American Bar Association
Section of International Law

Annual Meeting Presentation
April 20, 2018

“The Rise of Foreign Agent Laws: The Emerging Trends in their Enactment and Application in the U.S., Russia and Across the Globe.”
Sponsored by Eurasia/Russia Committee

Moderators:
Michael Shapiro, Co-Chair, Eurasia/Russia Committee, ABA Section of International Law, michael.shapiro.law@gmail.com
Diana Tsutieva, Senior Associate, Foley Hoag LLP, Washington DC, dtsutieva@foleyhoag.com

Speakers:
Jess Gavron, Legal Director, European Human Rights Advocacy Centre (EHRAC), Middlesex University, London, j.gavron@mdx.ac.uk
Robert K. Kelner, Partner, Covington & Burling LLP, Washington DC, rkelner@cov.com
Melissa Hooper, Director of Human Rights and Civil Society, Human Rights First, Washington DC, HooperM@humanrightsfirst.org
Maria Kanevskaya, PhD, NGO Lawyers Club, Russia and Founder of Advocates for Civil Society, Washington DC, hrrc2008@gmail.com

Co-sponsoring Committees:
International Litigation Committee
Human Rights Committee
The UN and International Organizations Committee
I. The United States’ Foreign Agents Registration Act


The FARA Registration Unit of the Counterintelligence and Export Control Section within the Department of Justice National Security Division (NSD) is responsible for the administration and enforcement of the Act.

History of the FARA
The Act was passed in 1938, originally to control the dissemination of Nazi and Communist propaganda. The major amendments to the Act were passed in 1966. They shifted its focus from political propaganda to political lobbying and narrowed its reach by requiring the government to prove that the agent is acting at the order, request, or under the direction or control of a foreign principal. The 1995 amendments exempted agents registered under the Lobbying Disclosure Act (LDA) from the FARA requirements and replaced the term “political propaganda” with the term “informational materials.” See Office of the Inspector General, Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act (Sept. 2016) at p. 2.

Foreign Principal and Its Agent
Under the FARA, a “foreign principal” includes a foreign government, a foreign political party, a foreign individual or an organization. See 22 U.S.C. § 611(b).

An “agent of a foreign principal” includes “any person who acts as an agent, representative, employee or servant, or any person who acts in any other capacity at the order, request, or under the direction or control of a foreign principal . . . “and

- (i) directly or indirectly engages “in political activities for or in the interests of such foreign principal” or
- (ii) acts as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of the foreign principal, or
- (iii) solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interests of the foreign principal, or
- (iv) represents the interests of the foreign principal before any agency or official of the U.S. Government. See 22 U.S.C. § 611(c)(1).
“Political activity” includes any activity to “influence any agency or official of the [U.S.] Government . . . or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.” 22 U.S.C. § 611(o).

Registration and Reporting Requirements
Within 10 days of the agreement to become an agent of a foreign principal, the agent must submit an initial registration with the FARA Registration Unit. See 22 U.S.C. § 612. The registration must include the information about the agent and principal, the nature of the work performed, and the copy of the agreement between the agent and the principal. Id. at § 612 (a). The agent is required to make supplemental filings every 6 months describing activities performed during that period and the compensation paid for that work. Id. at § 612 (b).

In addition, the agent is required to submit to the Registration Unit any “informational materials” (a term which is not defined in the Act) produced on behalf of the principal and transmitted to two or more persons within 48 hours. The materials must contain a “conspicuous statement” that the materials were distributed by an agent on behalf of the foreign principal. See 22 U.S.C. § 614(b).

Exemptions from Registration Requirements
There are a number of exemptions to FARA registration requirements, including for individuals and organizations whose activities are of purely commercial nature or solely for religious, scholastic, or scientific pursuits. Those engaged in activities “not serving predominantly a foreign interest” are also exempt. See 22 U.S.C. § 614 (d).

According to a recent report by the Office of the Inspector General, NSD has reported difficulties determining whether the activities performed by certain groups, such as think tanks, NGOs, university and college campus groups, or foreign media entities that may receive funding and direction from foreign government fall within or outside these exemptions. Audit of the NSDE’s Enforcement and Administration of the FARA at pp. 18-19. These organizations typically claim that they act independently of foreign control and are not serving predominantly a foreign interest and are not required to register. Id.

