

How FARA May Be Affected By New Case Law And Reforms

By **Brian Whisler, Ariel Bryant and Bruce Linskens** (February 10, 2023, 4:22 PM EST)

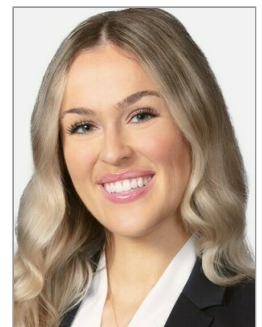
As 2023 gets fully underway, developments from the U.S. Department of Justice's enforcement of the Foreign Agents Registration Act in the preceding year foreshadow a continuation of significant events for FARA in 2023.

At the American Conference Institute's 4th National Forum on FARA in December, Jay Bratt, chief of the Counterintelligence and Export Control Section of the DOJ's National Security Division, described 2022 as a banner year due to:

- Increases and near-record levels of active FARA registrants, new registrants and foreign principals represented;
- The most inspections of registrants conducted by the DOJ in almost 40 years;
- A record number of criminal cases charged by the DOJ involving FARA and Title 18 of the U.S. Code, Section 951;^[1]
- The first civil complaint brought by the DOJ under FARA in over 30 years; and
- The addition of new attorneys and analysts to the DOJ's FARA Unit, signaling higher levels of enforcement activity this coming year.



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The Basics of FARA

FARA is a disclosure statute that was enacted in 1938 in response to concerns raised by the U.S. House of Representatives Special Committee on Un-American Activities Authorized to Investigate Nazi Propaganda and Certain Other Propaganda Activities over the large number of propagandists active in the U.S. at the time.

As amended, FARA applies broadly to anyone who acts on behalf of a foreign principal to, among other things, influence policy or public opinion.

Specifically, it requires foreign agents, barring an exemption, to register with the DOJ and to file disclosure reports outlining the purpose of their representation, as well as their activities, income and expenditures on behalf of the foreign principal.^[2]

Violations of FARA may result in both criminal and civil penalties for an individual's willful (1) failure to register; or (2) making of a false statement or omission of a material fact in connection with their registration.

Penalties include fines of up to \$250,000, imprisonment of up to five years, or both,[3] and the attorney general may pursue civil action against violators.[4]

The Wynn Decision

In what represented the first affirmative civil suit brought under FARA in more than 30 years, the U.S. District Court for the District of Columbia addressed ex post facto registration under the act.[5]

In *Attorney General of the U.S. v. Wynn*, the attorney general sought an injunction to force Steve Wynn, the former chairman and CEO of Wynn Resorts Ltd., to register under FARA even though his alleged agency relationship terminated in 2017.[6]

The agency relationship in question allegedly existed between Wynn and the People's Republic of China, as Wynn purportedly lobbied the Trump administration "regarding the PRC's interest in the return of an unnamed Chinese businessperson, who fled China in 2014 and sought political asylum in the United States," in exchange for favorable business treatment.[7]

The court **granted** Wynn's motion to dismiss because it determined that U.S. Court of Appeals for the District of Columbia Circuit precedent compelled the conclusion that the government could not require Wynn to register.

Specifically, the court relied on *U.S. v. McGoff*,[8] a criminal case under FARA, wherein the District of Columbia Circuit determined in 1987 that the agent's "obligation to file expires when the agent ceases activities on behalf of the foreign principal." [9]

In arriving at this conclusion, McGoff relied on Title 22 of the U.S. Code, Section 618(e), which reflects that failure to register is a continuing offense "for as long as such failure exists," as well as Section 612(a), which provides that "termination of such [agency] status shall not relieve such agent from his obligation to file a registration statement for the period during which he was an agent of a foreign principal." [10]

Ultimately, the Wynn court acknowledged it was bound by McGoff to grant Wynn's motion to dismiss even though it agreed with the dissent in that case, which advocated for a statutory interpretation of the act that would compel registration despite the termination of the agency relationship.[11]

On Dec. 13, 2022, the attorney general filed a notice of appeal in the District of Columbia Circuit.[12] Given that the court, in analyzing McGoff, all but conceded that the circuit interpreted FARA incorrectly, the DOJ will undoubtedly ask the court to reconsider its interpretation of the statute and attempt to have McGoff overturned.

Advisory Opinions

The DOJ provides parties with the ability to seek advisory opinions from the FARA Unit on whether their proposed activities would require registration under the act.[13] In 2018, the DOJ began publishing the advisory opinions in redacted form.

On Dec. 23, 2022, the DOJ released a number of new advisory opinions for the second half of 2022 that shed important light on the scope and limitations of the commercial exemption.

