Navigating the Foreign Agents Registration Act's shifting sands: what to make of DOJ's new enforcement priorities

By Ki Hong, Esq., Charles Ricciardelli, Esq., and Alexa Santry, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

APRIL 1, 2025

In a memorandum issued on Feb. 5, 2025, Attorney General Pam Bondi outlined changes to certain Department of Justice ("DOJ") enforcement priorities. Although much of the focus has been on the memorandum ratcheting down enforcement of the Foreign Corrupt Practices Act ("FCPA"), it created a similar seismic shift for the Foreign Agents Registration Act ("FARA"), the effects of which are yet to be seen.

Coupled with the still-pending Notice of Proposed Rulemaking ("NPRM") issued in the waning days of the Biden administration, these changes present a particularly acute dilemma for corporations, which have been struggling for years to divine the scope of FARA's exemption for certain types of commercial activity.

Overview of FARA

Enacted in 1938, FARA requires (subject to various exemptions) registration with the DOJ if any person (1) has an agency relationship (which the DOJ interprets broadly) with a foreign government, company or individual and (2) engages in certain covered activity in the U.S. When one represents the interests of a foreign government, covered activity includes attempts to promote that government's public interests in the U.S. When one acts on behalf of a foreign commercial interest, covered activity includes attempts to influence U.S. federal government policy.

As a result, FARA not only applies to those trying to sway U.S. opinions toward foreign governments, but also can apply to foreign companies (in particular those that are state-owned enterprises ("SOEs")) and even U.S. companies with certain foreign company ties (including U.S. subsidiaries of foreign parents) when engaging in some business-related activities.

For example, lobbying or grassroots media campaigns directed at U.S. tariff policies key to such companies' bottom lines or an SOE's efforts to secure state and local tax incentives can trigger FARA unless an exemption applies. As discussed in more detail below, FARA's oft-misunderstood "commercial exemption" carves out at least some activities directly in furtherance of bona fide commercial operations — but its precise scope continues to be in doubt.

The question is not whether to cast FARA concerns aside but rather, how to approach compliance in light of these developments. In other words, the Bondi memorandum may impact enforcement risk but not the legal risk.

After mostly ignoring the law for decades, the DOJ in 2017 renewed its focus on FARA and began interpreting and enforcing the statute in a surprisingly broad manner — something made possible by FARA's unusually vague and in some cases outdated language. In recent years, for example, this has included bringing charges against prominent business persons with concurrent ties to U.S. Administrations and foreign governments. The DOJ also issued advisory opinions in the past few years requiring registration by those representing sovereign wealth funds or simply making investments for such funds in the U.S.

Dissecting the Bondi memorandum

The Bondi memorandum appears to go a long way toward reversing this expansive approach by restricting criminal charges under FARA and 18 U.S.C. § 951 (a statute closely related to FARA) to cases involving "conduct similar to more traditional espionage by foreign government actors." The memorandum also dismantles the Foreign Influence Task Force and the National Security Division's Corporate Enforcement Unit.

An understandable reaction by companies may be to banish FARA to the backburners of their compliance regimes. However, while change is certainly afoot, it is important not to overreact to these signals. Indeed, while the memorandum adjusts the Department's criminal enforcement priorities, it does not change the law or the binding DOJ interpretations to date.

It also does not — at least expressly — impact the DOJ's civil enforcement priorities, leaving the FARA Unit free to continue to issue letters of inquiry and/or seek injunctive relief when it believes an individual or entity has failed to register. Indeed, the memorandum instructs the FARA Unit to refocus on civil enforcement, and Senator Chuck Grassley — a long-time FARA hawk — reacted to the memorandum, in a Feb. 6 post on X, by noting it moved FARA in the right direction and urging the DOJ to be "very aggressive" on civil FARA registration enforcement in the coming years.

As a result, the question is not whether to cast FARA concerns aside but rather, how to approach compliance in light of these developments. In other words, the Bondi memorandum may impact enforcement risk but not the legal risk. If the DOJ ends up scaling back the implementation of FARA across the board as a result of the memorandum, it may be reasonable for companies and their representatives to weigh whether to register based on how the statute was interpreted and applied before the DOJ's recent expansive approach.

FARA practitioners are also keeping a close eye on any personnel changes at the FARA Unit or Counterintelligence and Export Control Section, where the reshuffling or replacement of key staffers responsible for the current approach would be an indicator of a broader interpretive shift beyond criminal enforcement priorities. In short, it is too early to know what impact the memorandum will have on the actual implementation of FARA.

