PROPAGANDA BY PERMISSION: EXAMINING "POLITICAL ACTIVITIES" UNDER THE FOREIGN AGENTS REGISTRATION ACT

Tarun Krishnakumar[*]

ABSTRACT

Enacted in response to the spread of Nazi propaganda and other subversive material in the interwar period, the Foreign Agents Registration Act ("FARA") remains at the vanguard of exposing, and thereby deterring, foreign influence campaigns within the United States.

Adopting a disclosure-based approach, FARA prioritizes information symmetry and transparency over the prohibition of any specific activities or content. Under the statute, individuals and entities (agents) acting on behalf of foreign principals are required to register, disclose their ongoing activities, and file copies of material circulated on behalf of their principals. Notably, agents are required to make "detailed" disclosures regarding activities considered "political" in nature, as defined by the statute. Of the activities covered under FARA, "political activities" are potentially the most impactful in nature and, if unchecked, can cause the most harm.

These filings are intended to place stakeholders, including the American public, on notice about the activities of foreign agents within the U.S. Within this context, the quality and level of disclosures made by agents under FARA are not only standards for compliance but also determine the overall effectiveness of a statute that is premised on bringing transparency to foreign influence efforts. This question of effectiveness assumed all the more importance within context of recent concerns around foreign interference in U.S. democratic processes.

[*] The author is an attorney admitted to practice law in the United States (California) and in India. He received his legal education from the National Law School of India University, Bangalore and Georgetown University Law Center, Washington D.C. Among other affiliations, he has also served as a consultant to the Foreign Influence Transparency Initiative ("FITI"), housed at the Center for International Policy in Washington, D.C. His writing around FARA and global policy responses to foreign influence has featured in a number of online portals and blogs, including Just Security, the Harvard Journal of International Law, and RUSI's Newsbrief. The author is grateful to Ben Freeman, Director of FITI, for his encouragement to pursue this line of research and for his comments on an earlier draft of this Article. All views expressed in this Article are personal and all errors are solely the author's. This Article considers filings and forms available on the FARA.GOV database as were current and available online at the end of March 2020.

Comprehensive disclosures which provide sufficient notice and details of the "political activities" of an agent help achieve the underlying transparency-linked objectives of FARA, while vague or incomplete filings have the opposite effect. After providing a background to FARA, this Article studies this issue first, by seeking to draw out the background, development, and surprisingly ambiguous legal standards that disclosures of agents' "political activities" must adhere to. Second, based on an survey of a sample set of filings made under FARA, it analyzes if these standards are adhered to in practice. Learnings from this exercise are then used to evolve recommendations to strengthen the capacity of FARA to counter foreign influence operations.

INTRODUCTION

The history of influence activities is indistinguishable from the history of governments in general. For as long as empowered individuals and groups have been responsible for governing societies, others have sought to influence them and their decision-making.[1] In the words of one author, such activities are both "natural and inevitable."[2] Despite their longevity, the methods, origins, and targets have evolved over time.[3] While most types of influence activities—such as lobbying[4]—are legal, there remains a need to continually review and evolve the statutes intended to check less-welcome, covert, and undue forms of influence within a country's democratic sphere. With recent controversies in the space being triggered by concerns around Russian-origin information operations, fake news, and election interference,[5] the spotlight has shifted to sources of influence emanating across international borders and the effectiveness of the legal frameworks intended to counter them.

Within this context, a key statute within the U.S. that aims to regulate foreign-origin influence activities is the Foreign Agents Registration Act ("FARA"), originally enacted in 1938.[6] Rather than prohibiting any specific type of influence activity or material, FARA requires that individuals and entities acting on behalf of foreign principals ("foreign agents" or "registrants") register and disclose information about their activities. These disclosures are intended to ensure that stakeholders, including the American public and members of the executive and legislative branches of government, are placed on notice about the identities of foreign agents and their activities.[7]

While recent controversies have resulted in renewed scrutiny of FARA and gaps in its disclosure-based approach, existing literature fails to analyze questions around the *quality* of disclosures made by agents under the statute. This Article crucially aims to fill this gap in scholarship, vague, insufficient, or inaccurate filings, if unchecked, have the potential to call into question the very foundations of the disclosure-based approach upon which FARA is premised. In other words, if FARA – as a statutory framework – is not effective *in practice*, the U.S. remains susceptible to foreign-origin influence operations. An ineffective FARA would not only result

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[1] LIONEL ZETTER, LOBBYING: THE ART OF POLITICAL PERSUASION 8 (2d ed. 2011).

[2] *Id.* (emphasis added).

[3] *Id.* at 8–9; THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING: PURSUING POLITICAL INTERESTS IN AMERICA 20–30 (2016) (chronicling the evolution of the lobbying and the right to petition through history).

[4] For a legal definition of the term, see Disclosure of Lobbying Activities, 2 U.S.C. § 1602(7) (2020); anecdotally, the term "lobbying" itself is said to have emerged in Washington in the 1860s. *See* ZETTER, *supra* note 1, at 8 ("Those seeking to influence President Ulysses S Grant would congregate in the lobby of the Willard Hotel and try to attract the great man's attention as he headed towards the hotel bar, in order to raise specific areas of concern with him. Legend has it that after a while President Grant tired of their attentions and referred them scornfully as lobbyists.").

[5] *See, e.g.*, OFF. OF THE DIR. OF NAT'L INTEL., BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS" THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf; ELIZABETH BODINE-BARON ET AL., COUNTERING RUSSIAN SOCIAL MEDIA INFLUENCE, RAND CORP. (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2740/RAND_RR2740.pdf.

[6] Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2018)).

[7] H.R. REP. NO. 75-1381, at 2 (1937).

in poorer transparency in relation to covered activities, but also create a slippery slope for state and non-state actors to engage in more pernicious influence activities.

Similarly, this issue has received negligible attention in the enforcement context[8]—which has largely focused on undisclosed agents or those who make false statements to government.[9] Within this context, this Article aims to shed new light on issues relating to the quality of FARA disclosures by: (1) analyzing the legal standards for the *level of detail* FARA filings disclosing "political activities" of foreign agents must adhere to; and (2) studying, through an empirical analysis of recent (Exhibit B) filings, whether these standards are adhered to in practice.

As background to this exercise, Part I briefly outlines the evolving historical role of foreign agents in the U.S., while Part II provides a high-level introduction to FARA and the obligations under it. Part III discusses the legal standards governing *specificity* and *detail* to be adhered to by registrants. It argues that disclosures concerning "political activities" must be "detailed" even though regulations issued under FARA[10] do not expressly operationalize this standard. Part IV attempts to apply this legal standard to a dataset consisting approximately 140 FARA filings to understand trends in compliance, or lack thereof. Part V concludes by summarizing findings and applying these learnings to formulate priority areas for future research, study, and reform.

I. FOREIGN AGENTS THROUGH HISTORY: A SNAPSHOT

The roles, as well as perceptions, of foreign agents have evolved with changes in government and politics. Early lobbying efforts in the newly founded U.S. centered on issues of general federal (domestic) significance such as tariff legislation, railroad construction, industrial development, and treasury matters. However, the broadening agenda of Congress contributed to stark increases in the number of lobbyists as well as the diversity of issues they sought to represent.[11]

Initially though, such agents were employed by governments to assist in the conduct of diplomatic relations with foreign states. For instance, as early as 1786, in the "early stages of modern diplomacy," foreign nationals were appointed to serve as agents of the U.S. abroad. Agents in Morocco were empowered to "act in behalf of any American citizen who . . . may have occasion for [their] service, or to transmit to [the King of Morocco] . . . any letters or papers from the Congress."[12] Similarly, foreign nationals were appointed to represent U.S. interests as consul or consular

[8] U.S. DEP'T. OF JUST., OFF. OF THE INSPECTOR GEN., AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT 8–21 (2016), https://oig.justice.gov/reports/2016/a1624.pdf.

[9] CAPLIN & DRYSDALE, *Criminal Enforcement Summaries*, WWW.FARA.US, https://fara.us/criminal-enforcement-summaries/ (last visited May 15, 2020) (listing recent and historic criminal enforcement actions under FARA).

[10] 28 C.F.R. §§ 5.1-1101 (2007).

[11] *Lobbyists*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/Byrd_History_Lobbying.htm (last visited May 15, 2020) (providing an essay by Sen. Robert C. Byrd delivered on Sep. 28, 1987); *see also* Robert C. Byrd, *History of Lobbying: An Essay*, 85 CONG. DIG. 130, 130–31 (2006).

[12] *Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearing Before the S. Comm. on Foreign Rels.*, 88th Cong. 7–8 (1963) [hereinafter Ball Statement] (statement of the Hon. George W. Ball, Under Secretary of State).

agents abroad, including in Copenhagen (1792–1817), Bremen (1796–1826), and the Balearic Islands (1820–1835).[13]

Over time, foreign agents assumed roles in the lobbying, public relations, and legal spheres. For instance, agents began to be dispatched to advance U.S. interests abroad including pioneering missions to "stir up sentiment against the Anglo-French Anti-Slave Trade Treaty," and influence "European public opinion in favor of the Union cause in the Civil War."[14] Parallelly, foreign interests sought to influence Congress with notable instances including Canadian lobbying in support of the Reciprocity Treaty of 1854, and Russian efforts to lobby through the appropriations bill authorizing the payment of the $7,200,000 purchase price for Alaska in 1868.[15]

For the most part, these activities — including those conducted by foreign agents within the U.S. — were not seen as pernicious. On the contrary, as later acknowledged in State Department testimony before Congress, a foreign agent could play beneficial roles: "often serv[ing] as an interpreter of systems and habits of thought — as a medium for bridging the gulf of disparate national experiences, traditions, institutions, and customs."[16]

However, global conflicts — and their surrounding political currents — worsened perceptions around the activities of foreign agents in general. Ultimately, Congressional intervention in 1917 was stimulated by reports of English and German foreign agents "acting largely with impunity on domestic soil" in the lead up to U.S. involvement in World War I in conjunction with concerns that the federal counterintelligence machinery at the time was "fragmented and ineffective."[17] As part of the resulting Espionage Act, Congress required anyone acting as an agent of a foreign government to notify the Secretary of State. Commonly referred to as the Notification Statute[18] or "espionage-lite," this requirement is often confused with FARA.[19]

In 1938, similar concerns around the activities of Nazi and communist propagandists within the U.S. in the interwar period led to the enactment of FARA[20]— the statute central to this Article. These actors were found to engage in propaganda "aimed arbitrarily to group certain American citizens and persons in the United States . . . to inculcate [in them] such principles and teachings" so as to

[13] *Id.*

[14] *Id.*

[15] *Id.* at 9; Milton O. Gustafson, *Seward's Bargain: The Alaska Purchase from Russia*, PROLOGUE MAG. (Winter 1994), https://www.archives.gov/publications/prologue/1994/winter/alaska-check.

[16] Ball Statement, *supra* note 12, at 11.

