

**ALERT**

# DOJ Issues Several New FARA Advisory Opinions on Registration Triggers and Exemptions

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On October 3, the U.S. Department of Justice (DOJ) FARA Unit published a number of new advisory opinions (AOs) offering guidance and further insight on the Department's interpretation of certain FARA registration triggers and exemptions. Below are summaries of several of these AOs as well as key takeaways.

**SELECT KEY TAKEAWAYS:**

- While the FARA registration triggers are broad, they are not without limit. In order to trigger a FARA registration requirement, there must be an agency relationship between an entity and a foreign principal. If there is no agency, there is no FARA registration requirement.
- A U.S. subsidiary of a foreign parent can be deemed an agent of a foreign principal depending on the nature and scope of the subsidiary's activities and its relationship with the foreign parent.
- The FARA exemption for "diplomatic or consular officers" is incredibly narrow and limited to any "duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, while said officer is engaged exclusively in activities which are recognized by the Department of State as being within the scope of the functions of such officer."
- The religious, scholastic, fine arts, or scientific exemption to FARA registration is not available where an agent is engaged

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in “political activity,” which is broadly defined under FARA.

- A duly accredited lawyer’s representation of a client, including informal advocacy, in the scope of informal agency proceedings may qualify for the legal exemption to FARA registration, provided that the advocacy does not rise to the level of attempting to change U.S. policy.

## **ADVISORY OPINIONS:**

### **Agency Relationship**

**05/24/2023 AO**

Question: Is there an agency relationship between the nongovernmental organization (NGO) and foreign principals, and, if so, is the NGO required to register under FARA?

Facts: An NGO entity plans to engage in three activities within the United States related to its mission involving a foreign country. These activities include, among other things, sending a letter to Congress and sending retired U.S. military officers and other U.S. persons to a foreign country to discuss “U.S. national military strategy,” with foreign military officers. The NGO claims that these actions are not directed or requested by any foreign principal, and that no things of value are expected to be provided by the foreign principal contingent upon the activities undertaken by the NGO.

Analysis: DOJ concluded that because the NGO is not acting “at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal,” there is no agency relationship between the NGO and a foreign principal and, accordingly, there is no obligation for the NGO to register under FARA.

### **Trade/Commerce and Lobbying Disclosure Act (LDA) Exemptions**

**06/20/2023 AO**

Question: Do the activities undertaken by a foreign company and individual employee trigger a FARA registration requirement and, if so, would they qualify for the trade/commerce and LDA exemptions under Sections 613(d)(2), 613(d)(1), and/or 613(h) of the FARA statute?

Facts: A foreign company serves as a formal association representing a foreign industry group headquartered and incorporated internationally, with member companies making up a governing Board. Full-time members of the foreign company have voting privileges incorporated under the laws of the foreign country. The foreign company is “not directed or controlled, nor does it receive any funding from, the [Foreign Country] government.” The foreign company plans to promote the industry group by engaging in political activities in the U.S., including meeting with federal agencies, along with state and local regulators, to discuss policy issues and to promote the interests of member companies. The purpose of these efforts is not to advance the political or public interest of the foreign country. Individual officers of the foreign company will engage in

these activities, including an individual who is currently an elected official of a foreign government.

Analysis: DOJ found that because all of the voting members are incorporated under the laws of a foreign country, the foreign company is managed by multiple foreign principals. The U.S. lobbying activities undertaken by the foreign company constitute political activities, and, as such, the foreign company and any individuals engaging in the activities would therefore be agents of foreign principals required to register under FARA absent an exemption. The U.S. political activities are not “nonpolitical” for purposes of the exemption under Section 613(d)(1), rendering it unavailable. However, DOJ agreed that the exemption under Section 613(d)(2) should apply to the political activities since the foreign company (and the individual) are not directed or controlled by a foreign government nor are they engaged in activities that “directly promote the public or political interest of a foreign government or political party,” and instead the activities “benefit the financial and commercial interests of its members, all of which are private companies.” Here, the DOJ noted that although one of the foreign company’s officers is a former government official, it was rendering its decision on the applicability of the exemption at (d)(2) based on assertions that the officer’s involvement in the foreign company is in his private capacity. DOJ further noted that the foreign company may qualify for the exemption under Section 613(h) provided that (1) the foreign company becomes fully registered under the LDA; and (2) neither a foreign government nor a foreign political party serves as the “principal beneficiary of the U.S. political activities.”

### **Diplomatic and Trade/Commerce Exemptions**

#### **05/19/2023 AO**

Question: Is the foreign government organization exempt from FARA registration pursuant to Sections 613(a), (b), and/or (c) of the FARA statute?

