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Department of Justice Proposes Major Changes to FARA Regulations, Including Sweeping Changes Affecting Multinational Companies

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On January 2, 2025, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) soliciting public comments on potential amendments to the Department's regulations regarding the Foreign Agents Registration Act (FARA). The regulatory amendments proposed by the Department are significant, and they would take the statute in a substantially different direction. As detailed below, the proposed changes would completely overhaul an exemption for commercial activity by foreign corporations, which has existed in its current form for more than two decades, and make other consequential changes, including changes to an exemption for lawyers representing foreign interests.

Overall, in our assessment, the proposed revisions would considerably increase the Department's ability to use its own discretion to decide whether a given set of activities requires registration and reporting under FARA. By empowering the Department to apply a variety of amorphous, nonexclusive, and open-ended factors, the proposed regulations would give the Department expanded discretion to determine whether

activities fall within, or outside of, the statute's registration and reporting requirements. The proposed expanded discretion, however, comes at a significant cost to companies, associations, firms, think tanks, and others that rely on relative certainty about the bounds of the statute.

The proposed regulations themselves come with their own bit of history. In December 2021, the Department issued an advanced notice of proposed rulemaking (ANPRM) that posed a series of questions about potential revisions to the regulations. After assessing responses to the advanced notice, beginning in December 2022, the Department repeatedly expressed publicly that the proposed regulations would be issued "soon" or "in the coming months," but the publication of the proposed regulations was continuously delayed. The Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB) indicated that it had completed regulatory review on July 11, 2024, and the OMB website stated that the NRPM was slated to come out in July 2024. The proposed regulations were nonetheless not released informally until December 2024 and then published in the Federal Register at the start of 2025.

It is not yet clear whether the Trump administration will move forward with the proposed changes, make further changes to the proposal, or decide not to pursue the Biden administration's proposals. Interestingly, in a separate announcement on FARA on her first day in office, Attorney General Pam Bondi issued new guidance curtailing the criminal enforcement of FARA to "instances of alleged conduct similar to more traditional espionage by foreign government actors." At the same time, however, the guidance signaled potentially increased civil enforcement by directing the Department's FARA Unit to "focus on civil enforcement, regulatory initiatives, and public guidance."

I. Background

FARA requires that agents of foreign principals register with the Attorney General and file detailed disclosure reports every six months, along with "informational materials" that an agent may distribute on behalf of the foreign principal.

FARA defines a foreign agent as any individual or entity that engages, within the United States, in certain enumerated activities on behalf of a foreign principal. Agency is established by acting at the "order, request, or under the direction or control" of the foreign principal, as well as by activities that are "directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part" by the foreign principal. A foreign principal can be any person or entity outside the United States. Although foreign governments are widely understood to be covered by FARA, the

statute actually applies to a much broader array of foreign principals, including individuals, partnerships, associations, corporations, or any other entity organized under the laws of another country.

Registration and reporting are required when an agent of a foreign principal engages in one or more of the following activities within the United States, unless an exemption from registration applies:

1. Engaging in "political activities," a defined term that encompasses any activity that is intended or believed to influence the U.S. government or any section of the U.S. public regarding a matter of U.S. foreign or domestic policy or the interests of a foreign country or political party.
2. Acting as a "public-relations counsel," "publicity agent," "information-service employee," or "political consultant," each of which is defined by the statute.
3. Collecting or dispensing money or other things of value for or in the interest of a foreign principal.
4. Representing the interests of a foreign principal before an agency or official of the U.S. government, such as making direct contact with U.S. government officials.

II. The Department's Proposed Changes to FARA Regulations

Commercial Exemptions

The most dramatic changes proposed in the NPRM would overhaul the current regulations' exemption for commercial political activity by a foreign corporation. This exemption was adopted in 2003 when the Department implemented the statutory changes that Congress enacted with the Lobbying Disclosure Act (LDA) in 1995. In the LDA, Congress indicated its intent to place all private sector lobbying under the new lobbying disclosure law, leaving only activity on behalf of foreign governments under FARA. Consistent with that direction, the Department adopted a broad exemption from FARA for foreign commercial political activity.

1. Current Law

FARA has a statutory commercial exemption that applies to "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of the foreign principal. In the 2003 regulatory amendments implementing the LDA, the Department created an additional regulatory commercial exemption. Adopted under a

separate statutory authority exempting "other activities not serving predominantly a foreign interest," the Department's regulatory commercial exemption provides a complete exemption from FARA for any foreign corporation that was engaged in political activity "directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation." The current regulations also impose some limitations on the application of both the statutory and regulatory commercial exemptions. Most significantly, neither exemption is available if the activities "directly promote" the public or political interests of a foreign government or political party.

