Jennifer Kennedy Gellie
Chief, Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice
FARA Unit
175 N Street NE, Constitution Square, Building 3—Room 1.100
Washington, DC 20002

March 3, 2025

Dear Chief Gellie,

We the undersigned organizations write in response to the Notice of Proposed Rulemaking (NPRM) issued by the Justice Department on January 2, 2025 to solicit feedback for amendments to the regulations of the Foreign Agents Registration Act (FARA). We believe that FARA, and the Justice Department's proposed regulatory changes to the Act, raise clear First Amendment concerns. President Trump in his Executive Order on Restoring Freedom of Speech (Jan. 20, 2025) stated that it is U.S. government policy to "secure the right of the American people to engage in constitutionally protected speech." However, these proposed regulations fail to address vague provisions in FARA that can chill constitutionally protected activity and instead aggravate the Act's ambiguity, providing the Justice Department undue discretion that can be used in a politicized manner. The proposed regulations should be withdrawn or substantially rewritten to address these concerns.

On its face, FARA is strikingly sweeping. It imposes significant registration, disclosure, recordkeeping, and labeling burdens on anyone acting as an "agent" of a "foreign principal," and engaging in a broad set of covered activities, with potential criminal prosecution for noncompliance. A "foreign principal" under the Act can be a foreign government or political party, a foreign corporation, a foreign nonprofit, a foreign religious institution, a foreign individual, or even an American domiciled abroad. An "agent of a foreign principal," pursuant to the Act, can be someone merely acting at the "request" of that foreign principal. Finally, the Act covers a broad range of activities, including engaging in "political activities," which is defined to include any activity to influence "any section of the public in the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States," or engaging as a "political consultant," which includes "informing . . . any other person with reference to the domestic or foreign policies of the United States . . . . "

While the Justice Department has generally focused on enforcement of the Act in certain areas, like government lobbying, it has not shied away from enforcing it in other contexts. For example, the Department required a church in Pennsylvania to register for printing out banners at the "request" of congregants coming from Europe for the March for Life Rally.

According to the Department, in printing out the banners the church acted as a "publicity agent" of the foreign congregants – a registrable activity under FARA.

The Justice Department acknowledges that FARA takes in a broad sweep of activity that makes it susceptible to "abuses" by prosecutors. On February 5, 2025, Attorney General Bondi issued a memo on Department charging policies directing prosecutors to rein in their use of FARA by "limit[ing]" prosecutions to conduct that is "similar to more traditional espionage by foreign government actors."

The breadth of FARA means its scope is difficult to navigate. The Justice Department, for instance, has issued over 80 advisory opinions on the Act's "agency" definition alone. Indeed, a wide range of expressive and associative activity protected by the First Amendment can, in theory, fall under the Act's vague and sweeping provisions. For example, a U.S. nonprofit that arranges a public speaking event in the United States on human rights in Cuba at the "request" of a pro-democracy Cuba advocate living in Spain might be engaging in "political activities" as defined by FARA. FARA might similarly be interpreted to cover a journalist in the United States writing a story about U.S. immigration policy, at the request of their Canadian newspaper, that is accessible online by the U.S. public. Or a U.S. group simply responding to a "request" for factual information from an overseas partner about U.S. anti-sex trafficking laws might be considered a "political consultant" under FARA. Many entities and individuals that prefer not to register can be chilled from engaging in any expression that might trigger the Act's criminal penalties—even if that expression is protected by the First Amendment.

FARA imposes significant burdens on the expressive activity of those who need to register. The Act requires impacted organizations and individuals to register as foreign agents with the National Security Division of the Justice Department. Organizations and relevant employees must provide and frequently update publicly available records of activities covered under the Act or face significant criminal penalties. Registered organizations also face periodic audits of their records by the Justice Department. For any materials covered by the Act—which include "any information materials . . . disseminated or circulated among two or more persons" by agents of foreign principals—organizations must place a conspicuous statement that the materials are being distributed on behalf of a foreign principal. Some U.S. nonprofits have decided not to engage in First Amendment protected conduct rather than deal with these costs of registering under FARA.

Given the Act's sweeping nature, the burdens of registration, and the significant stigma associated with registration, FARA can easily enable selective enforcement for bad faith or malicious reasons, such as governmental hostility towards the content of the targeted activity. During the McCarthy era in the 1950s, the Justice Department prosecuted W.E.B. DuBois under the Act for allegedly circulating an anti-nuclear weapon petition at the "request" of a French anti-war nonprofit. Attorney General Bondi in her February 2025 charging memo recognized this potential for the "weaponization" of FARA and statutes like it.

The Justice Department's proposed regulations exacerbate First Amendment concerns created by the Act. While we agree with the Justice Department that FARA's "domestic interest" exemption (22 U.S.C. 613(d)(2)) should be interpreted to apply to both commercial and noncommercial actors, the Department's proposed two part test for applying the exemption, including its "non-exhaustive" set of factors to consider, is vague and creates confusion about what activity qualifies for this important exemption. Similarly, in declining to provide more clarity about the definition of an "agent of a foreign principal" or "political consultant", the Department further perpetuates the ambiguity in the Act of what is registrable activity. This can chill First Amendment protected conduct and provides the Justice Department too much discretion to decide when it will – and will not – require registration.

FARA's overbreadth and vagueness can undermine First Amendment rights to speech and association and the statute has a history of being used to target undesirable expressive conduct. Many of the First Amendment concerns raised by the Act can only be fully addressed through amending the underlying legislation. However, as the Justice Department considers adopting new regulations for FARA, it should adopt regulations that narrowly interpret the elements of the statute most susceptible to overbroad misreading in order to ensure that enforcement of FARA has the least restrictive effect on First Amendment protected speech and conduct. As such, these proposed regulations should be withdrawn or substantially rewritten to address these concerns. For any questions please contact Nick Robinson at nrobinson@icnl.org.

Sincerely,

American Civil Liberties Union (ACLU)
Americans for Prosperity
Charity & Security Network
Earthjustice
Foundation for Individual Rights and Expression (FIRE)
Institute for Free Speech
International Center for Not-for-Profit Law (ICNL)
Knight First Amendment Institute at Columbia University
National Coalition Against Censorship (NCAC)
PEN America
People United for Privacy Foundation
60 Plus Association