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Regulatory Update

DOJ Announces Significant Proposed Changes to Amend and Clarify FARA

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On December 19, 2024, the Department of Justice (DOJ) published a [Notice of Proposed Rulemaking](#) (NPRM) intended to “update and clarify” the regulations under the Foreign Agents Registration Act (FARA). The proposed changes to FARA mark a significant development, as the regulations were last amended almost two decades ago, in 2007.

The NPRM follows an Advance Notice of Proposed Rulemaking (ANPRM) [published](#) by the DOJ on December 13, 2021, which sought public comment on 19 specific questions regarding the regulations under FARA. The NPRM summarizes the public comments received, as well as the DOJ’s proposed changes to the regulations.

In a [statement](#) announcing the NPRM, the DOJ stated that the proposed rule would “make changes to key regulations, including those relating to the commercial exemption, the exemption for persons whose activities do not serve predominantly a foreign interest, and the exemption for persons qualified to practice law.” The DOJ also stated that the proposed rule would “modernize regulations relating to labeling informational materials in light of the significant technological changes that have occurred since the regulations were last amended more than a decade ago.” The proposed changes will have significant implications for active registrants and prospective registrants.

Proposed Changes to FARA Under the NPRM:

The DOJ’s key proposed changes would modify FARA’s “commercial” and “legal” exemptions and add new regulations regarding the filing and labeling of “informational materials.” The DOJ has also proposed additional changes to ensure that the regulations under FARA “keep pace” with technological advancements.

Proposed Changes to FARA’s Exemptions to Registration:

An agent of a foreign principal may be exempt from registration under FARA if the agent’s activities fall within the scope of [FARA’s eight exemptions](#). The DOJ’s proposed rules would significantly modify two exemptions: (i) the exemption for “private and nonpolitical activities,” commonly referred to as the “commercial” exemption to registration, and (ii) the exemption for “persons qualified to practice law,” commonly referred to as the “legal” exemption.

“Commercial” Exemption to Registration:

The NPRM proposes substantial revisions to the “commercial” exemption. As it is currently written, the “commercial” exemption evaluates whether activities are commercial, as opposed to political, in nature. The commercial [exemption](#) applies to persons who engage or agree to engage only “(1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest.” The current [regulation](#) indicates that for purposes of Section 3(d) of FARA, commercial activities are excluded from registration so long as they do not “directly promote the public or political interests of the foreign government.”

The DOJ proposes two changes to the first subsection of the “commercial” exemption for “private and nonpolitical activities in furtherance of the bona fide trade or commerce” of a foreign principal. In particular, the DOJ proposes removing the word “directly” from the current [regulation](#). This revision would likely limit the reach of the “commercial” exemption, as activities which simply promote rather than “directly promote” the interests of a foreign government (or political party) would not be exempt from registration.

In addition, the DOJ proposes expanding the “commercial” exemption to cover activities promoting recreational and business tourism in foreign countries. This expansion runs contrary to past advisory opinions by the DOJ. The Department [previously held](#) that activities promoting tourism on behalf of a foreign government could not qualify for the “commercial” exemption. The DOJ [maintained](#) that because tourism “creates an influx of capital and host of jobs” for the local population, it naturally serves the political and public interests of the foreign government. The NPRM, however, proposes to exempt from registration those who engage “only in promoting bona fide recreational or business travel to a foreign country” where the agent’s relationship to a foreign principal is “apparent to the public.” Under the NPRM, those activities would not be considered to promote the “public or political interests” of the foreign government or political party.

The NPRM proposes more drastic changes to the second subsection of the “commercial” exemption, relating to “activities not serving predominantly a foreign interest.” The DOJ outlines three proposed changes. The first change would clarify that the exemption applies to noncommercial interests in addition to commercial interests “so long as the predominant interest being served is not foreign.” This change is a response to comments from the nonprofit community. The clarification suggests that non-profits and non-governmental organizations may be entitled to exemption. Second, the NPRM would set forth four exclusions to the “commercial” exemption. The DOJ explains that these exclusions “focus only on the relationship (if any) between the activities and a foreign government or foreign political party, which is the key relationship animating the need for FARA registration.” Under the proposal, an agent would be considered to serve a predominantly foreign interest and is thus “categorically precluded” from the exemption if:

1. The intent or purpose of the activities is to benefit the political or public interests of the foreign government or political party;
2. A foreign government or political party influences the activities;
3. The principal beneficiary is a foreign government or political party; or
4. Activities on behalf of a state-owned enterprise (or an entity that is directed or supervised by a foreign government or political party) promote the political or public interests of that foreign government or political party.

The third proposed change would occur in situations in which none of these exclusions are triggered. To evaluate those scenarios, the DOJ introduces a “totality-of-the-circumstances” test to determine whether the activities at issue serve a predominately foreign or domestic interest. The DOJ proposes five non-exhaustive factors to guide the inquiry. Specifically, these factors include:

(i) whether the public and relevant government officials already know about the relationship between the agent and the foreign principal; (ii) whether the commercial activities further the interests of the domestic commercial entity more or less than the foreign commercial entity; (iii) the degree of influence (including through financing) that foreign sources have over domestic non-commercial entities such as nonprofits; (iv) whether the activities concern laws and policies applicable to domestic or foreign interests; and (v) the extent to which any foreign principal influences the activities.

