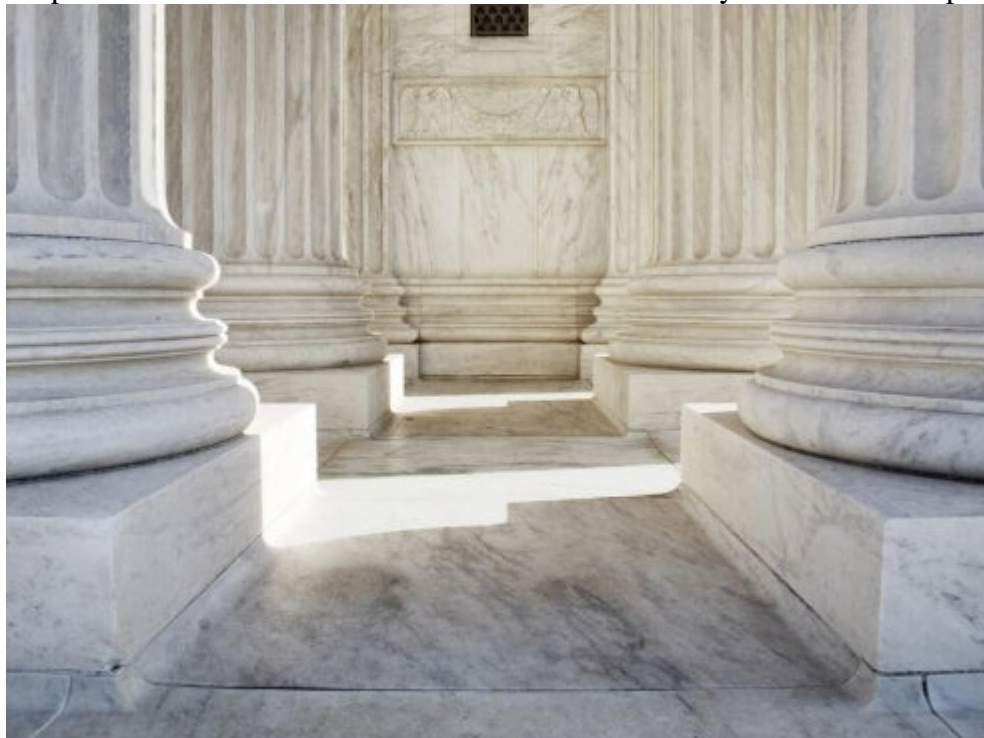


## [Updates](#)

January 02, 2025

### Proposed DOJ FARA Rules Would Increase Uncertainty for Global Companies Amid Heightened Enforcement



The U.S. Department of Justice (DOJ) published a [Notice of Proposed Rulemaking](#) (NPRM) to update regulations under the Foreign Agents Registration Act of 1938 (FARA) on January 2, 2025. If adopted, DOJ's proposed changes would give it more room to apply the 87-year-old counter-espionage law's reporting requirements to the activities of global corporations, domestic subsidiaries of foreign companies, domestic nonprofits that take money from abroad, and public affairs and lobbying firms.

The proposed changes come as DOJ moves to boost FARA enforcement through inspections, letters of inquiry, civil suits, and criminal prosecutions. The agency has emphasized the need to combat foreign malign influence operations and expressed the belief that foreign governments often use private companies to advance strategic geopolitical objectives.

Enforced by DOJ's National Security Division through its FARA Unit, FARA requires agents of foreign principals to register within 10 days of becoming an agent and before engaging in any registrable activity. Agents must disclose detailed information, including the terms of representation and any contracts. Additionally, agents must label and file with DOJ all informational materials distributed on behalf of the foreign principal within 48 hours. Periodic reports must also be filed, detailing the nature of the work performed.

