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Political Law Compliance and Investigations Update

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Department of Justice Proposes Amendments to Regulations Implementing Foreign Agents Registration Act

On December 19, 2024, the Department of Justice (DOJ) issued a Notice of Proposed Rulemaking (NPRM) proposing various revisions to the regulations implementing the Foreign Agents Registration Act (FARA). Most notably, by significantly narrowing FARA's "commercial exemptions" that many utilize, the proposed regulatory changes would potentially create additional uncertainty and risk for those representing the interests of foreign companies. We describe these changes and their implications in detail below and also summarize the other notable changes proposed in the NPRM.

The DOJ published the NPRM in the Federal Register on January 2, 2025. As a result, comments are due on March 3, 2025.

FARA Overview

Subject to various exemptions, FARA requires any person that (1) acts as an agent of a foreign principal (broadly defined to include both governmental and non-governmental entities and individuals) and (2) engages in certain covered activity within the U.S. to register and file reports with the DOJ. Covered activity under FARA includes:

- engaging in political activities;
  - "political activities" are defined to include any activity intended to influence U.S. officials or a segment of the public regarding U.S. government policy or, when advancing the interest of a foreign government, regarding any matter in the public or political interests of the foreign government
- acting as a public relations counsel, publicity agent, information-service employee or political consultant for, or in the interests of, such foreign principal;
- soliciting, collecting, disbursing or dispensing contributions, loans, money or other things of value for, or in the interest of, such foreign principal; or
- representing the interests of such foreign principal before any federal agency or official.

The Commercial Exemptions

What is commonly referred to as the "commercial exemption" is actually two separate exemptions — one is the statutory exemption for private and nonpolitical activities found at § 613(d)(1), while the other is a regulation appearing to expand on the statutory exemption for activities not serving predominantly a foreign interest (§ 613(d)(2)) by exempting the promotion of a foreign commercial interest even if engaged in political activities. The DOJ has proposed changes to regulations regarding both subsections.

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Proposed Changes Regarding the Commercial Exemption Under § 613(d)(1)

Section 613(d)(1) of the statute exempts promoting the commercial interest of a foreign corporation as long as it is private and does not involve engaging in political activities (defined to include any attempt to influence U.S. federal policy or advance the public or political interests of a foreign government, even if these interests do not involve U.S. policy). As long as one is not attempting to influence U.S. policy, this provision exempts a broad swath of activities on behalf of non-governmental foreign corporations, such as advertising campaigns designed to promote products in the U.S. The requirement that these activities be "private" raises a question as to whether this exemption is available for state-owned enterprises (SOEs). The current regulation at 28 C.F.R. § 5.304(b) answers this question in the affirmative, allowing the exemption to be used when acting to advance the commercial interests of an SOE as long as the activities do not "directly promote" the public or political interests of the foreign government. The NPRM proposes to eliminate the word "directly."

By eliminating "directly," the DOJ proposes to significantly narrow this exemption for commercial activities as it applies to SOEs. Indeed, in comments accompanying the NPRM, the DOJ suggests that when representing the interests of an SOE, one needs to look to any issue being advanced by the activities and determine whether it promotes — in any way, whether directly or indirectly — the public or political interests of the foreign government that controls or merely passively owns the SOE. This is regardless of whether the foreign government is involved in the effort or whether the SOE has a demonstrable commercial interest in the matter. As an example, those engaging in public relations activities on behalf of an SOE would have to consider the existence of any nexus between the issues they are discussing and a foreign government's interests and, if one exists, possibly register, no matter how insignificant of a connection exists. In practice, this standard is largely unworkable as prospective agents may have to guess whether the foreign government owner has an interest in the issue the SOE seeks to influence. Given the focus in this NPRM on SOEs, companies may also consider commenting on the level of ownership or control that is sufficient to qualify as an SOE.

