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Taking Stock of Newly Released FARA Advisory Opinions

The U.S. Department of Justice (DOJ) recently [released](#) for the first time dozens of advisory opinions issued by the FARA Registration Unit, the DOJ agency responsible for administering the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq. (FARA or the Act). The decision to post the advisory opinions comes in the wake of recommendations from DOJ's Office of Inspector General and pressure from members of Congress who have demanded action to clamp down on unregistered activity by foreign agents.

Congress enacted FARA in 1938 to track propaganda campaigns on the eve of World War II, and it amended the law in the mid-1960s to require detailed disclosure of industry lobbying efforts on behalf of foreign interests. While essentially a disclosure statute, FARA creates significant obligations for those acting in the United States on behalf of foreign principals. A series of enumerated political, media, fundraising and lobbying activities trigger disclosure, and there is no financial threshold for registration. The law provides exemptions for certain private activities in furtherance of bona fide trade or commerce, and for other activities also, but the application of these exemptions is highly fact-specific. FARA-regulated activities have been the source of significant controversy in the last several months, and Congress has been weighing legislation that would prune the law's exemptions and give DOJ more robust investigative authority.

The regulations implementing FARA give entities and individuals the ability to make formal written inquiries to the FARA Registration Unit (the FARA Unit) regarding the application of the Act to specific contemplated activities, but until this release the only publicly available materials derived from this guidance have been three single-paragraph summaries of advisory opinion responses posted on the FARA Unit's website. (The full text of these three opinions, with redactions, were also included in the release.) The newly released opinions provide insight into how DOJ has interpreted and applied the Act in response to dozens of requests for guidance made by corporations, public relations consultants, lobbying firms and law firms, among others, since 2010. (The three opinions that were previously summarized on the FARA website date back to before 2010.) They address topics ranging from the representation of foreign entities and individuals facing potential designation by the Office of Foreign Assets Control (OFAC) to the provision of public relations and advertising services promoting tourism in foreign countries.

Important lessons can be drawn from these opinions about the way DOJ interprets and applies FARA and the type of information that requesters of advisory opinions need to submit to enable the FARA Unit to provide effective guidance and to increase the odds that this guidance aligns with desired outcomes. However, in the days since their release, several commentators have been quick to draw conclusions about the application of various exemptions to the Act's registration requirements based on the opinions, and, in some cases, they may be overstating their precedential value.

Closer Look at FARA Advisory Opinions

First, as noted above, it is important to understand what the opinions *do not* provide.

FARA and its accompanying regulations do not provide for anyone other than the requester to rely on a FARA advisory opinion, and, given its longstanding past practice of not releasing opinions publicly, it is unlikely that the FARA Unit originally drafted these opinions with the intent that they would serve as guidance both for the requestor *and* for the conduct of other similarly situated entities. The FARA Unit actually made this explicit in connection with the release, cautioning that "[n]othing in these letters is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter." In contrast, for instance, Federal Elections Commission (FEC) regulations allow the public to rely on FEC advisory opinions

for activities that are materially indistinguishable from the facts at issue in the advisory opinion request.

Not only do these advisory opinions not carry the same precedential value as those from agencies such as the FEC, but they also lack important contextual and factual background in many cases, which limits their utility as an aid to discerning the department's positions on important interpretive issues. This is because DOJ has not posted the request letters that correspond to the opinions (again, unlike the FEC), and the identities of the requestors and foreign entities involved are redacted from the opinions themselves. Accordingly, in many opinions it appears likely that the available record does not contain all of the facts that were material to DOJ's conclusions. This is exemplified by one opinion included in the section on the commercial activities exemption for private and nonpolitical activities, which addresses communications by an unidentified individual with the president of the United States and the U.S. secretary of state on behalf of, and speaking favorably about, a candidate for president of a foreign country (02/01/12). The opinion concludes with a reference to the commercial exemption, but it reads like a non-sequitur because the FARA Unit declines to apply it to the facts as presented. Additional context is clearly required to understand the relevance of the commercial activities exemption to this fact pattern.

Guidance on Exemptions

Despite these limitations, the advisory opinions do shed some light on the agency's interpretation of some of the statute's more ambiguous provisions.

Lobbying Disclosure Act Exemption. For instance, advisory opinions on the Lobbying Disclosure Act (LDA) exemption from FARA registration illustrate the fact-specific nature of evaluating whether a given representation requires FARA registration or is eligible for exemption.

