

**RESPONSES OF
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DEPARTMENT OF JUSTICE**

AND

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ASSISTANT DIRECTOR
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FEDERAL BUREAU OF INVESTIGATION**

**TO QUESTIONS FOR THE RECORD
ARISING FROM A HEARING ENTITLED
“OVERSIGHT OF THE FOREIGN AGENTS REGISTRATION ACT AND
ATTEMPTS TO INFLUENCE U.S. ELECTIONS:
LESSONS LEARNED FROM CURRENT AND PRIOR ADMINISTRATIONS”**

**BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

JULY 26, 2017

QUESTIONS FROM SENATOR GRASSLEY

- 1. The Justice Department’s Inspector General (IG) released an audit in September 2016 of the National Security Division’s enforcement and administration of FARA. The IG audit found that there is a lack of statutory understanding of FARA, as well as a lack of a coherent enforcement strategy.¹ Specifically, the Inspector General noted “there was not a coordinated strategy on FARA,” and “there was no strategy addressing how FARA fits into the Department’s overall national security efforts.”² Even National Security Division officials “acknowledged the differing views on what constitutes a**

¹Office 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 11* (2016) [hereinafter *OIG DOJ Audit*].

²*Id.*

FARA charge,” and as a result are in the process of “educat[ing] field investigators and prosecutors on the difference.”³ Between 1966 and 2015, the Justice Department only brought seven criminal FARA cases of which one resulted in conviction at trial for conspiracy to violate FARA, two pleaded guilty to violating FARA, two others pleaded guilty to non-FARA charges, and the remaining two cases were dismissed.

- a. Have the Justice Department and FBI taken adequate steps to fully understand what a true FARA charge is? If so, please describe those steps. If not, why not?**

Response:

Yes. NSD has conducted multiple trainings around the country to both prosecutors and FBI investigators on FARA, how to conduct FARA investigations, and how FARA overlaps with, but also differs from, other statutes (like 18 U.S.C. § 951). FBI already has a distinct case classification for FARA cases; it continues to consider whether to implement a classification for Section 951 cases that is separate from espionage investigations. Going forward, our training programs will continue to incorporate FARA.

- b. Have the Justice Department and FBI adequately addressed how FARA fits into the Department’s overall national security efforts? If so, please explain how. If not, why not?**

Response:

Yes. FARA is an integral part of NSD’s “all tools” strategy to protect U.S. national security by exposing the otherwise hidden role of foreign governments in communications aimed at influencing the American public or U.S. Government officials. NSD is working to finalize a FARA enforcement strategy, as the 2016 IG report recommended.

- 2. The September 2016 audit found that the Justice Department’s failure to properly enforce FARA extended into civil enforcement as well, noting that injunctive relief had not been sought as a remedy since 1991.⁴ Such a lack of enforcement has created a lack of accountability. The IG report noted that documents were routinely submitted late or in many cases registrants ceased submitting required documents entirely.⁵ The IG noted that in light of the widespread delinquent FARA filings, injunctive remedies would be useful. For example, the IG found that between 2008 and 2014, some Justice Department requests to the registrant for late supplemental statements still do not**

³*Id.* at 10.

⁴*Id.* at 12.

⁵*Id.* at 13.

appear in the FARA database. As such, since the individual is already registered, injunctive relief would be merited.

- a. Is the IG correct that injunctive relief would be merited when registrants fail to provide supplemental statements as the law requires?**

Response:

The Department can seek injunctive relief under 22 U.S.C. § 618(f) when it has sufficient evidence to bring suit alleging that a person has failed to comply with the statute or its applicable regulations, including by failing to file supplemental statements (or terminations).

- b. Why has the Justice Department been so reluctant to use injunctive relief as a tool to enforce the law?**

Response:

As a practical matter, most registrants do file supplemental statements within 30 days (or seek an extension from the FARA Unit). About half of delinquent registrants are either foreign tourist bureaus or very small businesses that, in our experience, are no longer in business or have stopped working as agents (but have not taken the additional step of filing a termination). The FARA Unit follows up with delinquent registrants to supplement or terminate their registrations as appropriate.

However, because there are no civil penalties or fines for failing to file supplemental statements in a timely fashion, it would serve little enforcement purpose, and be an inefficient use of resources, to sue for relief that can be obtained through voluntary (if tardy) compliance. Injunctive relief would be appropriate where a party refuses to register even after being advised by the Department that he or she should, but in recent memory, no subject of our inquiries has refused to register after receiving a determination letter, and as a result, civil litigation has not been required to enforce the statute.