The proposed changes also create an express carve-out from FARA for activities that promote recreational or business tourism. This would reverse a longstanding DOJ position that activities promoting tourism in a foreign country constitute covered "political activities" since encouraging individuals to visit a country advances the country's public interest by benefitting its economy. Without explaining its reasoning, the DOJ concludes in the NPRM that promoting recreational or business tourism is "too attenuated" from advancing a government's public interests to require registration, and cites a statement from legislative history observing that foreign governments can engage in private commercial activities not involving political or policy matters. This suggests that the DOJ believes there is some type of activity that accrues to the benefit of a foreign government that does not rise to the level of advancing its public or political interest. However, this suggestion does not appear to align with prior advisory opinions, including, notably, a 2019 opinion[1] that found that a sovereign wealth fund's mandate to simply generate financial returns for a foreign government was inextricably linked to the foreign government's political and public interests. This inconsistency, and the importance of how the DOJ interprets the term "political or public interests" for multiple provisions of FARA, suggests that companies may need clarification on the line between activities that advance a country's political or public interests and those that do not.

Proposed Changes Regarding the Commercial Exemption Under § 613(d)(2)

While § 613(d)(1) exempts private, non-political activities, § 613(d)(2) exempts other activities (including political activities) "not serving predominantly a foreign interest." The current regulation at 28 C.F.R. § 5.304(c) appears to expand this exemption to cover activities on behalf of a foreign corporation, even if owned by a foreign government, that are in furtherance of its bona fide commercial operations, as long as they 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 political party. It was always unclear how this regulation, which purports to carve out political activities directly benefitting foreign corporations, squared with the statutory language in § 613(d)(2) that requires a U.S. interest to be predominantly advanced. However, several advisory opinions aligned with this broad view of the rule, thereby providing comfort to those representing the interests of foreign companies that their lobbying and public relations activities within the U.S. would not trigger FARA, absent involvement of a government entity or the activities directly advancing the interests of a foreign government. In more recent opinions, however, the FARA Unit appeared to abandon this interpretation and in public comments acknowledged that the regulation as currently written is likely *ultra vires*. The proposed changes in the NPRM entirely rework this regulation and introduce a new two-part test, the first part of which, however, is arguably just as *ultra vires* as the one it replaces.

[1] Advisory Op. No. 09-18-2019.

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Categorical Exclusions

The proposal would implement four categorical exclusions based on the relationship between the activities and any foreign government or political party. Under the proposed rule, if any of the following tests are met, the exemption at § 613(d)(2) would be unavailable:

- the intent or purpose of the activities is to benefit the political or public interests of a foreign government or political party;
- a foreign government or political party influences the activities;
- the principal beneficiary of the activities is a foreign government or political party; or
- in the case of a person whose activities are directly or indirectly supervised, directed, controlled or financed in whole or in substantial party by a government of a foreign country or a foreign political party (such as a state-owned enterprise), the activities promote the public or political interests of a foreign government or of a foreign political party.

The second and fourth exclusions may be particularly problematic and raise a question as to whether the DOJ has the statutory authority to interpret this exemption as not being available where there is any influence by a foreign government or if an SOE engages in any activity that happens to promote a foreign governmental interest. The plain language of the statutory exemption merely states that activities predominantly serving a U.S. interest are exempt. As such, foreign influence or interests in the activities, whether governmental or otherwise, should not automatically preclude the exemption if one can otherwise show the activities predominantly benefit a U.S. interest or interests. For example, an agent of a trade association or other multi-member organization with dozens of U.S. company members should not be forced to register simply because the organization has a single SOE member weighing in on the activities. In support of this sweeping approach, the DOJ merely notes that a relationship with a foreign government "is the key relationship animating the need for FARA registration." Whether one agrees with this view or not, this does not create statutory authority to narrow the exemption contained in the law in this manner. Accordingly, this regulatory proposal seems open to comment or challenge, especially in light of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*. Another matter left unanswered and potentially ripe for comment is how the DOJ proposes to determine whether activities are intended to benefit a foreign government and how to calculate the principal beneficiary of activities that advance the interests of multiple parties.

