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Three Arnold & Porter attorneys discuss how the Department of Justice is increasing its criminal enforcement of the Foreign Agents Registration Act and note that the DOJ's recently released advisory opinions provide limited but welcome guidance.

INSIGHT: Clearing the Mist Surrounding The Foreign Agents Registration Act



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The Department of Justice recently released several dozen advisory opinions that provide guidance on the Foreign Agents Registration Act (FARA). In a climate of increasing enforcement activity, this move toward greater transparency is welcome.

The advisory opinions do not demystify the many complexities of the statute. To the contrary, they limit their application quite strictly to the facts under review and quote directly from FARA and the regulatory guidance in 28 C.F.R. that has been available for many years, rather than providing new analysis to help interpret those provisions. Yet their conclusions with respect to specific fact patterns are helpful in understanding how the DOJ would view the FARA registration obligation in similar situations. In particular, the opinions address a number of scenarios routinely confronted by U.S. lobbying, consulting, and law firms in their work on behalf of foreign clients, though they are very fact-dependent and thus should not be viewed as ''precedent'' without careful consideration of the statute and regulations.

Background on FARA

FARA is a 1938 law that requires any ''person'' who ''act[s] as an agent of a foreign principal'' to register with the U.S. Attorney General and make periodic public disclosures, unless a statutory exemption applies. Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631 (codified as amended at 22 U.S.C. § 611 *et seq.*). Originally focused on foreign propaganda, the statute now covers a broad range of political, public relations, and other activities on behalf of foreign principals. *See* 22 U.S.C. § 611(c) (listing covered activities). FARA's purpose is ''to insure that the U.S. Government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence U.S. public opinion, policy, and laws.'' *See* DOJ FARA Frequently Asked Questions, available at https://

www.justice.gov/nsd-fara/general-fara-frequently-asked-questions.

FARA's definition of ''agent of a foreign principal'' has two parts.

First, in general, an agent must act ''at the order, request, or under the direction or control'' of the foreign principal. 22 U.S.C. § 611(c)(1).

Second, an agent must engage ''within the United States'' in one of four categories of activity identified in the statute. *Id.* These categories are:

(1) engaging in ''political activities'' for or in the interest of the foreign principal, *id.* §§ 611(c)(1)(i), (o);

(2) acting ''as a public relations counsel, publicity agent, information-service employee or political consultant'' for or in the interest of the foreign principal, *id.* § § 611(c)(1)(ii), (g)-(i), (p);

(3) soliciting, collecting, disbursing, or dispensing money or other things of value for or in the interest of the foreign principal, *id.* § 611(c)(1)(iii); and

(4) representing the interests of a foreign principal before a U.S. government agency or official, *id.* § 611(c)(1)(iv).

FARA's definition of ''foreign principal'' is not limited to foreign governments and political parties; work for foreign individuals and entities may trigger registration obligations as well. *See id.* § 611(b).

Although the language defining ''agent of a foreign principal'' is notoriously broad and vague, the statute's scope is limited by a set of enumerated exemptions. *See id.* § 613. For instance, the Lobbying Disclosure Act (LDA) exemption allows potential FARA registrants engaged in lobbying activities on behalf of a foreign principal to register under the LDA rather than FARA, so long as the foreign principal is not a foreign government or foreign political party (with one caveat explained below). *See id.* § 613(h). The exemptions also remove certain legal and commercial activities from FARA's purview. *See id.* § § 613(d), (g). Because FARA extends to many activities that fall within the day-to-day work of U.S. lobbyists, consultants, lawyers, and other professionals serving foreign clients, understanding the scope of the statutory exemptions is critical to complying with the statute.

Analysis of Recently Released Advisory Opinions

The DOJ has posted the advisory opinions at https://www.justice.gov/nsd-fara/advisory-opinions. The opinions are organized into eight categories:

(1) ''Agency: Advisory Opinions on Agency Relationship 611(a) - (d)'';

(2) ''Commercial Exemption: Advisory Opinions on 613(d)'';

(3) ''Religious, Scholastic, Fine Arts, or Scientific Pursuits: Advisory Opinions on 613(e)'';

(4) ''National Security Exemption: Advisory Opinions on 613(f)'';

(5) ''Legal Exemption: Advisory Opinions on 613(g)'';

(6) ''FARA vs. LDA: Advisory Opinions on 613(h)'';

(7) ''Attorney General Exemption: Advisory Opinions on 612(f)''; and

(8) ''Advisory Opinions: Additional General Information.''

Each opinion is posted as a PDF titled with the date it was issued. In keeping with this format, the discussion below refers to the opinions by category and date.

