

The Foreign Agents Registration Act (“FARA”) is an important tool used to combat foreign influence in the United States. It creates transparency by requiring certain agents of foreign principals who are engaged in political activities or other activities specified under the statute to make periodic public disclosure of their relationship with the foreign principal. One “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 may be required to register under FARA.<sup>1</sup> 22 U.S.C. § 611(c)(1).

Along with increased enforcement of the Act, the FARA Unit has increased transparency of its views of various aspects of the statute including by publishing its advisory opinions and determination letters. *See* 28 C.F.R. § 5.2. Consistent with that effort, this guidance is intended to provide greater clarity with respect to the Department’s understanding of a key threshold determination in assessing when the requirements of the Act apply—i.e., the definition of “agent of a foreign principal.” 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. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 76-77 (1976) (recognizing that federal statutes regulating expressive activities must be clear, particularly where “the violation of its terms carries criminal penalties and fear of incurring those sanctions may deter those who seek to exercise protected First Amendment rights” (footnote omitted)).

The purpose of FARA is not to restrict speech, but rather to identify it as the speech of a foreign principal (when fairly attributed), and thus to enable American audiences to consider the source in evaluating the message. As the D.C. Circuit has recognized, “Congress was particularly concerned that registration would not be imposed to stifle internal debate on political issues by citizens sympathetic to the views of foreigners but free from foreign direction or control.” *Attorney Gen. of U.S. v. Irish People, Inc.*, 796 F.2d 520, 524 (D.C. Cir. 1986); *see also* H.R. Rep. No. 89-1470, at 6 (1966) (disclaiming any attempt to regulate actions “of persons who are not, in fact, agents of foreign principals but whose acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal exercise of those persons’ own rights of free speech, petition, or assembly”). FARA does not require registration simply because a person expresses views that are favorable to or coincide with the interests of a foreign country or a foreign person. And the First Amendment protects the rights of U.S. persons to express such views.

Instead, FARA applies to statements by and activities of persons in their capacity as agents of foreign principals within the meaning of the statute. Thus, whether a person is an agent for purposes of FARA depends on whether the relationship between the foreign principal and the

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<sup>1</sup> FARA may also require registration where a person acts as an agent of a foreign principal’s intermediary, i.e., “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.” 22 U.S.C. § 611(c)(1). We do not address the scope of that provision here.

person is such that the latter's enumerated activities<sup>2</sup> within the United States may be fairly attributed to a foreign principal.

The definition of "agent" for these purposes should reflect the text and the purpose underlying the statute. *See Attorney Gen. of U.S. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982) ("*INAC*") ("In determining agency for the purposes of the Foreign Agents Registration Act . . . our concern is not whether the relationship can impose liability on [the] principal but whether the relationship warrants registration by the agent to carry out the informative purposes of the Act."). The statute requires registration when a person is an "agent" of a "foreign principal." 22 U.S.C. § 611(c)(1). Both terms connote a relationship whereby the person has undertaken to act on behalf of the interests of a "foreign principal." The statute proceeds to define the kind of relationships that require such registration. The first clause of the definition of "agent of a foreign principal" in section 611(c)(1) lists categories of relationships at common law that tend to have a formal, ongoing character ("an agent, representative, employee, or servant"). Those terms presuppose a formal and agreed-upon relationship between the principal and agent. *See, e.g., INAC*, 668 F.2d at 161.

The second clause of the definition broadens FARA's concept of agency to reach less formally defined (and more episodic) behavior in "any other capacity" at the "order," "request," or "under the direction or control" of a foreign principal. This expansion of the term "agent" allows FARA to reach conduct that is undertaken on behalf of a foreign principal even without a formal relationship, and it therefore goes beyond the common-law definition of agency. *See id.*; *see also* 22 U.S.C. § 611(c)(2) (defining "agent" to include someone who, *inter alia*, agrees to act as or holds himself out to be an agent as defined in (c)(1) "whether or not pursuant to a contractual relationship").<sup>3</sup> Even so, three of the four operative terms in the second clause ("order," "direction," and "control") convey that the foreign principal exercises some degree of authority over the agent. *See* 28 C.F.R. § 5.100(b) ("[T]he term *control* or any of its variants shall be deemed to include the possession or the exercise of the power, directly or indirectly, to determine the policies or the activities of a person, whether through the ownership of voting rights, by contract, or otherwise").