Totality of the Circumstances Test

Where the categorical exclusions described above do not apply, the DOJ proposes implementing a totality of the circumstances test to determine whether the agent in question's activities nonetheless serve predominantly a foreign interest. The proposed regulation identifies the following five non-exhaustive, unweighted factors as examples of what the DOJ will consider when applying this test:

- whether the relationship to and identity of any foreign principal is open and obvious to the public and explicitly disclosed to any agency or U.S. official with whom such activities are conducted;
- whether, in the case of a domestic commercial entity, the activities further the bona fide commercial, industrial or financial interests of that domestic entity as much or more than the commercial, industrial or financial interests of a related foreign commercial entity;
- in the case of an agent of a non-commercial or nonprofit organization located in the U.S., the extent to which the activities of the organization are influenced by a foreign entity or concern a foreign jurisdiction, including the extent to which domestic sources rather than foreign ones fund the activities of the organization;
- whether the activities concern laws or policies applicable to the U.S. operations or interests of the domestic person; and
- the extent to which a foreign principal influences the activities of the domestic person.

If implemented, this standard would do little to clarify the boundaries of the exemption at § 613(d)(2) other than to finally resolve that it is not available to those representing foreign companies that do not involve a U.S. entity or interest. For those representing U.S. companies with any ties to, or dealings with, foreign entities, this analysis risks becoming open to the DOJ's interpretation, allowing the agency to pick and choose the factors it needs to justify its conclusion.

US Subsidiaries of Foreign Corporations

As specifically applied to U.S. subsidiaries of foreign corporations, the changes outlined above do not yet signal a sea change in how such entities should approach their activities, though they potentially lay the groundwork for meaningful change. In particular, the second factor in the totality of the circumstances test outlined above provides some comfort to those representing U.S. subsidiaries of foreign parents that they will continue to be able to rely on the exemption for activities not serving

predominantly a foreign interest, as long as such persons can demonstrate their activities advance the U.S. entity's interests above all others. However, there is risk regarding the addition of other factors, both stated and unstated, that the DOJ may use to override this baseline proposition. For example, it is unclear how much and what type of influence from a foreign parent is too much to be able to use the exemption under this test. Importantly, one exemption the NPRM leaves untouched is the exemption for those registered under the Lobbying Disclosure Act (LDA), which is a key exemption upon which U.S. subsidiaries of foreign parents can often rely. However, the DOJ has previously stated its preference that Congress eliminate the LDA exemption altogether, which would put additional pressure on the totality of the circumstances test and the manner in which the DOJ inevitably applies it through its advisory opinions.

Other Proposed Changes

The Legal Exemption

FARA provides an exemption for attorneys who engage in the legal representation of a disclosed foreign principal in the course of judicial proceedings; criminal or civil law enforcement inquiries, investigations or proceedings; or agency proceedings required by statute or regulation to be conducted on the record. The NPRM proposes to codify existing guidance that this exemption applies not only to the activities within such proceedings, but also to activities within the bounds of "normal legal representation." Such activities would be explicitly defined to include providing information about the proceeding, inquiry or investigation to persons other than the agency or official decision-makers. As such, certain press statements and other media activity about litigation or a covered proceeding would generally be exempt if commonly conducted in the course of a "normal" representation. However, in a departure from existing guidance, the proposed change specifically notes that the exemption would not apply to any statements or other activities that qualify as "political activities." This could create a challenge for lawyers representing foreign clients seeking to engage in the type of press activities common in a legal representation, as attorneys would have to ensure their statements cannot be characterized as attempting to influence U.S. policy or advance the public interests of a foreign government client.

Informational Materials

FARA requires that registered agents file and label the informational materials they distribute with conspicuous statements disclosing the name of the foreign principal, the country in which the foreign principal is located, their FARA registration number and a note stating that further information is available via the DOJ's FARA website.

The NPRM proposes defining, for the first time, informational materials as "any material that the person disseminating it believes or has reason to believe will, or which the person intends to in any way, influence any agency or official of the U.S. government or any section of the U.S. public, with reference to formulating, adopting, or changing the domestic or foreign policies of the U.S. or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."

The NPRM also clarifies that the filing and labeling requirements apply regardless of the medium through which the informational materials are disseminated and provides specific, technical requirements for the location and format of the required statements depending on how the materials are distributed (*e.g.*, by broadcast, film, social media).

Miscellaneous Technical Amendments

The NPRM also proposes a variety of other technical changes, including procedural requirements when seeking advisory opinions, electronic filing requirements and updates to certain terminology.

The text of the NPRM can be found here.

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