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By electronic submission (via the Federal E-rulemaking Portal)

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Re: Advance Notice of Proposed Rulemaking (RIN 1105-AB67)

Campaign Legal Center (“CLC”) writes to comment on the Department of Justice’s Advanced Notice of Proposed Rulemaking (“ANPRM”) regarding the implementation of the Foreign Agents Registration Act (“FARA”).¹

These comments respond primarily to the ANPRM’s Questions 13, 14 and 17 regarding the definition of informational materials and the application of FARA’s informational material labeling requirements to social media and other digital communications. We encourage the Department to proceed with a rulemaking and to bring further clarity to this important law.

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

The Department should adopt regulations that provide for an abbreviated “conspicuous statement” label for character- or space-limited social media communications, and additionally require that the abbreviated label be embedded on the face of a digital post.

¹ 86 Fed. Reg. 70787 (Dec. 13, 2021).

Foreign agents are increasingly turning to social media and other forms of digital communication in order to influence policymakers, influencers, and the public. The Chinese government, for example, has hired YouTube content producers to push pro-Beijing messaging,² and recently hired a firm to recruit social media influencers amidst controversies connected to the Beijing 2022 Winter Olympics.³ Countries like Saudi Arabia and Iran have also used social media platforms like Twitter and Instagram to advance geopolitical goals.⁴

However, far too often, the average social media user will have no idea when they are being subjected to foreign propaganda.

The FARA informational materials database includes numerous tweets, Instagram posts, LinkedIn updates, and other social media communications made by foreign agents on behalf of foreign principals. However, those social media posts almost never disclose on their face that the content is attributable to a foreign source. Instead, the FARA-required label is usually only available on a social media account's profile page.

Social media users are bombarded with an endless scroll of posts, ads, and other information, and the nature of social media is such that a user might encounter a communication without ever having followed the speaker's account or engaged with their profile.⁵ Rarely will an average user take the time to investigate a particular post by clicking through to a user profile or a landing page. Indeed, sophisticated propagandists will target and tailor their messages so that their influence efforts will mesh seamlessly into a user's feed, giving a user little reason to investigate further and learn whether a communication derives from a foreign source.

As of 2016, the FARA unit expressed the view that it is impracticable to include a label on each post,⁶ but social media has rapidly evolved since then, and there are relatively few character limits on most social media communications. Tweets, for example, are now twice as long as they were in 2016, and posts on platforms like Instagram, Facebook or LinkedIn have much longer

² Paul Mozur, Raymond Zhong, Aaron Krolik, Aliza Aufrichtig, *How Beijing Influences the Influencers*, N.Y. TIMES (Dec. 13, 2021), <https://www.nytimes.com/interactive/2021/12/13/technology/china-propaganda-youtube-influencers.html>.

³ Anna Massoglia, *Chinese government deploying online influencers amid Beijing Olympics boycotts*, CENTER FOR RESPONSIVE POLITICS (Dec. 13, 2021), <https://www.opensecrets.org/news/2021/12/chinese-government-deploying-online-influencers-amid-beijing-olympics-boycotts>.

⁴ Daniel L. Byman, *How Middle Eastern Conflicts are Playing Out on Social Media*, BROOKINGS (Jan. 20, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/01/20/how-middle-eastern-conflicts-are-playing-out-on-social-media/>; Gabrielle Lim, Etienne Maynier, John Scott-Railton, Alberto Fittarelli, Ned Moran, and Ron Deibert, *Burned After Reading: Endless Mayfly's Ephemeral Disinformation Campaign*, CITIZENLAB (May 14, 2019), <https://citizenlab.ca/2019/05/burned-after-reading-endless-mayflays-ephemeral-disinformation-campaign/>.

⁵ For example, on Twitter, a foreign agent can drive a tweet into an individual's feed by paying to "promote" it. *What Are Promoted Ads?*, TWITTER (last visited Feb. 10, 2022), <https://business.twitter.com/en/help/overview/what-are-promoted-ads.html>. A foreign agent's tweet might also appear in a user's feed if another person followed by the user engages with the tweet, or if Twitter algorithmically recommends the tweet. *About Your Home Timeline on Twitter*, TWITTER (last visited Feb. 10, 2022), <https://help.twitter.com/en/using-twitter/twitter-timeline>.

