

Please note: This is the text of the Advance Notice of Proposed Rulemaking (ANPRM) as signed by the Assistant Attorney General for National Security, but the official version of the ANPRM will be as it is published in the Federal Register.

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DEPARTMENT OF JUSTICE

National Security Division

28 CFR Part 5

Docket No. NSD 102

RIN 1105-AB67

Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations

AGENCY: National Security Division, Department of Justice.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Justice’s National Security Division (NSD) anticipates issuing a Notice of Proposed Rulemaking (NPRM) that would amend or otherwise clarify the scope of certain exemptions, update various definitions, and make other modernizing changes to the Attorney General’s Foreign Agents Registration Act (FARA) implementing regulations. The Department is issuing this Advanced Notice of Public Rulemaking (ANPRM) to solicit suggestions for any potential amendments to, or clarifications of, the current FARA implementing regulations.

DATES:

Electronic comments must be submitted and written comments must be postmarked or otherwise indicate a shipping date on or before [INSERT 60 DAYS FOLLOWING PUBLICATION IN FEDERAL REGISTER]. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System at www.regulations.gov will accept electronic comments until 11:59 p.m. Eastern Time on that date.

ADDRESSES: If you wish to provide comments regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1105-AB67 or NSD Docket No. 102, by one of the two methods below:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the website instructions for submitting comments.
- Mail/Commercial Courier: Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: 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.

FOR FURTHER INFORMATION CONTACT: 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; telephone: (202) 233-0776 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this ANPRM via one of the two methods identified above and by the deadline stated above. All comments must be submitted in the English language, or accompanied by an English language translation.

Please note that all comments received are considered part of the public record and made available for public inspection at <https://www.regulations.gov>. Such information includes

personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

The Department may withhold from public viewing information provided in comments that it determines is offensive or may adversely impact the privacy of a third party. For additional information, please read the privacy notice that is available via the link in the footer of <https://www.regulations.gov>.

To inspect the agency's public docket file in person, you must make an appointment with the FARA Unit. Please see the "For Further Information Contact" paragraph above for FARA Unit contact information.

II. Background

The Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.* (FARA or the Act) was enacted to ensure that the government and the American people are aware of people who are acting within this country as agents of foreign principals and are informed about their activities undertaken to influence public opinion or governmental action on political or policy matters. FARA requires that people acting as agents of foreign principals, within the meaning of the statute, make periodic public disclosures of their agency relationship and activities, as well as their receipts and disbursements in support of these activities. Disclosure of the required information allows the American public and government officials to evaluate the agents' statements and activities with knowledge of the foreign interests they serve. The FARA Unit of the Counterintelligence and Export Control Section (CES) in the National Security Division (NSD) is responsible for the administration and enforcement of FARA.

The Act gives the Attorney General the authority to issue “rules, regulations, and forms as he may deem necessary to carry out the provisions” of the Act.¹ Under that authority, the Attorney General has issued regulations covering a range of administrative and enforcement functions.² The regulations were last amended in 2007. The Department is now considering amending and updating the regulations to clarify key substantive provisions, such as the attorney and commercial exemptions. Other changes under consideration would modernize the regulations to clarify how they apply to social media and electronic filing, among other things.

III. Request for Public Comments

Before issuing a NPRM with specific regulatory text for public comment, the Department is seeking preliminary input from the public on the regulations as a whole and in response to the specific questions set forth below:

A. AGENCY

Pursuant to 22 U.S.C. 611(c), an “agent of a foreign principal” is “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 does any of the following:

- Engages within the United States in political activities, such as intending to influence any U.S. Government official or the American public regarding U.S. domestic or foreign policy or the political or public interests of a foreign government or foreign political party;
- Acts within the United States as a public relations counsel, publicity agent, information service employee, or political consultant;

¹ See 22 U.S.C. 620; *see also id.* 612(f), 614(c).

² See 28 CFR 5.1-5.1101.

- Solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value within the United States; or
- Represents within the United States the interests of a foreign principal before U.S. Government officials or agencies.

In addition, 22 U.S.C. 611(p) defines “political consultant” to mean “any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party.”

Question 1: Should the Department incorporate into its regulations some or all of its guidance addressing the scope of agency, which is currently published as part of the FARA Unit’s FAQs on its website? *See* <https://www.justice.gov/nsd-fara/page/file/1279836/download>. If so, which aspects of that guidance should be incorporated? Should any additional guidance currently included in the FAQs, or any other guidance, be incorporated into the regulations?