- c. In several letters to the Committee, the Justice Department has asked for Civil Investigative Demand authority to issue administrative subpoenas. However, the Justice Department could convene a grand jury and issue subpoenas, obtain search warrants, and seek injunctive relief. These are very powerful tools already. Are these tools not enough to get the job done? Please explain.**

Response:

NSD appreciates the Committee's interest in the sufficiency of existing enforcement tools. Although grand jury subpoenas are a powerful investigative tool, and the Department will not hesitate to use them to gather evidence where there is a reason to believe a crime has been committed (i.e., in this context, where there is a reason to believe there has been a willful failure to register under FARA), it is not appropriate to use a grand jury's criminal investigative power with the goal of obtaining an administrative or civil remedy (e.g., registration or injunctive relief). Likewise, pursuant to the requirements of the statute, 22 U.S.C. § 618(f), a suit for injunctive relief should be brought only after the Department has amassed sufficient evidence to prove a violation by a preponderance of the evidence, and not merely as a means to gather information. It is not, first and foremost, an investigative tool.

- 3. According to the IG, FBI agents "felt that the Department's reluctance to bring charges in FARA cases resulted in missed opportunities to deter agents of foreign principals from criminal or other misconduct or to obtain valuable cooperation."⁶ The IG audit also claimed FBI agents believe NSD's review of FARA cases was "generally slow."⁷ NSD claimed that FARA charges are difficult to prove and the goal is registration and public disclosure, not prosecution.**

- a. Why is the Justice Department reluctant to bring charges? What steps will be taken to be more aggressive and better enforce FARA?**

Response:

The Department is not reluctant to bring charges. From 1966 to 2007, there were no successful prosecutions under FARA. From 2007 to the present, there have been four successful prosecutions on FARA-related charges. In recent memory, there has only been a single case in which a U.S. Attorney's Office has proposed a criminal FARA charge that NSD has not approved (and that case was prosecuted under a more serious offense and a conviction was obtained).

The Department will approve criminal prosecutions under FARA if there is sufficient, admissible evidence of a willful violation of the statute. But a successful criminal prosecution must meet the high burdens of proving willfulness and "direction or control" by a foreign principal, and there are several exemptions available under the statute that make it more challenging to prove criminal intent. Moreover, unlike espionage or similar conduct, which law-abiding Americans are likely to report if they observe, political activities under FARA do not necessarily

⁶OIG DOJ Audit at 11.

⁷OIG DOJ Audit at ii.

bear indicia of criminality, which makes it more difficult for law enforcement to identify proper subjects of investigation. Accordingly, the FARA Unit relies principally on media reports and other open source information, as opposed to reports from law enforcement or other government agencies, to initiate its inquiries.

b. The Justice Department is generally slow to bring charges. What steps are you taking to more quickly enforce and resolve cases?

Response:

There is no reluctance or undue delay in bringing criminal charges in FARA cases. We are aware of only one case in recent memory in which a U.S. Attorney's Office has proposed a criminal FARA charge that NSD has not approved (and the case was otherwise successfully prosecuted under a more serious criminal statute).

c. How is the Department's emphasis on voluntary registration and de-emphasis on prosecution not undermining the purpose of FARA, and what are you doing to impose consequences on those who do not voluntarily register, and prosecute those who avoid registration intentionally?

Response:

The Department enforces FARA to promote "public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals 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."⁸ In the vast majority of cases, this is accomplished through voluntary registration (sometimes after the Department alerts the registrant to its obligations under the statute through a letter of inquiry). The Department will, of course, approve criminal prosecutions under FARA if there is sufficient, admissible evidence of a willful violation of the statute. But a successful criminal prosecution must meet the high burdens of proving willfulness and "direction or control" by a foreign principal, and there are several exemptions available under the statute that make it more challenging to prove criminal intent. Moreover, unlike espionage or similar conduct, which law-abiding Americans are likely to report if they observe it, political activities under FARA do not

⁸Foreign Agents Registration Act of 1938, Pub. L. No. 77-532, 56 Stat. 248, 248-249 (1942) (codified as amended at 22 U.S.C. § 611, Policy and Purpose of Subchapter (2012)), <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title22/pdf/USCODE-2009-title22-chap11-subchapII.pdf>.

necessarily bear indicia of criminality, which makes it more difficult for law enforcement to identify proper subjects of investigation. Accordingly, the FARA Unit must rely principally on media reports and other open source information, as opposed to reports from law enforcement or other government agencies, to initiate its inquiries.