Enforcement of the FARA
A willful failure to register as an agent of a foreign principal may result in a fine and imprisonment for up to 5 years. See 22 U.S.C. § 618(a). The Department of Justice might also seek to enjoin a party from acting as an agent of a foreign principal in violation of the FARA. See id. at § 618(f).

During and after World War II, the United States successfully prosecuted 23 criminal cases under the Act, including against the German-American Vocational League.
Between 1966 and 2015, however, the Department brought only 7 criminal FARA cases, with only one resulting in a criminal conviction, two resulting in guilty pleas for FARA violations, and two resulting in guilty pleas for non-FARA violations. Audit of the NSDE’s Enforcement and Administration of the FARA, Executive Summary. According to OIG report, the Department has not sought civil injunctive relief under FARA since 1991. Id.

The number of FARA registrations peaked at 916 in 1987 but sharply declined by the mid-1990s, a development that could be attributed to the imposition of registration fees and a passage of the LDA. See Audit of the NSDE’s Enforcement and Administration of the FARA at pp. 5-6.

Several bills have been introduced into Congress in 2017 to strengthen the enforcement of FARA. See, e.g., Senate Bill 1679 (2017) (seeking to impose graduated civil fines for multiple offenses under FARA); Senate Bill 625 (2017) (seeking to provide the Attorney General with the investigative tools to identify and prosecute foreign agents who seek to circumvent Federal registration requirements and unlawfully influence the political process).

Russian Entities Registered under the FARA
As of January 30, 2018, there were six active FARA registrants for Russian foreign principals. See U.S. Department of Justice, FARA Quick Search, Active Registrants by Country or Location Represented-Russia (last visited Jan. 30, 2018). The most publicized was the November 2017 registration of T&R Productions, LLC which registered as an agent for ANO TV-Novosti, an entity overseeing broadcasts of the RT Network. See Devlin Barrett and David Filipov, RT Agrees to Register as an Agent of the Russian Government, Washington Post (Nov. 9, 2017).

II. The Russian Federation’s Foreign Agents Law

In July 2012, President Putin signed into law “Amendments to Legislative Acts of the Russian Federation Regulating the Activities of Non-Commercial Organizations Performing the Functions of a Foreign Agent.” See Federal Law No. 121-FZ dated July 20, 2012 (“Foreign Agents Law” or the “Law”). The Law was ostensibly modeled after the FARA.

Under the Law, any “non-commercial organizations”1 registered in Russia that receives foreign funding is designated a “foreign agent” if it engages in a “political activity.” Such NGOs must be listed on the “foreign agents” register which is administered by the Justice Ministry. See Federal Law No. 121-FZ.

1 The commentaries on the Law typically refer to such entities as “non-governmental organizations” (NGOs). For purposes of this presentation, we use these terms interchangeably.
Prior to the enactment of the Law, the concept of a “foreign agent” had not existed in the Russian legal system.

The Term “Foreign Agent” Has Negative Connotation in Russian Culture
According to the December 2016 survey by Levada-Center, an independent polling organization, the majority of respondents in Russia associated the term “foreign agent” with a spy, recruiter, foreign intelligence, double agent, infiltrator, enemy, enemy of the people, enemy of Russia, traitor, hate of Russia, and fifth column.

Key Provisions: Foreign Funding and “Political Activity”
Under the Law, any amount of foreign funding might trigger the registration requirement. Unlike FARA, there is no requirement that the agent act under the direction or control of a foreign principal, nor is there a concept of a “foreign principal.”

The Law originally defined “political activity” as “organizing and conducting political actions for the purposes of influencing governmental decision-making as well as influencing public opinion for the same purposes.” See Federal Law No. 121-FZ, Article 2.

In 2016, the Law was amended to purportedly clarify the scope of “political activity.” See Federal Law No. 179-FZ “On Introducing Amendments to Article 2 paragraph 6 of the Federal Law “On Non-Commercial Organizations”” at Art. 2; see also Front Line Defenders, Law Defining “Political Activity” Passed (June 9, 2016). The new definition, however, is as broad as the original and purportedly encompasses all activities carried out to influence the development and implementation of public policy or any governmental decision. See id.

