrete advice. First, the regulations should state that agency will be determined primarily by reference to the common law of agency. For example, the Restatement of Agency provides that an agency relationship exists only where the principal and agent agree that the agent will act on behalf, and be subject to the control, of the principal. *See* National Association of Criminal Defense Lawyers, Comment Letter on Advanced Notice of Proposed Rulemaking concerning the Foreign Agents Registration Act at 5 (Feb. 11, 2022) (https://bit.ly/3LaKA7i) (NACDL Letter). Given that there is an established common law meaning for an agency relationship, this would make it easier for people to know whether certain conduct is covered by FARA. New regulations also should clarify that subsidizing covered activity alone, without any direction or actual control by a foreign principal, is not enough to establish agency under FARA. In addition, there should be no agency relationship if the actor has an independent interest in engaging in the political activity at issue. In other words, an organization with a long tradition of environmental advocacy should not be transformed into an "agent of a foreign principal" simply by accepting funding from a non-U.S. organization that supports similar objectives, at least in the absence of electioneering or advocacy to the U.S. government.

Broader Commercial Exemption

FARA contains an exemption for any person who engages in private, nonpolitical activities in furtherance of the bona fide trade or commerce of a foreign principal, or in activities that do not predominantly serve a foreign interest. 22 U.S.C. §613(d). It makes sense that this limitation on the Act's reach would exist for commercial activity, although it is not clear why such a limitation does not also apply more broadly in the context of charitable organizations. (Currently, 22 U.S.C. §613(d) provides an exemption for charitable work that is limited to humanitarian aid: the work must involve "the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering.")

New regulations should address this issue by allowing non-profit organizations to benefit from something akin to the commercial exemption. Additional regulations in this area are critical because DOJ advisory opinions to date have created further confusion about this exemption. For example, a consulting firm for a foreign, state-owned bank was told to register before making compliance outreach to U.S. financial institutions, whereas a public relations firm working for a foreign embassy did not need to register in order to introduce a foreign government official to private industry leaders because those introductions were "private and non-political." *Compare* Department of Justice, National Security Division, Advisory Opinion pursuant to 28 C.F.R. §5.2 concerning Application of the Foreign Agents Registration Act (Feb. 9, 2018) (https://bit.ly/3EBwaLi) (consulting firm) *with* Department of Justice, National Security Division, Advisory Opinion pursuant to 28 C.F.R. §5.2 concerning Application of the Foreign Agents Registration Act (Dec. 21, 2017) (https://bit.ly/381Vgqk) (public relations firm); *see also,* NACDL Letter at 9 (discussing this inconsistency). Those who

seek to determine whether they might face a federal prosecution for failing to register under FARA should not have to parse dozens of advisory opinions to figure out the law.

Stronger Exemption For Religious, Scholastic Or Scientific Pursuits

FARA also contains an exclusion for a person or organization who engages "only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts." 22 U.S.C. §613(e). The regulations provide that this exemption does not apply to any person who engages in "political activities," *see,* 28 C.F.R. §5.304(d), which is defined to include "any activity that the person engaging in believes will, or that the person intends to, in any way 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 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," 22 U.S.C. §611(o).

Given this far-reaching definition, the "political activities" limitation makes this exemption far less useful than it should be. Many artists, scholars, and religious figures seek to influence public opinion in some broad sense, or to make a statement on an issue of domestic or foreign policy. It is not reasonable to expect all of these people to register under FARA simply because they accept funding from a foreign person or organization. For example, as one commenter explained, under the current law, the Americans who helped the French government fundraise for the Statue of Liberty would have been required to register as foreign agents given the political message animating her construction. *See,* International Center for Not-for-Profit Law, Comment Letter, Recommendations to the Justice Department on FARA concerning its Impact on Civil Society (Feb. 11, 2022) (https://bit.ly/3KTGKPY) (ICNL Letter). A better rule would allow the exemption to apply so long as the conduct did not involve some express involvement in elections or lobbying on behalf of a foreign government. In addition, this exemption should be broadened to apply to any advocacy by a nonprofit organization, not only those relating to religious, scholastic, academic, or scientific activities or the fine arts.

First Amendment Concerns

A number of organizations wrote to express their concern about how FARA's vague and sweeping provisions discourage First Amendment activity. *See,* ICNL Letter at 2-5. For example, given the broad definition of political activities, a U.S. nonprofit that arranges a public speaking event in the United States on the subject of human rights in the Sudan at the request of a pro-democracy Sudanese advocate might be engaging in "political activities." *See,* Alliance for Justice et al., Comment Letter on Advanced Notice of Proposed Rulemaking concerning the Foreign Agents Registration Act (Feb. 11, 2022) (https://bit.ly/38WsnfD). Yet this type of activity seems far afield from the concerns that led to FARA's enactment: a Nazi-directed "fifth column" within the United States, seeking to overthrow American democracy. The organizations also raised the concern that a broad statute like FARA can give rise to selective enforcement based on bad faith or other malicious reasons, citing the prosecution in the 1950s of W.E.B. DuBois for allegedly circulating anti-nuclear information at the request of a French anti-war group. *Id.* at 2. These organizations are correct that the current lack of clarity with respect to FARA's scope chills expression protected by the First Amendment.

One question remains: Is FARA's statutory text so broad that it cannot be repaired by DOJ's attempt at regulation? In other words, it may be that congressional action is required to appropriately cabin and clarify FARA. To be sure, congressional action on any issue often seems impossible these days. However, we take some encouragement from the fact that a recent House Judiciary Committee hearing seemed to reflect support for reform from both sides of the aisle. *See, Enhancing the Foreign Agents Registration Act of 1938*, H. Comm. on the Judiciary, 117th Cong. (Apr. 5, 2022) (https://bit.ly/3xISIIq).

In any event, whether by amending the statute or the regulations, it is high time for FARA to be repaired in order to make it clearer and less burdensome for those individuals and organizations who engage in protected expressive or advocacy-related activity without threatening our democracy by becoming a true "agent" of a foreign power.

—❖—