

February 11, 2022

Ms. Jennifer Kennedy Gellie
Chief, FARA Unit
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, DC 20002

**Re: Advanced notice of proposed rulemaking; request for comments
Foreign Agents Registration Act
Docket No. NSD 102; RIN 1105-AB67**

Dear Ms. Gellie:

The Council on Foundations (the “Council”) appreciates the opportunity to provide our input and comments to the Department of Justice (“the Department”) on the advanced notice of proposed rulemaking and request for comments for the Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations.¹

The Council is a nonprofit membership organization that serves as a guide for nearly 800 grantmaking foundations and corporations working to advance the greater good. Our foundation members and our nonprofit partners would benefit significantly from further clarity on each of the regulatory issues outlined below.

As a general matter, we applaud the Department for this Request and strongly believe that the Foreign Agents Registration Act (“FARA” or the “Act”)² must be modernized by updating the regulations.³ Our members, who pride themselves in their independence, can be unwittingly caught up in FARA’s broad regulatory regime, which can then create a stigma of foreign control, burden protected rights under the First Amendment, and significantly impact their mission and ability to help others. The Act, which had the initial goal of exposing Nazi propaganda efforts, should not be used to create a false sense of agency or sweep in activities that have little-to-no foreign nexus, especially activities within the philanthropic sector.

The Department should modernize its approach to the concept and definition of agency,⁴ provide further clarity on the exemptions related to “private and nonpolitical activities,”⁵ and bring the exemption related to “religious, scholastic, or scientific pursuits” into the 21st Century so that it can help organizations to meet the global challenges of today.⁶ While we understand that the Department is somewhat limited in rulemaking due to the overly broad language of the statute, we note that there are opportunities to provide significant clarity that currently reflect an

¹ 86 Fed. Reg. 70787 (December 13, 2021) (hereinafter “ANPRM” or the “Request”).

² 22 U.S.C. § 611, *et seq.*

³ 28 C.F.R. Part 5.

⁴ *See* “Question 1,” 86 Fed. Reg. at 70788. *See also* 22 U.S.C. § 611(c)(1), (2).

⁵ *See* “Questions 3 – 5, 9,” 86 Fed. Reg. at 70788. *See also* 22 U.S.C. § 613(d)(1), (d)(2), (d)(3); *see also* 28 C.F.R. § 5.304.

⁶ *See* “Question 6,” 86 Fed. Reg. at 70788. *See also* 22 U.S.C §613(e); *see also* 28 C.F.R. §5.304(d).

understanding of the true threats to the national security interests of the United States. We have outlined our thoughts below.

Question 1: Scope of Agency. We do not believe that incorporating the “relevant factors” of *agency*, as outlined in the six-part test in the Department’s 2020 Memorandum⁷ will provide any clarity with respect to who would be considered an agent of a foreign principal. We strongly recommend the Department adopt the definition of *agency* in the Restatement of the Law (3d) of Agency.⁸ This definition does not contradict the statutory language and is appropriate considering the Department’s own admission that some of the terms must be read in context with the intent of the provision as a whole.⁹ Providing this straight-forward and universally accepted definition would have the practical effect of capturing true agency in the philanthropic sector.

Questions 3-5, 9: Exemptions for Activities Not Serving a Predominantly Foreign Interest. The regulations interpreting the three exemptions in Section 613(d) of the Act must be clarified and modernized to capture all the activity the Act purports to exempt. Currently, the regulations implementing these exemptions only take into account certain activity by limited actors, which has created both confusion and the prospect of chilling activity and speech.

Currently, 28 C.F.R. § 5.304(c), which relates to Section 613(d)(2), only discusses foreign government-owned corporations without any guidance whatsoever as to applicability of the statutory text to other entities, including those in the philanthropic sector. There is no reason why the exemption for those who engage “in other activities not serving predominantly a foreign interest”¹⁰ would not also apply to charitable organizations, for instance. Nowhere in the text of this particular exemption does it mandate that individuals or entities must be engaged in commercial activity, and the regulations should not be written to assume that to be the case. We recommend that the regulations reflect the fact that the exemption applies across the board to all types of entities, including our members in the philanthropic sector.

Specifically, the current regulation states that those foreign government-owned companies should be allowed the exemption if their activities are not “directed by a foreign government or foreign political party.”¹¹ If this restriction on the exemption related to foreign government or political party direction were to remain in the regulation, we recommend that the exemption not then be further limited. For instance, we believe that the vague restriction on the exemption allowing only those entities whose political activities “do not directly promote the public or political interests of a foreign government or of a foreign political party” be eliminated. This phrase adds no value on top of the previous limitation related to direction and can cause significant confusion over what actions “directly promote” the interests of a foreign government

⁷ See “The Scope of Agency Under FARA,” Department of Justice, available at <https://www.justice.gov/nsd-fara/page/file/1279836/download> (May 2020) (hereinafter “Scope of Agency Memo”).

⁸ See Para. 1.01 (stating “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 or otherwise consents so to act.”).

⁹ For instance, although the term “request” found in § 611(c)(1) is an independent term, the Department has stated, “Although the term “request” is more expansive, we believe that it too must be read to connote some form of authority by the principal over the agent.” See Scope of Agency Memo at 2.

¹⁰ See 22 U.S.C. § 613(d)(2).

¹¹ See 28 C.F.R. § 5.304(c).

or political party. For instance, why should a charitable organization seeking disaster relief for a particular country be prevented from taking advantage of the exemption if such disaster relief would “directly promote” that foreign government’s interest?

The third exemption found in Section 613(d) relates to “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.” The Department should draft regulations that reflect the fact that “assistance” can take a variety of forms outside of medical aid, food, and clothing, and can involve rebuilding infrastructure and other forms of support to a population in need.

Question 6: Exemption for Religious, Scholastic, or Scientific Pursuits. The Department’s regulation limiting the Act’s exemption for religious, scholastic, or scientific pursuits¹² should be completely rewritten. Section 5.304(d), which eliminates the availability of exemption when “any person . . . engages in political activities”¹³ has no foundation in the Act and it should not be a requirement for exemption. Given the broad definition of *political activities* in the Act,¹⁴ it is foreseeable that those who engage in those pursuits outlined in the Act’s exemption would also seek to influence the public, which would be considered *political activities* and create a registration obligation. This outcome appears contrary to the purpose of the exemption in the Act.

In addition to eliminating the no political activities requirement, the Department should draft an implementing regulation that collectively defines these pursuits in a way that would exempt from registration *all* philanthropic pursuits engaged in by entities that qualify under 26 U.S.C. § 501(c)(3). While the terms *religious*, *scholastic*, *academic*, *scientific*, and *fine arts* are used, taken collectively, these categories suggest a type of entity that engages in charitable and philanthropic pursuits as well. This equally important work should be acknowledged by the Department in the implementing regulations.

We look forward to the Department’s next steps on modernizing and clarifying FARA’s implementing regulations and would be happy to provide additional details to assist in this process.

Respectfully submitted,

David Kass
Vice President, Government Affairs
Council on Foundations

¹² See 22 U.S.C. § 613(e).

¹³ 28 C.F.R. § 5.304(d).

¹⁴ See 22 U.S.C. § 611(o).