

COMPARISON OF
PROPOSED "DISCLOSURE OF FOREIGN FUNDING ACT"
AND
U.S. "FOREIGN AGENTS REGISTRATION ACT"

It has been asserted that the provisions of the recently-proposed Disclosure of Foreign Funding bill (FFB) closely parallel those of the U.S. Foreign Agents Registration Act (FARA). While there are limited similarities, the differences are far more numerous and material, and underscore important differences in the purpose, content and impact of the FFB and the FARA. These differences are fundamental, and negate any attempt to equate the two pieces of legislation.

Purpose

The FFB does not state a purpose, but its provisions are directed at obtaining information, and requiring certain forms of financial accountability, from all recipients of foreign funds which the Registrar of Reporting Organizations and Persons chooses, in his full discretion, to list.

The FARA, by contrast, is intended to require "public disclosure by persons engaging in propaganda *** and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals".

Activities Requiring Registration

The FFB vests in the discretion of the Registrar the power to list as a Reporting Organization or Person any organization or person receiving foreign funds. No criteria or standards to guide the exercise of this discretion are provided or implied in the text of the FFB.

The FARA requires registration only of "agents of a foreign principal". Foreign principals may be private or governmental organizations or individuals, but do not include U.S. citizens or juridical persons even if located abroad. "Agents" of foreign principals include those acting directly or indirectly at the direction or under the control of a foreign principal and who engage in political, publicity or lobbying activities for or in the interest of the foreign principal. Political activities include propaganda or other activities intended to influence the U.S. government or public with respect to U.S. domestic or foreign policies or the interests or policies of a foreign government.

The FARA is thus directed only at those persons, mostly professional lobbyists, who are being paid to act for foreign principals in an effort to influence U.S. policies. Other persons receiving foreign funds are not affected by the FARA.

Exemptions

Under the FFB, any recipient of foreign funds may become subject to its reporting and other requirements, at the discretion of the Registrar.

The FARA provides statutory exemptions for, among others, the press; diplomatic and consular officials acting within the scope of their duties; persons engaging in private and nonpolitical trade or other commercial activities for a foreign principal; persons engaged in religious, scholastic, academic, scientific or fine arts activities; and lawyers representing foreign principals in court or administrative proceedings. More fundamentally, it applies only to persons who are being paid to act on behalf of foreign principals.

Registration and Record-Keeping Requirements

The FFB requires that Reporting Organizations and Persons provide the Registrar with certain information, some specified in the FFB and the rest to be determined by the Registrar. These reporting requirements are triggered by receipt of foreign funds. Reporting Organizations and Persons must segregate foreign funds, keep records in certain ways, furnish information to the Registrar and meet certain other requirements. Information must be provided and records kept with respect to transactions for the six months preceding designation by the Registrar.

The FARA also imposes extensive reporting requirements. These requirements are designed to determine the nature of the relationship with the foreign principal, the activities which the agent has agreed to perform for the principal, and the remuneration which the agent is to receive for providing those services. Record-keeping must conform to standards set forth in regulations. Information must be supplied on transactions and other interaction between the foreign principal and the agent during a period of sixty days before the agency relationship was formally established.

A notable difference between the FFB and the FARA is that any recipient of foreign funds is potentially subject to the FFB's reporting requirements, whereas the FARA's requirements apply only to a relatively small class of persons who have chosen to enter into a specific form of agency relationship to provide certain kinds of services for a foreign principal.

Enforcement and Penalties

Under the FFB, inspectors may enter premises at any time without a warrant, may seize or copy documents and interrogate persons (including persons who may have information but with no relationship to the foreign funding or the recipient) and may otherwise demand an effectively unlimited range of information which may or may not relate to the question of receipt or use of foreign funds.

The FFB makes it illegal, among other things, to make false entries in records required to be kept or with the intent to defraud to erase records; to refuse to answer questions including with respect to matters which may bear no relationship to receipt or use of foreign funds; or to use funds for purposes other than those for which they were given.

Maximum penalties for violating the FFB are R40,000 or 10 years, or both, in addition to confiscation of funds. For certain lesser violations the penalties are R4,000 or one year, or both, in addition to confiscation. Upon institution of a prosecution, the Registrar may direct that the foreign funds be frozen until the trial is concluded.

The FARA requires that books and records be available for inspection by designated officers "at any reasonable time"; the U.S. Constitution requires that a judicial warrant be obtained for any other inspection, seizure or interrogation relating to the requirements of the FARA. The Administrative Procedures Act and other legal protections limit the government's scope and discretion in conducting an investigation based on an asserted violation of the FARA.

Violations under the FARA include willfully making a false statement of a material fact, willfully omitting to state such a fact or a fact necessary to make the registration statement not misleading. Lesser violations include transmission of propoganda in certain circumstances, contracting for payment contingent on the success of agreed political activities and acting as an agent of a foreign principal after filing an incomplete registration statement -- but only after receiving written notification of the specific areas requiring supplementation and having been provided ten days in which to rectify the error.

The maximum penalty under the FARA is \$10,000 or five years imprisonment; for lesser violations it is \$5,000 or six months. There are, of course, no provisions for confiscation or freezing funds. Aliens convicted of violating the FARA may be deported.

The FFB provides the Registrar with extremely wide powers to obtain information relating either to the receipt or use of foreign funds or to other purposes, and envisages imposition of severe penalties even for such offenses as making a false entry without intent to defraud or deceive, or for failing to provide information on matters unrelated to receipt or use of funds. Freezing of funds during a prosecution, even if the prosecution eventually fails, will in many cases destroy the recipient. The FARA, by contrast, creates no extraordinary investigative powers, requires in most cases a willful and material violation of its provisions and imposes relatively mild penalties for actions many would see as posing a greater threat to society.

Other Matters

The FFB does not in terms limit the purposes for which foreign funds may be received (although a court may conclude that funds were not used for the purposes given even if the donor and the recipient agree that they were properly used). It does, however, require that any changes in those purposes be approved by the Registrar.

The FARA limits the purposes for which an agent may receive funds only by prohibiting making payment contingent on the success of political activities by the agent. The Government is given no other power over the terms or conditions of that relationship.

Information obtained in the course of implementing the FFB or investigating alleged violations of its terms may be provided to other State agencies; they may, among other things, serve as the basis for proceedings under the Fund-Raising Act or the Affected Organizations Act.

Information obtained in implementing or investigating violations of the FARA may also be shared with other agencies of the U.S. Government. There is, however, no U.S. analog to the Affected Organizations Act, and U.S. laws relating to the raising of funds are generally far less stringent and less stringently applied than is the Fund-Raising Act.

Conclusion

Assertions that the proposed Disclosure of Foreign Funding Act is essentially identical to, or even closely resembles, the U.S. Foreign Agents Registration Act are incorrect. The FFB and FARA resemble each other principally in certain administrative details relating to the information required from persons required to register and maintenance of records. The parallels are of minor significance; such provisions may be found in other South African and U.S. statutes dealing with a wide range of regulated activities, as well as in similar statutes of many other countries.

The differences, however, are fundamental. The FFB and FARA are fundamentally dissimilar in their purposes. They are different in the scope, number and characteristics of those affected. They differ in the predictability of the process by which organizations or persons become subject to their terms. They differ in the means by which they may be enforced. They differ in the degree of intent and kinds of actions which may result in prosecution. They differ, finally, in the penalties and consequences, direct and indirect, resulting from breaching their terms.

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