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 McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) ("While not an inescapable rule, [the canon *noscitur a sociis*] is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.") (internal quotation marks omitted). As the Department of Justice has previously advised, "[i]f we broadly construed the term 'request' to include all forms of argument or persuasion, it would be totally out of line with the other terms, 'agent,' 'order,' and 'direction and control.'" *Inquiry Into the Matter of Billy Carter and Libya:*

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<sup>2</sup> 22 U.S.C. § 611(c)(1)(i)-(iv).

<sup>3</sup> FARA requires that even when no written agreement to act as an agent exists a registrant must provide details of any oral agreement. *See* 22 U.S.C. § 612(c).

Hearings Before the Subcomm. to Investigate the Activities of Foreign Governments of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess., vol. 2, 700, 701 (1980) (statement of Philip B. Heymann, Assistant Attorney General for the Criminal Division) (“Heymann Testimony”). At the same time, however, a mere “request” cannot be equated with an “order,” or require a legally enforceable obligation, as that would violate a “presumption” of construction, “that statutory language is not superfluous.” *McDonnell*, 136 S. Ct. at 2369 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006)). Thus, the Second Circuit has observed that “request” “is not to be understood in its most precatory sense,” but should be read to fall “somewhere between a command and a plea.” *INAC*, 668 F.2d at 161.

The ultimate test for agency under FARA is whether it is “fair to draw the conclusion that an individual is not acting independently, is not simply stating his or her own views, but is acting as an agent or alter ego of the foreign principal.” Heymann Testimony at 701. Although “the exact perimeters of a ‘request’ under the Act are difficult to locate,” and mere persuasion would be insufficient, “the surrounding circumstances will normally provide sufficient indication as to whether a ‘request’ by a ‘foreign principal’ requires the recipient to register as an ‘agent.’” *INAC*, 668 F.2d at 161.

Accordingly, these circumstances must evince some level of power by the principal over the agent or some sense of obligation on the part of the agent to achieve the principal’s request. In assessing whether a person should be viewed as an “agent” for purposes of FARA, the Department will consider relevant factors including:

- “[W]hether those requested to act were identified with specificity by the principal.” *Id.* A foreign government’s general plea to “members of a large religious, racial, or ethnic group . . . for contributions or generalized political support” does not make them agents, if they respond. *Id.* On the other hand, “when a particular individual, or a sufficiently limited group of identifiable individuals, is asked to act, the surrounding circumstances may show that those ‘requested’ are in some way authorized to act for or to represent the foreign principal.” *Id.*
- “[T]he specificity of the action requested.” *Id.* “A general plea for political or financial support is less likely to constitute a ‘request’ under the Act than is a more specific instruction. Once a foreign principal establishes a particular course of conduct to be followed, those who respond to its ‘request’ for complying action may properly be found to be agents under the Act.” *Id.* at 161-62.
- *Whether the request is compensated or coerced.* Compensation may take the form of monetary payments, in-kind benefits, the promise of future business or favorable regulatory treatment, or the like. A foreign government could also leverage conduct through threats or otherwise (for example, through a threat of adverse regulatory treatment of a businessperson’s interests in that country). The presence of compensation or coercion makes it more likely that the person is acting under the direction or control of the foreign principal and not of his own volition.