The advisory opinions were issued under 28 C.F.R. § 5.2, sometimes referred to as ''FARA Rule 2,'' which provides a mechanism for potential FARA registrants or their counsel to seek guidance regarding whether a particular course of conduct ''requires registration and disclosure pursuant to the Act or is excluded from coverage or exempted.'' 28 C.F.R. § 5.2(a). The review process is limited to ''presently contemplated activity'' and excludes ''[a]nonymous, hypothetical, non-party and ex post facto review requests.'' *Id.* §§ 5.2(a), (b). Further, the requesting party must provide a detailed description of the facts and certify that the disclosure is ''true, correct and complete . . . with respect to the proposed conduct.'' *Id.* §§ 5.2(e), (f). The potential registrant may rely on a written response from the DOJ so long as the information provided in the review request was accurate and complete and the circumstances have not changed. *Id.* §§ 5.2(j), (k).

As noted, the newly released opinions do not provide much analysis. They quote directly from the statute and regulations and provide little explanation of how the DOJ interprets the relevant language. Yet because nearly all of the opinions summarize the facts under review and take a position on whether registration is required, they shed some light on how DOJ would view a potential registrant in similar circumstances. The advisory opinions are redacted to withhold the names of the participants, including the foreign principals at issue, but the situations they describe are common to many U.S. firms.

''Political Activities''

One of the most difficult areas of FARA interpretation is the determination of what constitutes ''political activities'' within the meaning of 22 U.S.C. § 611(o). The statute defines ''political activities'' to include any activity the potential registrant believes will, or intends to, influence a U.S. agency, official, or section of the public ''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.'' 22 U.S.C. § 611(o). Although this definition is broad, the newly released opinions provide some guidance for common situations.

For example, one opinion (Agency 6/22/17) concluded that consulting work for a foreign company in a foreign country did not require registration under FARA where the work was limited to providing advice on the policies of the foreign country to improve the country's global standing and relations with countries other than the United States. The opinion noted that the parties' draft consulting agreement included a list of activities covered by FARA which the potential registrant would not perform, although it did not specify what those activities were.

Another opinion that may be useful to consulting firms (Agency 12/6/17) held that providing communications assistance to U.S. firms in connection with work for which the firms were registered under FARA did not require registration, where the relevant contracts were with the U.S. firms rather than the foreign government client and the contracts explicitly provided that the potential registrant would not engage in any of the four

categories of activities that trigger an obligation to register under FARA. The contracts specified that the work would not include making strategic decisions, advising or representing the firms on public relations matters, publishing or distributing written material on behalf of the firms or the foreign government, or meeting with U.S. officials on the firms' or foreign government's behalf. The contracts further provided that the potential registrant would not engage in efforts to influence U.S. government officials or the public with respect to U.S. domestic or foreign policy.

In a third opinion involving consulting (Agency 2/7/18), a consultant for a U.S. firm assisting a foreign government with the creation of a government agency was not required to register under FARA even though the work included providing support for meetings with U.S. Department of Defense officials. The opinion noted that the meetings were expected to focus on commercial aspects of the industry and that the potential registrant would not seek to influence U.S. policy.

In each of these cases, the DOJ relied on language from the relevant contracts to conclude that the proposed activities were not covered by FARA or, in some cases, that there was no agency relationship between the potential registrant and the foreign principal. The opinions thus suggest that contractual language can be significant to the DOJ's assessment of potential registration obligations. Where appropriate, including express representations in the contract as to the scope of the proposed work, including whether the U.S. firm will engage in activities covered by FARA, is a best practice that can help establish whether the work would require registration.

This is not to say that parties can use contractual terms to avoid FARA registration when the work to be performed constitutes covered activity and no exemption applies. An opinion from 2012 (Agency 11/8/12; second of two opinions listed for this date) determined that a U.S. nonprofit organization was required to register under FARA for activities on behalf of a foreign ministry that could be viewed as educational as much as political: convening panels of government officials and private sector leaders to discuss issues of interest to the foreign government; hosting foreign government officials in Washington; training interns and introducing them to the policy community; working with the foreign embassy in Washington; and conducting educational workshops. The opinion concluded that these activities constituted both ''political activities'' and political consulting work under FARA. As this example shows, the meaning of ''political activities'' is not limited to what we traditionally understand as ''lobbying,'' and it is broader than the specific communications with covered executive and legislative branch officials that require registration under the LDA.