One commonly used exemption is referred to as the commercial exemption, which, according to the statute, may apply to "private and nonpolitical activities in furtherance of the bona fide trade or commerce" undertaken on behalf of a foreign principal, or "in other activities not serving predominantly a foreign interest."

In an opinion dated Oct. 11, 2022, the requesting entity was a U.S. subsidiary of a publicly traded foreign corporation that was 40% owned by a parent foreign corporation that included current or former members of a foreign government among its officers and directors.[14]

The entity represented that "operational control is left to the Company's U.S. based leadership by design," although the foreign corporation's officers review and approve the U.S. company's "annual budget and high-level operating plan, as well as provide high-level budget and revenue targets." [15]

The entity stated, without conceding, that the foreign corporation and the parent foreign corporation "would be treated as state-owned enterprises." [16]

The FARA Unit found that although the U.S. company would be an agent because of its relationship with the parent foreign corporation, the U.S. company was eligible for one of the exemptions set out in Title 22 of the U.S. Code, Section 613, finding in particular that the "proposed lobbying does not serve 'predominantly a foreign interest.'" [17]

Moreover, the FARA Unit noted that the lobbying would be covered by the Lobbying Disclosure Act exemption, as long as the lobbying activities "are on behalf of an individual or corporation and not a foreign government or foreign political party." [18]

In an opinion dated Aug. 19, 2022, the requesting entity contracted with a U.S. subsidiary of a foreign corporation that was owned by a foreign government, to provide "brand management, marketing, strategic planning, account management services, advertising strategies, and advertising services." [19]

The FARA Unit concluded that the U.S. company would be an indirect agent of the foreign government and the foreign company due to its contract with the U.S. subsidiary that constituted work as a publicity agent. [20]

However, the FARA Unit found that the U.S. company's activities fell within the commercial activities exemption because there was no reference to political or other activities mentioned in FARA that rendered the company's activities as anything other than "private and nonpolitical in furtherance of the bona fide trade or commerce," and because the financial benefits to the foreign government were only incidental. [21]

The commercial exemption is considered the most frequently used exemption to FARA's registration requirement. Unfortunately, there remains considerable uncertainty regarding the outer boundaries of this exemption.

As highlighted by the latest round of released advisory opinions, they continue to provide critical insight into the DOJ's decision-making process and can reflect shifts in enforcement tactics and how the scope of such exemptions are interpreted.

In short, these opinions can serve as a blueprint to FARA enforcement for parties willing to invest the time in their review.

Legislative Reform

FARA's vague statutory language and the evolving interpretation by the DOJ of certain provisions has led to widespread agreement over the years that FARA is in need of **legislative reform** to update and modernize the outdated statute.

Toward the end of 2022, the DOJ expressed support for eliminating the LDA registration exemption to FARA in a letter to a bipartisan group of senators. [22]

In the letter, the DOJ expressed support for the Foreign Agents Disclosure and Registration Enhancement Act, S. 1724, that would provide the DOJ with new FARA enforcement capabilities. [23]

Under FARA, a foreign agent who engages in political activities on behalf of a foreign principal and is registered as a lobbyist under the LDA is exempt from FARA's registration requirements if (1) the foreign principal at issue is not a foreign government or related party, and (2) a foreign government or related party is not the primary beneficiary of the agent's activities. [24]

A repeal of the LDA exemption would significantly expand FARA's scope, reversing Congress' decision

in the 1990s to place foreign commercial lobbying under the LDA rather than FARA.

Prior to the enactment of the LDA exemption, the number of FARA registrants and foreign principals were twice as high as current numbers.[25]

Elimination of the LDA exemption would likely force U.S. subsidiaries of foreign-based companies to report their lobbying activity under FARA, which includes more onerous registration and disclosure requirements.

While the Foreign Agents Disclosure and Registration Enhancement Act did not advance out of committee, the Senate in December passed the Lobbying Disclosure Improvement Act, S. 4893, a bill that would require registered lobbyists to disclose on their LDA registration whether the registrant is exempt under FARA's LDA exemption.[26]

Previously, in September, the Senate passed the Disclosing Foreign Influence in Lobbying Act, S. 4254, a bill that would require LDA registrants to "identify any connection with a foreign government or political party that plans, supervises, directs, or controls any effort of that lobbyist, regardless of those entities' financial contributions to the lobbying effort." [27]

In addition, during the Senate's consideration of the fiscal year 2023 National Defense Authorization Act last fall, an amendment was accepted that would have precluded the use of the commercial exemption and the LDA exemption for an agent of a foreign principal that is a foreign adversary, which currently includes China, Cuba, Iran, North Korea and Russia.[28]

Although these measures were not enacted, similar initiatives will likely be reintroduced in the 118th Congress.