2. Proposed Changes to the Regulatory Commercial Exemption for Foreign Corporations Engaged in Political Activity

The Department proposed significant changes to the regulatory commercial exemption for foreign corporations engaged in political activity. In the NPRM, the Department proposed to completely eliminate the full exemption for corporate political activity that furthers a commercial interest. In its place, the Department has proposed through regulation a "predominant interest" test—with only one factor in the non-exhaustive test related at all to corporate commercial activity—and four new exclusions that would preclude the use of the exemption completely in certain circumstances.

Interestingly, the NPRM presented these new criteria in the reverse order, outlining the four new exclusions and then describing the "predominant interest" test that would apply if an exclusion did not apply. The effect, we believe, is actually the opposite: The "predominant interest" test would be the actual prevailing analysis—consistent with the statutory exception for activities "not serving predominantly a foreign interest"—and the four exclusions would merely preclude the application of the "predominant interest" test in certain circumstances.

Taking the proposed rules in the order they are presented in the NPRM, however, the four new exclusions would preclude the application of the exemption in the following circumstances:

(1) The exemption would be unavailable if the "intent or purpose" of the activities were to promote the political or public interests of a foreign government or foreign political party.

(2) The exemption would be unavailable if a "foreign government or foreign political party influences the activities."

(3) The exemption would be unavailable if the "principal beneficiary of the activities" were a foreign government or foreign political party.

(4) The exemption would be unavailable if the activities "promote the public or political interests" of a foreign government or political party and the activities are "directly or indirectly supervised, directed, controlled, or financed" by a foreign government or political party.

For all other instances, the NPRM proposed a "predominant interest" test. The NPRM provided a "non-exhaustive list of factors to determine whether, given the totality of the circumstances, the predominant interest being served is domestic rather than foreign." The NPRM identified the following factors:

(1) Whether the agent's relationship and the identity of the foreign principal is "open and obvious to the public and explicitly disclosed" to U.S. government officials.

(2) Whether the activities further the bona fide commercial, industrial, or financial interests of a domestic commercial entity (e.g., a U.S. subsidiary of a foreign parent) "as much or more than" the interests of the related foreign entity (i.e., the foreign parent company).

(3) For noncommercial entities, the extent to which the activities are influenced by a foreign entity, concern a foreign jurisdiction, or are financed by foreign sources.

(4) Whether the activities concern laws or policies applicable to the U.S. operations or interests of the domestic person.

(5) The extent to which a foreign principal influences the activities of the domestic person.

Collectively, these proposed changes would convert the existing exemption for foreign corporate commercial activity into a much narrower exemption covering only activities that predominantly serve a U.S. domestic interest. A foreign corporation could no longer seek to influence the U.S. government or public on a policy issue that primarily affects the commercial interests of the foreign corporation without triggering FARA's registration and reporting obligations. For example, it's customary for companies to use the existing commercial exemption when executives of a foreign-headquartered company come to the United States to meet with government officials and discuss the company's global commercial issues. Under the proposed new regulations, the exemption would only be available if the executive solely discussed issues where the "predominant interest" is in the United States, notwithstanding the company's global activities and footprint. Notably, this regulation would only constrain foreign company executives. Executives in the United States representing only U.S.-

headquartered companies would be free to discuss their companies' global operations without limitation from FARA.

3. Proposed Changes to Existing Limitations on the Commercial Exemptions

The Department also proposed a major change to the existing limitation on both the statutory and regulatory commercial exemptions, which provides that neither exemption is available if the activities "directly promote" the public or political interests of a foreign government or political party. In the commentary accompanying the proposed new rules, the Department correctly noted that it is sometimes difficult to discern whether a given set of activities "directly" promotes the interest of a foreign government or only indirectly promotes such interests. The NPRM also pointed to comments submitted in response to the ANPRM that made the same point.

To address these issues, the Department proposed deleting the word "directly." As a result, the proposed new limitation would preclude the use of this exemption for *any* activity that promotes the interests of a foreign government—no matter how marginal, minimal, tangential, or inconsequential. This is a massive change from current law, reflecting a significant narrowing of the existing commercial exemptions.

Although the parameters of "directly promote" are indeed sometimes hard to discern, there are some areas that are well-defined in precedents. For example, general efforts to promote the commercial interests of a foreign corporation have been considered outside of FARA even though the increased revenue for the foreign corporation would lead, indirectly, to increased tax revenue for the company's home government. With this proposed change, however, any activity that promotes the interests of a foreign government would be excluded from the exemption. The deletion of "directly" additionally suggests that the proposed regulations would not require any nexus between the purpose of the relevant activity and the benefit provided to the government.

