

Justice Department Issues ANPRM to Modernize and Clarify FARA and Seeks Comments

December 17, 2021

On December 13, 2021, the U.S. Department of Justice (DOJ) National Security Division issued an Advance Notice of Proposed Rulemaking (ANPRM) and request for public comments regarding clarification and modernization of Foreign Agents Registration Act (FARA) implementing regulations. Comments on the ANPRM are due Tuesday, February 11, 2022.

FARA is a disclosure statute designed to promote transparency in the U.S. political, media, and public relations arenas, among others, with respect to foreign influence. Generally, FARA requires every “agent of a foreign principal” engaging in certain political or quasi-political activities in the United States to register as such with the DOJ and to periodically – and publicly – disclose certain details of that agency relationship with the foreign principal.

The ANPRM states that DOJ is “considering amending and updating the regulations to clarify key substantive provisions, such as the attorney and commercial exemptions” as well as other changes to “modernize the regulations to clarify how they apply to social media and electronic filing” among others.

The DOJ has prioritized FARA enforcement in recent years and the ANPRM indicates that FARA remains a DOJ priority. In 2016, the DOJ Inspector General audited the Department’s FARA enforcement and found that FARA registrations had sharply declined since the 1990s and that the FARA Unit rarely pursued enforcement actions. The Inspector General’s report, at least in part, sparked congressional hearings, legislative reform efforts, as well as changes within the DOJ,

Authors

Tessa Capeloto
Partner
202.719.7586
tcapeloto@wiley.law
Paul J. Coyle
Associate
202.719.3446
pcoyles@wiley.law

Practice Areas

Election Law & Government Ethics
Foreign Agents Registration Act (FARA)
International Trade
National Security

including several high-profile criminal prosecutions and civil actions. Now, with the ANPRM, the DOJ has initiated the process to revise the FARA regulations for the first time since 2007.

The ANPRM contains nineteen specific questions for public comment, which cover the following topics: agency, exemptions, Rule 2 advisory opinions, labeling of informational materials, E-filing, and agent contact information requirements. The questions are reproduced in full below.

DOJ notes that the most helpful comments “will be those that answer one or more of the specific questions asked; explain what changes, if any, should be made to the regulations and why; and support that position with accompanying data, information, or legal authority.” In addition to providing comments on the specific questions, DOJ welcomes input “on any other aspect of the current FARA regulatory structure that the public believes should involve the issuance, amendment, or rescinding of any regulation[.]”

Wiley attorneys routinely handle matters on all aspects of FARA compliance, from counselling clients on whether registration is required to assisting clients with completing and executing their FARA filings. For more information about this ANPRM and request for comments, please contact one of the attorneys listed on this alert.

Agency

Question 1: Should the Department incorporate into its regulations some or all of its guidance addressing the scope of agency, which is currently published as part of the FARA Unit’s FAQs on its website? See <https://www.justice.gov/nsd-fara/page/file/1279836/download>. If so, which aspects of that guidance should be incorporated? Should any additional guidance currently included in the FAQs, or any other guidance, be incorporated into the regulations?

Question 2: Should the Department issue new regulations to clarify the meaning of the term “political consultant,” including, for example, by providing that this term is generally limited to those who conduct “political activities,” as defined in 22 U.S.C. 611(o)?

Exemptions

Question 3: Should the Department issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises? If so, how should the Department amend the regulation to address when such activities do not serve “predominantly a foreign interest”?

Question 4: Is the language in 28 CFR 5.304(b), (c), which provides that the exemptions in sections 613(d)(1) and (d)(2) do not apply to activities that “directly promote” the public or political interests of a foreign government or political party, sufficiently clear? And does that language appropriately describe the full range of activities that are outside the scope of the exemptions because they promote such interests, including indirectly? Should the language be clarified, and, if so, how?

Question 5: What other changes, if any, should the Department make to the current regulations at 28 CFR 5.304(b) and (c) relating to the exemptions in 22 U.S.C. 613(d)(1) and (2)?

Question 6: Should the Department issue additional or clarified regulations regarding this exemption to clarify the circumstances in which this exemption applies? If so, how should those additional regulations clarify the scope of the exemption?

Question 7: Should the Department amend 28 CFR 5.306(a) to clarify when activities that relate to criminal, civil, or agency proceedings are “in the course of” such proceedings because they are within the bounds of normal legal representation of a client in the matter for purposes of the exemption in 22 U.S.C. 613(g)? If so, how should the Department amend the regulation to address that issue?

Question 8: What other changes, if any, should the Department make to 28 CFR 5.306 to clarify the scope of the exemption in 22 U.S.C. 613(g)?

Question 9: Are there other aspects of the statutory exemptions that the Department should clarify, whether to make clear additional circumstances in which registration is, or is not, required?

Inquiries Concerning Application of the Act

Question 10: Should the Department revise 28 CFR 5.2(i) to allow the National Security Division longer than 30 days to respond to a Rule 2 request, with the time to begin on the date it receives all of the information it needs to evaluate the request? If so, what is a reasonable amount of time?

Question 11: Should the Department include with its published Rule 2 advisory opinions the corresponding request, with appropriate redactions to protect confidential commercial or financial information, so that the public may better understand the factual context of the opinion?

Question 12: What other changes, if any, should the Department make to the current process for using advisory opinions pursuant to 28 CFR 5.2?

Labeling Informational Materials

Question 13: Should the Department define by regulation what constitutes “informational materials”? If so, how should it define the term?

Question 14: What changes, if any, should the Department make to the current regulation, 22 CFR 5.402, relating to labeling informational materials to account for the numerous ways informational materials may appear online? For example, how should the Department require conspicuous statements on social media accounts or in other communications, particularly where text space is limited?

Question 15: Should the Department amend the current regulation, 22 CFR 5.402(d), relating to “labeling informational materials” that are “televised or broadcast” by requiring that the conspicuous statement appear at the end of the broadcast (as well as at the beginning), if the broadcast is of sufficient duration, and at

least once-per hour for each broadcast with a duration of more than one hour, or are there other ways such information should be labeled?

Question 16: Should any changes to regulations relating to the labeling of “televised or broadcast” informational materials also address audio and/or visual informational materials carried by an online provider? And, if so, should the regulations addressing labeling of such audio and/or visual information materials be the same as for televised broadcasts or should they be tailored to online materials; and, if so, how?

Question 17: Should the Department amend 22 CFR 5.402 to ensure that the reference to the “foreign principal” in the conspicuous statement includes the country in which the foreign principal is located and the foreign principal’s relation, if any, to a foreign government or foreign political party; and, if so, how should the regulations be clarified in this regard?

E-Filing

Questions 18: What changes, if any, should the Department make to its regulations to account for the e-File system that was adopted after the regulations were last updated in 2007?

Miscellaneous Changes

Question 19: Should the Department amend 28 CFR 5.1 to require—separate from the registration statements, supplements, and related documentation—that agents provide their business telephone numbers and business email addresses to facilitate better communications with the FARA Unit?