4. Mr. Browder filed his complaint with the Justice Department on July 15, 2016 about Fusion GPS and Natalia Veselnitskaya, the Russian lawyer, who we now know was at the June 9th meeting in Trump Tower in addition to her anti-Magnitsky lobbying effort, and Rinat Akhmetshin, who also engaged in anti-Magnitsky lobbying. A letter of inquiry is generally the first step in starting an investigation into potential FARA violations, yet according to press reports, the Department did not send one to any of the people involved until April of 2017.⁹

a. What did the Justice Department do to investigate that complaint before I wrote about it on March 31, 2017?

Response:

Leaving aside whether those press reports are accurate, it is the long-standing policy of the Department not to comment on pending investigations or closed investigations that have not become public.

b. Has a letter of inquiry been sent to Fusion GPS or Natalia Veselnitskaya. If not, why not?

Response:

Letters of inquiry are considered investigative activity, and, consequently, unless and until the recipient of a letter registers under FARA, we neither confirm nor deny whether the Department sent a letter of inquiry or took other investigative steps. To provide the public or Congress with information about non-public investigative activity could compromise the reputational or privacy rights of uncharged parties, undermine any ongoing investigations of those parties, and give the misimpression that the Department's investigative steps are susceptible to political influence.

5. Has the Justice Department ever prosecuted someone for violating FARA after having registered?

⁹Desmond Butler and Chad Day, *Russian-American lobbyist joined Trump's son's meeting, too*, The Associated Press (Jul. 15, 2017). <https://apnews.com/dceed1008d8f45afb314aca65797762a/Russian-American-lobbyist-says-he-was-in-Trump-son's-meeting>.

Response:

As the statute provides, filing a registration statement does not preclude prosecution for willfully failing to file it when due, 22 U.S.C. § 612(d), although to-date, none of the Department's seven prosecutions for FARA violations involved an individual who had untimely registered.

- 6. Has the Justice Department ever prosecuted someone for violating FARA when money was not exchanged between the foreign principal and agent for services rendered?**

Response:

Although to-date, all of the Department's seven prosecutions for FARA violations involved individuals who received money from the foreign principal, proof that money was exchanged is not necessary to establish an agency relationship under FARA.

- 7. As a public disclosure law it is important to understand what factors would require someone to register under FARA. Accordingly, based on your knowledge of FARA's requirements, please answer the following:**
- a. If a company engages in a publicity or lobbying campaign to promote the political or public interests of a foreign government in an effort to influence U.S. policy, does that generally create an obligation to register under FARA?**

Response:

FARA requires persons in the United States who engage in specified activities (such as political activities, acting as public relations counsel, or soliciting or dispensing money or other things of value) on behalf of a foreign government or foreign political party to register under FARA if those activities are conducted at the "request of or under the direction or control of a foreign principal" or are "directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal," and not otherwise exempt. 22 U.S.C. § 611(c). Although a company that properly registers under the Lobbying Disclosure Act may be exempt from registering under FARA, *see* 22 U.S.C. § 613(h), the exemption is not available when the "principal beneficiary" of the activity is a foreign government or foreign political party, *see* 28 C.F.R. § 5.307.

- b. Generally speaking, does the attorney exemption apply to businesses that are not law firms and that engage in a public relations or lobbying campaign to promote the political or public interests of a foreign government in an effort to influence U.S. policy?**

Response:

The attorney exemption applies to lawyers engaged in legal representation of foreign principals in the courts or similar types of proceedings, so long as the attorney does not try to “influence agency personnel or officials other than in the course of judicial proceedings.” 22 U.S.C. § 613(g).

- c. If an American business works for a foreign business that fails to register but should have because it is trying to influence U.S. policy on behalf of a foreign principal, and that American business does in fact lobby or perform public relations for the foreign business to influence U.S. policy, is that American business exempt from registering just because its parent company failed to register?**

Response:

As a threshold matter, FARA’s registration obligation applies to agents who act “within the United States,” 22 U.S.C. § 611(c), not to foreign principals of those agents. The answer depends on whether the American business was, in conducting the political activities, itself acting as an agent of the foreign principal, *i.e.*, under its direction or control, directly or indirectly. If the American company meets FARA’s definition of an agent of a foreign principal, it must register unless it is exempt under Section 613.

QUESTIONS FROM SENATOR FEINSTEIN

- 1. Do you support any changes to the Lobbying Disclosure Act exemption¹⁰ to the Foreign Agents Registration Act? If so, please explain.**

Response:

The National Security Division (“NSD”) appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

- 2. Do you support legislation amending the Foreign Agents Registration Act to provide the FARA Unit with civil investigative authority? Why or why not?**

¹⁰22 U.S.C. § 613 (h).

