

An Unprecedented Look Inside the FARA Unit

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For close observers of the Foreign Agents Registration Act — a formerly modest-sized contingent that seems to grow daily — the June 8 release by the U.S. Department of Justice of over 50 FARA advisory opinions was a watershed. These opinions offer an unprecedented glimpse into how the FARA Registration Unit interprets the act and its implementing regulations, and also provide the FARA bar and potential registrants with concrete, real world examples that shed light on previously murky interpretive questions.

Despite their volume and utility, these advisory opinions are only as revealing as the facts and questions presented by the requesting parties. In other words, many of FARA's interpretive grey areas remain. A repeating mantra in the opinions is that specific facts matter; accordingly, each opinion may only be a detail or two away from a completely opposite result.

For that reason, some commentators have already pointed out that these opinions could create a perverse outcome: rather than enhancing compliance with the act, they could provide a road map for those who hope to avoid registering under FARA. Regardless of the consequences, the opinions make clear that a fine line may exist between an obligation to register and none at all.

Even if the June 8 advisory opinions do not provide all the answers, they unquestionably contain guidance that must be reckoned with in the future. Here are several broad themes and takeaways that legal practitioners and potential FARA registrants should keep in mind:

Foreign agents, you know them when you see them.

The largest category of opinions, by far, concerns questions regarding what constitutes an "agent of a foreign principal." Not surprisingly, that threshold issue continues to vex potential registrants because it encompasses fact-intensive questions that often lead to subjective or inconsistent interpretations. This is certainly true when assessing whether a potential registrant is acting "at the order, request, or under the direction or control" of a foreign principal. It is also the case when analyzing whether a party is engaged in "political activities" within the United States. The latter issue becomes even more complicated if the requesting party purports to be a journalist or a working member of the news media engaged in activities protected by the First Amendment. Notably, the vast majority of opinions in this category concluded that there was no obligation to register under the act. The lesson, then, may be that many circumstances merit seeking an advisory opinion from the FARA Registration Unit to validate a sound but unapproved analysis regarding a potential agency relationship.

Contracting around a FARA registration obligation may be possible.

Multiple opinions address, at least in part, contractual arrangements between potential registrants and foreign principals that include language specifically designed to disclaim or avoid a FARA registration obligation. In each instance, the FARA Registration Unit appears to have weighed heavily such contractual language in finding that the requesting party's activities were outside the bounds of 22 U.S.C. § 611(c)(1)(i)–(iv) and, thus, did not trigger an obligation to register under the act. Further, the opinions also demonstrate that maintaining only an indirect relationship with a foreign principal — by contracting directly with a U.S. company that, in turn, contracts with a foreign entity — may avert the formation of an agency relationship with the foreign principal and an accompanying registration obligation.

Carefully consider the soundness of your Lobbying Disclosure Act exemption claim.

To many, the Lobbying Disclosure Act exemption is perceived as a loophole to FARA because the LDA's less comprehensive disclosure requirements largely obscure what FARA reveals. The DOJ supports two pending legislative proposals to enhance FARA – the Disclosing Foreign Influence Act and the Foreign Agents Registration Amendments Act – to eliminate the LDA exemption. Due to the generally inhospitable climate surrounding the LDA exemption, parties may want to take extra care before asserting that it applies.

The advisory opinions highlight two specific issues that warrant further consideration before claiming this exemption. First, a party could be precluded from claiming the LDA exemption because its seemingly private foreign principal could, upon further analysis, be "bound together" with a foreign government, making the foreign government in essence the principal. As illustrated in the opinions, the de facto involvement of a foreign government could result from a significant contribution of funds by the government or the structure of the foreign country's economy itself. Second, the LDA exemption would not apply if a foreign government or foreign political party is the principal beneficiary, a point that can be obscured by complex facts. Because the burden of establishing the availability of any exemption falls upon the person claiming it, a party hoping to avail itself of the LDA exemption should be prepared to substantiate that position with more than just an LDA registration statement.

Not everything is private, nonpolitical commercial activity (however much potential registrants may wish it were so).

Although the commercial exemption is one of the most frequently invoked, the advisory opinions make clear that potential registrants should not take an unduly broad view of its scope. As the most recent opinions from February 2018 demonstrate, the FARA Registration Unit will not simply accept a requesting party's labels when it comes to determining whether activities are truly "private," "nonpolitical" and "in furtherance of bona fide trade or commerce" of a foreign principal. Parties need to be prepared to back up those labels with specific facts; moreover, they should refrain from hastily concluding that the commercial exemption applies simply because there is some commercial angle to the representation of a foreign principal. Likewise, parties also should be objective in assessing whether their activities are "serving predominantly a foreign interest," an inquiry that requires analysis of multiple elements including the identity of the party directing the activities and whether the activities are directly promoting the public or political interests of a foreign government or foreign political party. Because the ultimate burden is on the party claiming the exemption, solid support for such a position is a must.

Lawyers representing foreign clients should be cognizant of the scope of their representation.

For most attorneys, particularly those with international practices and foreign clients, FARA's legal exemption is well known. What some may take for granted, however, is that it is relatively easy for an otherwise exempt legal representation of a foreign principal to cross into a registrable activity under the act. This is significant in Washington, DC, where legal representations routinely have multiple facets that interface with different U.S. government agencies at various levels of responsibility and seniority. The line between run-of-the-mill legal advocacy and "political activities" implicating FARA can be blurry; even one meeting with the U.S. government that exceeds the bounds of the legal exemption could trigger a registration requirement.

Knowledge can be a dangerous thing.

Criminal liability only arises under FARA in instances of willful violations, and criminal enforcement of the act almost never occurs. Publication of these advisory opinions could change that. Traditionally, the evidentiary hurdle of proving willfulness has discouraged the DOJ from pursuing criminal charges in all but the most egregious cases. Now, however, where a potential registrant's facts mirror or closely resemble one of the published advisory opinions, a claim of ignorance of a registration obligation may be insufficient to counter a charge of knowledge or even willfulness. In other words, the DOJ may be far less forgiving than it has been in the past, especially in light of a more aggressive FARA enforcement climate.

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