[17] John F. Fox Jr., *Bureaucratic Wrangling over Counterintelligence, 1917–18*, CIA LIBR. (2005), https://www.cia.gov/resources/csi/studies-in-intelligence/volume-49-no-1/bureaucratic-wrangling-over-counterintelligence-1917-18/.

[18] 18 U.S.C. § 951 (2020) (requiring registration of individuals, other than diplomatic or consular officials, acting within the United States as 'agents of foreign governments' (defined in 18 U.S.C. § 951(d) (2020)). *See also Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of the Honorable Michael Horowitz, Inspector General, U.S. Dep't of Just.) See, in particular, response to Question No. 5.

[19] *See, e.g.*, Matthew Kahn, *No, Maria Butina Wasn't Charged With Violating FARA*, LAWFARE (Jul. 27, 2018, 12:22 PM), https://www.lawfareblog.com/no-mariia-butina-wasnt-charged-violating-fara; *FARA Related Statutes*, U.S. DEP'T OF JUST., https://www.justice.gov/nsd-fara/fara-related-statutes (last visited May 15, 2020) (noting that registration under FARA serves as the requisite notification under 18 U.S.C. § 951).

[20] Ball Statement, *supra* note 12, at 12; H.R. REP. NO. 75-1381, at 1–2 (1937).

influence U.S. policy.[21] According to a 1937 Committee Report, "incontrovertible" evidence proved that:

> [M]any persons in the United States representing foreign governments or foreign political groups . . . [were] supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country . . . .[22]

Despite these concerns, rather than prohibiting these activities or restricting circulation of such material, FARA espoused a disclosure-based approach. As originally enacted, the statute required foreign propagandists to register with the State Department[23] and make disclosures concerning their activities.[24] In this manner, it was intended that the government and the American people would know "who are engaged in this country by foreign agencies to spread doctrines alien to [the American] democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question"[25] or, in other words, "who they were, where the propaganda came from, and who was paying for it."[26] At the time of enactment, it was hoped that FARA would focus "the spotlight of pitiless publicity"[27] on foreign agents and force them to come out "in[to] the open" or subject themselves to penalties.[28] However, if nothing else, alongside growing U.S. prominence in global affairs, the number of foreign agents registered under FARA has only increased over time.[29]

II. FARA IN THE MODERN CONTEXT

Despite having undergone a significant number of amendments since its enactment,[30] FARA — as currently in force — continues to emphasize information gathering and disclosures over outright prohibition of any foreign agent conduct.[31] At the same time, its focus has since shifted from propaganda and subversive material

[21] H.R. REP. NO.75-1381, at 1–2. *See also* H.R. REP. NO. 74-153 at 1 (1935) (Report of committee tasked with investigating Nazi propaganda); CYNTHIA BROWN, CONG. RSCH. SERV., R45037, THE FOREIGN AGENTS REGISTRATION ACT (FARA): A LEGAL OVERVIEW (2017), https://fas.org/sgp/crs/misc/R45037.pdf.

[22] H.R. REP. NO. 75-1381, at 1–2.

[23] Subsequent to comprehensive amendments to FARA in 1942, responsibility for administering and implementing the statute was transferred to the Department of Justice.

[24] Foreign Agents Registration Act, Pub. L. No. 75–583, §§ 2–5, 52 Stat. 631, 632–33 (1938).

[25] H.R. REP. NO. 75-1381, at 2.

[26] Ball Statement, *supra* note 12, at 10; *see also* S. COMM. ON FOREIGN RELS., 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT 1–3 (Comm. Print 1977).

[27] H.R. REP. NO. 75-1381, at 2.

[28] *Id.* at 3.

[29] S. REP. NO. 89–143, at 4 (1965) ("Since the Second World War, and particularly since the end of the Korean war, U.S. oversea commitments—both political and economic—have grown markedly. In this same period, foreign governments along with foreign political and commercial interests became more active in attempting to influence the direction of our policies.").

[30] BROWN, *supra* note 21, at 2 (containing a general overview of the amendments to FARA since enactment in 1938).

[31] Jacqueline Van De Velde, *The "Foreign Agent Problem": An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations*, 40 CARDOZO L. REV. 687, 700 (2018).

to lobbying and political activities conducted by foreign agents.[32] In the words of the Senate:

> The original target of foreign agent legislation—the subversive agent and propagandist of pre-World War II days—has been covered by subsequent legislation, notably the Smith Act. The place of the old foreign agent . . . has been taken by the lawyer-lobbyist and public relations counsel whose object [is not] to subvert or overthrow the U.S. Government, but . . . to influence its policies to the satisfaction of his particular client.[33]

Subsequent lobbying reforms in the 1990s further restricted the applicability of FARA to agents of foreign governments and foreign political parties — with agents of other foreign entities (such as corporations) permitted to register under the less-stringent Lobbying Disclosures Act ("LDA").[34]

The requirements of FARA, in its current form, are facially straightforward. Under the statute, agents[35] undertaking certain activities on behalf of foreign principals,[36] are required to register with the Department of Justice ("DOJ")[37]; engage in periodic supplemental filing[38]; file copies of informational materials they distribute on behalf of their principal[39]; and maintain records of their activities.[40] Activities which trigger registration and filing requirements for foreign agents include: (1) engaging in "political activities"[41] as defined by FARA; (2) acting as a public relations counsel[42]; publicity agent,[43] information-service employee,[44] or political consultant[45]; (3) soliciting, collecting, or disbursing things of value on behalf of a

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[32] S. COMM. ON FOREIGN RELS., 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT 1–3 (Comm. Print 1977).

[33] S. REP. NO. 89-143, at 4, 2 (1965) (noting that "the increased tempo of nondiplomatic activity has picked up in almost direct proportion to [the United States'] growing political, military, and economic commitments around the world").

[34] S. COMM. ON FOREIGN RELS., *supra* note 26; H.R. REP. NO. 104-339, at 21–22 (1995). Explaining in relation to § 9 of H.R. 2564:

> Under this Section, a lobbyist for a foreign commercial entity is required to register under the Lobbying Disclosure Act and a lobbyist for a foreign government or foreign political party is required to register under FARA. With this distinction, agency law as currently applied to FARA remains unchanged. For example, a lobbyist for a foreign corporation that is owned by a foreign government will register under the Lobbying Disclosure Act, rather than under FARA, so long as the lobbyist's political activities are in furtherance of the bona fide commercial, industrial or financial operations of the foreign corporation.

H.R. REP. NO. 104-339, at 21–22.

[35] 22 U.S.C. § 611(c) (2020) (defining the term "agent of a foreign principal").

[36] *Id.* § 611(b) (defining the term "foreign principal").

[37] *Id.* § 612(a) (requiring "agents of foreign principals" to register with the Attorney General by filing a complete registration statement along with required supplements thereto).

[38] *Id.* § 612(b) (requiring "agents of foreign principals" to file half-yearly statements supplementing registration statements).

[39] *Id.* § 614(a).

[40] *Id.* § 615 (requiring "agents of foreign principals" to keep and preserve books of account and other records with respect to activities).

[41] *Id.* § 611(o). *See also* BROWN, *supra* note 21, at 5.

[42] *Id.* § 611(g) (defining "public-relations counsel").

[43] *Id.* § 611(h) (defining "publicity agent").

[44] *Id.* § 611(i) (defining "information-service employee").

[45] *Id.* § 611(p) (defining "political consultant").

principal[46]; and (4) representing foreign principals before federal agencies or officials.[47]

The primary filings required for covered entities under FARA include: (1) registration documents[48] consisting of an initial registration statement with necessary exhibits (Exhibit A,[49] B,[50] C,[51] and D[52]), supplemental statements at six-month intervals,[53] and short form registration statements where applicable[54]; (2) copies of information materials circulated by the agent on behalf of the foreign principal — whether in printed or other form[55]; and (3) other (non-periodic) filings including amendments to filed documents,[56] and conflict provision filings.[57]

Certain categories of foreign agents, otherwise covered, are exempt from registration and filing requirements under FARA. These exemptions apply to diplomatic and consular officers[58] as well as their staff [59]; foreign government officials [60]; persons engaged in private non-political activities in furtherance of trade or commerce [61]; persons engaged in religious, scholastic, academic, or scientific pursuits [62]; persons qualified to practice law [63]; and agents who have registered under the LDA.[64]

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[46] *Id.* § 611(c)(1)(iii).

[47] *Id.* § 611(c)(1)(iv).

[48] 28 C.F.R. §§ 5.200-5.201 (2020) (detailing the filings requirements associated with registration under FARA).

[49] *Id.* § 5.201(a)(1) (detailing that Exhibit A "shall be filed on a form provided by the Registration Unit" and "shall set forth the information required to be disclosed concerning each foreign principal").

[50] *Id.* § 5.201(a)(2) (detailing that Exhibit B shall set forth "the agreement or understanding between the registrant and each of his foreign principals as well as the nature and method of performance of such agreement or understanding and the existing or proposed activities engaged in or to be engaged in, including political activities, by the registrant for the foreign principal").

[51] *Id.* § 5.201(c). This statute explains that Exhibit C is to be filed by registrants which are organized as associations, corporations, organizations, or other combinations and is to consist of:

> (1) A copy of the registrant's charter, articles of incorporation or association, or constitution, and a copy of its bylaws, and amendments thereto; (2) A copy of every other instrument or document, and a statement of the terms and conditions of every oral agreement, relating to the organization, powers and purposes of the registrant").

Id.

[52] *Id.* § 5.201(e) (detailing that Exhibit D is to be filed "Whenever a registrant, within the United States, receives or collects contributions, loans, money, or other things of value, as part of a fund-raising campaign, for or in the interests of his foreign principal . . . ." This statement shall set forth:

> the amount of money or the value of the thing received or collected, the names and addresses of the persons from whom such money or thing of value was received or collected, and the amount of money or a description of the thing of value transmitted to the foreign principal as well as the manner and time of such transmission.

Id.

[53] *Id.* § 5.203 (detailing the requirement to file supplemental statements at half-yearly intervals).

[54] *Id.* § 5.202(a) (detailing the requirement for "partner[s], officer[s], director[s], associate[s], employee[s] or agent of a registrant" who does not fall within the exceptions outlined in § 5.202 to file a registration statement).

[55] 22 U.S.C. § 614(a) (2020).

[56] 28 C.F.R. § 5.204.

[57] 18 U.S.C. § 219 (2020).

[58] 22 U.S.C. § 613(a).

[59] *Id.* § 613(c).

[60] *Id.* § 613(b).

[61] *Id.* § 613(d).

[62] *Id.* § 613(e).

[63] *Id.* § 613(g).

[64] *Id.* § 613(h).

