ALM | LAW.COM

New York Law Journal

Come Fly With Me: DOJ's Proposed FARA Amendments and the Tourism Industry

By Sidhardha Kamaraju and Aaron Wiltse

January 16, 2025

The Foreign Agents Registration Act (FARA) has had some time in the sun recently, with DOJ winning (and losing) several recent high-profile criminal and civil trials. But beyond the headlines, FARA plays a critical—and often burdensome—role for many businesses that seek commercial opportunities in the United States on behalf of foreign clients.

Recently, DOJ has proposed modifications to FARA regulations pertaining to commercial ventures that, on the one hand, could greatly increase the scope of the statute's reach, while, on the other, serve as a boon for those that deal in a multibillion dollar industry: foreign tourism. Although only time will tell whether DOJ's proposal goes into effect, companies that act in the United States on behalf of foreign businesses or governments would be wise to proactively seek guidance to make sure they are well-positioned to take advantage (or cover) if the new regulations take hold.

Sidhardha Kamaraju

Aaron Wiltse

Background of FARA's Registration Requirements

FARA, 22 U.S.C. §611 *et seq*., is designed to promote transparency around the activities of individuals ("foreign agents") engaging in certain activities in the United States on behalf of foreign persons, entities, governments or political parties ("foreign principals").

Those agents are required under FARA to register with DOJ, file public disclosures regarding their activities, and retain copies of informational materials they distribute within the United States. FARA aims to enable both the U.S. public and government to take into

account the agents' relationship with their foreign principal when making decisions in response to the agents' activities.

An individual qualifies as a "foreign agent" if he engages in certain activities in the United States "as an agent, representative, employee, or servant…at the order, request, or under the direction or control, of a foreign principal." 22 U.S.C. § 611(c)(1). The most significant "foreign principals" are foreign governments and political parties, but the category also includes any non-U.S. individual, partnership, association, corporation, or organization. *Id*. § 611(b).

The one bright side of DOJ's proposed amendments is its aboutface with respect to promoting tourism.

While many may think of lobbying as the principal activity targeted by FARA, in reality, the statute covers a wide swath of conduct, including, for example, acting as "a public relations counsel [or] publicity agent" for a "foreign principal," or "solicit[ing], collect[ing], disburs[ing], or dispens[ing] contributions, loans, money, or other things of value for or in the interest of such foreign principal." *Id*. § 611(c)(1)(i)-(iv).

Cabining its scope somewhat, the statute contains several exemptions, including for lawyers working on behalf of foreign clients in routine litigation. Of particular note are two exemptions that are often employed (or at least attempted to be employed) in connection with commercial efforts in the United States. *First*, FARA exempts from registration agents who engage "in private and nonpolitical activities in furtherance of the bona fide trade or commerce of [a] foreign principal" ("Private Activities Exemption"). *Id*. § 611(d)(1). *Second*, it exempts agents who engage "in other activities not serving predominantly a foreign interest" ("Other Activities Exemption," and, together with the Private Activities Exemption, the "Commercial Exemptions"). *Id*. § 611(d)(2).

DOJ's Proposed Changes to the Commercial Exemptions

DOJ has issued regulations further detailing the scope of the Private Activities and Other Activities Exemptions. As to the first, DOJ's regulations provide that agents acting in furtherance of the trade or commercial interest of a foreign principal benefit from the exemption "so long as the activities do not directly promote the public or political interests of the foreign government." 28 CFR § 5.304(b).

As to the second, DOJ's regulations provide the exemption to a foreign agent engaged "in political activities on behalf of a foreign corporation, even if owned in whole or in part by a foreign government…where the political activities are directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation, 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." 28 CFR § 5.304(c).

In December 2021, DOJ issued an advanced notice of proposed rulemaking seeking public comments on 19 questions regarding various

aspects of FARA's regulations. 86 FR 70787 (Dec. 13, 2021).

In early January, DOJ issued a notice of proposed rulemaking setting forth DOJ's assessment of the responses it received to those questions, and the changes it proposes to make in light of them. 90 FR 40 (Jan. 2, 2025).

These proposed revisions to the FARA regulations include codification of guidance regarding the exemption for lawyers and the imposition of e-filing requirements. Most significantly, though, the recently issued notice outlines DOJ's intent to revise the Commercial Exemptions.

> If DOJ adopts these new regulations, however, then those registrants can breathe easier: for example, celebrities, social media influencers, public relations firms, travel agencies, or state-sponsored airlines, among scores of others, hired by foreign governments to market their country as tourist destinations will no longer have to register with FARA.

Private Activities Exemption & Tourism. Though DOJ proposes to delete only a single word from the current regulation, that single word carries a great deal of weight. The exemption currently applies "so long as the activities do not directly promote the public or political interests of the foreign government," and DOJ intends to delete "directly" from the exemption. DOJ's proposed change thus sweeps conduct that "indirectly" promotes those interest into the statute's reach for the first time.

