U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

The Honorable Robert Menendez
Chair
Committee on Foreign Relations
United States Senate
Washington, DC 20510

The Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable James E. Risch
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chair Menendez, Chair Durbin, Senator Risch, and Senator Grassley:

This letter presents the views of the Department of Justice on S. 1724, the "Foreign Agents Disclosure and Registration Enhancement Act of 2021." The Department supports this important piece of legislation.

S. 1724 would authorize the Department's National Security Division to issue civil investigative demands to enhance enforcement of the Foreign Agents Registration Act ("FARA"). The legislation also includes other improvements to FARA. The comments below explain the significance of various provisions in the bill, from the Department's perspective, and offer suggestions to make the legislation even stronger. As we explain below, the bill presents a constitutional concern, which we encourage the Committee to address. We would welcome the opportunity to provide additional technical assistance.

I. Constitutional Concerns

Section 5(c) of S. 1724 would require the Attorney General to submit to the Congress an annual report concerning the issuance of civil investigative demands. The legislation would require the report to include "a description" of "the nature of the conduct" constituting a potential violation of the Foreign Agents Registration Act, a description of the nature of the materials or testimony sought during the investigation; the number of times that the Attorney General sought judicial enforcement of a civil investigative demand and "a detailed description of the circumstances" leading the Attorney General to seek such an order; and a "description of the results" of civil investigative demands including whether the Attorney General ultimately filed charges related to potential FARA violations. Because some of this information may

concern sensitive law enforcement investigations, we recommend making this reporting requirement precatory or clarifying that the Attorney General may withhold sensitive law enforcement information.[1]

II. Policy Comments

Section 2: Authorizing the Attorney General to Issue Civil Investigative Demands to Promote Enforcement of Disclosure Requirements for Agents of Foreign Principals

Section 2 of the bill would authorize the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for National Security to issue a civil investigative demand ("CID") to compel the production of documents, interrogatories, or depositions in support of a civil investigation by the National Security Division concerning compliance with FARA. These provisions would assist greatly the Department's efforts to enforce FARA.

Currently, where the Department suspects that a person is an agent of a foreign principal and has not registered as required by FARA, the Department generally must rely upon that person to provide relevant information voluntarily at our request in order to investigate. Such inquiries—at least initially—generally do not involve suspected criminal violations that would support using criminal tools, such as a grand jury subpoena. In such cases, we lack the authority to compel the production of documents, interrogatories, and depositions to support our civil enforcement efforts. This authority is necessary to obtain all relevant information about the nature of the suspected agent's activities and interactions with a foreign principal, so that the Department can independently determine whether a FARA registration obligation applies. Incomplete voluntary responses to our requests for information, as well as selective or otherwise misleading responses, either leaves the Department unable to assess whether there is a registration obligation or leads the Department to conclude erroneously that the person is not obligated to register. Some counsel even have advised the Department that neither they nor their clients take these informal requests as seriously as they would formal legal process, like a subpoena. The need for a non-criminal, but compulsory, investigative tool is particularly clear where (1) aggressive enforcement must be balanced against significant First Amendment considerations and the conduct under investigation (essentially, forms of speech) is not itself typically criminal, and (2) where a criminal investigation would be more intrusive, burdensome, and consequential for the subject of the investigation than is warranted based on the facts known at the investigation's inception. Consistent with the long-standing approach of the FARA Unit, this investigative tool would be implemented in a manner consistent with the United States' international legal obligations, particularly with respect to the inviolability of a foreign diplomatic or consular mission's archives and documents.

[1] *See Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. O.L.C. 77 (1989).

The bill would provide the Department with the same basic civil investigative tools and remedies with respect to FARA that other Department components use routinely in their civil enforcement efforts, including the Antitrust Division and the Civil Division. *E.g.*, 12 U.S.C. § 5562 (Consumer Financial Protection Bureau); 15 U.S.C. § 1311 *et seq.* (Antitrust Division); 31 U.S.C. § 3733 (Civil Division's Fraud Section). We would be happy to discuss with the drafters any technical issues relating to the CID provisions in the bill.

Section 3: Foreign Agents Registration Criminal Enforcement

Section 3 of the bill would increase the maximum fines set forth in 22 U.S.C. § 618(a)(2) for criminal violations of FARA. For a misdemeanor violation, the fine would increase from $5,000 to $15,000. For a felony violation, the fine would increase from $10,000 to $200,000.

