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DOJ Officials' Remarks Signal New Trends In FARA Activity

By **Robert Kelner, Brian Smith and Alexandra Langton** (December 14, 2023, 3:46 PM EST)


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On Dec. 1, three top U.S. government officials responsible for enforcing the Foreign Agents Registration Act gave remarks at the American Conference Institute's 5th National Forum on FARA.

In their remarks, each of the speakers — Deputy Assistant Attorney General Eun Young Choi, Acting Chief of the Counterintelligence and Export Control Section Jennifer Gellie, and FARA Unit Chief Evan Turgeon — reiterated and reinforced the U.S. Department of Justice's commitment to enforcing the statute aggressively.

The officials also previewed potentially substantial regulatory changes that the department will propose in its forthcoming notice of proposed rulemaking, or NPRM, along with highlighting the department's enforcement and legislative priorities.

In this article, we summarize and examine these developments, each of which could have significant implications for international companies, sovereign wealth funds and others, along with the political, legal and public relations consultants who advise them.

FARA Notice of Proposed Rulemaking

Most notably, the department announced that it will soon propose sweeping changes to FARA's implementing regulations, particularly with respect to regulations affecting the application of FARA to multinational corporations.

In December 2021, the department published an advance notice of proposed rulemaking, the first step toward a major rulemaking, which it promised would "modernize" the current regulations. Twenty-nine individuals and entities submitted comments in response to the advance notice, and the FARA bar has been waiting expectantly for the department's proposed changes to appear in an NPRM.

Gellie previewed that the FARA unit has developed proposed regulations that are now being reviewed by senior officials within the department and other government offices. While she did not provide the exact timing of the publication, she expected that the NPRM would be available "soon" and offered a preview of the substantive changes.

Some of the changes she previewed appeared in the advance notice. For example, Gellie stated that the

NPRM will include new, detailed instructions for labeling online information materials such as social media.

Gellie also previewed significant changes to the commercial exemptions to FARA. She described the changes as a rebranding of the regulatory commercial exemption into an exemption for domestic activities.

At present, FARA has two commercial exemptions. First, a statutory provision, Section 613(d)(1), exempts from registration "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of a foreign principal. This exemption covers "the exchange, transfer, purchase, or sale of commodities, services, or property of any kind."

Second, in 2003, the DOJ adopted a regulatory commercial exemption that, under its current scope, exempts political activities on behalf of a foreign corporation that are directly in furtherance of the corporation's commercial, industrial or financial operations.

The regulation was adopted pursuant to separate statutory authority, under Section 613(d)(2) of the statute, for "other activities not serving predominantly a foreign interest." As a result, this exemption is sometimes referenced as the (d)(2) commercial exemption.

Pursuant to the department's existing regulations, both the statutory and regulatory commercial exemptions are limited, and neither is available for activities that "directly promote the public or political interests of a foreign government or of a foreign political party."

FARA practitioners and the regulated community have sometimes struggled to identify the outer bounds of the types of matters that the department might consider to be directly promoting the interests of a foreign government and those that directly further commercial, industrial or financial operations.

Gellie reported that the department's proposed solution is to replace the existing regulation interpreting the Section 613(d)(2) exemption and rebrand it as a domestic interest exemption to align more closely with the statutory language.

Specifically, she suggested that the new regulatory implementation of the (d)(2) exemption would address whether an agent's activities predominantly benefit a U.S. person or entity, or a foreign person or entity.

She did not specify the criteria that the department would use to evaluate whether activities "predominantly benefit" U.S. persons, although her description seemed to mirror elements of an old exemption for domestic subsidiaries of foreign corporations. Congress repealed that exemption in FARA when it adopted the Lobbying Disclosure Act of 1995, which was intended to apply to such subsidiaries engaged in lobbying in the U.S.

Gellie justified the change, emphasizing that the statutory language for Section 613(d)(2) succinctly exempts "activities not serving predominantly a foreign interest," and makes no mention of foreign corporations or foreign corporate interests.

Thus, she explained, the current regulations inappropriately focus only on foreign corporate principals and require modification. The (d)(1) statutory commercial exemption would remain, she said, and continue to carry the label of the commercial exemption.

It is difficult to assess this proposed major change to the FARA regulations until we see the precise language to which Gellie referred. Based on her description, however, the change could have major implications for U.S. subsidiaries of foreign corporations and other companies and organizations that rely on the regulatory commercial exemption to FARA.

The (d)(2) commercial exemption is a common exemption to FARA on which many U.S. subsidiaries of foreign companies rely for their corporate government relations activities. Repealing the (d)(2) exemption could significantly expand the universe of entities required to register under the statute.

As such, many of the attendees at the conference anxiously reached for the microphone to ask clarifying questions. In response to one question, Gellie indicated that it was the department's intent in this change — along with the proposed change to the Lobbying Disclosure Act, or LDA — exemption discussed below, to require foreign corporations to disclose and report their political activities under FARA, rather than the LDA.

She acknowledged that this change would require congressional action, including a decision by Congress to "reverse course" from the action it took in the 1995 LDA, which sought to place private sector lobbying under the LDA and reserve FARA for foreign governmental lobbying.

It was nonetheless clear that the department's forthcoming proposed regulations will seek to move as far in this direction as possible under the current statutory structure. Gellie invited concerned parties to submit responses to the forthcoming NPRM, which we expect many will do.

DOJ's Enforcement Priorities

Turning to enforcement, the new FARA unit chief, Turgeon, gave significant remarks for the first time since he assumed the position earlier this year. Turgeon emphasized two areas for attention: FARA compliance by sovereign wealth funds and FARA's application to foreign funding of litigation in the U.S.