4. Other Changes in the Existing Commercial Aspects of FARA

The Department also proposed other changes to various commercial aspects of FARA.

First, where the current regulatory commercial exemption applies only to "political activity" of a "foreign corporation," the Department proposed two important and welcome changes. The new exemption would apply to any activity, not just political activity. Political activity is just one of four types of activity that can trigger the statute, and the application of the exemption to all FARA-related activity would be a welcome

change. In addition, the Department proposed to codify a position that it has taken in various advisory opinions specifying that this exemption can apply to nonprofit entities, in addition to for-profit corporations, which aligns with the Department's proposed move away from treating the exemption as a purely commercial exemption.

Second, the Department proposed that promotion of "bona fide recreational or business travel to a foreign country" no longer requires FARA registration and reporting. This proposal would be a significant abandonment of the Department's long-held position that tourism promotion activities require FARA registration. Previously, the Department took the position that tourism promotion constituted political activities because tourism "creates an influx of capital and a host of jobs" for the foreign country. In the NPRM, the Department noted that tourism promotion is "attenuated from political or policy matters" and the sponsor of such promotion is usually readily apparent to the viewer.

Lawyers' Exemption

1. Current Law

FARA provides an exemption from registration for "[a]ny person qualified to practice law" who engages in a "legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States." Under the current regulations, this lawyers' exemption is limited and is not available if the lawyer "attempts to influence or persuade agency personnel or officials" outside of the relevant legal proceeding ("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").

The lawyers' exemption is one of the few areas in FARA that has seen significant improvement in the past few years. After first issuing an advisory opinion that essentially limited lawyers to in-court activities, the Department changed course and acknowledged that lawyers are engaged by clients to provide a variety of representational activities. In revised guidance, the Department clarified that the lawyers' exemption applies to all services within the "bounds of normal legal representation [of a client]."

2. Proposed Changes to the Lawyers' Exemption

In the NPRM, the Department proposed codifying the "bounds of normal legal representation" standard and provided specific examples of activities that would be included within the scope of a legal representation. The proposed regulations would specify that influencing government officials in a proceeding and providing information to others—such as the public—about the proceeding would be within the

exemption. The proposed regulations would also require an attorney to disclose the attorney's foreign principal to the court, agency personnel, or officials before whom the attorney appears.

In addition to codifying the current application of the exemption, the Department also proposed adding a significant new limitation on the lawyers' exemption. The proposed limitation would preclude the application of the exemption to "political activities" undertaken by the lawyer, which are activities that are intended or believed to influence the U.S. government or public on a matter of policy.

The proposed revised regulations, therefore, would permit a lawyer to provide information to the public about a legal proceeding, but the lawyer could not attempt to influence the government or public through such statements without exceeding the exemption and therefore triggering FARA registration. This seems an unworkable tightrope to walk for any lawyer engaged in a proceeding that garners public attention. It seems impossible to suggest that a lawyer, for example in a press conference on the courthouse steps, could explain and present the client's arguments and positions in the litigation without influencing the views of someone who is listening.

Additionally, and consistent with the NPRM's treatment of the commercial exemption, this proposal seems to give the FARA Unit maximum discretion to decide whether any given activity falls outside of the statute and exemption.

Informational Materials

1. Current Regulations

In addition to imposing registration and reporting obligations on FARA registrants, FARA also requires that registrants file copies of "informational materials" with the Department and include disclaimers on those materials. Any time a registrant disseminates "informational materials" for or in the interests of a foreign principal, the registrant must file a copy of the informational materials with the Department's FARA Unit within forty-eight hours. Informational materials must also have a "conspicuous statement" identifying the registrant and its foreign principal. Notably, the term "informational materials" is not currently defined specifically in the statute or regulations (although there is a long list of document types that can be considered informational materials "prints").

2. Proposed Changes to the "Informational Materials" Definition

The proposed changes would define "informational materials." The proposed definition covers

> [A]ny material that the person disseminating it believes or has reason to believe will, or which the person intends to in any way, influence any agency or official of the Government of the United States or any section of the public within the United States, 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.

The manner or form of dissemination (i.e., print or electronic) would not affect whether the material meets the definition. Providing this actual definition for informational materials is a helpful clarification by the Department.

3. Proposed Changes to the Filing and Labeling Requirements

For filing informational materials, the proposed regulations would require screen captures or contemporaneous reproductions of all informational materials to be filed as a PDF or other standard electronic file format.

In addition, the proposed regulations impose several changes to the "conspicuous statement" labeling requirements. The proposed regulations would require the conspicuous statement to include the foreign principal, the country (or state, territory, or principality) in which the foreign principal is located, and the FARA registration number, none of which are required in the statement under current guidance. The statement would also need to be in a "font size and color that are easy to read."