The current criminal fines have not been updated since 1966. While section 3 provides appropriate increases above the current statutory maximum, we recommend raising the maximum fine for the misdemeanor offenses from $5,000 to $100,000 for an agent's failure to label informational materials; failure to provide notice of the agency relationship to government officials (including Congressional committees); violation of the prohibition on contingency fee arrangements; and for acting as an agent of a foreign principal more than 10 days after receiving a deficiency notice from the Attorney General. *See* 22 U.S.C. §§ 614(b), (e), (f); 618(a)(2), 618(g), (h). This amount would be consistent with 18 U.S.C. § 3571(b)(5), which establishes a maximum fine of $100,000 for class A misdemeanors. For felony violations, including the willful failure to register and willfully making false statements or omissions, we recommend increasing the maximum fine from $10,000 to $250,000, consistent with 18 U.S.C. § 3571(b)(3), which establishes a $250,000 maximum penalty for federal offenses that do not specify the amount of the fine.

Section 3 would make it unlawful for an agent of a foreign principal to willfully fail to notify a member of Congress, the staff of a member of Congress, or the staff of a congressional committee that the agent was registered under FARA "before or during any meeting." We support this provision but recommend broadening the disclosure requirement to apply to any engagements between registered agents and legislative branch and executive branch officials, as defined in the Lobbying Disclosure Act. *See* 2 U.S.C. §§ 1602(3), (4). We recommend that the requirement be added to Section 614, not Section 618. Section 614 contains other disclosure obligations to government officials, including to members of Congress. A willful violation of those requirements subjects an agent to a fine or imprisonment or both under Section 618 (a).

Section 4: Foreign Agents Registration Civil Enforcement

Section 4 of the bill would further enhance FARA compliance and enforcement by adding civil penalties for delinquent or defective filings and for other violations. The Department strongly supports this proposal because the authority to impose such penalties would fill a significant enforcement gap. Currently, the Department's civil enforcement authority is

limited to bringing an action in district court for an injunction to mandate compliance. That imposes a high cost on the Department and since the only consequence is an order to comply with the act, the remedy provides little incentive to comply before the issuance of a court order. Pursuing criminal charges for willful violations of FARA's provisions often will be inappropriate or unavailable for the types of common compliance problems we face.

The legislation would create three tiers of violations for which a civil penalty could be imposed.[2] The first tier would apply when a person either "fails to file a timely or complete registration statement" or "fails to file a timely or complete supplement." Such conduct would be subject to a civil penalty of $10,000 or $1,000 per violation, respectively. The second tier would apply to those persons who receive notice of deficient registration statements under Section 8(g) (22 U.S.C. § 618(g)) and who "knowingly fail[] to remedy" certain deficiencies within 60 days after receiving the notice. Such violations would be subject to a civil penalty of up to $200,000 for such a "knowing failure." The third category would apply to any person who "knowingly" fails to comply with any other provision of FARA. A civil penalty of up to $200,000 would apply.[3]

We recommend simplifying the civil penalty structure and eliminating the categories of knowing violations, which impose a standard of proof similar to the willfulness standard for criminal offenses. We recommend imposing a higher maximum civil penalty, which we recommend setting at $100,000, for the failure to register, failure to label informational materials, and failure to make the disclosures required by Sections 4(e) and (f) (22 U.S.C. §§ 614(e), (f)).[4] In the Department's experience, these are the most significant civil violations. A lower maximum penalty, which we recommend setting at $50,000, would apply to failures to remedy deficient filing statements, failures to file timely or deficient supplements, failures to file informational materials with the FARA Unit, and any other violations of FARA. These violations often can be remedied by the registrant and require less of an incentive to compel

[2]The bill uses the terms "civil penalties" and "fines" interchangeably. We recommend using the term civil penalties exclusively so that the language would be consistent with the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 and our implementation of that law, which allows for annual inflationary adjustments of statutory civil penalties recovered by the Department. *See* 28 U.S.C. § 2461 Note; 28 C.F.R. § 85.5; 86 Fed. Reg. 70740 (Dec. 13, 2021).

[3]In each instance, the penalties imposed must be used to defray the costs of enforcing FARA. The Department welcomes this requirement because it would enhance our ability to enforce FARA. Likewise, we approve of the bill's requirement that none of the monies paid as a penalty for failure to file a timely or complete registration statement may be paid by the foreign principal. We would recommend, however, that this provision apply to all the civil penalties.

[4]We also recommend including in this tier new proposed disclosure requirements, as set forth below in Section III.C.

compliance. These penalties could be sought in district court, and the provision could provide factors for the court to consider in setting the amount, including whether the violation was in bad faith or knowing. These penalties are sufficiently high to ensure agents do not simply consider the risk of non-compliance as a cost of doing business, but they are not so high as to approach the amounts set for criminal fines.

We would be happy to work with the drafters to craft appropriate language to address these civil penalty issues.

