

CLIENT ALERT

# New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

May 8, 2023

## AUTHORS

David Mortlock | Michael J. Gottlieb | Samuel Hall | David Levine

On Friday, April 28, 2023, the Foreign Agents Registration Act (“**FARA**”) Unit of the National Security Division of the Department of Justice (“**DOJ**” or the “**Department**”) released several new Advisory Opinions, one of which may significantly expand the scope of activities allowable under FARA’s so-called “commercial exemption.” The Advisory Opinion offers a potential new test, focusing on the relationship of the agent to the foreign principal’s political activity, for determining whether activity is private and non-political, and therefore exempted from FARA’s registration and disclosure obligations. Though Advisory Opinions are not binding, they reveal the enforcement intentions of the FARA Unit. What is more, the Advisory Opinions released presently may be particularly revealing because updated FARA regulations are expected to be released in the coming months.

## Background on FARA and the Commercial Exemption

FARA is a law that requires certain agents of foreign principals who are engaged in political or other specified activities to make a periodic public disclosure of their relationship with the foreign principal.

Generally speaking, a party is an “agent of a foreign principal” that must register under FARA if it acts “in any . . . capacity 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 and who directly or through any other person,” and within the United States, in pertinent part:

---

## New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

- (i) engages in political activities<sup>1</sup> for or in the interests of such foreign principal;
- (ii) acts as public relations counsel, publicity agent, information-service employee or political consultant<sup>2</sup> for or in the interests of such foreign principal; [or]
- (iii) solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal . . .

22 U.S.C. § 611(c). Therefore, if a party undertakes one of the enumerated activities in the United States on behalf of a foreign principal, he or she incurs a registration obligation under FARA.

However, FARA also includes a number of statutory exemptions to registration, most notably here the so-called “commercial exemption” at 22 U.S.C. § 613(d). The commercial exemption excludes “(1) private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) [ ] other activities not serving predominantly a foreign interest” from FARA’s registration and disclosure obligations. The Justice Department has issued regulations implementing the commercial exemption that attempt to explain its reach:

“[A] person engaged in political activities on behalf of a foreign corporation . . . will not be serving predominantly a foreign interest where . . . the political activities are not directed by a foreign government or political party and the political activities do not directly promote the public or political interests of a foreign government or of a foreign political party.”

28 C.F.R. § 5.304(c) (emphasis added). FARA’s implementing regulations also state that activities “shall be considered ‘private,’ even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interests of the foreign government.” *Id.* at § 5.304(b). These regulations have themselves been subject to multiple interpretations,<sup>3</sup> but the intent is to exempt at least certain categories of purely commercial conduct from FARA’s requirements.

---

<sup>1</sup> The Act defines “political activity” as “any activity that the person engaging in believes will, or that 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.” 22 U.S.C. § 611(o).

<sup>2</sup> The Act defines a “political consultant” as “any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party.” 22 U.S.C. § 611 (p).

<sup>3</sup> Compare “Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations,” Advanced Notice of Proposed Rulemaking, 86 Fed. Reg. 70787, dated December 13, 2021 (“Because the regulation in 5.304(c) addresses only activities on behalf of state-owned enterprises, it does not provide guidance on whether political activities on behalf of other foreign principals fall within the [commercial] exemption . . .”) with Advisory Opinion dated July 30, 2020 (applying the exemption to a privately held life sciences company),

---

## New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

### Advisory Opinions

The Department's regulations implementing FARA provide parties with the unique opportunity to make inquiries of the FARA Unit concerning the Department's present enforcement intentions with respect to contemplated activities. See 28 C.F.R. § 5.2. These inquiries must reflect actual, contemplated transactions (*i.e.*, they must not be hypothetical), and cannot be anonymous. 28 C.F.R. § 5.2(b). But, DOJ must respond to these inquiries within 30 days, and they can provide useful guidance to parties finding themselves in unique factual scenarios.