Within this context, it is clear that FARA historically, as well as in its current form, adopts an approach of semi-structured information gathering and disclosure to inform stakeholders about the interests represented by foreign agents. As a corollary, it may be inferred that crucial to the successful functioning of the statute are the accuracy and comprehensiveness of filings made by covered entities. If the objective of FARA is information symmetry and providing notice of foreign influence efforts, it is a precondition that filed materials must be sufficiently detailed so as to actually provide effective notice of the identity, interests, and activities of the agent. Anything less would not permit stakeholders to arrive at informed decisions regarding the provenance and neutrality of interest groups and materials disseminated by them.[65]

Despite the criticality of this requirement, no literature has focused on the quality of filings made by foreign agents in relation to the nature, means, and methods of their activities. Towards addressing this gap, this Article will focus on foreign agent filings which disclose activities that are "political" in nature, arguably the most impactful form of foreign influence activity in general, and the most harmful if unchecked. Further, following FARA's 1966 amendments, "political activities" are now central to FARA compliance and require the most the most particularized disclosures.

The subsequent parts of this Article will, in the context of "political activities," focus on the law and practice surrounding the level of detail in certain FARA filings — enquiring what the legal standard is and, through an empirical lens, whether entities comply with these requirements in practice.

III. THE QUESTION OF DETAIL UNDER FARA: LEGAL PERSPECTIVES

Despite a shift in FARA's statutory focus, recent enforcement activities suggest that FARA remains a key statute intended to check unwelcome forms of foreign influence within the U.S.[66] Recent concerns regarding foreign interference in U.S. elections have only served to reinvigorate interest in the statute and firmly turned the spotlight on what was for long considered an arcane[67] and poorly-worded[68] piece of legislation.

Between 1966 and 2015, the DOJ only brought seven criminal cases under FARA.[69] However, recent years have seen a "significant uptick" in prosecutions — including cases against a number of high-profile individuals including Paul Manafort,

[65] Ball Statement, *supra* note 12, at 12. *See also* S. COMM. ON FOREIGN RELS., 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT 1–3 (Comm. Print 1977) (discussing the role of transparency and disclosure in countering undue foreign influence).

[66] *See, e.g.*, Joshua R. Fattal, *The Justice Department's New, Unprecedented Use of the Foreign Agents Registration Act*, LAWFARE (Dec. 18, 2019, 8:00 AM), https://www.lawfareblog.com/justice-departments-new-unprecedented-use-foreign-agents-registration-act (discussing the role of FARA in countering online foreign influence and disinformation campaigns).

[67] COVINGTON & BURLING, THE FOREIGN AGENTS REGISTRATION ACT ("FARA"): A GUIDE FOR THE PERPLEXED 2 (2018), https://www.law.upenn.edu/live/files/9251-theforeignagentsregistrationactfaraaguidefortheper (referring to FARA as arcane and comparing it with the "obscure: FCPA).

[68] Nick Robinson, *The Foreign Agents Registration Act is Broken*, FOREIGN POL'Y (Jul. 22, 2018), https://foreignpolicy.com/2019/07/22/the-foreign-agents-registration-act-is-broken/.

[69] U.S. DEP'T OF JUST., *supra* note 8, at 8.

Michael Flynn, and Richard Gates.[70] DOJ leadership has also signaled that it intends to further scale up enforcement against foreign influence operations.[71] Commentators have linked this renewed prioritization to revelations concerning Russian foreign influence activities uncovered as part of the Mueller investigation.[72]

At the same time, enforcement thus far has largely focused on individuals or entities that have failed to register with DOJ. Or, where they have made false statements in the course of an investigation.[73] DOJ has not brought any enforcement actions concerning the level of disclosure or quality of filings made by registrants. While this is likely in part due to low prioritization of FARA enforcement in general, it is also likely the case that these types of issues are often resolved without resort to prosecution. For instance, DOJ will often allow individuals and entities to amend their deficient filings.[74]

Alongside being infrequently enforced, FARA has historically been subjected to limited scholarly treatment.[75] According to a frequently updated law firm database, since 1990 and till early 2020, there had been only five academic articles written on FARA.[76] Most of these focused either on issues of general policy, like then-pending FARA amendments, recently enacted amendments,[77] or the need for statutory reform to address problems like overbroad language, vague terminology, and emerging national security threats.[78]

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[70] Melissa S. Ho & Andrew T. Fox, *Emerging Trend: DOJ Turns to Rarely Used FARA Statute in Recent Surge in Prosecutions*, NAT'L L. REV. (Nov. 18, 2019), https://www.natlawreview.com/article/emerging-trend-doj-turns-to-rarely-used-fara-statute-recent-surge-prosecutions (last visited May 15, 2020); *see also Recent FARA Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/nsd-fara/recent-cases (last visited May 15, 2020).

[71] Katie Benner, *Justice Dept. to Step Up Enforcement of Foreign Influence Laws*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/us/politics/fara-task-force-justice-department.html; Theodoric Meyer, *Van Grack discusses how he's running the FARA unit*, POLITICO (Sept. 25, 2019), https://www.politico.com/newsletters/politico-influence/2019/09/25/van-grack-discusses-how-hes-running-the-fara-unit-480955.

[72] Zephyr Teachout, *How Mueller revived a law that protects us all against foreign money*, WASH. POST (Apr. 19, 2019), https://www.washingtonpost.com/outlook/2019/04/17/how-mueller-revived-law-that-protects-us-all-against-foreign-money/; Meyer, *supra* note 71.

[73] Ben Freeman, *Want to fight foreign influence? Fix FARA filings*, THE HILL (Nov. 17, 2019), https://thehill.com/opinion/judiciary/470763-want-to-fight-foreign-influence-fix-fara-filings; CAPLIN & DRYSDALE, *supra* note 9 (listing recent and historic criminal enforcement actions under FARA); Tarun Krishnakumar, *In Absence of Foreign Agents Registration Reform, DOJ Tweaks Could Make a Big Difference,* JUST SECURITY (Mar. 31, 2021), https://www.justsecurity.org/75589/in-absence-of-foreign-agents-registration-reform-doj-tweaks-could-make-a-big-difference; CAPLIN & DRYSDALE, *Civil Enforcement Summaries*, WWW.FARA.US, https://fara.us/civil-enforcement-summaries/ (last visited May 15, 2020) (listing recent and historic civil enforcement actions under FARA).

[74] 28 C.F.R. § 5.204 (2020) (providing in part that an initial, supplemental, or final statement "deemed deficient" must be amended upon DOJ request).

[75] Nick Robinson, *'Foreign Agents' in an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE L. J. 1075, 1078 (2020).

[76] CAPLIN & DRYSDALE, *Other Resources*, WWW.FARA.US, https://fara.us/resources/ (last visited May 23, 2020).

[77] *See* Mark B. Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security*, 25 TEX. INT'L J. 23 (1990); Phillip Perry, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L J. 23 (1990); Charles Lawson, *Shining the Spotlight of Pitiless Publicity on Foreign Lobbyists Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151 (1996).

[78] Robinson, *supra* note 75; *see generally* Jahad Atieh, Comment, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT'L L. 1051 (2010); Perry, *supra* note 77; Joshua R. Fattal, *FARA on Facebook, Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 903 (2019).

In contrast, the policy sphere has been much more active in research and advocacy around the implementation of FARA. Organizations including the Project on Government Oversight ("POGO"), the Center for Responsive Politics, and the Foreign Influence Transparency Initiative ("FITI") have tracked filings and released several reports on FARA compliance. These reports also serve to highlight the need for broader FARA reform. In particular, FARA's statutory and enforcement deficiencies include: late (or non) filing or mislabeling of information materials, lack of enforcement of filing deadlines, and improper disclosures relating to the dissemination of informational materials.[79] Reports by POGO and FITI have also focused on issues like the activities of specific foreign lobbies and the foreign funding of think tanks.[80] Several organizations also track foreign influence spending and FARA-covered activities — providing public datasets and reporting on interesting FARA filings.[81] While no scholarship has centered on the level of detail contained in FARA filings, several experts have flagged the criticality of the issue.[82]

Within this context, this Article aims to contribute to the discourse by focusing on two main questions concerning FARA filings made by registrants. First, what is the level of detail required to be satisfied by disclosures concerning the "political activities" of registrants under FARA? Second, based on a sample set of filings, are there notable trends in the manner in which registered foreign agents comply with these requirements?

In examining these questions, this Article focuses on disclosures of "political activities" as contained in Exhibit B filings by foreign agents. These documents have been chosen for several reasons. At the outset, Exhibit B filings are filed upon the initiation of a new foreign agent relationship and are meant to contain "detailed" disclosures relating to the activities and "political activities" to be undertaken on behalf of the concerned principal.[83] These exhibits include details (and, if applicable, copies) of the agreement entered into between the registrant and the foreign principal–including, in most cases, the financial terms.[84] This information offers unique insights into the nature and dynamics of agent-principal relationships under FARA.

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[79] BEN FREEMAN & LYDIA DENNETT, PROJECT ON GOV'T OVERSIGHT LOOPHOLES, FILING FAILURES, AND LAX ENFORCEMENT: HOW THE FOREIGN AGENTS REGISTRATION ACT FALLS SHORT (Dec. 16, 2014), https://www.pogo.org/report/2014/12/loopholes-filing-failures-and-lax-enforcement-how-foreign-agents-registration-act-falls-short/.

[80] *See generally* BEN FREEMAN, THE QATAR LOBBY IN WASHINGTON, CTR. FOR INT'L POL'Y (May 2020), https://static.wixstatic.com/ugd/3ba8a1_eae58acd2c11459894d8e45fbbe1552d.pdf; BEN FREEMAN, FOREIGN FUNDING OF THINK TANKS IN AMERICA, CTR. FOR INT'L POL'Y (Jan. 2020), https://static.wixstatic.com/ugd/3ba8a1_4f06e99f35d4485b801f8dbfe33b6a3f.pdf.

[81] *See, e.g.*, *Foreign Lobby Watch*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/fara (last visited Apr. 1, 2020); POLITICO: POLITICO INFLUENCE, https://www.politico.com/politicoinfluence/ (last visited Apr. 1, 2020); *see also* Theodoric Meyer, *Cryptic FARA Filing May Spur Questions from DOJ*, POLITICO (Sept. 24, 2019), https://www.politico.com/newsletters/politico-influence/2019/09/24/cryptic-fara-filing-may-spur-questions-from-doj-480480 (highlighting a deficient filing).

[82] *See, e.g.*, Freeman*, supra* note 73 (noting several deficiencies with the level of detail and transparency provided in FARA filings); BEN FREEMAN, THE EMIRATI LOBBY: HOW THE UAE WINS IN WASHINGTON, CTR. FOR INT'L POL'Y 3 (Oct. 2019), https://docs.wixstatic.com/ugd/3ba8a1_cc7f1fad2f7a497ba5fb159a6756c34a.pdf?index=true; DARREN E. TROMBLAY, POLITICAL INFLUENCE OPERATIONS: HOW FOREIGN ACTORS SEEK TO SHAPE U.S. POLICY MAKING 208 (2018) (flagging how some registrants provide boilerplate responses on FARA filings).