⁶ Office of the Inspector Gen., U.S. Department of Justice, *Audit of the National Security Divisions' Enforcement and Administration of the Foreign Agents Registration Act*, at 20 (2016), <https://oig.justice.gov/reports/2016/a1624.pdf>.

character limits.⁷ Notably, the Federal Election Commission also once considered it impracticable to include disclaimers on character-limited social media advertisements, but since 2017, has begun to acknowledge that technology has evolved and that disclaimers can be accommodated on major social media platforms.⁸

Additionally, platforms are increasingly providing for disclaimer labels outside of a post itself, including to inform viewers when content derives from a foreign source. YouTube appends an informational label to videos from state-owned media sources.⁹ Twitter applies distinct tags to certain official government accounts and state-owned media, including on unpaid “organic” content.¹⁰ Facebook and Instagram also place state-controlled media labels on both paid and unpaid posts from certain foreign government-owned sources.¹¹ These platform-imposed policies apply to only a subset of the communications subject to FARA labeling requirements, yet these examples highlight the variety of ways in which social media communications can be adapted to accommodate different forms of labeling.¹²

The Department should adopt rules providing for an abbreviated label that, at a minimum, states that the materials are distributed by a foreign agent on behalf of a clearly identified foreign principal.¹³ The rules could provide that the use of an abbreviated label is permissible when it is not possible for a communication to include a full conspicuous statement.

Because most social platforms can readily accommodate such an abbreviated label, **the Department should also require that the label be embedded on the face of the communication itself.** This is the only way to effectively advance FARA’s goal of informing Americans about when they are being exposed to foreign propaganda.¹⁴ The label should

⁷ See Jacqueline Zote, *How Long Should Social Posts Be? Try This Social Media Character Counter*, SPROUT SOCIAL (Jul. 26, 2021), <https://sproutsocial.com/insights/social-media-character-counter/> (describing Twitter’s 280 character limit for tweets, Facebook’s 63,206 character limit for posts, Instagram’s 2,200 character limit for captions, LinkedIn’s 110,000 character limit for published content, and YouTube’s 5,000 character limit for video descriptions).

⁸ Compare FEC Advisory Opinion 2011-09 (Facebook) with FEC Advisory Opinion 2017-12 (Take Back Action Fund); see also April Glaser, *Political Ads on Facebook Now Need to Say Who Paid for Them*, SLATE (Dec. 18, 2017), <https://slate.com/technology/2017/12/political-ads-on-facebook-now-need-to-say-who-paid-for-them.html>.

⁹ *Information Panel Providing Publisher Context*, YOUTUBE, (last visited Feb. 10, 2022), https://support.google.com/youtube/answer/7630512?p=publisher_transparency&visit_id=1-636531077201178201-1911216465&rd=1.

¹⁰ *About Government and State-Affiliated Media Accounts on Twitter*, TWITTER (last visited Feb. 10, 2022), <https://help.twitter.com/en/rules-and-policies/state-affiliated>.

¹¹ *Labeling State-Controlled Media on Facebook*, FACEBOOK (last visited Feb. 10, 2022), <https://about.fb.com/news/2020/06/labeling-state-controlled-media/>.

¹² Labeling policies have also been inconsistent across platforms and, in some cases, only partially implemented. See, e.g., Nicole Buckley, Morgan Wack, Joey Schafer, Martin Zhang, *Inconsistencies in State-Controlled Media Labeling*, ELECTION INTEGRITY PARTNERSHIP (Oct. 2020), <https://www.eipartnership.net/policy-analysis/inconsistencies-in-state-controlled-media-labeling>.

¹³ The Department currently requires the label to state: “This material is distributed by (name of registrant) on behalf of (name of foreign principal). Additional information is available at the Department of Justice, Washington, D.C.” See FARA Frequently Asked Questions, DEPARTMENT OF JUSTICE, <https://www.justice.gov/nsd-fara/frequently-asked-questions#46> (last visited Feb. 10, 2022); see also 22 C.F.R. § 5.402.

¹⁴ 22 U.S.C. § 611 (Policy and Purpose) (describing the statute’s purpose of disclosing “propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals,”

immediately let viewers know that the communication is made on behalf of a foreign source; the benefits of labeling would be defeated if the label were only available via a profile page, or via a new icon or acronym that will not be recognized by most social media users.¹⁵ Indeed, studies show that platform state media warning labels are only effective when the label is prominently placed so it cannot be overlooked by users.¹⁶

Finally, although the ANPRM asks specifically about social media labeling, any regulations should be platform and technology neutral, so that they may be adapted to new and evolving forms of communication.