Response:

NSD appreciates the Committee's interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

3. Do you support amending the Foreign Agents Registration Act to authorize the levying of civil fines for failure to register under FARA? Why or why not?

Response:

NSD appreciates the Committee's interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

4. Do you support updating the amount of criminal fines that can be assessed under the Foreign Agents Registration Act? Why or why not?

Response:

NSD appreciates the Committee's interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

5. What are the differences between the Foreign Agents Registration Act and 18 U.S.C. §951 in terms of what they require, and how they are used and enforced? Would you recommend any changes to either the Foreign Agents Registration Act or 18 U.S.C. §951 to clarify those differences, or to make it easier to utilize and enforce those statutes?

Response:

Section 951 is used to prosecute clandestine behavior that is itself injurious to the national security. More specifically, the Department has used § 951 to punish, disrupt, and deter three categories of individuals who engage in covert conduct: (1) foreign intelligence officers who are here without official cover and who engage in espionage-like conduct, such as the Russian illegals who were prosecuted in 2010; (2) co-optees

(assets or sources) of foreign intelligence officers who provide sensitive, but unclassified, information to their foreign handlers; and (3) procurement agents in the U.S. who illegally export commodities to foreign end-users who are prohibited from acquiring these products directly from the United States. It is not necessary to prove the defendant acted willfully in failing to register, which is a necessary element for a felony violation of FARA.

By contrast, FARA covers only political activities, lobbying, public relations services, and fund raising. None of that conduct is per se threatening to the national security (indeed, it is protected by the First Amendment). FARA is broader in its coverage because, unlike § 951, it is not limited only to those who act on behalf of a foreign government. Foreign political parties, persons, organizations, and businesses fall within FARA's definition of foreign principals.

The Department does not believe any changes to § 951 are necessary, including changes to the definition of who falls within its prohibitions. To the extent there has been confusion among law enforcement agents and prosecutors about the differences between FARA and § 951, the Department is addressing that issue through appropriate training.

As described above, the Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

QUESTIONS FROM SENATOR KENNEDY

- 1. In September 2016 the Department of Justice, Office of the Inspector General released a report following a year-long review titled, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*.¹¹ In this report, the OIG stated that, "*NSD officials believe that Congress should act and once again require those who lobby for foreign commercial interests to register under FARA. We agree with the concern that foreign governmental and commercial interests overseas may not always be distinct and we recommend that NSD perform a formal assessment of the LDA (Lobbying Disclosure Act) exemption, along with the other current FARA exemptions and determine whether a formal effort to seek legislative change is warranted*". Within this same Office of the IG Report, the National Security Division stated "*As noted in the report, the FARA Unit has attributed a decrease in the number of registrants and foreign principals to the enactment of the LDA exemption and has also***

¹¹*Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, page 19, para 3 - 4, <https://oig.justice.gov/reports/2016/a1624.pdf>.

noted that the reporting requirements of LDA are not as robust as those under FARA. Prior to the OIG Report, NSD embarked on efforts to study the LDA and other FARA exemptions” (OIG Rpt, Pg 35, Bullet Point No. 1). Based on today’s hearing and as it pertains to the OIG report please answer the following questions:

- a. According to this year-long Office of the Inspector General report, exemptions within Foreign Agents Registration Act exist because of changes made in the Lobbying Disclosure Act (LDA). Do you agree that changes made to FARA in the LDA have made it more difficult to understand when it is necessary to comply with FARA requirements?**

Response:

We believe two changes made to FARA by the LDA and the Lobbying Disclosure Technical Amendments Act (“LDTAA”) have affected FARA enforcement.

First, the LDA and the LDTAA created the “LDA exemption,” under which agents of some foreign principals – other than the agents of foreign *governments* or foreign *political parties, e.g.,* foreign corporations – do not need to register under FARA if those agents engage in lobbying activities and register under the LDA. As a result, many agents of foreign principals choose to register under the LDA and are exempt from the wider and more detailed disclosure of activities required under FARA.

Second, the LDA repealed FARA’s old “safe harbor” provision, 22 U.S.C. § 611(q), which exempted lobbyists representing multinational corporations having a substantial commercial presence in the United States. As a result, the Department must now apply another, freestanding FARA exemption for “private and nonpolitical activities,” 22 U.S.C. § 613(d), which requires the Department to distinguish between bona fide commercial activity and political activity, which can be challenging.