[83] U.S. Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended (2019) [hereinafter Exhibit B], https://www.justice.gov/nsd-fara/page/file/1273636.

[84] *Id.*

Further, Exhibit B filings contain prospective/forward-looking disclosures which must, by implication, remain accurate. Other documents which also contain disclosures of "political activities," such as Supplemental Statements, are retrospective. Therefore, in the initial stages of a foreign agent relationship, the only available document which details "political activities" is an Exhibit B filed by a registrant. Lastly, Exhibit B filings have been chosen for their manageable volume (per unit time) in comparison to other more frequent filings (such as Supplemental Statements) which may also contain insightful disclosures relating to the "political activities" of registrants.

A. LEGAL STANDARD FOR DISCLOSURE OF "POLITICAL ACTIVITIES"

When FARA was enacted in 1938,[85] it did not contain express language specifying the level of detail with which activities of registrants were required to be disclosed in filings.[86] Rather, the statute delegated to the Secretary of State the power to prescribe the level of detail with which registrants were required to disclose their activities as part of supplemental statements required to be filed every six months.[87] Regulations issued by the State Department in 1939 required that all spaces in the registration statement must be filled in — and no "essential detail" be left out.[88]

While template forms for Registration and Supplemental Statements prescribed alongside these regulations did not provide a specific field or space in which the activities of foreign agents were to be detailed,[89] they required the registrant to provide contracts of employment which were "to indicate in complete detail the nature of the employment of registrant and the terms and conditions thereof."[90] While co-located regulations issued under Title VIII of the Espionage Act required "a detailed statement of the present and proposed activities of such agent," the import of this provision was not further detailed.[91]

While FARA has been amended several times since enactment, it was not until the 1942 amendments that express provisions relating to disclosures of activities of foreign agents were included. Under the amended FARA, registration statements were now also to include a "comprehensive" statement of existing and proposed activities of the registrant[92] and a "detailed" statement of every registrable activity performed by an agent on behalf of himself or any person other than a foreign

[85] Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631 (codified at 22 U.S.C. § 611 et seq.).

[86] Under the 1938 FARA, foreign agents were required to disclose details including: (1) their name, business address, and residential address; (2) name of the principal or person on whose behalf they were acting as agents; (3) copies of all contracts (or statement of terms and conditions, if oral) of employment under which such person acts or agrees to act as agent; (4) date of commencement of activities and contract; (5) compensation to be paid as well as names of all foreign principals contributing to such contribution; and (6) charter documents of registrant, if applicable. *Id.* § 2.

[87] *Id.* § 3(c).

[88] Foreign Principals and Foreign Governments, Registration of Agents, 4 Fed. Reg. 3940, 3942 (Sept. 16, 1939) (codified at 28 C.F.R. pt. 5).

[89] *Id.* § 24.5 (noting the Format of Registration Statement at § 24.3).

[90] *Id*.

[91] *Id.* § 24.29.

[92] Foreign Agents Registration Act, ch. 263, sec. 233, § 2(a)(4), 56 Stat. 248, 252.

principal.[93] In contrast to the 1939 Regulations, new regulations issued under the amended FARA in 1942 did not contain specific provisions relating to the disclosures of activities of agents—barring that registrants were required to file Exhibit C forms which were to contain details of their activities on behalf of foreign principals.[94]

As discussed in the previous Section, the 1966 Amendments to FARA were responsible for shifting the focus of the statute from propaganda and subversion to political activities and lobbying. With this shift, it is unsurprising that these amendments also introduced the concept of "political activities" to FARA.[95] Notably, these amendments also amended FARA to require a "detailed" statement of "political activities" performed by the registrant on behalf of the principal — to be filed as part of registration statements.[96] Similar provisions requiring "detailed" statements were included in relation to expenditures of registrants in connection with the foreign principal representation,[97] and registrable activities of agents performed on behalf of themselves or persons other than foreign principals.[98] Regulations issued in 1967 pursuant to these amendments, for the very first time, provided additional clarity on the legal standard for activity-related disclosures. Section 5.210 of the regulations[99] — which remains unamended till date — provided as follows:

> A statement is "detailed" within the *meaning of clauses 6 and 8 of section 2(a) of the Act* when it has that *degree of specificity necessary to permit meaningful public evaluation of each of the significant steps taken by a registrant to achieve the purposes of the agency relation.*

Notably, this definition – as is clear from its text – only applied to the use of the term "detailed" in relation to agent expenditures (FARA § 2(a)(8))[100] and registrable activities of agents performed on behalf of themselves or persons other than foreign principals (FARA § 2(a)(6)).[101] Despite a requirement being included for "detailed" statements to be filed in relation to the "political activities" of agents in 1966 (FARA § 2(a)(4)),[102] the definition of "detailed" included in section 5.210 does not expressly

[93] *Id.* § 2(a)(6).

[94] Forms, Administration of the Foreign Agents Registration Act, 7 Fed. Reg. 4717, 4719 (Jun. 25, 1942) (codified at 28 C.F.R. pt. 5).

[95] Act to Amend the Foreign Agents Registration Act of 1938, Pub. L. No. 89-486, 80 Stat. 244 (amending FARA and adding the definition of "political activities" at section 1(o)).

[96] *Id.* § 2(3) (providing in relation to Section 2 of FARA: "*Subsection (a)(4) is amended by inserting before the semicolon at the end thereof a comma and the following: 'including a detailed statement of any such activity which is a political activity.*'") (emphasis added).

[97] *Id.* § 2(6) (amending FARA § 2(a)(8)).

[98] *Id.* § 2(4) (amending FARA § 2(a)(6)).

[99] Administration and Enforcement of Foreign Agents Registration Act of 1938 ((as amended at 32 Fed. Reg. 6362, 6364 (Apr. 22, 1967)) (codified at 28 C.F.R. § 5.210 (2020)) (emphasis added).

[100] 22 U.S.C. § 612(a)(8) (2020).

[101] *Id.* § 612(a)(6).

[102] *Id*. § 612(a)(4). This statute requires that:

> [c]opies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; a comprehensive statement of the nature and method of performance of each such contract, and of the existing and proposed activity or activities engaged in or to be engaged in by the registrant as agent of a foreign principal for each such foreign principal, including a detailed statement of any such activity which is a political activity.

Id.

extend to cover statements under this requirement. This raises questions relating to the level of detail with which "political activities" of foreign agents are required to be disclosed. For the reasons below, it is submitted that the same meaning of "detailed" provided in section 5.210 of the regulations (extracted above) must be ascribed to the term "detailed statements" under § 2(a)(4) of FARA as well.

i. Same Words Within a Statute to be Construed Similarly

At the outset, it may be noted that the same word "detailed" has been used within FARA on multiple occasions – i.e., within §§ 2(a)(4), 2(a)(6), and 2(a)(8) – to describe the nature of statements required to be filed under each of these provisions. It is a well-accepted principle of statutory interpretation that "identical words used in different parts of the same statute are . . . presumed to have the same meaning."[103]

While the application of this principle can be defeated by demonstrating that the context of usage of the similar words was different,[104] this rebuttal is not attracted in relation to the use of "detailed" in the present context. In the context of FARA, the word "detailed" has only ever been used as a prefix to the word "statement" and only in the context of describing the quality of filings to be made by registrants under the statute. Not only is the context similar, it is identical.

Therefore, it cannot stand to reason that the context of usage is different. Consequently, the presumption of consistent usage stands and "detailed" as used in § 2(a)(4) must be interpreted and construed in the same manner in which it is used within §§ 2(a)(6) and 2(a)(8).

ii. Legislative Intent Supports This Interpretation

The use of legislative history to support statutory interpretation by courts is, to say the least, controversial.[105] Notwithstanding rising acceptance of legislative history, critics point to political, theoretical, and practical problems posed by reliance on such material.[106] Despite these criticisms, there is broad agreement that legislative history can play a role in purposes other than establishing "legislative intent," such as

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[103] Robers v. United States, 572 U.S. 639, 643, (2014) ("Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning" (quoting Merrill Lynch et al. v. Dabit, 547 U.S. 71, 86, 126 S. Ct. 1503 (2006))); IBP, Inc. v. Alvarez, 546 U.S. 21, 33 (2005) ("[T]he normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning. *E.g.*, Sullivan v. Stroop, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L.Ed.2d 438 (1990)."); VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 57 (2018); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

[104] LARRY M. EIG, CONG. RSCH. SERV., R97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 15-16 (2014) ("The general presumption is not rigid, however, and 'readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" [Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1933). *See also* Robinson v. Shell Oil Co., 519 U.S. 337, 342-43 (1997)]. Context and statutory history can override the presumption.").

[105] *See generally* SCALIA & GARNER, *supra* note 103, at 369–90 (2012).

[106] *Id.* at 375.

for "establishing linguistic usage" when the text of a statute is unclear or ambiguous.[107]

In the context of FARA, the application of these principles to discern the meaning of "detailed" is unlikely to be affected by the above criticisms. The Senate Committee on Foreign Relations and the House Committee on the Judiciary, in largely identical reports, while commenting on § 2(6) of the 1966 amendment,[108] which sought to amend FARA § 2(a)(8), stated that the inclusion of the language mandating "detailed statements" was intended to require "that degree of specificity necessary to permit meaningful public evaluation of each of the significant steps taken to achieve the purposes of the agency."[109] Crucially, both Committees clearly stated that this meaning not only extended to "detailed statements" under § 2(6) but also other subsections where the same language was used.[110]

In summary, legislative materials that preceded the passage of the 1966 Amendments which introduced the requirement for "detailed" statements not only provided guidance on what the term was supposed to mean but also clearly stated that this meaning applied to all instances (i.e. provisions) where the defined term was used. Following on, the adoption of this definitional language *verbatim* by the DOJ in § 5.210 of the regulations (which is identical to the Committee's language above) clinches the issue. Where the DOJ has issued interpretative regulations identical to pre-enactment language, and where such pre-enactment language was expressly intended to consistently apply across all uses of "detailed statement," it is clear that "detailed statement" as used in § 2(a)(4) of FARA must be given the same meaning enumerated in § 5.210 of the regulations.

B. "DETAILED STATEMENTS": THE LEGAL STANDARD

The above sections demonstrate that there are strong arguments why "detailed" as used in § 2(a)(4) in relation to "political activities" must be accorded the same interpretation taken by the DOJ in relation to §§ 2(a)(6) and 2(a)(8) of FARA. Therefore, under the status quo, it is clear that statements disclosing "political activities" of registrants under FARA must be sufficiently detailed so as to permit *meaningful* public evaluation of the significant steps taken by the registrant on behalf of the foreign principal to achieve the objectives of the latter.

However, this standard does not stand alone as regards disclosures relating to the nature of activities of foreign agents. Even without having to engage in the above interpretational exercise, § 2(a)(4) provides layered disclosure requirements which would regardless have to be satisfied. For instance, over and above requiring

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[107] *Id.* at 388. *See, e.g.*, Carrieri v. Jobs.com, Inc., 393 F.3d 508, 518–19 (5th Cir. 2004) ("Only after application of the principles of statutory constructions, including the canons of construction, and after a conclusion that the statute is ambiguous may the court turn to the legislative history.").