Commercial exemption confusion and the NPRM

While the Bondi memorandum may signal a more minimalist approach to FARA, the NPRM proposes a significant expansion by dramatically narrowing what is commonly referred to as the "commercial exemption," adding further confusion to an exemption that has long been the source of debate and consternation. This exemption — as it stands today — is actually made up of two separate exemptions.

The first exemption, a statutory one found in § 613(d)(1) of FARA, exempts "private and nonpolitical activities" for non-governmental commercial entities, as long as their activities are not intended to influence U.S. government policy. Meanwhile, DOJ regulations go on to state that SOEs are able to use this exemption as long as their activities do not "directly promote" the public interests of their foreign government owner.

The NPRM, however, proposes removing the word "directly," thereby forcing an SOE's employees and consultants into the potentially unworkable situation of carefully assessing whether their activities could in any way promote the public interests of the foreign government owner, regardless of the government's level of involvement or the SOE's commercial interests.

The second "commercial exemption" is a separate DOJ regulation (28 C.F.R. § 5.304(c)) under a different statutory section exempting activity that does not predominantly promote a foreign interest. Despite this, the rule appears to exempt one from registering even when acting entirely on behalf of a foreign commercial interest and trying to influence U.S. policies (again as long as one is not promoting a foreign government's public interests).

Until advisory opinions issued in mid-2023 seemed to confirm this broad application of the regulation by exempting political activity directly on behalf of non-U.S. entities, many applied it cautiously given the statute's narrower focus. However, the FARA Unit's position appeared to swing back in the other direction with a statement in late 2023 that § 5.304(c) is overly broad as written and should not apply where there is no identifiable and predominant U.S. interest. The Unit's latest advisory opinions align with this narrower view of the exemption.

While it remains important not to overstate the impact of the Bondi memorandum, it is also difficult to ignore that it has introduced a shift in how FARA is likely to be applied, including perhaps with respect to commercial activity.

Accordingly, the NPRM brings this rule back to the basics of the statute — applying it to activity that does not predominantly promote a foreign interest, instead of allowing it to somehow create a blanket commercial exemption. However, the proposed revision adds categorical exclusions that would disallow use of the exemption when any foreign government interest is involved, even if not predominant — for example, if a foreign government exerts influence over the activities in question.

In addition to the practical concerns of determining what level or type of influence would trigger this exclusion, the proposal raises a serious legal question as to whether the DOJ has the authority to interpret § 613(d)(2) as automatically unavailable where a foreign government is involved. The statute simply exempts activities not predominantly serving a "foreign" interest and makes no distinction based on whether that interest is governmental.

For activities surviving the categorical exclusions, the DOJ proposes a totality of the circumstances test to determine

whether the agent's activities nonetheless serve predominantly a foreign interest. The five non-exhaustive, unweighted factors in the proposed regulation do little to clarify the boundaries of the exemption. Additionally, for those representing U.S. companies with ties to or dealings with foreign entities, this analysis risks becoming open to the DOJ's ad hoc interpretation, allowing the agency to pick and choose the factors it needs to justify its conclusion.

The future of FARA

Before the release of the Bondi memorandum, the regulated community and FARA practitioners had begun acting as though the current regulatory commercial exemptions were already defunct given the most recent advisory opinions' narrow interpretation of that exemption and the NPRM's bid to codify it.

Now, the fate of the commercial exemptions and the NPRM is unclear. While it remains important not to overstate the impact of the Bondi memorandum, it is also difficult to ignore that it has introduced a shift in how FARA is likely to be applied, including perhaps with respect to commercial activity.

As such, it may provide companies with some leeway to revert to older interpretations of these exemptions by applying the plain language of the current regulations, at least until the DOJ issues more concrete guidance through finalized regulations or new advisory opinions. However, this approach is not without risk, as the DOJ's civil enforcement capabilities remain intact. Until the dust settles on how the DOJ will implement FARA, companies will have challenging risk assessments to make.

Ki Hong is a regular contributing columnist on political law for Reuters Legal News and Westlaw Today.

About the authors



Ki Hong (L) is a partner at **Skadden, Arps, Slate, Meagher & Flom LLP** and head of the firm's political law compliance and investigations group. He advises major corporations on the unique political law issues they face when engaging in government affairs or government procurement activity. He is based in Washington, D.C., and can be reached at ki.hong@skadden.com. **Charles Ricciardelli** (C) is a partner in the political law compliance and investigations group at the firm. He advises clients on government affairs compliance at the federal, state and local levels and on state and federal pay-to-play laws. He is based in Washington, D.C., and can be reached at charles.ricciardelli@skadden.com. **Alexa Santry** (R) is an associate in the political law compliance and investigations group at the firm and is based in Washington, D.C. She can be reached at alexa.santry@skadden.com.

This article was first published on Reuters Legal News and Westlaw Today on April 1, 2025.