“‘Political activity’ can take the form of an event such as a gathering, meeting, or rally; participation in elections, polls and referendums, including the monitoring of these events. Furthermore, the notion encompasses the distribution of information containing assessments of authorities of any level and their policies, particularly if such assessments are made in order to change existing laws. This extends to public addresses and open letters to various officials.” Id.

Although the Law technically excludes NGOs involved in science, arts, healthcare, social services, protection of motherhood and childhood, support of persons with disabilities, sports, ecology, and charity from the registration requirements, a number of organizations involved in these areas were designated as “foreign agents.” See Section III, infra.

NGOs Can Be Placed on the “Foreign Agents” Register Without a Court Order
No organization voluntarily registered during the first year the Law was in effect. As a result of massive inspections of the NGOs conducted by the Justice Ministry in the Spring of 2013, the authorities targeted at least 90 NGOs in connection with the Law and filed administrative cases against NGOs and their leaders for failure to
In June of 2014, the Law was amended to allow the Justice Ministry to put NGOs into the register without their consent or a court order. See Federal Law No. 147-FZ “On Introducing Amendments to Article 32 of the Federal Law ‘On Non-Commercial Organizations.’”

NGOs Can Petition to Leave the Register under Certain Circumstances
Initially, the NGOs placed on the register weren’t permitted to leave it. In 2015, the Law was amended to provide for the removal from the register. See Federal Law No. 43-FZ dated March 8, 2015 “On Introducing Amendments to Articles 27 and 38 of the Federal Law on “Public Associations” and Article 32 of the Federal Law “On Non-Commercial Organizations.” Upon a petition, an NGO might be removed from the register under certain circumstances, for example if it has not received foreign funds and has not engaged in a “political activity” within a year or if the organization has liquidated. See id.

Criminal Penalties for Violation of the Law
Pursuant to Article 330.1 of Russia’s Criminal Code, “malicious” failure to comply with the Law’s registration requirements is subject to fines and imprisonment for up to two years. See Criminal Code of the Russian Federation Art. 330.1.

To date, the only case under this statute was brought against Valentina Cherevatenko, the Chair of the Women of Don, an organization which advocates for women’s rights, gender equality and human rights. On June 19, 2017, the charges were dropped on the grounds that no crime had been committed. See Frontline Defenders, Case History: Valentina Cherevatenko.

Russian Constitutional Court Upheld the Law
The Russian Constitutional Court upheld the provisions of the Law in April 2014. The Court found no legal or constitutional grounds for an argument that the term “foreign agent” had negative connotations from the Soviet era, such that its use was “not intended to persecute or discredit” affected entities. The Court also found that the “foreign agent” terminology was consistent with the public interest and state sovereignty. See Human Rights Watch, Russia: Constitutional Court Upholds ‘Foreign Agents’ Law (April 8, 2014).

Foreign Agents Law Extended to Mass Media Organizations
In November of 2017, in response to the U.S. Justice Department requiring RT to register under the FARA, see Section I infra, Russia amended its law on mass media to authorize the government to require foreign media organizations to also register as “foreign agents.” See Andrew Ross, Russian Legislators Pass Law Targeting
Unlike NGOs under the Foreign Agents Law, media organizations do not need to engage in a “political activity” to be required to register.

As of January 27, 2018, the Justice Ministry included nine organizations, including Voice of America and Radio Free Europe, into the “foreign agents media register.” See [Register of Foreign Media Companies Performing Functions of Foreign Agent, Justice Ministry of the Russian Federation](last visited January 27, 2018).

In December of 2017, the Russian parliament considered expanding the law even further by treating individuals as “mass media outlets.” Under the proposed legislation, any person or entity flagged as a “foreign agent,” will also be required to establish legal representation in Russia and cooperate with the Justice Ministry. See [Russian Lawmakers Want To Make It Possible To Blacklist Individual People — Literally Anybody With Internet Access — As Foreign-Agent Mass Media Outlets, Meduza](Dec. 21, 2017).