Question 2: Should the Department issue new regulations to clarify the meaning of the term “political consultant,” including, for example, by providing that this term is generally limited to those who conduct “political activities,” as defined in 22 U.S.C. 611(o)?

B. EXEMPTIONS

1. Commercial Exemptions

Two of the three exemptions in 22 U.S.C. 613(d) apply to “[a]ny person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest.” In 28 CFR 5.304(b), the word “private” is defined to include activities on behalf of a foreign principal that is “owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interests of the foreign government.” For

activities on behalf of state-owned enterprises, 28 CFR 5.304(c) provides that the phrase “not serving predominantly a foreign interest” includes “political activities” that:

- Are “directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporations”;
- Are not “directed by a foreign government or foreign political party”; and
- “[D]o not directly promote the public or political interests of a foreign government or of a foreign political party.”

Because the regulation in 5.304(c) addresses only activities on behalf of state-owned enterprises, it does not provide guidance on whether political activities on behalf of other foreign principals fall within the exemption. The Department is considering issuing regulations to address contexts not currently covered by the existing regulations. The Department is also seeking comment on whether to revise the existing regulations to address the scope of the exemptions, such as by limiting the scope of the exemptions so that they would not apply if the activities promoted—either directly or indirectly—the public or political interests of a foreign government or foreign political party.

Question 3: Should the Department issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises? If so, how should the Department amend the regulation to address when such activities do not serve “predominantly a foreign interest”?

Question 4: Is the language in 28 CFR 5.304(b), (c), which provides that the exemptions in sections 613(d)(1) and (d)(2) do not apply to activities that “directly promote” the public or political interests of a foreign government or political party, sufficiently clear? And does that language appropriately describe the full range of activities that are outside the scope of the

exemptions because they promote such interests, including indirectly? Should the language be clarified, and, if so, how?

Question 5: What other changes, if any, should the Department make to the current regulations at 28 CFR 5.304(b) and (c) relating to the exemptions in 22 U.S.C. 613(d)(1) and (2)?

2. Exemption for Religious, Scholastic, or Scientific Pursuits

This statutory exemption, 22 U.S.C. 613(e), applies to “[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.” The regulation in 28 CFR 5.304(d) provides that this exemption “shall not be available to any person described therein if he engages in political activities as defined in [22 U.S.C. 611(o)] for or in the interests of his foreign principal.”

Question 6: Should the Department issue additional or clarified regulations regarding this exemption to clarify the circumstances in which this exemption applies? If so, how should those additional regulations clarify the scope of the exemption?

3. Exemption for Persons Qualified to Practice Law

This statutory exemption, 22 U.S.C. 613(g), applies to “[a]ny person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States,” provided that for purposes of the exemption “legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.” The exemption applies where a person, qualified to practice law, engages or agrees to engage in the legal representation of a disclosed foreign principal before any court or agency of the

Government of the United States. The regulation at 28 CFR 5.306(a) provides that the exemption does not apply to an agreement to provide legal representation to further political activities, as defined by FARA, to influence or persuade agency personnel or officials, other than in the course of: judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or other agency proceedings required by law to be conducted on the record. The exemption may apply to an attorney's activities that relate to such proceedings so long as the activities do not go beyond the bounds of normal legal representation of a client in the matter.

Question 7: Should the Department amend 28 CFR 5.306(a) to clarify when activities that relate to criminal, civil, or agency proceedings are “in the course of” such proceedings because they are within the bounds of normal legal representation of a client in the matter for purposes of the exemption in 22 U.S.C. 613(g)? If so, how should the Department amend the regulation to address that issue?

Question 8: What other changes, if any, should the Department make to 28 CFR 5.306 to clarify the scope of the exemption in 22 U.S.C. 613(g)?

4. Additional Clarifications of Statutory Exemptions

Question 9: Are there other aspects of the statutory exemptions that the Department should clarify, whether to make clear additional circumstances in which registration is, or is not, required?

C. INQUIRIES CONCERNING APPLICATION OF THE ACT

Any present or prospective agent of a foreign principal, or the agent's attorney, may request from the Assistant Attorney General for National Security a statement of present enforcement intentions (also known as a “Rule 2” or an “advisory opinion”) as to whether the agent has an obligation to register under FARA. These requests must be made in writing to the

FARA Unit. The subject of the request must be an actual event, not a hypothetical situation, and may not involve only past conduct. Any request must be specific and contain in detail all relevant and material information, including the names of the potential agents and principals, the nature of their activities, and a copy of any existing or proposed contract. Responding to each request involves significant attorney research and analysis to address fully the facts presented in the request.