DOJ published an unofficial copy of the NPRM on December 20, 2024, and comments are due by March 3, 2025, at 11:59 p.m. ET, after which DOJ will consider whether to adopt or change the draft rules. The rulemaking began in the first year of the Biden administration with the publication of an Advance Notice of Proposed Rulemaking (ANPRM). It is not known whether the incoming Trump administration has played any role in drafting the new, proposed rules, or how it might view the draft rules, although some of the new administration's ideological adherents have called for the examination of so-called "loopholes" in FARA, to deter Chinese economic espionage.

## Key Proposed Changes

At the heart of the proposed rules are changes to FARA's exemptions for private and nonpolitical activities promoting bona fide trade and commerce and "other activities not serving predominantly a foreign interest." In recent years, DOJ has also called for the repeal of FARA's so-called "LDA exemption," which allows agents to forego FARA registration if they have engaged in lobbying activities and properly registered under the Lobbying Disclosure Act (LDA), and if no foreign government or foreign political party is the principal beneficiary of their lobbying activities. Together, these exemptions provide the most common bases upon which domestic subsidiaries, nonprofits, foreign companies, and firms with foreign clients advance private interests without triggering FARA's extensive disclosure requirements. An organization already bears the burden of proving that an exemption applies if challenged, and the draft rules appear crafted to give DOJ greater flexibility to find that an exemption does not apply.

### Major Changes to FARA's Commercial Exemptions

22 U.S.C. § 613(d)(1) exempts "private and nonpolitical activities" in furtherance of a foreign principal's bona fide trade or commerce. This exemption allows foreign companies to, among other things, collect and disburse funds in the United States, or avail themselves of public relations services, without triggering registration requirements. The current regulations provide that, to be exempt, the activities must not "directly promote" the political or public interests of a foreign government or foreign political party. For years, the regulated community and DOJ alike have struggled with this and other, similar ambiguities in the law, and so commenters urged DOJ to provide more detailed guidance on what exactly it means to "directly promote" foreign government or party interests. The draft rules would delete the word "directly," meaning that the exemption would not apply whenever otherwise registrable activity was deemed to "promote foreign government or foreign political party interests."

As interpreted by the current rules, 22 U.S.C. § 613(d)(2)'s exemption for "other activities not predominantly serving a foreign interest" allows the agent of a domestic subsidiary, foreign corporation, or even a corporation owned in whole or in part by a foreign government to engage in political activities without registration, so long as the activities promote the foreign principal's bona fide commercial, industrial, or financial activities, are not directed by a foreign government or foreign political party, and do not directly promote the public or political interests of a foreign government or a foreign political party. This exemption allows consulting firms to, among other things, provide political and crisis communications advice to private foreign clients and even state-owned enterprises without having to register or report under FARA.

The draft rules would make clear that the (d)(2) exemption applies to both commercial and noncommercial entities, but only if the predominant interest being served is not a foreign one. Under the draft rules, DOJ would apply the exemption first by applying a series of exclusions, and then—if no exclusion applied—by using a fact-dependent and circumstance-specific analysis of the parties, their relationships, and the activities undertaken.

The NPRM creates four specific exclusions to the (d)(2) exemption. An agent would be precluded from obtaining the exemption if:

- Exclusion 1. The intent or purpose of the activities is to benefit the political or public interests of a foreign government or political party. Where there is evidence that the agent is specifically motivated to advance these foreign government or political party interests, FARA registration would be required. Where multiple motivations exist, the motivation to advance the interest of the foreign government or political party would create a rebuttable presumption that the foreign interest predominates.

- Exclusion 2. A foreign government or political party influences the activities. DOJ will infer that any foreign government or political party influence is being exercised deliberately to benefit the government or party. The influence can be exerted directly or through an intermediary, and the exemption can be barred even if the relevant persons do not appreciate that the influence originated with a foreign government or foreign political party. The existence of this influence alone is sufficient to preclude the (d)(2) exemption from applying. The exclusion is intended to give DOJ “flexibility to determine if such influence is present in any form.”
- Exclusion 3. The principal beneficiary is a foreign government or political party. This exclusion echoes one of the primary conditions of FARA’s “LDA exemption,” discussed above. The NPRM did not discuss how DOJ would determine if a foreign government or political party would be the principal beneficiary of potentially registrable activities.
- Exclusion 4. The activities are directly or indirectly supervised, directed, controlled, or financed in whole or substantial part by a foreign government or political party, including when a state-owned enterprise is involved, and promote the political or public interest of that foreign government or political party. The current regulation excludes from the exemption activities that “directly promote” the public or political interests of a foreign government or political party. Here, DOJ is again proposing to remove the word “directly” before “promote” from the language.