- *Whether the political activities align with the person's own interests.* In assessing whether a person is acting on behalf of a foreign principal, the Department may consider whether the person appears to be advancing his own interests or those of a U.S. person, on the one hand, or the interests of a foreign principal, on the other. For example, a businessperson may be expected to have his own reasons for advocating for a particular policy change that will benefit him financially (e.g., lobbying against tariffs that make it more expensive for him to import goods from China). But it may be less obvious what an importer would have to gain from how Tibetan monks, Uighurs, and Hong Kong protestors are treated, other than how the Chinese government might reward or punish him for his speech about such matters. See S. Rep. No. 89-143, at 4 (1965) (“The Constitution, which protects the right of U.S. citizens to petition their Government, does not afford the same protection to the citizen who exercises that right at the direction of or in the interests of a foreign principal.”).
- *Whether the position advocated aligns with the person's subjective viewpoint.* Likewise, the fact that a person is persuaded on a matter by a foreign principal and then advances that position is not, standing alone, sufficient to make him an agent. A foreign government's explanation of its point of view, for example, may persuade a policymaker to adopt that position as his own; his subsequent actions in support of that position may be taken of his own accord, not as a function of any agency relationship. See, e.g., *INAC*, 668 F.2d at 161 n.6 (quoting Heymann Testimony at 701). At the same time, the fact that a person and a foreign principal may agree on a particular policy does not necessarily preclude an agency relationship, because lobbyists often agree with their clients' views without losing their status as agents.
- *The nature of the relationship between the person and the foreign principal.* Other considerations may also be evidence of a principal-agent relationship, including whether there is an ongoing relationship between the person and the foreign principal, whether the person's actions are coordinated with the foreign principal, whether the person seeks (or receives) feedback on his performance, the frequency of meetings between the person and the foreign principal, whether the relationship is documented in a written agreement, and whether the action is a one-off or part of a pattern.

The Department's public guidance (through Advisory Opinions or public enforcement actions) has been consistent with the foregoing principles:

- A U.S. businessperson who was an Honorary Consul General of a foreign nation was “spearheading a project of [his/her] own creation” to raise money for a memorial in that foreign country. Because the U.S. person was not acting at the request of the foreign government, we advised that there was no obligation to register (even though, of course, it is likely these actions will burnish the U.S. person's standing in the foreign country and may carry benefits).<sup>i</sup>

- Similarly, when an American was detained abroad, we advised that an advocate who proposed to lobby U.S. government officials to engage with foreign counterparts and take steps to win the American’s release would not be acting on behalf of the foreign government, where the advocate’s motivations were purely humanitarian, and he would have no contractual or other formal relationship with the foreign government (although the foreign government could benefit from any resulting interactions with American officials).<sup>ii</sup>
- On the other hand, a U.S. organization that received 30-50% of its funding from a foreign government was advised to register when its advocacy targeted the interests of Americans from that foreign country, but “coincidentally, [was] also in the interests of the [foreign] people and governments.”<sup>iii</sup>
- Billy Carter may well have wanted a better relationship between Libya and the United States, but when he accepted a \$200,000 loan from the foreign government, his repeated lobbying of U.S. officials “could no longer be regarded as independent behavior that just happened, entirely by chance, to parallel the interests of the Libyan government,” which made it “fair to demand [his] registration” under FARA.<sup>iv</sup>

Department personnel who have questions about the scope of FARA and the parameters of this guidance should contact the FARA Unit. Members of the public may seek advisory opinions with respect to contemplated activities that may implicate FARA as provided by 28 C.F.R. § 5.2.<sup>4</sup>

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<sup>i</sup> Advisory Opinion (Aug. 26, 2011), available at <https://www.justice.gov/nsd-fara/page/file/1070146/download>.

<sup>ii</sup> Advisory Opinion (Feb. 13, 2018), available at <https://www.justice.gov/nsd-fara/page/file/1038886/download>.

<sup>iii</sup> Advisory Opinion (Apr. 4, 2019), available at <https://www.justice.gov/nsd-fara/page/file/1180306/download>.

<sup>iv</sup> Heymann Testimony at 702 (“[W]hen Billy Carter received \$220,000 from Libya, he crossed the line that separates independent conduct from conduct as an agent. His receipt cast a new color on his prior conduct, making it appear less independent, and also making his relationship with the Libyans appear more personal and important to them. At the same time, when he accepted this money he came under an obligation to Libya for the future. His statements and actions could no longer be regarded as independent behavior that just happened, entirely by chance, to parallel the interests of the Libyan government.”).

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<sup>4</sup> Requests for advisory opinions must concern “an actual, as opposed to hypothetical, transaction” and “may not involve only past conduct.” 28 C.F.R. § 5.2.