NSD appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

- b. Do you agree that the exemptions provided by changes in the LDA create ample ambiguity for businesses or individuals working with foreign entities to go without registering, potentially without fully understanding that they should register under FARA?**

Response:

As the response to (a), above, indicates, the exemptions require interpretation and judgment. However, even where agents *do* understand the limits of the exemptions under FARA, and exceed them, the fact of the exemptions can make it difficult to bring a criminal prosecution, which requires proof of “willfulness.”

- c. Do you agree that changes in LDA and ambiguity in requirements has made it more difficult for your department and others tasked with monitoring foreign agents to carry out intended jobs related to FARA and monitoring of foreign activity?**

Response:

The greater the potential overlap between the LDA and FARA, the more likely it is that registrants will chose to register under the LDA, and the more difficult it is to identify those agents who should properly register under FARA and to prosecute those who have knowingly avoided registering under FARA.

- d. Based off of your expertise, do you believe legislative changes to FARA requirements could help law enforcement to better monitor foreign agents and activity and US enforcement of FARA? Do you believe there is need to provide improved criteria as to what defines a foreign shell corporation?**

Response:

NSD appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative changes to improve FARA, as well as its views on pending legislative proposals. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation. However, we do agree that the Department often has difficulties in proving “direction or control” by a foreign principal – an obstacle that may be compounded through the use of non-transparent corporate forms.

- 2. In 2008 the Government Accountability Office published an assessment of the Foreign Agents Registration Act, *Post Government Employment Restrictions and Foreign Agent Registration*, which states that “To enhance Justice’s ability to ensure that the American people know the identity of persons trying to influence U.S. government policy in the United States on behalf of foreign entities, Congress may wish to consider (1) granting the Department of Justice civil investigative demand authority to inspect the records of persons Justice believes should be registered as agents of foreign principals and (2) requiring persons claiming certain exemptions to provide advance written notification to Justice**

*before engaging in the exempt activities.*¹² Considering the clear recommendation on the part of the Government Accountability Office, please answer the following questions regarding the potential effectiveness of civil investigative demand authority:

- a. **The Government Accountability Office report, cites that due to the ambiguity of the Foreign Agents Registration Act and the Lobbying Disclosure Agreement, there is often confusion amongst individuals and businesses if they should register and proposes civil investigative demand authority as a possible solution to this. Do you agree with the Government Accountability Office’s assessment that the use of Civil Investigative Demand Authority could add clarity to prospective registrants and improve enforcement?**

Response:

NSD appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

- b. **Additionally, the Government Accountability Office cites the lack of ability by law enforcement to inspect the records of those suspected to in violation of registration. Do you believe that Civil Investigative Demand Authority could be useful in aiding law enforcement with reducing ambiguity and bolstering enforcement?**

Response:

NSD appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. The Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

3. **In the 2016 Office of the Inspector Report, the National Security Division raises concerns regarding exemptions within both the Foreign Agents Registration Act, and the Lobbying Disclosure Act. The National Security Division concurs with the Office of the Inspector General’s recommendation and commits to studying these exemptions. The National Security Divisions sets firm deadlines for agency recommendations, stating “Prior to the OIG Report, NSD embarked on efforts to study the LDA and other FARA exemptions. Those efforts will continue, and NSD will determine the need and**

¹²Government Accountability Office *Post Government Employment Restrictions and Foreign Agent Registration*, page 15, para 2, <http://www.gao.gov/new.items/d08855.pdf>.

*viability of legislative changes by June 30, 2017.”*¹³ Considering the commitment of the National Security Division to assessing the viability of legislative changes, I ask that you help answer questions regarding this:

- a. **In the aforementioned 2016 OIG report, comments provided by the National Security Division commit the agency to further investigate exemptions within FARA and the LDA. Specifically, the NSD committed to determining the need of legislative changes by June 30th 2017. Has this occurred?**

Response:

NSD appreciates the Committee’s interest in enhancing FARA to improve our ability to enforce it. NSD has concluded its study of the LDA exemption and the Administration is evaluating legislative proposals to improve FARA, as well as its views on pending bills in Congress. In the interim, while those views are under consideration, we are available to offer technical assistance, as appropriate, on drafts of legislation.

- b. **If the June 30th deadline by the National Security Division has not been met, has the investigation been completed?**

Response:

See response to question 3(a) above.

- c. **Has the National Security Division been able to reach a conclusion as to the need of changes to these statutes?**

Response:

See response to question 3(a) above.

¹³*Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act* page 35, bullet point #12, <https://oig.justice.gov/reports/2016/a1624.pdf>