Exemption for Persons Qualified to Practice Law:

FARA also provides an [exemption](#) to registration for lawyers who engage in legal representation of a disclosed foreign principal “before any court of law or any agency of the Government of the United States.” The NPRM clarifies the exemption’s coverage of legal representation that occurs outside of the courtroom or agency hearing room. The DOJ proposes that the “legal” exemption extends to broader counsel “provided such representation does not extend beyond the bounds of normal legal representation.” “Legal representation” [is defined](#) to include activities by counsel, on behalf of a *disclosed* foreign principal, intended to influence or persuade “judicial proceedings,” “criminal law or civil enforcement inquiries, investigations, or proceedings,” or “agency proceedings.” To qualify for the exemption, however, legal representation must not constitute “political activities” within the meaning of FARA. The DOJ explains, for instance, that an attorney “seeking to persuade persons who are not involved in the proceeding, investigation, or inquiry,” such as Congress or the general public, “to adopt or change foreign or domestic U.S. policy” would not qualify for the exemption.

Informational Materials:

To keep pace with technological advances, the NPRM proposes a “comprehensive overhaul” of FARA regulations regarding “[informational materials](#).” FARA requires any agent who distributes informational materials to two or more persons to file two copies of those materials with the DOJ within 48 hours of distribution and requires that the informational materials contain a “conspicuous statement” disclosing that they are being distributed on behalf of the foreign principal. The NPRM proposes four changes related to “informational materials.”

First, the DOJ proposes defining “informational materials” by regulation for the first time. The NPRM would define “informational materials” as “any 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.” Materials that are not related to political activities are excluded from the proposed definition.

Second, the regulations would require that agents file “informational materials” through the FARA eFile system absent special circumstances. Third, the NPRM proposes significant changes to the ways in which “informational materials” must be labeled, due to the expanding ways in which “informational materials” are being disseminated (including by social media). Among these changes, the DOJ proposes that the conspicuous statement must include the name of the country or the territory where the foreign principal is located, as that information may not be apparent from relevant registration materials. The statement must also include the FARA registration number and inform that additional information is available on the DOJ’s FARA website. Moreover, the statement must be displayed at the beginning of the materials and in a font size and color that are easy to read. Additionally, labeling requirements will vary depending on the medium of dissemination, allowing maximum transparency weighted against the nature and limitations of each medium. For instance, “informational materials” posted on an internet platform or website must display, throughout the website, a conspicuous statement and a link to the registrant’s filings on DOJ’s FARA website.

Finally, the DOJ proposes to clarify that requests for information or advice from any U.S. government agency or official must contain a statement about the agent’s relationship with a foreign principal. The proposed rule defines a “request” made to any U.S. government agency or official to include “all

communications related to that request even if the communication itself does not contain a specific request for information or advice.” This includes requests to schedule a meeting with an agency or official.

Additional Proposed Changes:

The NPRM also sets forth regulatory and miscellaneous proposed changes to the existing regulations under FARA. The DOJ indicates that some of the proposed changes are “necessitated by recent technological changes.” Proposed changes include, among others:

- Requiring that a request for an advisory opinion be submitted in writing to the FARA Unit through the Department’s FARA website.
- Expanding the amount of information required for the submission of an advisory opinion. For instance, where the request is on behalf of an entity (and not an individual), the request must include “a list of partners, officers or directors or persons performing the functions of an officer or director of the entity and all relevant and material information regarding their current or past affiliation with a foreign government or foreign political party.”
- Requiring that registrants provide a business email address and business telephone number to facilitate easier communications with the FARA Unit.

Conclusion:

The NPRM marks a key effort by the DOJ to update and clarify the regulations under FARA. In so doing, the DOJ proposes significant changes to the “commercial” exemption to registration and brings the regulations for “informational materials” up to speed with technological innovations.

The DOJ’s proposed changes would undoubtedly impact active registrants, as well as individuals and entities considering whether to register under FARA. The proposed changes may come as a welcome development to those seeking clarity regarding FARA’s exemptions to registration. However, the rules would likely narrow the availability of the “commercial” exemption to registration. In addition, the proposed rules would create new obligations for registrants with respect to the labeling of “informational materials.” Companies and entities should ensure that they stay informed of developments relating to the NPRM, and that they are prepared to adhere to the new regulations under FARA.

Key Takeaways:

- The NPRM marks a key effort by the DOJ to update and clarify the regulations under FARA, which were last amended almost two decades ago.
- Proposed changes would modify the “commercial” and “legal” exemptions and add new regulations regarding the labeling of informational materials.
- The proposed changes would impact active registrants, as well as individuals and entities considering whether to register under FARA.
- Companies and entities should ensure that they understand and are prepared to adhere to the new regulations under FARA.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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