With respect to foreign litigation funding, Turgeon explained that he perceived several risks to "undisclosed and undiscoverable" third-party foreign funding of U.S. litigation:

- Foreign entities doing business in the U.S. may seek to create a competitive advantage as compared to their U.S. competitors by tying up U.S. companies in lengthy and expensive courts cases.

- Foreign funders of U.S. litigation may gain access to proprietary and sensitive commercial information through litigation discovery.

- Foreign adversaries may fund litigation on political issues that are divisive within the U.S. public.

Turgeon indicated that foreign litigation funding may trigger FARA registration in the first place because the statute broadly covers activities related to collecting or disbursing money in the U.S. on behalf of a foreign principal. He also emphasized that the lawyers' exemption may not apply to lawyers who act on behalf of, or at the request of, the third-party foreign funder without disclosure of that role.

This priority appears to be a new area of focus for the FARA unit, and it will be particularly relevant for law firms, expert witnesses, public relations firms and other actors involved in litigation who may

erroneously believe that they can rely on an exemption.

Turgeon further expressed an intent to focus on sovereign wealth funds that act as the "alter ego" of a foreign government and promote foreign governmental or political goals in the U.S. He contrasted some sovereign wealth funds that are "focused on investment returns" and other sovereign wealth funds that are "focused on political goals too."

He stated that the commercial exemptions to FARA may not apply in the latter circumstances. This statement follows a notable advisory opinion by the FARA unit in which it concluded that registration was required of a consulting firm for making contacts with U.S government officials on behalf of a sovereign wealth fund that, according to the FARA unit, were "intended to send a message ... presumably for a positive purpose," even though the firm said it was only gathering factual information and expressly stated that it would not seek to influence the government officials.

Agents of sovereign wealth funds will have to carefully review and monitor their activities in the U.S. given the FARA unit's focus.

In her remarks, Deputy Assistant Attorney General Choi emphasized the importance of ensuring that agents of foreign corporations comply with FARA, highlighting the department's recent focus on FARA compliance by all foreign principals, not just foreign governments.

She reported that "more than 50% of the current FARA registrants are corporations or other business organizations" and "corporate actors and other entities like sovereign wealth funds, law firms, or think tanks that act on behalf of foreign principals must uphold their registration requirements under FARA."

These statistics will surprise foreign private sector entities that may incorrectly assume that only lobbyists or lobbying firms file under FARA frequently.

To further emphasize the department's priorities in the past year, she announced that the FARA unit "conducted 25 total inspections, which is the highest number of inspections since 1985, nearly 40 years ago."

Choi revealed that "[t]his is part of an overall trend of increasing our number of inspections each year." In the prior two years, she said, the department "conducted 22 and 20 inspections, respectively. She said that she "expect[s] this number to stay high in the coming year," and cited the addition of a new FARA analyst to the unit's staff.

These inspections can be burdensome and expensive for registrants, and they also provide the DOJ with access to information that could potentially lead to an investigation or even criminal proceedings.

DOJ's Legislative Priorities

Both Choi and Gellie also emphasized the department's legislative priorities.

First, the department continues to seek civil investigative demand authority to compel the production of documents, interrogatories or depositions in a civil investigation by the FARA unit.

Currently, the department must choose between using criminal investigative tools and relying on information voluntarily provided by the regulated community through "inquiry letters," at least at the

outset of a civil investigation. The FARA unit currently has no civil compulsory process to obtain this information.

Second, the department seeks authority to issue civil penalties for FARA violations such as deficient filings or being party to prohibited contingency fee arrangements. This authority would provide the department with an intermediate alternative to criminal investigations and civil injunctions.

Third, the officials reiterated the department's proposal to eliminate the LDA exemption to FARA, which was first announced last year in a letter to Sen. Chuck Grassley, R-Iowa.

Under the LDA exemption, FARA's registration requirements do not apply to an agent that "has engaged in lobbying activities and has registered" under the LDA. This exemption is available only if the foreign principal is a foreign individual or a foreign private sector entity; it is not available for those representing foreign governments or political parties.

The elimination of the LDA exemption would significantly expand the scope of foreign private sector entities that would be required to register under FARA, as many foreign corporations, foreign individuals and other foreign nongovernmental agents that engage in lobbying activities in the U.S. rely on this exemption to satisfy FARA. This change, together with the potential elimination of the (d)(2) exemption, would be an enormous expansion of the statute.

Finally, the department seeks a legislative solution to a 2022 decision by a U.S. District Court for the District of Columbia judge in Washington, D.C. — Attorney General of the United States v. Wynn — which held that because the defendant had terminated his agency relationship with the foreign principal prior to the lawsuit, he could not be enjoined to register under FARA, even retroactively.

The court's reasoning underlying its holding was complicated and based on a 1987 U.S. Court of Appeals for the District of Columbia Circuit case, United States v. McGoff, and textual analysis of the statutory provision relating specifically to civil injunctive actions.

The department seeks to clarify the statute to make clear that an agent of a foreign principal must register and comply with FARA even after the agency relationship has ended. If successful, this would open the door for the DOJ to seek civil injunctions nationwide to compel retroactive registration by persons who previously acted as foreign agents, even where their representational activities had clearly ceased.

Significantly, Gellie noted that even absent legislation to address the Wynn case, the DOJ remains free to bring civil injunction actions in other federal court circuits, as Wynn and McGoff only apply in the D.C. Circuit. She mentioned in particular that many companies have offices in New York, which is in the Second Circuit.

These developments reinforce the department's renewed focus on aggressively enforcing the statute and tightly regulating the activities of foreign agents in the U.S. The proposed changes, along with other substantive developments over the last several years, have converted a once sleepy, backwater statute into a significant national security and criminal enforcement tool.

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