Additionally, DOJ makes its responses to these inquiries public in the form of "Advisory Opinions." These opinions are heavily redacted to remove any identifying information, and are released irregularly on the FARA Unit's website ([fara.gov](http://fara.gov)). Additionally, the Opinions do not carry the force of law, and instead reflect only the Unit's intentions with respect to the very specific set of facts with which it was presented at the time it considered the request. However, because FARA-enforcement cases rarely proceed to litigation, the Advisory Opinions form a sort of informal case law for FARA practitioners and a guide for possible registrants. Accordingly, the current set of Advisory Opinions gives a strong sense of the FARA Unit's interpretation of its enforcement authority at the moment, even if that interpretation is not binding.

### The January 24 Advisory Opinion

Of the five Advisory Opinions released publicly on April 28, the Opinion dated January 24, 2023 (the "**Opinion**" or the "**January 24 Opinion**") is likely of the most interest to potential registrants. The Opinion permits a novel invocation of the commercial exemption, potentially expanding the scope of non-registerable activity.

The January 24 Opinion is a response to a U.S. company that appears (again, all identifying information is redacted) to operate in the public relations sector and is interested in bringing on a foreign politician as a client. According to the Opinion, the U.S. company "has not agreed to distribute a foreign principal's message, but rather has contracted with FOREIGN POLITICIAN to selectively advertise his availability and fee requirements to U.S. audiences who want to hear from FOREIGN POLITICIAN and are willing to pay what the market demands for [the politician's] appearances." Advisory Opinion of January 24, 2023 at 2.

The FARA Unit appears to accept this characterization of the U.S. company's activities. After determining that an agency relationship exists and determining that the U.S. company is carrying out otherwise registerable activities (in the form of soliciting or collecting money) on behalf of the foreign principal, it nonetheless finds no registration obligation. In explaining its reasoning, the Opinion states:

U.S. COMPANY has represented that its activities would be nonpolitical given that U.S. COMPANY would have no insight into or ability to affect the content of FOREIGN

---

<https://www.justice.gov/media/1123371>, and Advisory Opinion dated December 6, 2019 (applying the exemption to a firm working on behalf of a foreign chamber of commerce), <https://www.justice.gov/media/1191136/>.

---

## New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

POLITICIAN's speeches. Accordingly, we believe that U.S. COMPANY would be exempt from FARA's registration and disclosure requirements pursuant to the exemption outlined in Section 613(d)(1) of the Act because U.S. COMPANY would be engaged in "private and nonpolitical activities in furtherance of the bona fide trade or commerce" interests of FOREIGN POLITICIAN.

Advisory Opinion of January 24, 2023 at 2.

Without knowing the precise scope of the activity the U.S. company proposed carrying out or the terms of the proposed contract with the foreign politician (both data points the FARA Unit had access to), this Opinion appears to propose a new test for determining whether conduct is "private and nonpolitical" within the scope of the commercial exemption. Rather than engaging with the statutory definition of "political activity" (22 U.S.C. § 611(o)), the Opinion asks whether the potential foreign agent has "insight into or ability to affect the content of" the foreign principal's message. This is novel, and a reversal of how the FARA Unit has traditionally viewed the question of whether conduct constituted political activity. In prior Opinions, the FARA Unit has, consistent with the statutory definition of "political activity," considered the likely or intended impact of an agent's activity on the U.S. public, without regard for whether the agent had any "insight into or ability to affect the content of" the message distributed.<sup>4</sup>

Here, the U.S. company was proposing to advertise on behalf of a foreign politician endeavoring to speak to U.S. audiences. Though we cannot know, it is reasonable to assume that U.S. audiences would want to hear from a former foreign politician in order to hear his or her policy views and prescriptions, either with respect to the U.S. or to his or her country. It seems highly likely, therefore, that promoting the former politician for speaking opportunities within the U.S. could at least potentially meet the definition of political activity under FARA, which includes actions a person "believes will, or that the person intends to, in any way influence . . . [a] 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." 22 U.S.C. § 611(o). That the FARA Unit did not pursue this angle, and instead asked whether the U.S. company had "insight into or ability to affect the content of" the foreign principal's message, seems notable.