Where none of these exclusions are triggered, DOJ has proposed to adopt a “totality of the circumstances” test to determine whether activities predominately serve a foreign or domestic interest. DOJ has identified a non-exhaustive list of factors to determine whether the predominant interest being served is domestic rather than foreign, such that the (d)(2) exemption should apply. The FARA Unit will consider various factors such as:

- Whether the public and relevant government officials know about the relationship between the agent and the foreign principal.
- Whether the commercial activities further the commercial interests of a foreign commercial entity more than those of a domestic commercial entity.
- The degree of influence—including financing—that foreign sources have over the domestic noncommercial entities, including nonprofits.
- Whether the activities concern U.S. laws and policies that are more relevant to domestic interests or to foreign interests.
- The extent to which any foreign principal (not limited to a foreign government or foreign political party) influences the activities. Here, the greater the foreign influence involved, the more likely the foreign interest predominates.

DOJ’s reliance on these factors appears highly fact dependent and the FARA Unit expects to rely on FARA advisory opinions and enforcement actions to clarify how—if at all—these factors will apply.

#### **FARA’s Legal Exemption**

FARA provides an exemption to registration for lawyers engaged in legal representation of a disclosed foreign principal before a court or U.S. government agency. DOJ is proposing to amend this exemption by clarifying that “legal representation” includes activities commonly considered part of client representation in the proceedings, so long as they do not constitute political activities. The proposed rule would clarify that an attorney of record in any of the covered proceedings, investigations, or inquiries also can provide certain information about the activities to others, including the press, without losing the exemption.

#### **Informational Materials**

FARA requires agents to label and file with DOJ “informational materials” transmitted to two or more persons for or in the interests of the foreign principal. DOJ proposes to define “informational materials” as any material that the person disseminating believes or has reason to believe will, or which the person intends in any way, influence any agency or official of the government of the United States 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. Once disseminated, an agent must file copies of the informational materials with DOJ.

The NPRM proposes a standard labeling requirement for informational materials. The proposed rule includes a new requirement that the standard label contain not just the language required by the statute—*i.e.*, that the material is distributed by the registrant on behalf of the foreign principal, and that additional information is available at the Department of Justice, Washington, D.C.—but also the country (or state, territory, or principality) in which the foreign principal is located. This information must be at the beginning of the materials in the same language as the rest of the materials, in a font and color that are easy to read.

The proposed rules prescribe specific requirements for internet websites and platforms hosted and controlled by the registrant, or for which the registrant has administrative rights. A website must contain the required statement in an easy-to-read font size and color that stands out against the background on the “home” and “about” pages, along with a hyperlink to the registrant’s filings on the FARA website. If there is insufficient space, each comment or post must include an embedded image of the required statement, which also contains the word “FARA,” the registrant’s registration number, and a link to the registrant’s filings on the FARA website.

For informational materials that are televised or broadcast, the proposed rules would add a requirement that such materials be introduced with and concluded by a statement that conveys that the person responsible for the materials is an agent. Similarly, DOJ proposes adding a requirement that programming lasting longer than one hour include a conspicuous statement to that effect every hour. DOJ further proposes that the requirements for “broadcasts” apply to audio-video transmittals made through internet-based websites and other electronic platforms reasonably calculated to reach an audience in the United States.

Finally, DOJ proposes to clarify that when an agent requests information from any U.S. government agency or official, including Congress, the communications must contain a statement about the agent’s relationship with a foreign principal, even when the communications pertain only to scheduling meetings to discuss the request.