[108] Pub. L. No. 89-486, 80 Stat. 244 (1966) (amending FARA).

[109] S. REP NO. 89-143, at 10 (1965); H.R. REP No. 89-1470, at 9 (1966).

[110] S. REP NO. 89-143, at 10 (1965); H.R. REP No. 89-1470, at 9. Both reports state as follows:

> The phrase "a detailed statement," as used in this subsection (as well as in a number of others in section 2) is intended by the committee to require that degree of specificity necessary to permit meaningful public evaluation of each of the significant steps taken to achieve the purposes of the agency.

S. REP NO. 89-143, at 10 (1965); H.R. REP No. 89-1470, at 9.

"detailed" statements in relation to "political activities," this provision requires "a comprehensive statement of the nature and method of performance of each [principal-agent] contract and of the existing and proposed activity or activities engaged in or to be engaged in by the registrant as the agent of a foreign principal for each such foreign principal."[111] Seemingly applying to *all activities* to be conducted by an agent on behalf of a foreign principal, this is a broader requirement than which applies to "political activities." While the rules of statutory interpretation will likely require that "political activities" be disclosed as per the higher "detailed" standard,[112] even if such a standard were not present, these activities — at very least — would likely have to be described in "comprehensive" terms as required under § 2(a)(4).

III. THE QUESTION OF DETAIL UNDER FARA: EMPIRICAL PERSPECTIVES

The above Section sought to provide insight into the legal standard that disclosures concerning "political activities" must adhere to under FARA. It concluded that "political activities" must be disclosed in a manner that is specific enough to permit meaningful public evaluation of each of the "significant steps" taken by the registrant on behalf of the foreign principal to achieve the objectives of the representation.

While there is no further statutory or executive guidance on what this standard means in practice, its textual formulation indicates that it requires that, in relation to "political activities," disclosures must, at a minimum: (1) be specific; (2) indicate what the objective of the representation is; (3) detail each significant steps taken by the registrant towards such objective; and (4) in general, be of such a nature that they are meaningful to members of the public who wish to evaluate them. This legal standard is broadly tracked by Question (or Form Field) No. 10 of the Exhibit B form,[113] which requires a description of "all such political activities indicating, among other things, the relations, interests or policies to be influenced together with the means to be employed to achieve this purpose."[114] Similarly, the requirement of § 2(a)(4) to provide a comprehensive statement of registrant activities is broadly tracked by Questions 8 and 9 of Exhibit B, which require registrants to describe fully "the nature and method of performance of the above indicated agreement or understanding" and "the activities the registrant engages in or proposes to engage in on behalf of the above foreign principal," respectively.[115]

This Section attempts to supplement this understanding with an empirical analysis of a sample set of Exhibit B filings made by registrants. The objective of this exercise is to serve as a marker for future research and study by considering trends in compliance with the above standards among others — or, alternatively, the lack thereof.

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[111] 22 U.S.C. § 612(a)(4) (2020).

[112] 28 C.F.R. § 5.210 (2020).

[113] Certain registrants have made filings in the format provided by Form NSD-4 (Revised 05/17), and others have used the format provided by Form NSD-4 (Revised 06/19). In the former, political activity disclosures are sought at Question 9 and not 10. For the purposes of this paper, the numbering used in the later form will be used as standard.

[114] Exhibit B, *supra* note 83, at Question 10.

[115] *Id.* at Questions 8 and 9.

A. OVERVIEW OF DATASET

In order to conduct this analysis, the following sections consider a dataset of Exhibit B filings received by the DOJ between December 1, 2019, and March 31, 2020. Extracted directly from the DOJ FARA eFile portal, this includes around 140 documents categorized as "Exhibit A/B" filings by the filing system. However, as noted below, documents categorized as "Exhibit A/B" filings often do not include the Exhibits themselves — sometimes containing bare agreements or other mislabeled documents.

B. METHODOLOGY

While the primary focus of this paper is on the "political activities" of foreign agents, the present analysis is not restricted to the fields which specifically require registrants to disclose such activities. This is due to the fact that details of "political activities" may be dispersed over various fields of an Exhibit B filing. Therefore, in order to analyze the quality of disclosures made by agents in Exhibit B filings, it is necessary to consider fields apart from Question 10 of Exhibit B (which specifically pertains to "political activities"). Consequently, this Section focuses on the following fields within Exhibit B forms:

(1) *Format of agreement between the registrant and foreign principal*:[116] This field concerns whether the agreement is based on a "formal written contract," "exchange of correspondence," or neither. An example of the last category may be an oral agreement not reduced to writing. In addition to format, where relevant or anomalous, this head will also include consideration of characteristics such as contract length and execution status.

(2) *Nature and method of performance of the agreement*:[117] This field requires details relating to the terms of the agreement between the registrant and foreign principal. As there is no express guidance about what must be included within this field that is not part of (3) below, the two fields are considered together [Question 8].

(3) *Activities registrant proposed to engage in on behalf of the principal*:[118] This field requires "full" details of the activities the registrant engages in or proposes to engage in on behalf of the foreign principal [Question 9].

(4) *Political Activities*:[119] This field requires confirmation of whether the activities proposed to be undertaken by the agent on behalf of the foreign principal include "political activities." If the response to this prompt is yes,

[116] *Id.* at Questions 4, 5, and 6.
[117] *Id.* at Question 8.
[118] *Id.* at Question 9.
[119] *Id.* at Question 10.

a *detailed* description of such activities is required to be provided [Question 10].[120]

(5) *Miscellaneous*: In addition to the substantive/qualitative information that may be provided in the fields above, where relevant, this Section will consider issues such as whether entries to Exhibit B are direct responses or references to other documents ("directness" of responses) and whether entries to Exhibit B form fields are legible. In addition, it will also consider other factors which may affect meaningful public evaluation of such filings.

C. ANALYSIS

While the dataset of filings studied for the present analysis is small in relation to the total number of FARA filings available, it is not so small as to prevent the drawing of broad conclusions relating to trends in Exhibit B filings. Further, it is important to note that the dataset considered relates to filings made subsequent to the recent spike in FARA enforcement activity (and prior to the majority of the COVID-19 pandemic). Therefore, any observations relating to non-compliance with statutory provisions are likely to be an underestimation of similar trends in relation to the broader dataset.

At the same time, it may be noted that the likely remedy for insufficiently detailed filings would be a notice from the DOJ, which, at best, may require registrants to remedy deficiencies.[121] Given the infrequency of FARA enforcement and—as the analysis below will provide, at best, a rough overview of—the scale of the problem, these factors may operate to question the very foundational assumptions of FARA, i.e., that transparency and disclosures can help counter the effects of foreign influence activities. In other words, if filings are habitually deficient, the risk of DOJ scrutiny is low, and the remedial measures—at the first instance—are minimal, valid questions may be asked of the adequacy of the approach taken by FARA as a whole. It is within this limited context that the following analysis must be viewed.

i. Agreement

This Section considers non-substantive characteristics relating to Exhibit B filings—including nature of filings, medium, and completeness from a procedural perspective. Rather than the substance of filings, it focuses on issues relating to form and format. An analysis of these considerations is important as non-substantive

[120] If a registrant discloses political activities, it must

> describe all such political activities indicating, among other things, the relations, interests or policies to be influenced together with the means to be employed to achieve this purpose. The response must include, but not be limited to, activities involving lobbying, promotion, perception management, public relations, economic development, and preparation or dissemination of informational materials.

Id. at Question 10. (emphasis added).

[121] U.S. DEP'T. OF JUST., *supra* note 8, at 8–21 (noting at various points that the National Security Division of the Department of Justice preferred to pursue registration (and voluntary compliance) rather than prosecution).

factors can also have a significant impact on the ability of the public to meaningfully evaluate the activities of a foreign agent.

Format. While the total number of documents labelled as Exhibit B filings on the FARA database that were analyzed was 143, only 120 of these actually contained Exhibit B forms. Of these, the vast majority of Exhibit B filings—95 out of 120—pertained to principal-agent relationships that had been reduced into *written* contractual arrangements.[122] At the same time, the titling, format, and nature of these agreements varied widely and included one or two-page engagement letters,[123] letters of appointment,[124] services contracts,[125] special "Foreign Agent Written Agreements"[126] and other forms of agreements. Similarly, the length of contracts included as annexures varied from single-page agreements to complex contracts as long as 38[127] and 261 pages.[128] In cases where the agreements were of such lengths, there was no specific correlation observed in relation to the detail with which the registrant described its activities within Exhibit B. This raises the question of whether filings of excessive length act to aid or hurt the ability of third parties to meaningfully evaluate the activities at issue. Further, as the following sections demonstrate, the fact that a relationship is reduced into contractual form does not guarantee that sufficient detail is provided.

In the minority of filings, 25 out of 120, agreements were not in specific written contractual form. These included cases where the agreement consisted of exchange of correspondence[129] (5 of 120) and other non-written (or oral) arrangements (20 of 120).[130] In addition to the above, 29 out of 143 documents categorized as Exhibit B filings on the FARA database also pertained to existing representations and covered issues including renewals,[131] extensions,[132]

[122] Exhibit B forms where registrants had indicated, through responding in the affirmative to Question 4, have been considered as written agent relationships for the purpose of this analysis.

[123] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Qatar (Dec. 17, 2019), https://efile.fara.gov/docs/6771-Exhibit-AB-20191217-1.pdf.

[124] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, DPWorld FZE (Dec. 30, 2019) [hereinafter DPWorld FZE], https://efile.fara.gov/docs/6200-Exhibit-AB-20191230-13.pdf.

[125] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Federal State Unitary Enterprise Rossiya Segodnya International Information Agency (Jan. 15, 2020), http://www.fara.gov/docs/6490-Exhibit-AB-20200115-3.pdf.

[126] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Hmong Kingdom ChaoFa State (Mar. 16, 2020), https://efile.fara.gov/docs/6800-Exhibit-AB-20200316-1.pdf.

[127] *See, e.g.*, DPWorld FZE, *supra* note 124.

[128] *See, e.g.*, Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Department for International Trade, Government of the United Kingdom (Feb. 24, 2020), https://efile.fara.gov/docs/6795-Exhibit-AB-20200224-1.pdf.

[129] Exhibit B forms where registrants had indicated, through responding in the affirmative to Question No. 5, have been considered as being concluded by exchange of correspondence for the purpose of this analysis.

[130] Exhibit B forms where registrants had indicated, through responding in the affirmative to Question No. 6, have been considered as being concluded through oral or non-written arrangements for the purpose of this analysis.

[131] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Embassy of the Republic of Korea (Feb. 28, 2020), https://efile.fara.gov/docs/6401-Exhibit-AB-20200228-13.pdf.