LDA Exemption

The opinions also provide guidance on the exemption at 22 U.S.C. § 613(h) for work on behalf of foreign principals that is separately disclosed under the LDA. By its terms, this exemption is not available where the foreign principal is a foreign government or foreign political party. 22 U.S.C. § 613(h). A 2010 opinion (FARA vs. LDA 1/20/10) shows that the relationship between the potential registrant and the foreign government or political party need not be direct. This opinion concluded that a U.S. consulting firm retained by a foreign trade association was not eligible for the LDA exemption because, although the associated foreign government was not the U.S. firm's client, the foreign government had provided funds of approximately $10 million to the trade association for various projects, including projects that promoted the political or public interests of the foreign government in the United States. Thus, the DOJ viewed the firm ''as representing the [foreign government] through [foreign trade association],'' and the firm was required to register as a foreign agent.

In addition, by regulation, the LDA exemption is not available where a foreign government or political party is ''the principal beneficiary'' of the FARA-covered activities. 28 C.F.R. § 5.307. One opinion (FARA vs. LDA 12/3/12; second of two opinions listed for this date) found that a U.S. law firm's proposed political activities on behalf of a large, private foreign bank did not fall within the LDA exemption because the foreign government would be a principal beneficiary of the activities. Interestingly, the DOJ reasoned that there would be two principal beneficiaries—the foreign bank and the foreign government—rather than concluding that the foreign government would be ''*the* principal beneficiary,'' as provided in the regulations. *See* 28 C.F.R. § 5.307 (emphasis added).

Although these examples are helpful, there continues to be considerable gray area in determining when work performed on behalf of a foreign entity that is not a foreign government, but may have a relationship with the foreign government or share similar goals, would trigger a FARA registration obligation even where the work is already disclosed under the LDA.

Legal Exemption

Gray areas also remain in determining the boundaries of the legal exemption at 22 U.S.C. § 613(g), though again there are some helpful opinions in the recent release. The legal exemption is available to agents representing foreign principals (including foreign governments and foreign political parties) before U.S. courts and agencies. *See* 22 U.S.C. § 613(g). The exemption does not extend to certain attempts to influence policy as defined in 28 C.F.R. § 5.306.

Two separate opinions relating to OFAC work help clarify the DOJ's view of the line between exempt legal work and non-exempt attempts to influence. A U.S. law firm representing a foreign bank and individual with respect to possible OFAC sanctions, including in any potential government investigation or enforcement proceeding, was found to be eligible for the legal exemption because the work was limited to the specific application of OFAC's policies to the foreign bank and individual (Legal Exemption 5/3/18; first of two opinions listed for this date). The opinion noted that if the work were to extend beyond that specific application and implicate wider policy or political considerations, registration under FARA could be required. An opinion of the same date, but involving different clients (Legal Exemption 5/3/18; second of two opinions listed for this date), similarly held that a law firm representing a state-owned company and an individual in connection with potential OFAC sanctions qualified for the legal exemption because the work fell short of an attempt to influence OFAC's policies beyond their specific application to the two clients.

Many of the opinions relating to the legal exemption addressed the more straightforward application of that

exemption to work on behalf of foreign governments, entities, and individuals in connection with litigation or agency proceedings. The DOJ found the exemption to apply in each of these cases (e.g., Legal Exemption 9/10/13, 7/27/11, 2/16/11, and 8/27/03), although it warned in some of the opinions that expansion into ''political activities'' would require registration.

Commercial Exemption

Finally, a number of opinions addressed the exemptions available under 22 U.S.C. § § 613(d)(1) and (2). These exemptions apply where a potential registrant is engaged only ''(1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of [the] foreign principal,'' or ''(2) in other activities not serving predominantly a foreign interest.'' 22 U.S.C. § 613(d). The regulations at 28 C.F.R. § 5.304 implement the statutory language as follows:

- Section 5.304(a) defines ''trade or commerce'' to include ''the exchange, transfer, purchase, or sale of commodities, services, or property of any kind.'' 28 C.F.R. § 5.304(a).

- Section 5.304(b) provides that activities ''in furtherance of the bona fide trade or commerce'' of the foreign principal are ''considered 'private,' even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interests of the foreign government.'' *Id.* § 5.304(b).