### III. The Application of the Russian Foreign Agents Law

NGOs on the Register Have Their Rights Restricted Compared to Other NGOs

NGOs placed on the register “have to undergo an annual audit (paid for out of their own budgets) or provide the Justice Ministry with information about events they’ve carried out, their management teams (every six months), how they spend funds received from foreign sources (every quarter), as well as publish[ ] this information on special websites run by ministry officials.” Daria Skibo, *Five Years of Russia’s Foreign Agent Law, ODR Russia and Beyond* (Aug. 14, 2017).

Failure to register, observe deadlines for filing audits, or not marking its published material as those “published by a foreign agent” subjects NGOs to substantial fines. See *id*.

“[O]ther impacts of the ‘foreign agent’ designation have included . . . smear campaigns and threats against staff, termination or restriction of specific projects, and local authorities’ refusal to continue collaboration.” Human Rights Watch, *Russia: ‘Year of Ecology’ a Sham* (Nov. 21, 2017).

Since 2013, about 160 NGOs were included in the “foreign agents” register. As of January 30, 2018, 83 organizations were on the register. See [Register of NGOs Performing Function of Foreign Agent, Justice Ministry of the Russian Federation](last visited January 27, 2018). Of the organizations that have left the register, about half have either self-liquidated, been liquidated by a court decision, or are in the process of liquidation. Daria Skibo, *Five Years of Russia’s Foreign Agent Law, ODR Russia and Beyond* (Aug. 14, 2017).
Foreign Agents Law Has Been Used to Target a Broad Range of Organizations
According to a recent Human Rights Watch report, the Law “has been used to target a broad range of independent organizations that work on human rights, health, environmental issues, migrants, and refugees, as well as research organizations, groups that conduct public opinion polling, and groups that provide legal aid to victims of rights abuses or support people with HIV/AIDS or victims of Soviet repression.” Human Rights Watch, Russia: 'Year of Ecology’ a Sham (Nov. 21, 2017).

Prominent Russian human rights organization targeted by the Law include Human Rights Defense Centre Memorial and AGORA Association, a network of human rights lawyers and activists which was closed by court order for alleged violations of the Law. See Human Rights Watch, Russia: Government vs. Rights Groups (Sept. 8, 2017).

Other high-profile Russian NGOs affected by the Law include Public Verdict (assists victims of police misconduct); Committee Against Torture (investigates allegations of torture and assists victim of police brutality); Golos (organization in defense of voters’ rights; liquidated in 2016 for alleged repeated violations of the Law); SOVA Centre for Information and Analysis (promotes human rights and democracy through research, advocacy and monitoring); Vyohd (organization in defense of LGBT rights); Levada-Center (independent polling organization); and Dynasty Foundation (private funder of scientific research shut down in 2015 after being included in the “foreign agents” register).

IV. The Venice Commission Opinion and ECHR Proceedings

The Venice Commission Opinion
On June 27, 2014, the European Commission for Democracy Through Law (Venice Commission) issued its Opinion on the 2012 version of the Foreign Agents’ Law. Overall, the Commission found that the Law has a chilling effect on the freedoms of expression and association in Russia. See id. at ¶¶ 137-139.

Specifically, the Commission concluded that the term “foreign agent” stigmatizes NGOs and seriously hampers their activities and recommended that the term be abandoned. See id. at ¶132. Further, it concluded that the legitimate goal of ensuring transparency of NGOs receiving foreign funding cannot justify measures which hamper activities of organizations operating in the areas of human rights and rule of law. See id. at 134. The Commission found that the term “political activities” was “broad, vague,” and disparately interpreted, and urged Russia to develop a clear definition that would not be used to specifically target human rights defenders or applied to NGOs based on their political opinions. See id. at ¶135. The Commission also noted concerns with the practical implementation of the Law given that NGOs were subjected to “numerous extraordinary inspections” with no clear legal grounds. Id. at ¶136.
European Court of Human Rights Proceedings
In the Spring of 2017, the ECHR combined 48 petitions filed by 61 Russian NGOs which had appealed to the Court against the application of the Foreign Agents law. The appellants include Memorial, Golos, Ecodefence (an anti-nuclear group), Moscow School of Civic Education, Regional Press Institute, and the Freedom of Information Foundation.