The LDA exemption does not require a person who engages in lobbying activity for a foreign principal to register under FARA as long as: (1) the person engages in lobbying activities and registers under the LDA; (2) the foreign principal is not a foreign government or foreign political party; and (3) the "principal beneficiary" of the activity is not a foreign government or foreign political party. In applying these rules, DOJ concluded in one opinion (01/05/18) that lobbying for a U.S. corporation that is 51.1% majority-owned by a foreign government does not qualify for the LDA exemption because a foreign government would be the principal beneficiary of the activity. In another opinion (11/10/15), the department concluded that the LDA exemption would apply where a foreign government holds a 40% stake in a company and where the foreign government controls two of the company's five board seats. These opinions suggest that, at least in certain cases, the precise amount of foreign government ownership and control of a company can be a significant factor in assessing whether the LDA exemption applies.

Commercial Activities Exemptions. Likewise, the opinions addressing the so-called commercial activities exemptions indicate that the FARA Unit looks at the totality of the circumstances when evaluating the application of these exemptions and that activities on behalf of foreign government instrumentalities will not necessarily be disqualifying.

For example, the FARA Unit rejected the application of the commercial activities exemptions in two opinions, one involving outreach to government officials and other political activities on behalf of a foreign government's central bank (02/19/18), and another concerning advertising services on behalf of a foreign government's tourism bureau (01/20/84). But the FARA Unit also accepted application of the exemptions in two other opinions dealing with activities directly on behalf of a foreign governments. In one opinion, the FARA Unit concluded that a government relations firm, which was working on behalf of an embassy of a foreign country to facilitate meetings between a foreign government official and private industry leaders in the defense and cybersecurity markets, was exempt from registration under the first prong of the exemption for private and nonpolitical activities in furtherance of the bona fide trade or commerce of a foreign client (12/21/17). In the second opinion

(also discussed below in the context of the legal exemption), the FARA Unit likewise concluded that a law firm working with federal law enforcement agencies on behalf of a foreign government in connection with ongoing investigations was exempt from registration under the first prong of the exemption (08/27/03).

Legal Exemption. The opinions addressing the legal exemption from registration under FARA help demonstrate the limits of its application with respect to contacts with government officials that are not strictly in the context of on-the-record judicial or agency proceedings. The FARA Unit did not contest the application of the legal exemption for law firms whose representation of foreign government clients involved: (1) contact with federal law enforcement agencies in connection with an ongoing investigation (08/27/03); (2) pre-litigation discussions with government officials, in the course of judicial proceedings, advocating that particular policies affecting the legal rights of foreign nationals be enforced as required (02/16/11); and (3) written requests to OFAC that it stay designation of clients until they are afforded an opportunity to defend against their designation (05/03/18).

However, the FARA Unit denied the application of the legal exemption to the following: (1) a firm's attempts to persuade the U.S. State Department to grant a waiver to a federal rule preventing its foreign government plaintiff client from collecting damages for lost tax revenues in connection with an active lawsuit against a multinational distributor (12/07/10); and (2) a government relations firm educating U.S. policymakers and lobbying Congress about a foreign company's business operations and proposed acquisition of a U.S. company in tandem with efforts by a law firm to assist the foreign company navigate an administrative process under the Committee on Foreign Investment in the United States (CFIUS) process (12/03/02). However, these opinions also illustrate the importance the FARA Unit places on the scope and target of communications made under the legal exemption? the exemption is much more likely to be applicable where the activities involved are limited to communications with the agencies responsible for the underlying legal proceeding at issue.

Utility of New FARA Opinions

Given FARA's broad statutory sweep, notoriously ambiguous definitions and the dearth of caselaw or other precedent available to help interpret its application, these newly released advisory opinions provide an important source of guidance for individuals and entities attempting to understand their potential obligations under the Act when engaging in activities in the United States on behalf of foreign governments, political parties, corporations and individuals.

However, it is important not to overstate their precedential value as they do not generally lend themselves to drawing definitive conclusions about the way the Act may apply to particular circumstances. Rather, they confirm that DOJ's application of the Act's elements can be extremely fact-specific, particularly where the foreign principal is directed, controlled or funded by a foreign government or political party, and demonstrate the need to evaluate the potential registration obligations in connection with such representations with an equally focused attention to the specific factual circumstances involved.

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