Question 10: Should the Department revise 28 CFR 5.2(i) to allow the National Security Division longer than 30 days to respond to a Rule 2 request, with the time to begin on the date it receives all of the information it needs to evaluate the request? If so, what is a reasonable amount of time?

Question 11: Should the Department include with its published Rule 2 advisory opinions the corresponding request, with appropriate redactions to protect confidential commercial or financial information, so that the public may better understand the factual context of the opinion?

Question 12: What other changes, if any, should the Department make to the current process for using advisory opinions pursuant to 28 CFR 5.2?

D. LABELING INFORMATIONAL MATERIALS

22 U.S.C. 614(b) requires that any informational materials that are or will be disseminated to two or more persons by an agent of a foreign principal contain a “conspicuous statement” that the materials are distributed by an agent of a foreign principal and that additional information is on file with the U.S. Department of Justice. Section 614(b) also provides that the “Attorney General may by rule define what constitutes a conspicuous statement.” The regulations implementing this statutory requirement were last amended in 2003 and do not reflect the challenges of labeling informational materials disseminated through various online media platforms.

Question 13: Should the Department define by regulation what constitutes “informational materials”? If so, how should it define the term?

Question 14: What changes, if any, should the Department make to the current regulation, 22 CFR 5.402, relating to labeling informational materials to account for the numerous ways informational materials may appear online? For example, how should the Department require conspicuous statements on social media accounts or in other communications, particularly where text space is limited?

Question 15: Should the Department amend the current regulation, 22 CFR 5.402(d), relating to “labeling informational materials” that are “televised or broadcast” by requiring that the conspicuous statement appear at the end of the broadcast (as well as at the beginning), if the broadcast is of sufficient duration, and at least once-per hour for each broadcast with a duration of more than one hour, or are there other ways such information should be labeled?

Question 16: Should any changes to regulations relating to the labeling of “televised or broadcast” informational materials also address audio and/or visual informational materials carried by an online provider? And, if so, should the regulations addressing labeling of such audio and/or visual information materials be the same as for televised broadcasts or should they be tailored to online materials; and, if so, how?

Question 17: Should the Department amend 22 CFR 5.402 to ensure that the reference to the “foreign principal” in the conspicuous statement includes the country in which the foreign principal is located and the foreign principal’s relation, if any, to a foreign government or foreign political party; and, if so, how should the regulations be clarified in this regard?

E. E-FILING

The Department now uses an e-File system with web-fillable forms. This system makes it easier for new registrants to keep their registrations current and helps the public search for and download information about FARA registrants.

Questions 18: What changes, if any, should the Department make to its regulations to account for the e-File system that was adopted after the regulations were last updated in 2007?

F. MISCELLANEOUS CHANGES

While administering FARA, the FARA Unit has found that being able to contact agents via business telephone numbers and business e-mail addresses promotes the efficient administration of FARA. Neither the Act nor the current regulations requires agents to provide this information.

Question 19: Should the Department amend 28 CFR 5.1 to require—separate from the registration statements, supplements, and related documentation—that agents provide their business telephone numbers and business e-mail addresses to facilitate better communications with the FARA Unit?

Comments that will provide the most assistance to the Department in issuing a NPRM will be those that answer one or more of the specific questions asked; explain what changes, if any, should be made to the regulations and why; and support that position with accompanying data, information, or legal authority.

In addition to providing comments on the specific nineteen questions listed above, the Department is also seeking input from the public on any other aspect of the current FARA regulatory structure that the public believes should involve the issuance, amendment, or rescinding of any regulation not otherwise identified above.

IV. Regulatory Certifications

This ANPRM has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation. This ANPRM is not a “significant” regulatory action pursuant to Executive Order 12866 and, accordingly, the Office of Management and Budget (OMB) has not reviewed it.

This action does not propose or impose any requirements; rather, this ANPRM is being published to seek information and comments from the public about possible revisions and amendments to FARA’s current regulatory scheme.

The requirements of the Regulatory Flexibility Act (RFA) do not apply to this action because, at this stage, it is an ANPRM and not a “rule” as defined in 5 U.S.C. 601.

Following review of the comments received in response to this ANPRM, if NSD proceeds with a notice or notices of proposed rulemaking regarding this matter, the Department will conduct all relevant analyses as required by statute or Executive Order.

Dated: Dec 7, 2021



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