[132] *See, e.g.*, Dep't of Just., annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Embassy of Qatar (Mar. 25, 2020), http://www.fara.gov/docs/6561-Exhibit-AB-20200325-3.pdf.

supplements,[133] terminations,[134] and amendments.[135] Seven of these 29 consisted of bare documents–unaccompanied by an Exhibit B form or a covering letter. This lack of contextual documents can be expected to not only complicate the meaningful evaluation of filings but may also amount to a violation of FARA regulations.[136]

Completeness. In all but two cases, where parties had indicated that principal-agent agreements were in written form, the referenced contractual documents were appended to the Exhibit B form. Further, in almost all cases — 112 of 120 documents — where Exhibit B forms were present, the agreements in question had been executed by both parties prior to filing with the DOJ. However, in at least 3 out of 120 cases, executed agreements were of a boilerplate nature with specific services being detailed in appendices or annexures that were not signed by the parties.[137]

In contrast, where an Exhibit B filing pertained to an existing arrangement (i.e., was a renewal, amendment, supplement, etc.), in all but 2 out of these 29 cases, the filings only included or referred to the new or amended terms. In other words, they did not either provide details relating to or attach a copy of the underlying agreements.[138]

Similarly, in one case where an existing representation was amended by an exchange of correspondence, it was observed that key attachments referred to in the email correspondence were not filed alongside the emails in which they were referenced.[139]

A concerning trend related to open-ended or framework agreements which provided that the specific activities to be performed for the foreign principal would be determined on the basis of separate/independent statements of work to be executed subsequently.[140] In the cases that adopted this approach, there was no evidence that

[133] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Consulate General of Japan (NY) (Feb. 27, 2020), https://efile.fara.gov/docs/6289-Exhibit-AB-20200227-14.pdf.

[134] *See, e.g.*, Letter from Christopher M. Kise, Foley & Lardner LLP, to Reinaldo Munoz Pedrova, Attorney General (Feb. 7, 2020), https://efile.fara.gov/docs/6787-Exhibit-AB-20200208-2.pdf.

[135] *See, e.g.*, Dep't. of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Nizami Ganjavi International Center (Jan. 17, 2020), https://efile.fara.gov/docs/6587-Exhibit-AB-20200117-2.pdf.

[136] 28 C.F.R. § 5.207(a) (2020) (providing that each initial, supplemental, and final statement shall be "*complete in and of itself*" and prohibiting incorporation of information by reference to statements previously filed) (emphasis added).

[137] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, The Kingdom of Saudi Arabia (through MSLGROUP Americas, LLC d/b/a Qorvis Communications) (Mar. 3, 2020), http://www.fara.gov/docs/6801-Exhibit-AB-20200318-1.pdf.

[138] For an example of a filing where the underlying agreement was not attached, see Dep't of Just., Dubai Tourism and Commerce Marketing and Edelman FZ LLC (Feb. 18, 2020), http://www.fara.gov/docs/3634-Exhibit-AB-20200218-77.pdf (notably this example consists only of the contract amendment and does not include a covering letter or form).

[139] Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Consulate General of Japan (NY) (Mar. 19, 2020), http://www.fara.gov/docs/6289-Exhibit-AB-20200319-15.pdf. This filing refers to an exchange of correspondence as the basis for a supplemental agreement. While an email chain has been enclosed, key documents stated to be attached to the email chain have not been provided as part of the same document. *Id.*

[140] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Low Taek Jho (Jan. 22, 2020), http://www.fara.gov/docs/6642-Exhibit-AB-20200122-3.pdf.

parties had actually filed subsequent statements of work or sub-contracts with the DOJ.

Contractual Terms. What varied with the form of the agreement was also the level of detail with which the contracts themselves described the nature of services provided by the agent to the foreign principal. In this regard, some agreements made no mention of the specific services being offered,[141] others provided a detailed list of services — but did not mention the issue or objective underlying the provision of services,[142] while some provided detailed disclosures on both counts.[143] The level of detail with which contracts discuss agent activities and duties assumes relevance as several filings merely made references to the contract instead of providing responses to questions including Questions 8 through 10. This issue is addressed in more detail below.

Legibility. Another criterion that was considered in relation to the filings was legibility of the entries in question. Within this context, none of the documents included within the dataset of 120 Exhibit B forms suffered from significant legibility concerns. However, in at least two cases the text filled into various form fields was of a degraded quality and difficult to read.[144] Even such text had been recognized through OCR and could be digitally selected and copied. It is expected that older FARA filings may suffer from more significant legibility-related concerns.

ii. Nature & Method of Performance of Agreement & Activities to be Undertaken on Behalf of Principal

Unlike the Section above, which focused on trends in non-substantive characteristics of Exhibit B filings, this Section briefly considers responses to Questions 8 and 9 of Exhibit B. At the same time, responses to these questions are not the primary focus of this paper. This is as, unlike "political activities," there is no express legal standard to which disclosures under these fields must conform, and the DOJ provides no detailed in-form guidance on what responses to these queries must contain.[145] Despite this, a preliminary study of responses to these questions reveals several interesting trends.

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[141] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Komala Representation in the US (Feb. 24, 2020), http://www.fara.gov/docs/6639-Exhibit-AB-20200224-3.pdf (the engagement letter provided only indicates that the registrant will provide the Client "*government affairs and media relations services and will agree with it on a work plan.*" No further indication of specific activities or issues is provided); Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Political Union of Citizens "Georgian Dream – Democratic Georgia" (Feb. 12, 2020) [hereinafter Georgian Dream – Democratic Georgia], http://www.fara.gov/docs/6278-Exhibit-AB-20200212-16.pdf (despite providing a detailed standard form contract, the agreement only obliquely indicates that the registrant will provide "*public affairs professional services*" to the client. No further details are provided).

[142] Georgian Dream – Democratic Georgia, *supra* note 141.

[143] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Reinaldo Munoz Pedroza, Attorney General, Bolivarian Republic of Venezuela (Mar. 20, 2020), http://www.fara.gov/docs/6325-Exhibit-AB-20200320-2.pdf (providing a detailed agreement with clearly specified policy objectives and proposed activities).

[144] *See, e.g.*, Dep't of Just., Annexure to Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Turkiye Radyo Televizyon Kurumu (Mar. 12, 2020), https://efile.fara.gov/docs/6780-Exhibit-AB-20200312-1.pdf.

[145] In the absence of form-level guidance, the general standard laid down in 22 U.S.C. § 612(a)(4) likely will apply in relation to both fields.

The overarching theme of these trends is inconsistency and confusion. First, this is best exemplified by the varying approaches of registrants in responding to Question 8 of the Exhibit B form. While some registrants used this field to describe the terms of agreements entered into with their foreign principals, most provided a general description of the activities proposed to be undertaken on behalf of the principal or the issues/interests sought to be represented. For instance, a filing by a registrant, in response to Question 8 outlined the objective of the representation ("Promote LISCR's interest with United States stakeholders and agencies, particularly relating to maritime industry related matters impacting the Liberian Registry")[146] while others detailed the activities to be performed for the benefit of the foreign principal[147] or described the contractual arrangements.[148]

Second, a comparison of responses to Questions 8 and 9 of Exhibit B also supports the overarching theme of inconsistency. In at least sixteen of the forms analyzed, registrants adopted a "copy-paste" approach — reproducing identical statements in response to both questions.[149] At best, this demonstrates that parties are not clear about the requirements of each field. At worst, this trend is indicative of parties showing wanton indifference in providing answers that are responsive to the prompts of the Exhibit B form.

While Question 8 provides little guidance on what is expected from registrants, Question 9 is somewhat clearer. Here, registrants are required to "describe fully the activities the registrant engages in or proposes to engage in on behalf of the above foreign principal."[150] While there is no guidance on how much detail is required to be included in this field, it at least must be "full" or "comprehensive."[151] However, in at least half of the 120 filings, the description of

[146] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, LISCR, LLC Q. No. 8 (Feb. 14, 2020), https://efile.fara.gov/docs/5870-Exhibit-AB-20200214-15.pdf.

[147] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Ivanyan and Partners Question 8 (Feb. 13, 2020), https://efile.fara.gov/docs/6793-Exhibit-AB-20200213-1.pdf. Responding to Question 8 by stating:

> Provide written quarterly reports that summarize current events-all source materials are publicly available. Source materials include periodicals such as the *New York Times*, *Washington Post*, *Roll Call*, and the *Wall Street Journal*; documents provided by congressional committees (statements, supporting materials); subscription services (BGov, Politico Pro, Reuters) and think tank documents (Atlantic Council, Brookings, CAP, CATO, etc.).

[148] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, 342 Association (Feb 6, 2020), https://efile.fara.gov/docs/6791-Exhibit-AB-20200206-3.pdf (last visited May 22, 2020) ("This agreement is between Registrant and 342 Association for the provision of public affairs and communications strategy consulting services. The term of the agreement is September 18, 2019 through October 17, 2019. Accordingly, Registrant's representation of 342 Association ended on October 17, 2019, and the registration of Registrant and all short-form registrants should be terminated. 342 Association has paid Registrant 50% of the project fee under the agreement; the final payment for the remaining 50% is due and expected soon.").

[149] Registrants have used general language like "Registrant will provide strategic consulting services, including representation before the U.S. Senate, U.S. House of Representatives, and U.S. executive branch agencies" in response to all three questions. Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Ministry of Justice of the Republic of Kazakhstan (through RJI Capital Corporation) (Feb. 7, 2020), https://efile.fara.gov/docs/6774-Exhibit-AB-20200207-2.pdf.

[150] Exhibit B, *supra* note 83.

[151] In the absence of form-level guidance, the general standard laid down in 22 U.S.C. § 612(a)(4) likely will apply in relation to both fields.

registrant activities provided was clearly insufficient by any standard of measurement. In one egregious instance, a registrant disclosed a non-written arrangement merely describing it as "[m]edia consulting, strategic communications, writing and editing" with no further details on the specific activities or issues to be addressed as part of the representation.[152]

In addition, as indicated above, many responses to Question 9 were verbatim reproduction of Question 8 responses. Unsurprisingly, most of these would also not likely amount to full or comprehensive disclosures of registrant activities.[153] In general, it was also observed that limited representations — for example, in relation to a particular event or trip — were less problematic in terms of disclosure.[154]

Lastly, several filings also declined to answer Question 9 directly — instead, directing readers to refer to the appendix (typically, the attached contract) for information on registrant activities. While it is unclear if such incorporation by reference would stymie meaningful public inquiry in all cases, there were multiple cases where such references were red herrings. In these cases, the contracts themselves were silent on the nature of the engagement, did not detail registrant activities, or contained information otherwise unresponsive to Question 9. For instance, in one example, the registrant stated "See attached contract for details of agreement" in response to Questions 7 through 9 (numbering different due to older NSD-4 form being used). However, the attached contract was also bereft of any details relating to the arrangement apart from the fact that the registrant was to "advise and place paid media" (sic) for the client.[155] In contrast, in some other cases, contracts were comprehensive and provided detailed terms relating to the activities to be conducted by the registrant.[156]

iii. Political Activities Disclosures

Unlike the responses to Questions 8 and 9, there is arguably a clearer legal standard to which disclosures of the "political activities" of a registrant must conform (Question 10). As suggested in the previous Section, these must be "detailed," i.e., reflect "that degree of specificity necessary to permit meaningful public evaluation of

[152] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Embassy of the Republic of Azerbaijan to the United States of America (Jan. 31, 2020), https://efile.fara.gov/docs/6789-Exhibit-AB-20200131-1.pdf.