Section 5: Comprehensive Strategy to Improve Enforcement and Administration

Section 5(a) would require the Department to develop and implement a comprehensive strategy to improve enforcement and administration of FARA within 120 days. Section 5(b) would require the Department's Inspector General to submit to the Congress within one year a report regarding (1) the extent to which the Attorney General has developed and implemented the strategy, and (2) the usage, effectiveness, and any potential abuse of the CID authority granted in the legislation. Section 5(a)(3) would require the Department to assess the appropriateness of the exemptions under section 3 of FARA, under which persons who represent the interests of foreign principals are otherwise exempt from the statute's registration obligations. Section 5(c) would require the Department to submit an annual report to the Congress detailing the usage in the preceding year of the CID authority granted in the legislation, including, among other things, the number of CIDs issued; the nature of the conduct under investigation; the provisions of FARA alleged to have been violated; the nature of information received from the CID; whether the Department filed charges after issuing a CID; and information related to all petitions for orders for the enforcement of CIDs. Section 5(d) would require the Department to submit a report two years after the date of the enactment regarding steps that could be taken to permit electronic filing by registrants.

We support the requirements of Section 5. As noted above, however, we recommend amending section 5(c) to protect the Attorney General's ability to protect sensitive law enforcement information. We would be happy to recommend additional technical changes to some of the reporting requirements in section 5(c) to ensure that they are tailored appropriately to protect the Department's investigations while accommodating the Congress's proper oversight role. We also believe that subsection 5(d) is unnecessary. That subsection would require a report two years after enactment of this bill addressing steps that we can take to implement electronic filing. This provision is unnecessary because FARA registrants have filed registrations electronically since 2011, and the Department is currently in the process of transitioning the remaining legacy registrants to the electronic filing system. Once this process is complete, all registrations will be entered in a structured data format, allowing for improved search functionality across FARA filings.

Section 6: Analysis by the Government Accountability Office

Section 6 of the bill would require an analysis by the Comptroller General three years after enactment regarding the effectiveness of enforcement and administration of FARA. We have no objection to this requirement.

Section 7: Audit of the Lobbying Disclosure Act ("LDA") Exemption under FARA

Section 7 of the bill would require the Comptroller General, in consultation with the Attorney General and the Department's Inspector General, to conduct an audit of the use of the FARA exemption for LDA registrants and to submit recommendations to Congress. Such a provision is unnecessary. In 2016, the Department's Inspector General recommended that our National Security Division assess the LDA exemption and determine whether the Department should seek its repeal. The Division conducted the assessment and concluded that the LDA exemption should be removed from FARA. Accordingly, rather than supporting an audit on the efficacy of the LDA exemption, the Department would support its repeal.

In 1995, Congress enacted the Lobbying Disclosure Act to bring greater accountability to federal lobbying practices, and, in so doing, amended FARA to add an exemption for those who lobbied on behalf of foreign commercial interests and registered under the LDA. *See* 22 U.S.C. § 613(h). In the more than a quarter century since, however, LDA registration has not proven to be an adequate substitute for transparency when FARA's requirements would otherwise apply. Besides the less rigorous LDA disclosure requirements applicable to those who lobby on behalf of foreign commercial interests, the Department has found that foreign governments increasingly use state-owned enterprises for a mix of commercial and geo-political strategic purposes, making it more difficult to disentangle agents for foreign commercial interests (who may obtain the LDA exemption) and those who are agents for foreign governments and political parties (who are not eligible for the LDA exemption). As such, the FARA exemption for LDA registrants can shield from the more rigorous FARA disclosure obligations persons who would otherwise be FARA registrants engaged in furthering (directly or indirectly) the public or political interests of a foreign government. Indeed, when a person invokes the LDA exemption, even if the conduct falls outside the exemption, the mere existence of the exemption can make it difficult to prove the LDA was being used to willfully violate FARA, as an LDA registrant can attempt to claim a mistaken reliance on the exemption.

Removing the FARA exemption for LDA registrants would close this problematic gap in FARA without requiring registration by agents engaged in ordinary commercial activities. The commercial exemption would continue to apply for those who engage only in "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of the foreign company or "in other activities not serving predominating a foreign interest." 22 U.S.C. §§ 613(d)(1), (2).

III. Additional Amendments to FARA

The Department is currently working on its own legislative proposal, which it hopes to be able to discuss with your staff in the near future. We believe that S. 1724 presents an opportunity to make several additional, beneficial changes to FARA that the Department is exploring, and we would welcome working with your staff on these changes.

* * *

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

CARLOS URIARTE Digitally signed by CARLOS URIARTE Date: 2022.11.21 12:05:19 -05'00'

Carlos Felipe Uriarte
Assistant Attorney General