Facts: A foreign government organization (the organization), headquartered internationally, advises foreign companies on internationalization strategy, including within the U.S. market. The organization participates in conferences, panels, and webinars with an intention of bringing in investments into its foreign nation and communicates with federal and local government entities within the U.S. The organization consists of two legal entities; a foreign company LLC wholly owned by a foreign government, and a foreign government agency. Additionally, the organization has a U.S. subsidiary, a nonprofit corporation located in the U.S., that is wholly owned by the foreign company. A division of the foreign company, referred to as “the unit”, provides marketing services to promote materials in favor of the foreign nation. The foreign company also employs numerous employees working in the U.S. that have been accredited as diplomatic or consular officials.

Analysis: DOJ concluded that the U.S. subsidiary is an agent of a foreign principal, as it is wholly owned by a foreign company and its sole function is to support its foreign parent’s political activities in the United States. Moreover, the political activities pursued by the U.S. subsidiary would not render them eligible for any of the exemptions to FARA registration under Section 613. DOJ further asserted that the exemption under Section 613(d)(2) does not apply to the U.S. subsidiary because it serves “predominantly a foreign interest.” According to the organization’s public mission statement, it aims to pull in direct investments into the foreign nation. Neither

the organization nor the foreign company appear to be engaging in “bona fide trade or commerce,” and, therefore, the exemption under Section 613(d)(1) does not apply to either entity. Thus, the U.S. subsidiary has an obligation to register under the Act for acting on behalf of the foreign company, and no exemptions apply. Finally, DOJ noted that the accredited individual employees are not subject to FARA registration, seeing as they hold diplomatic or consular statuses and are thus exempt from registration pursuant to Section 613(a). Any noncredited individuals would not qualify for this exemption.

### **Religious, Scholastic, Fine Arts, or Scientific Exemption**

**07/07/2023 AO**

Question: Do the activities undertaken by an individual to support certain religious-related events hosted by a foreign organization trigger registration under FARA and, if so, would they qualify for the exemption pursuant to Section 613(e)?

Facts: An individual plans to support two events hosted by a foreign organization. The foreign organization does not advocate policy positions or endorse candidates, but rather “primarily provide[s] interfaith guidance and explain[s] the tenants of their holy book.” The first event will take place in the U.S. and has a focus on academics, with a primary target audience of foreign dignitaries and religious figures. The foreign organization has invited religious scholars from U.S. institutions. The individual will provide logistical support, will manage invitations, and may help distribute event materials to U.S. invitees in attendance. The second event, also held in the U.S., will host religious academics but will not be promoted publicly.

Analysis: By distributing event materials on behalf of the foreign organization, the individual would be a publicity agent and an information-service employee, and thus would trigger a registration obligation. However, DOJ concluded that the individual qualifies for the exemption for religious pursuits under Section 613 (e) based on the following three assertions made by the requestor: the foreign organization is a religious organization that does not seek to advocate policy positions, it does not engage in political activity, and the individuals’ actions are limited to logistical support.

### **Legal Exemption**

**03/31/2023 AO**

Question: Do the activities taken on by a U.S. law firm trigger registration under FARA and, if so, would the firm qualify for exemption pursuant to Section 613(g)?

Facts: A U.S. law firm is representing a foreign client before the State Department in connection with sanctions imposed on the foreign client and associated foreign individuals pursuant to an administrative sanctions program. The law firm’s work is focused, in part, on investigating the State Departments factual bases for designating the foreign client, in which the law firm retained additional investigation counsel to assist. The law firm argued that (i) it “is entitled to the Section 613(g) exemption with respect to the Expected Agency Interactions, even though there are no implementing regulations establishing formal agency proceedings for

the purpose of contesting designations pursuant to [the State Department-administered sanctions program], and (ii) that the Expected Agency Interactions do not amount to attempts to influence or persuade agency personnel that would be impermissible because they will occur outside of a formal agency proceeding.”

Analysis: DOJ determined that the foreign client is a foreign principal and that the engagement letters confirm that the law firm will be acting on behalf of the foreign client before federal agencies. DOJ Emphasized that as for the law firm’s exemption under Section 613(g), eligible legal representation “does not include attempts to influence or persuade agency personnel or officials other than 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,” (emphasis added).” Nonetheless, DOJ concurred that the law firm is entitled to the exemption under Section 613(g) with respect to its expected interactions with federal agencies. DOJ noted that even if the law firm were to further engage “those with decision-making authority at the State Department and OFAC regarding the sanctions at issue,” they would conclude that the interactions would still fall within the Section 613(g) exemption. Thus, the law firm is not obligated to register under FARA.

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*Maddie Van Aken, a Legislative and Reporting Coordinator at Wiley Rein LLP, contributed to this alert.*