#### **Other Proposed Changes**

DOJ is proposing other changes, which may affect FARA registrants:

- A person who engages only in promoting bona fide recreational or business travel to a foreign country would fall within FARA’s bona fide trade or commerce exemption. DOJ said that it had reconsidered its past position that tourism promotion qualifies as political activities by creating economic benefits for the host country.
- Payments for advisory opinions, registrations, and other submissions must be made via DOJ’s FARA website. Additionally, all filings—including registrations, supplemental statements, Short-Form statements, and exhibits—must be made electronically through the FARA eFile system.
- A request for an advisory opinion must be submitted in writing to the FARA Unit via the FARA website. When an advisory opinion is requested for any entity other than an individual, the request must include a list of partners, officers, or directors or persons performing similar functions of an officer or director of the entity and all relevant and material information regarding their current or past affiliation with a foreign

government or political party.

- A party claiming an exemption must include the statutory or regulatory basis for the exemption claim.
- Each registrant is required to provide a business email address and telephone number for easier communications with the FARA Unit.

## **Other Insights From the Rulemaking Document**

While DOJ did not act on all of the subjects raised in the 2021 ANPRM and the comments received, it made some observations in the NPRM on how it currently interprets and enforces FARA, again consistent with preserving maximum flexibility to enforce the broadly-worded statute:

- While DOJ declined to clarify the definition of “agent,” it affirmed that the definition reaches beyond the common-law definition, and emphasized that it had “issued sources of guidance on the scope of agency, like this document and certain advisory opinions, that may not be contained within the FAQs” it has published on the FARA website.
- Similarly, DOJ declined to codify through regulation its previously expressed view, drawn from the legislative history, that FARA’s definition of “political consultant” was tied to the definition of political activities. “If a putative agent is unsure about whether the agent’s activities are registrable, the agent should request an advisory opinion.”
- DOJ repeatedly cited its published advisory opinions as providing guidance on questions regarding FARA’s scope. However, to date, these opinions have been redacted to a degree that can make it hard, if not impossible, to identify the specific facts on which the outcomes turn. DOJ declined a proposal to publish incoming requests for advisory opinions, expressing concerns about staff burden and keeping business information confidential.
- DOJ made clear that for an attorney merely to seek an advisory opinion about FARA’s potential applicability was not, by itself, an act requiring FARA registration by the attorney. It also made clear that “non-attorney legal professionals” may fall within the legal exemption when supporting the exempt work, but that specific questions could be raised through the advisory opinion process.
- DOJ appeared to retreat from an earlier indication that the LDA exemption might not apply when a foreign government or foreign political party was among multiple principal beneficiaries of the lobbying activity, saying that a footnote in a March 2019 advisory opinion expressing this view “does not reflect the present enforcement intentions of the Department.”

## **Implications for Clients**

The NPRM presents several implications for foreign businesses and those that advance their interests in the United States.

Insofar as the rules’ adoption would bring increased exposure to FARA registration and reporting obligations, organizations engaged in political or other registrable activities would need to assess whether their activities fall within the law’s broad reach. Activities previously considered exempt—particularly under the (d)(2) exemption—may no longer be treated as exempt under the new regulations. However, there may be questions about how precisely new regulations would affect the applicability of FARA exemptions. Recent Supreme Court of the United States precedent holding that a reviewing court should not provide deference to an agency’s NPRM could come into play. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). For example, under *Loper*, an individual entitled to FARA’s “other activities” exemption might still have a colorable judicial argument that they can still avail themselves of that exemption, even if DOJ finds that he or she triggers one of the new exclusions or fails to meet the “totality of the circumstances” test.

Even if the draft rules are not quickly adopted, they reflect DOJ's present intention to enforce FARA aggressively and interpret its exemptions sparingly, even in circumstances in which a firm might not realize that the statute could apply. As DOJ continues to increase enforcement of FARA, companies, nonprofits, and advocacy groups should consider adopting FARA-specific compliance policies.

For more information on the topic, contact experienced counsel. Our Political Law team provides guidance and strategic advice to clients seeking to navigate FARA registration and reporting obligations.

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