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

Yes, at least in the context of the abbreviated disclaimer described in response to ANPRM Question 14.

Current labeling requirements may mislead rather than inform. For example, listeners to radio broadcasts of the Russian government’s state-run “Radio Sputnik” program hear an hourly disclaimer that states: “*This radio programming is distributed by RM Broadcasting LLC on behalf of the federal state unitary enterprise Rossiya Segodnya International Information Agency. Additional information is on file with the Department of Justice.*”¹⁷ The disclaimer formally identifies the agent and foreign principal that are registered with the Department, but fails to communicate to the average listener that they are hearing a broadcast from a Russian government-owned news source.

so that “the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities”); *see also Meese v. Keene*, 481 U.S. 465, 481 note 15 (1987) (citing *Viereck v. United States*, 318 U.S. 236, 251, 63 S.Ct. 561, 568, 87 L.Ed. 734 (1943) (Black, J., dissenting)) (describing how Congress in enacting the FARA statute “intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source”).

¹⁵ For example, the digital advertising industry adopted a standardized “AdChoices” icon to give users the option to obtain more information about behavioral advertising, but studies have shown that only a fraction of internet users recognized the AdChoices icon and an even smaller number of those users understand what it means. Alina Tugend, *Key to Opting Out of Personalized Ads, Hidden in Plain View*, N.Y. TIMES (Dec. 20, 2015), <https://www.nytimes.com/2015/12/21/business/media/key-to-opting-out-of-personalized-ads-hidden-in-plain-view.html>; *see also* Stacia Garlach & Daniel D. Suthers, ‘I’m supposed to see that?’ *AdChoices Usability in the Mobile Environment*, HAWAII INT’L CONFERENCE ON SYSTEM SCIENCES (2018), <https://scholarspace.manoa.hawaii.edu/bitstream/10125/50364/1/paper0477.pdf>. The Department should not attempt to create a new FARA-specific icon or label, as it will not be recognized or understood by most users.

¹⁶ Jack Nassetta & Kimberly Gross, *State Media Warning Labels Can Counteract the Effects of Foreign Misinformation*, HARVARD KENNEDY SCHOOL, MISINFORMATION REVIEW VOLUME I(7), (Oct. 2020), https://misinfreview.hks.harvard.edu/wp-content/uploads/2020/10/nassetta_state_media_warning_labels_20201030-2.pdf.

¹⁷ *See* Craig Patrick, *Russia Paying Florida Businessman for Right to Broadcast Radio Sputnik Over U.S. Airwaves*, FOX 13 TAMPA BAY (Apr. 30, 2021), <https://www.fox13news.com/news/russia-paying-florida-businessman-for-right-to-broadcast-radio-sputnik-over-us-airwaves>.

In developing requirements for an abbreviated disclaimer, the Department should identify the pieces of information that are most relevant to assessing a communication's source. Rather than requiring a formalistic script, the Department could consider adapting a functional labeling regulation that more generally requires that a reasonable person be able to understand that the communication is made on behalf of a foreign principal, the country of origin of that principal, and whether that principal has a relationship with a government or political party.

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

"Informational materials" is a key term that can trigger FARA's labeling and filing requirements, but is not defined in statute or regulations. It is not clear that there is substantial confusion about the breadth of the "informational materials" definition; indeed, the FARA informational materials database is hardly overinclusive, and one would be hard-pressed to find examples of filed materials that might not meet a reasonable interpretation of the term. If the Department does define "informational materials" in its regulations, the definition should be broad.

"Informational materials" are only subject to labeling and filing when they are (1) transmitted by an agent of a foreign principal, (2) "for or in the interests of such foreign principal," via (3) "the United States mails or by any means or instrumentality of interstate or foreign commerce," and (4) "in any form which is reasonably adapted to being . . . disseminated or circulated among two or more persons." 22 U.S.C. § 614(a).

The quantity of materials subject to labeling and filing is already significantly limited by these conditions, particularly the requirement that the materials be disseminated "for or in the interests of" a registered agent's foreign principal.

Thank you for your consideration of these comments, and please do not hesitate to contact us for additional information,



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