The proposed regulations further detail more specific rules regarding the placement and font or size of the conspicuous statement for print, television, and radio content, as well as online content.

4. Proposed Changes to the Notification Requirement for "Political Propaganda"

The proposed regulations clarify the notification requirement for "political propaganda." Currently, registrants may not convey to any agency or government official, in the interests of a foreign principal, political propaganda or request certain information and advice, unless the propaganda or request is prefaced or accompanied by a true and accurate statement that the person is a registrant. The proposed changes would give the "political propaganda" definition the same meaning as "informational materials." Significantly, the changes broaden "any request" to include all communications *related to* the request, including any communications regarding the scheduling of a meeting. As a result, registrants would be required to include a disclaimer on all communications with U.S. government officials relating to any request, including scheduling meetings.

Many Provisions Remain Unchanged

The Department did not propose any changes to several areas of the FARA statute that have created uncertainty in the regulated community.

(1) *LDA Exemption*: The Department did not propose regulatory changes to the LDA exemption. In the NPRM, it stated that it will "continue to deny the exemption . . . in any situation where a foreign government or foreign political party is the principal beneficiary of the lobbying activity." In separate communications, including in congressional correspondence and public statements, Department officials have made clear that their legislative priorities include eliminating the LDA exemption to FARA. Coupled with eliminating the broad commercial exemption for political activities, terminating the LDA exemption would significantly expand the scope of foreign private sector entities that would be required to register under FARA.

The NPRM did address the LDA exemption in one significant and important way. In a major concession, the Department expressly backed away from the position it had taken in certain advisory opinions that the LDA exemption is not available if *any* principal beneficiary of the activity is a foreign government, even though the regulation plainly limits the exemption only if "the principal beneficiary" is a government.

(2) *Press Exemption*: The Department also did not propose changes to the press exemption. By statute, the press exemption excludes from the definition of an agent of a foreign principal certain domestic newspapers, magazines, and other publications engaged in bona fide news or journalistic activities. While the Department did not propose regulations to the exemption, it notably stated that "there is no sound statutory or policy reason to distinguish between online and traditional print media" with respect to this press exemption, and "the statutory language does not in fact compel any such distinction." As a result, the Department reasoned that even though an online-only media entity "cannot qualify as a publication having mail privileges with the U.S. Postal Service," one of the criteria in the text of the press exemption, "such a media entity could still qualify for the exclusion so long as it otherwise complies with the remaining criteria set forth" in the exemption.

(3) *Scope of Agency*: In response to the advance notice, the FARA Unit received several comments encouraging the Department to clarify the scope of agency under FARA. The FARA Unit declined to make regulatory changes

in response to these comments, stating, "[T]he Department is not proposing to adopt the common-law definition of agency or to codify the Scope of Agency guidance document in the FARA regulations at this time." The Department published the Scope of Agency guidance document in 2020, detailing several factors it will consider in evaluating agency under the statute.

(4) *Academic Exemption*: An academic exemption to FARA applies to persons solely engaged in bona fide religious, scholastic, academic, or scientific pursuits or the fine arts. Current regulations provide that the exemption is not available if the person is engaged in "political activities," a significant limitation on the exemption. The Department did not believe changes were necessary to this exemption, stating that it can provide "reasonable guidance" through the "advisory opinions process."

Repeated Deferral to Advisory Opinion Process

Finally, the NPRM is notable for its repeated references to the advisory opinion process, and the narrative accompanying the proposed regulations repeatedly and expressly defers some of the thorniest and most important issues in the proposed regulations for resolution through future advisory opinions. This unusual reliance on the advisory opinions process, in lieu of proposing specific and well-defined regulations, aligns with our initial observation that the proposed regulations would substantially increase the Department's discretion in applying FARA. Given the time and effort that the Department and commenters devoted to the proposed regulations, we would have preferred that the regulations provide clear and measurable criteria for triggering the statute. This can be done. For example, the LDA has measurable time, monetary, and contact criteria, and it specifically defines the government officials the statute covers. The narrative in the NPRM and the proposed regulatory changes to FARA move, unfortunately, in the opposite direction. In our view, the proposed regulations should instead provide clear guidance to the regulated community about the bounds of the statute rather than deferring application of the statute to individual review by the Department.

III. Next Steps

The proposed rules are not final. The NPRM provides the public the continued opportunity to submit comments on the proposed regulations. Comments on the proposed regulations are due on or before March 3, 2025 (sixty days after the date of publication in the Federal Register). Paper comments must be postmarked on or before

that date, and electronic comments will be accepted until 11:59 p.m. Eastern on that date.

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