[153] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Dr. Reginald Boulos (Jan. 27, 2020), https://efile.fara.gov/docs/6788-Exhibit-AB-20200130-1.pdf (providing identical vague responses to Questions 8 and 9: "Consultant to provide advice to Client relating to political strategy, public relations, and Client's government relations with the governments of Haiti and the United States . . .").

[154] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Confindustria (Dec. 8, 2019), http://www.fara.gov/docs/6764-Exhibit-AB-20191208-1.pdf; Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Davor Stier (Dec. 2, 2019), http://www.fara.gov/docs/6759-Exhibit-AB-20191202-4.pdf ("Registrant unsuccessfully attempted to schedule an informal meeting with White House staff on behalf of the foreign principal . . . .").

[155] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Terra Peregrin S.A (Jan. 10, 2020), https://efile.fara.gov/docs/6399-Exhibit-AB-20200110-34.pdf.

[156] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Republic of Turkey (Feb. 3, 2020), http://www.fara.gov/docs/6328-Exhibit-AB-20200203-11.pdf (despite the Exhibit B filing itself being bereft of details, the attached contract is detailed).

each of the significant steps taken to achieve the purposes of the agency."[157] While the exact contours of what this entails are not settled, several conclusions can be drawn from a bare perusal of this standard. At a minimum, disclosure must, with specificity, disclose the purposes of the agency as well as each of the significant steps proposed to achieve them. For the purposes of the present analysis, this is the standard broadly relied upon.

In relation to the present dataset, of the 120 Exhibit B forms considered, 91 indicated that they involved the registrant engaging in activities of a "political" nature. A study of these disclosures indicated two types of broad issues — those relating to accuracy of the disclosure, and those relating to the level of detail.

Accuracy. The issue of accuracy concerns whether the categorization of activities of the registrant as "political" is accurate. This issue assumes significance as no further disclosures are required from registrants who respond that they are not engaging in "political activities." In contrast, as per the Question 10 prompt, a registrant engaging in "political activities" is required to "describe all such political activities indicating, among other things, the relations, interests or policies to be influenced together with the means to be employed to achieve this purpose."[158] Further, as per the prompt, "[t]he response must include, but not be limited to, activities involving lobbying, promotion, perception management, public relations, economic development, and preparation and dissemination of informational materials."[159]

Of the ninety-one Exhibit B forms which indicated that registrants sought to engage in "political activities," in at least twelve cases, there were concerns that the categorization of the activities of the registrant may have been inaccurate. Based solely on materials and statements made by the registrants themselves in their filings, in at least ten of these cases, registrants who disclosed that they were *not* engaged in "political activities" seem to have miscategorized their activities. In some cases, the categorization of activities as non–political were egregious and had glaring errors. For instance, in one case, a registrant who described its activities as "[b]uilding relationships with members of congress and staff" declared that it was not engaging in "political activities."[160]

Less commonly, in a few cases, the inverse was observed, with registrants seemingly erroneously classifying clearly non–political activities as political in nature. For instance, it is unlikely that a registrant who — as per form-provided data — only engages in monitoring of public domain sources, would be found to engage in a "political activity" under FARA.[161]

Completeness and Detail. Analysis under this heading involved studying cases where registrants indicated that they intended to engage in "political activities"

[157] S. REP NO. 89-143, at 10 (1965).

[158] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Question 10 (2019), https://www.justice.gov/nsd-fara/page/file/1235221/download.

[159] *Id*.

[160] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Kingdom of Saudi Arabia (Feb. 6, 2020), https://efile.fara.gov/docs/6790-Exhibit-AB-20200206-1.pdf.

[161] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Ivanyan and Partners, Question 8 (Feb. 13, 2020), https://efile.fara.gov/docs/6793-Exhibit-AB-20200213-1.pdf.

and the level of detail in which they responded to Question 10 of the Exhibit B form. Based on the criteria discussed above, where a registrant did not clearly disclose the interests or issues it sought to influence or provide details relating to the manner in which it sought to influence such issues, it was considered that the filing did not meet the requisite standard of detail required under FARA. This analysis revealed several notable trends.

At the outset, it is worth mentioning the manner in which registrants sought to describe their "political activities." Of the ninety-one registrants who disclosed "political activities," the vast majority (at least eighty-six) attempted to directly respond to the question within the template form. The remaining registrants tried to respond by attempting to refer to an attached contract[162] or, in one case, a previously filed Exhibit B form.[163] Unlike in relation to Questions 8 and 9 above, this approach is less likely to pass muster under Question 10, given the higher legal standard for detail applicable to disclosure of "political activities." In many cases, the contracts referred to did not contain any information responsive to the prompts in Exhibit B.[164] At the same time, there were examples of cases where registrants provided insufficient details in direct response to Question 10, but where the attached contractual agreement addressed these gaps through detailed disclosures concerning the scope of the representation.[165]

Similar to observations made in relation to Questions 8 and 9 of the Exhibit B form, several registrants adopted a "copy–paste" approach to Question 10 — choosing to reproduce verbatim responses provided to Question 9[166] and, in some cases, Questions 8 and 9.[167] This approach was found to be taken in at least seventeen filings out of ninety–one. This figure includes cases where registrants also merely indicated that the response to Question 10 was the same as responses to previous questions. Given the standard for disclosures of "political activities," and the differing premises of Questions 8 and 9, such a response is unlikely to satisfy the legal standard required for Question 10. An exception to this would be where the responses

[162] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Saro Spadaro, question 10 (Mar. 9, 2020), http://www.fara.gov/docs/6399-Exhibit-AB-20200309-39.pdf. This filing merely states "See Attached Contract" in relation to questions 8–10.

[163] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Embassy of Qatar, Question 10 (Mar. 25, 2020), http://www.fara.gov/docs/6561-Exhibit-AB-20200325-3.pdf.

[164] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, of Zari David (Eliezer) Kovo (Jan. 25, 2020), http://www.fara.gov/docs/6399-Exhibit-AB-20200125-36.pdf.

[165] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Bureau of Foreign Trade, Ministry of Economic Affairs, Government of the Republic of China (BOFT) (Feb. 19, 2020), https://efile.fara.gov/docs/3988-Exhibit-AB-20200219-7.pdf (While the details provided in the Exhibit B form are limited (though likely sufficient), there is substantially more specific information provided concerning the objectives and methods of the representation in the attached contract between the registrant and foreign principal).

[166] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Talal F. Aldabbous (Jan. 27, 2020), https://efile.fara.gov/docs/3718-Exhibit-AB-20200127-17.pdf. In response to the question on political activities, the response merely states "*See Question 9 above*." *Id.* (emphasis added).

[167] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Ministry of Justice of the Republic of Kazakhstan (Feb. 7, 2020), https://efile.fara.gov/docs/6774-Exhibit-AB-20200207-2.pdf. This filing merely states "*Registrant will provide strategic consulting services, including representation before the U.S. Senate, U.S. House of Representatives, and U.S. executive branch agencies*." *Id.* (emphasis added).

of a registrant to Questions 8 and 9 were extremely broad and far exceeded the scope for each — a feature only observed in two instances.

In relation to substantive requirements for disclosures of "political activities," a defining trend was the lack of detail provided by registrants. Of the ninety–one responses studied, only around nineteen filings were found to contain disclosures which disclosed issues/interests represented *as well as* the steps to be undertaken to achieve them. While there were several cases that were on the margins, even by conservative estimates, more than half of the responses studied did not seem to contain adequately detailed disclosures relating to "political activities" to be undertaken by a registrant. Several filings merely provided a solitary and uninformative line in response to the Question 10 prompt. For instance, egregious cases included a filing where a registrant, in relation to "political activities", merely stated: "Please see the attached contract. Registrant's services include consulting services in connection with public relations, media relations, government relations, and litigation."[168] The attached contract did not provide any additional details in relation to registrant "political activities" — barring that it would provide strategic consulting and management services in connection with unspecified pending litigation against the foreign principal before the U.S. District Court for the Northern District of California. While it is clear that this filing refers to ongoing litigation with Facebook, no part of the filing meets the "detailed" standard for disclosure of "political activities."

Several cases involved registrants providing detailed disclosures relating to the nature of activities proposed to be engaged in as part of the representation, but insufficient mention of the actual issues or policies sought to be influenced on behalf of the foreign principal. For example, one registrant detailed its proposed activities but failed to specify the issues or policies that it sought to influence, apart from indicating that they related to "US-Honduras relations."[169]

At the same time, it may be misleading to suggest that all cases required a uniform standard of disclosure of "political activities." Through the review of filings, it was also observed that registrants were engaged for representations of varying breadth. While some registrants were engaged solely around specific events[170] or meetings,[171] others were engaged for open-ended or extremely broad representations

[168] Dep't of Just., Exhibit B to Registration Statement pursuant to the Foreign Agents Registration Act of 1938, as amended, Q Cyber Technologies Ltd. (Jan. 6, 2020), https://efile.fara.gov/docs/6170-Exhibit-AB-20200106-74.pdf (last visited May 22, 2020).

[169] Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Gov't of Honduras (Jan 16, 2020), https://efile.fara.gov/docs/5430-Exhibit-AB-20200116-82.pdf (last visited May 22, 2020).

[170] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Consulum FZ LLC (Dec. 13, 2019), https://efile.fara.gov/docs/6769-Exhibit-AB-20191213-1.pdf. The registrant was retained "to support the Saudi Film Council, General Cultural Authority, the Saudi leadership delegation and Saudi filmmakers . . . at the 2018 Cannes Film Festival." *Id.* at 5 (emphasis added). This filing is also an example of one which was made seemingly after more than a year of delay. *Id.*

[171] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Confindustria (Dec. 8, 2019), http://www.fara.gov/docs/6764-Exhibit-AB-20191208-1.pdf. The registrant was retained to accompany an Italian industry delegation to the U.S. and "moderate a roundtable and present short speech on the excellence of Italian exports in front of US audiences." *Id.* at 5 (emphasis added). This representation is an example of a time-limited agency relationship centered around a defined event.

— typically referring to *all* issues that may affect a particular foreign principal.[172] It is reasonable to expect that the more limited the representation, the narrower disclosures it would require in relation to "political activities." In contrast, it is not clear how specific the disclosures in an open-ended registration must be. In order to provide the public a reasonable chance to evaluate the activities of the registrant, it may be necessary to provide — at a minimum — indicative references to the broad objectives of the representation, types of issues likely to be influenced and the types of "political activities" likely to be engaged in for the same purposes. These indicative disclosures would later be complemented by the Supplementary Statement filings of a registrant which, if in order, would operate to provide backward-looking disclosures of activities engaged in over the previous six-month period.