- Section 5.304(c) provides that a potential registrant ''engaged in political activities on behalf of a foreign corporation'' is not ''serving predominantly a foreign interest'' for purposes of 22 U.S.C. § 613(d)(2) ''where the political activities are directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation,'' provided that the political 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 of a foreign political party.'' *Id.* § 5.304(c). This subsection applies even where the foreign corporation is owned in whole or part by a foreign government. *Id.*

The opinions on the commercial exemption nearly always extended the exemption to activities on behalf of foreign companies, though one (Commercial Exemption 2/9/18; first of two opinions listed for this date) found that work on behalf of a foreign central bank did not qualify under either 22 U.S.C. § § 613(d)(1) or 613(d)(2). The opinion reasoned that at least some of the proposed activities, which included providing strategic advice and engaging with the Federal Reserve Board and Comptroller of the Currency to demonstrate the foreign bank's suitability for establishing commercial relationships with U.S. financial institutions, would directly promote the public interests of the foreign country and, for that reason, also would serve predominantly a foreign interest. The opinion relied on language from 28 C.F.R. §§ 5.304(b) and 5.304(c) in reaching this conclusion.

Given the possible breadth of the commercial exemption and lack of guidance to date, we expect its application to be of particular interest to potential FARA registrants going forward.

Other Observations

Although the newly released opinions introduce welcome transparency to the DOJ's historically opaque approach to FARA enforcement, they vary in clarity and should be read carefully. The opinions do not always clearly identify the statutory provisions and regulations from which their analysis is drawn—or even, in some cases, which covered activities or exemptions form the basis for the decision. Thus, understanding their conclusions requires matching up the relevant legal standards with the facts: whether the activities in question are ''political activities''; whether the foreign principal is a foreign government or a foreign political party; whether the activities directly promote the public or political interests of the foreign government or serve predominantly a foreign interest; and so on.

Another piece of advice: the opinions reveal that the DOJ's FARA Registration Unit is very unhappy when it does not receive sufficient information to evaluate the facts. The Rule 2 process is designed to provide guidance, but the FARA Unit does not appreciate inquiries that are not fully transparent and complete, as required by the rule. One opinion (Legal Exemption 12/3/12) made multiple critical references to missing information in the request before rejecting the requesting party's claim to an exemption. This opinion and others (e.g., Agency 4/9/13) either concluded that FARA registration was required or requested additional information where the inquiry did not provide enough detail to justify the claim.

Looking Ahead

The newly released opinions will not answer all of the questions that arise in considering which activities require registration under FARA and when certain exemptions apply. But the guidance they provide is nonetheless valuable in this era of increasing enforcement activity.

The criminal provisions of FARA have been used only sparingly, but several recent cases have brought the potential risks of acting as an unregistered foreign agent into the spotlight. Most notably, Paul Manafort was recently detained without bond pending trial on charges that include serving as an unregistered agent of foreign principals (the government of Ukraine, the Party of Regions, and Victor Yanukovych), in violation of FARA. *See* Superseding Indictment as to Paul J. Manafort, Jr. and Konstantin Kilimnik, *United States v. Manafort*, No. 17-cr-201, ECF No. 318 (D.D.C. filed June 8, 2018); Order of Detention, *United States v. Manafort*, No. 17-cr-201, ECF No. 328 (D.D.C. filed June 15, 2018). Prosecutions for this offense have been rare, but the Manafort indictment also includes a count for false and misleading statements made in Manafort's FARA filings, suggesting that the government is concerned with potential concealment and not just administrative defects. Michael Flynn also was reportedly being investigated for potential FARA violations relating to work on behalf of foreign interests in Turkey, but he pled guilty to unrelated false statements charges. *See* Charlie Savage, *How Michael Flynn May Have Run Afoul of the Law*, N.Y. Times (May 25, 2017), https://www.nytimes.com/2017/05/25/us/politics/michael-flynn-russia.html; Plea Agreement as to Michael T. Flynn and Statement of Offense by Michael T. Flynn, *United States v. Flynn*, 17-cr-232, ECF Nos. 3 and 4 (D.D.C. filed Dec. 1, 2017). In a more recent but less high-

profile case, Nisar Chaudhry pled guilty to a FARA violation in connection with outreach to U.S.-based think tanks on behalf of the government of Pakistan. Dep't of Justice, *Maryland Man Pleads Guilty to Failure to File a Foreign Agent Registration Statement* (May 7, 2018), https://www.justice.gov/opa/pr/maryland-man-pleads-guilty-failure-file-foreign-agent-registration-statement. This case was unusual because, unlike most previous prosecutions involving FARA, there did not appear to be efforts to conceal the activity or other indications of a consciousness of guilt that typically support a finding of criminal intent.

These cases show that the DOJ is increasing its criminal enforcement of FARA, so it is important for anyone engaged in work on behalf of foreign interests in the United States to comply fully with the statute's requirements and stay apprised of developments in the DOJ's approach. In light of the statute's vague language and the absence of clarifying case law, the recently released opinions provide the best resource available for understanding the DOJ's view of FARA and its exemptions.

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