If U.S. parties can cabin their "private and nonpolitical activities in furtherance of [ ] bona fide trade or commerce" from the political messages of foreign principals by disclaiming any ability to influence the message, such entities have an additional

---

<sup>4</sup> See, e.g., Advisory Opinion dated July 14, 2022, <https://www.justice.gov/media/1266151>. A U.S. company proposed a contract with a foreign company to "develop and manage the engagement with the United States Congress, Departments of [Redacted] and other applicable Agencies with the intent to encourage investment in the identified areas of priority by [foreign corporation]" and further that "[the U.S. company] will work with the Departments of [Redacted] and other applicable Agencies to streamline the [Redacted] process." In that case, the FARA Unit evaluated whether that conduct was undertaken with an intent to influence the U.S. government with respect to specific policies, without regard for whether the U.S. company had insight into or influence over the foreign principal's message.

---

## New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

avenue for invoking the commercial exemption. This argument may have particular force for entities engaged in activity that, like the U.S. company's activities in the January 24 Opinion, is secondary to distribution of the message itself.

It is also the case, however, that the sharp departure from prior practice might simply reflect the FARA Unit's judgment that the facts it was presented with (which we have limited insight into) were *sui generis* and that an expansion of the commercial exemption was not intended. Because of the limited precedential value of Advisory Opinions generally, it is possible that DOJ will see the potential for FARA evasion in this Opinion's reasoning and that the evaluation of whether an agent had any "insight into or ability to affect the content of" the foreign principal's message (which turns the usual political activity analysis on its head) is a framework that will not be revived for future fact patterns.

Nevertheless, entities in the public relations, consulting, and strategy sectors particularly should consider this Advisory Opinion's rationale when determining whether they have a FARA registration obligation.

### FARA Modernization

The January 24 Opinion may be of particular interest for potential FARA registrants because it comes so close in time to the anticipated roll out of updated regulations. The Department had issued an Advance Notice of Proposed Rulemaking ("**ANPRM**") in December 2021,<sup>5</sup> seeking input for modernization to FARA's implementing regulations, including those expounding on the commercial exemption. Though there has been no action taken on the public comments submitted in response to the ANPRM, in remarks on March 28, 2023, Deputy Attorney General Lisa Monaco stated that the DOJ was "strengthening enforcement of the Foreign Agent Registration Act (FARA) to bolster transparency of foreign activities in the United States," and specified that, "[i]n the coming months [the DOJ] will issue new rules to clarify the range of activities that require registration under the Act."<sup>6</sup> Several interested parties submitted comments to the ANPRM urging the Department to revise its regulations related to the commercial exemption, and members of the informal FARA bar have viewed updates to those portions of the regulations as likely. Accordingly, the FARA Unit publicly expounding on its views of the limits of the commercial exemption at the present time offers possible insight into the forthcoming proposed regulations.

---

<sup>5</sup> <https://www.federalregister.gov/documents/2021/12/13/2021-26936/clarification-and-modernization-of-foreign-agents-registration-act-fara-implementing-regulations>.

<sup>6</sup> <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-defending-rule-law-against-hostile>.

---

## New FARA Advisory Opinion Potentially Expands Scope of Commercial Exemption

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

---

**David Mortlock**

202 303 1136

dmortlock@willkie.com

**Michael J. Gottlieb**

202 303 1442

mgottlieb@willkie.com

**Samuel Hall**

202 303 1443

shall@willkie.com

**David Levine**

202 303 1062

dplevine@willkie.com

Copyright © 2023 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in Brussels, Chicago, Frankfurt, Houston, London, Los Angeles, Milan, New York, Palo Alto, Paris, Rome, San Francisco and Washington. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).