Analysis of the dataset also suggests that disclosures of "political activities" are affected by the format of the agreement between the registrant and foreign principal. Of the ninety-one Exhibit B forms disclosing "political activities," twenty pertained to representations that were concluded orally (i.e., not in any written format). Discounting four of these as they pertained to the same event/representation, the data suggests that at least ten out of the remaining sixteen filings did not contain adequate disclosures of "political activities." This is notable as orally concluded representations do not contain attachments such as contracts. Therefore, where a representation is agreed to in unwritten form, third-party evaluation of the relationship will rely solely on disclosures made in responses to Questions 8, 9, and 10 (among others) of Exhibit B.[173] This makes it all the more necessary that adequate detail be provided in these cases.

Overall, the above survey provides a broad and non-exhaustive indication of the issues that currently subsist with the disclosure of "political activities" under FARA. Well over half of the dataset analyzed likely did not meet the legal requirement for "detailed" with a number of other concerning trends also being observed. If unaddressed, these issues may have the effect of challenging the very assumptions upon which FARA is built. Without permitting meaningful public scrutiny of agent activities, transparency cannot be effective. At very least, there is a case to be made for guidance which clarifies the applicable legal standard (whether to require more details or less) and promotes systemic consistency.

CONCLUSIONS & RECOMMENDATIONS

A. CONCLUDING OBSERVATIONS

The first part of this paper sought to introduce FARA, examine its historical roots, and identify the legal standard for disclosure of "political activities" under it. Based

[172] *See, e.g.*, Dep't of Just., Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Afghanistan-U.S. Democratic Peace and Prosperity Council (Mar. 19, 2020), https://efile.fara.gov/docs/6803-Exhibit-AB-20200319-1.pdf. While in general the filing is detailed, it provides no details or examples of specific policy matters or issues relating to which it provides lobbying and related services.

[173] *See, e.g.*, Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended, Embassy of the Republic of Azerbaijan to the United States of America (Jan. 31, 2020), https://efile.fara.gov/docs/6789-Exhibit-AB-20200131-1.pdf (providing insufficient disclosure information despite the lack of an attached contract).

on the analysis above, it concluded that there are strong reasons to suggest that disclosures of "political activities" must be "detailed" in the manner set out under § 5.210 of the FARA regulations. In other words, registrants under FARA must — in their Exhibit B filings — disclose their intended "political activities" in a manner that permits "meaningful public evaluation of each of the significant steps taken [by the registrant] to achieve the purposes of the agency relation."[174]

While there is no judicial or executive guidance as to what this standard amounts to in practice, a bare reading suggests that this must include disclosure of the issues underlying the representation and the steps taken to achieve them. Moreover, this disclosure must be of such specificity that an ordinary person is able to draw reasonable conclusions regarding the "political activities" in question.

Following on from the above, the second part of this Article sought to examine trends in compliance with this standard, among others, within a sample set of Exhibit B forms filed with the DOJ. This survey revealed several problematic issues in relation to the quality of disclosures made by registrants in their filings. It concluded that, if unaddressed, these issues have the potential to undermine the disclosure-centric approach of FARA.

In relation to non-substantive issues relating to format, several concerns were observed. The *first* of these was the inconsistent adoption of the most recent NSD-4 form by registrants. Despite the latest revision of NSD-4 (at the time of the above survey in March 2020) having been issued in 2019, several registrants continued to use the 2017 version of the form.[175] This increases the enforcement burden as the newer version contained features that would have made it easier to detect delayed filings. *Second*, principal-agent agreements, regardless of form and length, are treated in the same manner under FARA. In other words, a 200-page written contract is treated at par with an unwritten agreement, and Exhibit B forms disclosing either are expected to conform to the same level of detail. This is incongruous as written contracts tend to contain a wealth of information over and above disclosures made within the Exhibit B form. In contrast, unwritten agreements are described solely on the basis of the disclosures made within Exhibit B. As was observed, this leads to several instances where disclosures relating to non-contractual arrangements were clearly insufficient. *Third*, several Exhibit B filings were incomplete in that they did not have accompanying Exhibit B forms and consisted of bare documents (such as contract amendments and renewals). Similarly, several documents classified on the DOJ portal as Exhibit B forms did not contain Exhibit B itself.

Several problematic trends were also observed in relation to disclosures of registrant activities. The most notable of these was apparent registrant confusion in differentiating between the requirements of Questions 8 and 9 of NSD-4. Registrants adopted varying approaches to answering these prompts and, in many cases, produced identical responses to both questions. *Second*, registrants, in many cases, did not provide responses that either satisfied the requirements of the question prompt or met

[174] 28 C.F.R. § 5.210 (2020).

[175] U.S. Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended (2017), superseded by Dep't of Just., Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended (2020), https://www.justice.gov/nsd-fara/page/file/1273636/download.

the underlying legal standard.[175] Registrants adopted varying strategies, in this regard, including providing vague responses and referring readers to attached contractual documents. In many cases, the attached contractual documents were themselves insufficiently clear, too complex, or wholly unresponsive. All of these trends, and especially the last, directly affect the ability of a third party to meaningfully evaluate the principal-agent representation.

In relation to "political activities," similar trends in registrant filings were observed. At the outset, there were several cases where it was unclear if the parties had accurately classified their activities as being "political" in nature. In this regard, seemingly non-political activities were identified as "political" and vice-versa. Much like responses to Questions 8 and 9, responses to Question 10 were often identical reproductions of responses to previous questions or unsubstantiated references to contractual documents. Both issues are problematic where the material referred to did not meet the legal standard for detail. The final, and key, trend concerning "political activities" related to the quality of disclosures made by registrants. Here, it was observed that a majority of the filings did not seem to meet the meaningful public evaluation standard discussed above. Only a minority of disclosures adequately detailed the activities to be engaged in, *as well as* the underlying policy or political objectives. There were also several egregious cases where disclosures were intentionally obfuscated to prevent third-party scrutiny of the ultimate beneficiary of registrant services, or the activities sought to be engaged in.

Overall, these observations paint a worrying picture of the current state of FARA filings. The trends pointed out above, individually as well as cumulatively, operate to frustrate the ability of stakeholders to meaningfully evaluate principal-agent relationships. While no generalizations should be drawn from the limited survey above, there are, at least, strong indications that the future of FARA will depend on further study and analysis of the quality of disclosures made by registrants. At the same time, the trends also revealed several gaps in the statute (and its implementation) which can undermine its effectiveness. Targeted legislative and executive intervention can address these gaps and strengthen FARA as the primary mechanism to check foreign influence operations of a political nature. Some of these are discussed below.

B. RECOMMENDATIONS ON POLICY & ENFORCEMENT

The above sections sought to identify concerns with the current approach to filings and disclosures under FARA. This Section aims to offer corrective policy and enforcement recommendations — particularly around Exhibit B filings. For ease of reading, they have been presented in a bullet-point and simple-language format.

i. Legislative & Policy Priorities

[176] In the absence of form-level guidance, it is likely that the general standard laid down in 22 U.S.C. § 612(a)(4)
will apply in relation to both fields. It may also be noted that form NSD-4 was revised in May 2020, subsequent to the time period of filings surveyed in this Article.

(1) *Clarifying legal standard:* In order to promote clarity, the DOJ should clearly articulate and clarify the legal standard that FARA-filings in general, and disclosures of "political activities" specifically, must meet. This involves reviewing and harmonizing the standard for "detailed" as present in regulations issued under FARA.

(2) *Benchmarking "detailed:"* The standard for "detailed" must be a dynamic benchmark which provides a minimum standard and requires registrants to adduce additional material based on factors including:

a. Length of attachments (such as contractual documents);
b. Format of principal-agent arrangement (written vs. non-written);
c. Nature and duration of the engagement (one-time vs. ongoing); and
d. Scope of the arrangement (defined vs. open-ended).

(3) *Enforcing quality:* The DOJ should take steps to improve FARA-related enforcement relating to *quality* of the disclosures made by registrants. A critical part of this will be strengthening civil and criminal enforcement and disincentives in relation to poor-quality filings which do not meet requisite legal thresholds. Merely filing an incomplete or vague filing should not grant a free pass to a registrant.

ii. Filing-related Recommendations

(1) *Form clarity:* NSD-4 must be amended to clarify the specific requirements (and *inter se* differentiate) between Questions 8, 9, and 10 of Exhibit B. This involves providing formal or in-form guidance as to what registrants are expected to detail within each of these fields. The DOJ may consider providing formal guidance or illustrations which explain each form field and details what must be addressed therein.

(2) *Incorporation by Reference:* When registrants make a filing that is adjunct to a previous filing (such as an amendment, renewal, extension, or termination), they must be mandated to include such document as part of the new filing either in relevant part, or as a whole. Registrants must not be permitted to make wholesale references to attached documents in place of answering any specific questions on Exhibit B. In other words, incorporation by reference to responses must no longer be permitted.

(3) *Transparent Beneficiaries:* NSD-4 must be amended to include a field requiring parties to disclose all known beneficiaries of the representation over and above the named foreign principal.

iii. *Unsigned Documents:* Registrants must be required to certify as accurate (for example, through notation) any unsigned annexures or appendices to the contractual arrangement.

iv. *Open-ended Representations:* Registrants must be required to file separate and additional statements of work (SOWs) that may be executed pursuant to an open-ended contract.

For optimal effect and consistency, these suggestions for intervention above should form part of future efforts at auditing, as well as legislative or regulatory reform. After all, FARA has not seen substantive reform in decades, while key portions of the DOJ's regulations under the statute – including those relating to the level of detail requirement – have not been reviewed since the 1960s.[177]

As legislative pressure over FARA builds, if nothing else, the takeaway for policymakers from the above exercise must be that when it comes to FARA, the devil is in the details. Legislation concerned with amending FARA to cover larger policy gaps (e.g., jurisdiction over non-U.S. persons, and widening the definition of "foreign agent") will only go so far. To truly ensure that FARA is effectual, such amendments should be combined with a microscopic study and review–by statutory mandate–of the minutiae of issues relating to FARA forms and filings. These instruments form the backbone of FARA and without efforts to address gaps and optimize their impact, compliance with the statute will be reduced to a box-checking exercise with little real impact on exposing foreign influence—its true purpose.

[177] BEN FREEMAN, BRIAN STEINER, AND TARUN KRISHNAKUMAR, RECENT PROPOSALS TO AMEND THE FOREIGN AGENTS REGISTRATION ACT: A SURVEY, CTR. FOR INT'L POL'Y (Apr 2021), https://3ba8a190-62da-4c98-86d2-893079d87083.usrfiles.com/ugd/3ba8a1_893ea900a31846949820e13837a04a2e.pdf;