

CLIENT ALERT

New Proposed FARA Regulations: Christmas Present or Lump of Coal?

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AUTHORS

David Mortlock | Samuel Hall | Michael J. Gottlieb | Michael S. Schachter
Kristin Bender | David Levine

Just over two years after the publication of an Advanced Notice of Proposed Rulemaking (the “**ANPRM**”),¹ the Department of Justice (the “**Department**”) delivered an early Christmas present to practitioners with the December 20, 2024 release of a [Notice of Proposed Rulemaking](#) (the “**NPRM**”) that proposes changes to the implementing regulations for the Foreign Agents Registration Act (“**FARA**”; 22 U.S.C. § 611 *et seq.*). However, at least some of the changes are likely to be viewed as a lump of coal by the regulated community. By far the most notable change is a re-write of the rules governing the parameters of the so-called “commercial exemption” to FARA. This change would decrease the availability of the exemption (and therefore implicate potentially onerous registration with the Department) for commercial activities that had previously been considered non-registerable. In addition, the Department proposed a number of less-controversial technical changes to the regulations relating to the labeling of informational materials, registration filing, and the scope of exempted legal-related activities.

The Department’s proposed rules will remain open for public comment until March 3, 2025, and the final rules would be released at some point thereafter following the Department’s consideration of feedback. That said, the incoming Trump administration has yet to weigh in on the proposed changes, so the fate of these proposed rules under new Justice Department leadership remains up in the air. Notably, Attorney General nominee Pam Bondi was once a FARA registrant herself, and so brings a potential personal interest to the subject matter. Regardless of whether the proposed rules are

¹ <https://www.federalregister.gov/documents/2021/12/13/2021-26936/clarification-and-modernization-of-foreign-agents-registration-act-fara-implementing-regulations>.

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implemented in their current form, the content provides some direction to the regulated community regarding the Department's current views of FARA's notoriously vague text and indicates in particular that parties should re-evaluate their continued reliance on the commercial exemption.

I. Proposed Commercial Exemption Regulations Rewrite

The most significant change that the Department has proposed in the NPRM is to effectively close off the availability of the commercial exemption to a wide swath of commercial activities that would have been exempted from registration under the current regulations.

As background, FARA's statutory text contains a number of specified exemptions from the obligation to register.² Perhaps the most significant exemption is the so-called "commercial exemption" which is codified at 22 U.S.C. § 613(d) and (by the terms of its heading) exempts "private and nonpolitical activities." The commercial exemption has historically been relied upon by a number of foreign companies (both state-owned and private) carrying out business, and related activities, in the United States. The commercial exemption contains two distinct and independent prongs, the first related to "private and nonpolitical activities in furtherance of the bona fide trade or commerce,"³ and the second related to "activities not serving predominantly a foreign interest."⁴ The current FARA regulations seem to permit businesses that carry out even political activities⁵ to rely on this second prong (the "**§ 613(d)(2) exemption**"), so long as the political activities "are not directed by a foreign government or foreign 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."⁶ The proposed regulations would do away entirely with that current reading of the § 613(d)(2) exemption, and are consistent with recent advisory opinions and statements made by Department personnel that characterized the current regulation as *ultra vires* and ultimately disconnected from the text of the statute.

In place of the current 28 CFR 5.304(c), which sets out the limits of the § 613(d)(2) exemption, the Department has proposed the addition of a new paragraph 5.304(d) that attempts to identify whether the underlying activity benefits a U.S. entity's interests more than a foreign entity's interests (regardless of whether the foreign entity is a government, political party, or

² 22 U.S.C. § 613.

³ 22 U.S.C. § 613(d)(1).

⁴ 22 U.S.C. § 613(d)(2).

⁵ 22 U.S.C. § 611(o) ("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 or a foreign political party").

⁶ 28 CFR 5.304(c).

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corporate parent).⁷ In order to carry out this analysis, proposed paragraph 5.304(d) would introduce what the Department has described as four “exclusions” to the exemption:

- i. The intent or purpose of the activities is to promote the political or public interests of a foreign government or foreign political party;
- ii. A foreign government or foreign political party influences the activities;
- iii. The principal beneficiary of the activities is a foreign government or foreign political party; or
- iv. In the case of a person whose activities are directly or indirectly supervised, directed, controlled, or financed in whole or in substantial part by a government of a foreign country or a foreign political party, the activities promote the public or political interests of a foreign government or of a foreign political party.⁸

If one of those four circumstances exists, the activity would *not* be covered by the commercial exemption.

In cases where none of these exclusions applies—and so the exemption would otherwise be available—the Department has proposed a list of “non-exhaustive” factors to guide prospective registrants’ analysis in determining whether registration would nonetheless be necessary because the activities “serve predominantly a foreign interest.”⁹ These factors include: (1) whether the public and relevant government officials already know about the relationship between the agent and the foreign principal; (2) whether the commercial activities further the commercial interests of a foreign commercial entity more than those of a domestic commercial entity; (3) the degree of influence that foreign sources have over domestic non-commercial entities, such as nonprofits; (4) whether the activities concern U.S. laws and policies applicable to domestic or foreign interests; and (5) the extent to which any foreign principal influences the activities.¹⁰ Accordingly, *even if* activities serve *bona fide* commercial interests, prospective registrants must also assess whether the activities also serve predominantly a domestic interest; what were formerly alternative bases for the exemption would now *both* need to be met in order for the exemption to apply.