In addition to striking the word "directly," DOJ also proposes revisiting the statute's treatment of tourism promotion. For almost 40 years, DOJ has taken the position that the promotion of tourism on behalf of a foreign government (or foreign agency) in the United States requires registration under FARA.

For example, in June 2018, DOJ stated that "a company promoting tourism on behalf of foreign government-owned tourism authorities" had to register under FARA because "[p]romoting tourism on behalf of a foreign government through press releases, seminars, advertising, and the like cannot be construed as private and nonpolitical activities" and "tourism creates an influx of capital and additional jobs for the indigenous population, both of which are in the political or public interest of the foreign country."

As a result, according to DOJ, the promotion of tourism would not be "private and nonpolitical," as required to exempt those activities from FARA registration under the Private Activities Exemption.

In October 2021, DOJ reasserted its position in response to another request for an advisory opinion, this time from a public relations firm that had been retained by a "government tourism entity." The entity was a nongovernmental body that was funded both with private funds and through a tax levied on international travelers entering the foreign country.

The public relations firm asserted that it was not required to register, but DOJ disagreed. After determining that the firm was working as an agent of a foreign principal, DOJ concluded that promoting tourism was not a "private and nonpolitical" activity because "tourism creates

an influx of capital and host of jobs for the locality, both of which, in this case, serve the political and public interests of the foreign government." Similarly, because increased tourism served the foreign government's interests, the public relations firm also could not satisfy the Other Activities Exemption's requirement that the activity did not "serv[e] predominantly a foreign interest."

As a result, as it stands now, anyone who seeks to promote tourism in the United States on behalf of a foreign governmental agency must register under FARA. DOJ, however, appears to have had a change of heart, and has proposed to amend the Private Activities Exemption to allow "promoting bona fide recreational or business travel to a foreign country to come within this exemption where the agent's relationship to a foreign principal is apparent to the public." 90 FR 40, 51.

While this change would allow promotion of tourism to a foreign country, DOJ made clear that it expects that the relationship to the foreign principal will be clearly described in communications to the American public.

Other Activities Exemption. DOJ's proposal to change the Other Activities Exemption, by contrast, is much more comprehensive.

First, the proposed regulation would identify four categories of activities that do not qualify under the exemption. Activities would not be subject to 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) the activities are undertaken on behalf of an entity that is directed or supervised by a foreign government or political party (such as a state-owned enterprise) and promote the political or public interests of that foreign government or political party."

Of note, the final exclusion mirrors part of the current regulation, except that, as with the Private Activities Exemption, DOJ also proposes removing "directly" before "promote."

Second, in scenarios where a categorical exclusion does not apply, DOJ proposes "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, such that the exemption should apply." These factors are:

- "(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 (including through financing) 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."

Ramifications

FARA registration requirements can impose a significant burden on companies and individuals trying to tap the U.S. market. The disclosures require, among other things, publicly identifying fee arrangements between the foreign agent and their foreign principal and regular status updates.

Through these changes, DOJ now seeks to greatly increase the reach of the statute, the result of which could create significant confusion as to when the statute applies.

Ironically, in justifying the deletion of the word "directly" from the Private Activities Exemption, DOJ contends that the current regulation creates confusion about whether an activity directly or indirectly promotes a foreign principal's interest. But by deleting the "directly" limitation, the statute may now reach all kinds of "indirect" conduct that was not only previously exempt from FARA, but is also far from obvious to define—for example, any commercial activity by a state-owned enterprise arguably serves a foreign government's interest, at the very least through increased tax revenues, exports, or jobs.

And before folks jump to say that such a position would be untenable, it is important to remember that it is precisely that type of connection that DOJ relied upon for decades in concluding that promoting tourism required FARA registration.

Similarly, with respect to DOJ's proposed multifactor test for the Other Activities Exemption, DOJ has said that it plans to leave to "advisory opinions and enforcement actions" to "clarify how these factors apply to a range of activities"—cold comfort for anyone seeking to evaluate their registration requirements now. Individuals and companies engaged in work in the United States on behalf of foreign government agencies or companies should seek counsel to help forecast DOJ's position.

The one bright side of DOJ's proposed amendments is its about-face with respect to promoting tourism. While most people think of lobbyists as the primary FARA registrants, in fact, broad swaths of FARA registrations are submitted in connection with promotion of tourism to foreign countries.

If DOJ adopts these new regulations, however, then those registrants can breathe easier: for example, celebrities, social media influencers, public relations firms, travel agencies, or state-sponsored airlines, among scores of others, hired by foreign governments to market their country as tourist destinations will no longer have to register with FARA.

But, even with this newfound freedom, folks involved in the promotion of tourism should still consult experienced FARA counsel to ensure that their conduct comports with the new exemption and that their marketing materials meet DOJ's expectations with respect to transparency.

Sidhardha 'Sid' Kamaraju *is a partner in Pryor Cashman's white-collar defense + investigations, financial institutions, and litigation groups.* **Aaron Wiltse** *is an associate in the firm's white-collar defense + investigations group.*