The petitioners challenged the Foreign Agents Law pursuant to Articles 10 (freedom of expression), 11 (freedom of assembly and association), and 14 (prohibition of discrimination) of the European Convention on Human Rights.

On May 7, 2017, the Council of Europe Commissioner for Human Rights submitted his Third Party Intervention in the ECHR proceedings. In addition, amicus briefs were submitted by Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders, the Institute of Law and Public Policy, a Moscow-based independent think tank, the International Service for Human Rights, and a number of other human rights organizations.

In October of 2017, the Justice Ministry submitted a 130-page formal response to the questions communicated by the ECHR. The petitioners are expected to submit their response in the Spring of 2018.

V. Foreign Agents Laws in Other Countries
The following nations have considered enacting or have passed their own versions of “foreign agents” laws in the past decade: Azerbaijan, Kirgizstan, Tajikistan, Kazakhstan, Armenia, Bosnia, Egypt, Israel, Ethiopia, Uganda, China, Cambodia, Venezuela, and Ecuador. They are not necessarily verbatim copies of the FARA or the Russian Law, although some were clearly inspired by the “Russian” model. These laws, however, have been decried by human rights advocates as having one common thread: they are designed to target civil society groups that receive international funding. Several examples highlight this problem:

Hungary: In June 2017, Hungary passed a law that imposed restrictions on nonprofits receiving international funding. Groups getting more than around $26,000 a year from abroad have to register with the courts and identify themselves as being foreign-funded. This has been viewed by Amnesty International as “stigmatising non-governmental organizations (NGOs) that receive foreign funding” and “escalating crackdown on critical voices.” Hungary has responded to U.S. criticism of its law by comparing it to the FARA.

Israel: The Israeli “foreign agents” law was passed in July 2016 and was branded as a “direct translation” from English of the FARA, with significant modifications. It requires groups that receive more than half their funding from foreign governments
to report that fact in their communications with the public. Human rights advocates observe that the law has disproportionately burdened groups critical of the government. For example, the law will apply to 25 groups—most of them human rights organizations, organizations run by Palestinian citizens of Israel, or research and advocacy groups associated with the political opposition.

**Azerbaijan.** In 2013-2015, Azerbaijan introduced a number of restrictive amendments to its NGO laws, including amendments to the Laws on NGOs and on Grants. Local NGOs are allowed to receive foreign funding only if the foreign donor has an agreement with the Ministry of Justice, a registered local branch or representative, and has obtained the right to give a grant in Azerbaijan. In December 2015, the Rules on Obtaining the Right to Provide Grants in the Republic of Azerbaijan by Foreign Donors entered into force. The Rules established the procedure for foreign donors to obtain registration (pre-approval) from the government in order to provide grants to Azerbaijani NGOs.

In some other countries, “foreign agents” laws were introduced by were either not enacted (Kirgizstan) or eventually repealed (Ukraine). Notably, in Ukraine, the foreign agents law, which was similar to the Russian law and required nongovernmental NGOs to register as “foreign agents” if they received any foreign funding or support, was repealed two weeks after President Yanukovych was forced to flee Russia.

**Relevant sources:**

International Center for Not-for-Profit Law, FARA’s Double Life Abroad (Oct. 2017)

European Human Rights Advocacy Center, Legislating Against Foreign Funding of Human Rights: A Tool of Repression in the Former Soviet Union (May 25, 2016)

Melissa Hooper, Russia’s Bad Example, Free Russia Foundation and Human Rights First (Feb. 2016).
Additional Resources:

Office of the Inspector General, U.S. Department of Justice, Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act (Sept. 2016)

Amnesty International, “Agents of the People”: Four Years of “Foreign Agents” Law in Russia (Nov. 2016)

NGO Lawyers Club, Russian NGOs after the Foreign Agents Law: Sustaining Civic Activism in an Adverse Setting (May 2016)


Vladimir Kara-Murza, FARA and Putin’s NGO Law: Myths and Reality, Institute of Modern Russia (May 9, 2013).