This proposed reconsideration of the § 613(d)(2) regulations—with what amounts almost to a 10 step analysis—would introduce a number of complications for potential parties. For instance, while the proposed regulations are perhaps more connected to the statutory text of the commercial exemption than their predecessors, in many cases the new rules would trade one ambiguity (when does activity “directly promote” a foreign government’s interests?) for another (how should parties

⁷ Paragraph 5.304(c) would now clarify that the § 613(d)(2) exemption will apply equally to commercial and non-commercial activities (e.g., those of a non-profit), so long as the activity meets the requirements specified in proposed new paragraph 5.304(d).

⁸ <https://www.federalregister.gov/documents/2025/01/02/2024-30871/amending-and-clarifying-foreign-agents-registration-act-regulations#sectno-citation-5.304>.

⁹ *Id.*

¹⁰ *Id.*

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evaluate whether a foreign government has “influenced” its actions?). The Department’s NPRM provides only hints of how parties should carry out the analysis that the new regulations would require. Further, the question of how parties should view their retroactive registration obligations in light of the apparent wholesale repudiation of the current paragraph 5.304(c) is left unanswered.¹¹ As discussed below, given the likelihood of substantial feedback, it is possible that the Department will provide additional insight into these and other questions if and when it moves forward with these proposals.

II. Other Proposed Changes

In addition to the headline proposal to regulations relating to the commercial exemption, the NPRM also proposes a number of more technical updates to the regulations.

Of note, the Department has proposed a significant update to the regulations governing “informational materials”—copies of which registrants must file with the Department and which must bear a “conspicuous statement” alerting readers to the FARA registration status of the publisher. Helpfully, the NPRM proposes that the regulations define “informational materials” for the first time, and propose a definition tied to FARA’s current definition of “political activity.” Under proposed paragraph 5.100(g), informational material would be any material that the disseminating party:

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.¹²

The Department has also attempted to create labelling guidelines for informational materials that will be applicable across platforms. For instance, on websites where character limits might not permit a traditional “conspicuous statement” (such as X/Twitter or Bluesky), the proposed regulations require that parties embed an image file of the conspicuous statement as a workaround.¹³ The Department’s proposal also clarifies that any requests to government officials on behalf of a foreign

¹¹ This point may be moot as a practical matter in many cases due to the [denial](#) of the Department’s request for *en banc* reconsideration of *Attorney General of the United States v. Wynn*, in which the DC Circuit held that the Department cannot civilly compel retroactive FARA registration if the registerable activity has ceased. Department officials have reiterated that while *Wynn* is binding law in D.C., it is free to seek retroactive civil enforcement in other jurisdictions.

¹² <https://www.federalregister.gov/documents/2025/01/02/2024-30871/amending-and-clarifying-foreign-agents-registration-act-regulations#sectno-citation-5.100>.

¹³ <https://www.federalregister.gov/documents/2025/01/02/2024-30871/amending-and-clarifying-foreign-agents-registration-act-regulations#sectno-citation-5.401>.

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principal—including the act of scheduling a meeting, with no additional substantive content—must contain a statement regarding the agent’s relationship with the foreign principal.¹⁴

The Department has also proposed updating the regulations implementing the legal exemption—which exempts from registration activities by attorneys during the course of certain legal proceedings—to account for modern legal practice. The proposed regulations seek to clarify that attorneys whose activities “fall within the bounds of normal legal representation,”¹⁵ including by speaking to the press about the case or matter, will still be covered by the exemption. This change matches recent guidance statements and advisory opinions from the Department.

III. Future Prospects

While the FARA bar has been eagerly anticipating these proposed regulations since the publication of the ANPRM over two years ago, their chances of being actually implemented (in whole or in part) are uncertain. President-elect Trump’s Attorney General nominee-designate Pam Bondi has not publicly expressed an opinion about the proposal, and there is not yet a public nominee-designate to lead the Department’s National Security Division (which has principal responsibility for these regulations). However, given the significant impact that reconsideration of the commercial exemption regulations would have on the regulated community, we expect the incoming administration to receive significant feedback from impacted businesses and practitioners. In addition, the multiple high-profile FARA (and FARA-related) enforcement cases that the Department brought against Trump associates,¹⁶ would suggest that the administration will likely study the Department’s proposals in this area closely.

As noted above, public comment on the proposed regulations will remain open for 60 days following publication in the Federal Register (March 3, 2025), and we encourage impacted parties to consider submitting a comment to the Department. The Department will be required to consider and respond to substantive comments prior to finalizing these regulations. Given the likely attention that this proposal will attract, we expect that the period between the close of public comment and the publication of any final rule will be significant while the incoming Trump administration reviews the proposals.

Regardless of whether the specific proposals in the NPRM are adopted in the Code of Federal Regulations, however, the rewrite of the commercial exemption regulations sends an unmistakable message about the Department’s current enforcement intentions. In short, the Department does not consider the current regulations sufficiently connected to the statutory text, and we recommend that any party relying on the commercial exemption review its activities with that likely limitation in mind.

¹⁴ <https://www.federalregister.gov/d/2024-30871/p-178>.

¹⁵ <https://www.federalregister.gov/documents/2025/01/02/2024-30871/amending-and-clarifying-foreign-agents-registration-act-regulations#sectno-citation-5.306>.

¹⁶ See, e.g., <https://www.willkie.com/news/2022/11/willkie-wins-sweeping-victory-and-acquittal-for-thomas-barrack-in-illegal-foreign-lobbying-trial>.

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

Michael J. Gottlieb

202 303 1442

mgottlieb@willkie.com

Michael S. Schachter

212 728 8102

mschachter@willkie.com

David Mortlock

202 303 1136

dmortlock@willkie.com

Samuel Hall

202 303 1443

shall@willkie.com

Kristin Bender

202 303 1245

kbender@willkie.com

David Levine

202 303 1062

dlevine@willkie.com

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