A bipartisan group of senators led by Sen. Chuck Grassley, R-Iowa, have already indicated on Jan. 24 that they were reintroducing the Disclosing Foreign Influence in Lobbying Act.

Regulatory Reform

In yet another sign that FARA requires reform, the DOJ **issued** an advanced notice of proposed rulemaking in December 2021 "that would amend or otherwise clarify the scope of certain exemptions, update various definitions, and make other modernizing changes to" FARA.[29]

This would mark what would be the first significant changes to the regulations in nearly 20 years.

During the comment period ending on Feb. 11, 2022, the DOJ received almost 30 substantive submissions in response to its solicitation of comments.

At the conference in December, Jennifer Gellie, chief of the FARA Unit, indicated that the DOJ is drafting proposed language, and parties will have another chance to submit further comments on what they believe are needed changes to bring FARA into the 21st century.

Overall Takeaways

As this new year unfolds, counsel should keep a close eye on these developing areas as the FARA landscape continues to evolve.

First, if the D.C. Circuit reverses the judgment of the district court in Wynn, such that the act requires registration even after the termination of the agency relationship at issue, affected entities will face the burden of a lengthier registration and enforcement window.

Alternatively, if the D.C. Circuit affirms the decision of the district court — i.e., the DOJ cannot force ex post facto registration — then the DOJ will likely reconsider its enforcement framework to determine how best to compel registration during the duration of the agency relationship.

In addition, counsel should continue to review the FARA Unit's advisory opinions for developments on what constitutes political activities, and how the DOJ interprets the application and scope of certain exemptions.

As noted above, certain activities that may be perceived as falling outside the scope of FARA, or to fall within one of the exemptions, could be viewed by the DOJ to be a registrable activity. For that reason, it is important to stay abreast of the DOJ's enforcement trends.

Further, counsel should continue to track legislative reform efforts as potentially the first step in the direction of eliminating, or at least modifying, the LDA exemption to FARA.

If the LDA exemption to FARA is ultimately repealed, it would have significant implications for U.S. companies with foreign parents or affiliates that rely on the LDA registration exemption to satisfy their FARA obligation.

Foreign-owned corporations as well as U.S.-based subsidiaries seeking to influence U.S. policy would be required to register and report their activity under FARA, thus increasing the regulatory burdens on such private companies.

Finally, counsel should watch for the next step in the regulatory reform process. Updating the FARA regulations will hopefully provide needed clarification for the application of FARA that is long overdue.

In sum, a number of significant developments in the FARA landscape await resolution in 2023. As a result, we can expect another active year with potentially impactful changes that warrant close attention.

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[1] In contrast with FARA, Section 951 is a more conventional criminal statute, historically used in espionage cases, that expressly prohibits taking certain undisclosed actions on behalf of foreign principals. Notably, this statute formed the legal basis for the recent DOJ enforcement actions brought against Tom Barrack, former Trump campaign advisor, and his assistant, Matthew Grimes, both of whom were acquitted in November 2022 by the jury on all charges alleging illegal agency on behalf of the United Arab Emirates government and related conduct.

[2] 22 U.S.C. § 611(b), (c)(1) (defining a "foreign principal" and an "agent of a foreign principal").


[3] *Id.* § 618(a); 18 U.S.C. § 3571.

[4] 22 U.S.C. § 618(f).

[5] *AG of the U.S. v. Wynn* , No. 22-1372 (JEB), 2022 U.S. Dist. LEXIS 186071, at *9 (D.D.C. Oct. 12, 2022).

[6] *Id.* at *1-2.

[7] *Id.*

[8] *U.S. v. McGoff* , 831 F.2d 1071 (D.C. Cir. 1987).

[9] *Wynn*, 2022 U.S. Dist. LEXIS 186071, at *19 (quoting *McGoff*, 831 F.2d at 1082).

[10] Id. at *13-15.

[11] Id. at *12-17, *29.

[12] Notice of Appeal, AG of the U.S. v. Wynn, No. 1:22-cv-01372-JEB, ECF. No. 22 (D.D.C. Dec. 9, 2022).

[13] 28 C.F.R. § 5.2.

[14] Advisory Opinion Request Pursuant to 28 C.F.R. § 5.2, U.S. Dep't of Just. at 1 (Oct. 11, 2022), <https://www.justice.gov/file/1559341/download>.

[15] Id.

[16] Id.

[17] Id. at 3.

[18] Id.

[19] Advisory Opinion Request Pursuant to 28 C.F.R. § 5.2, U.S. Dep't of Just. at 1 (Aug. 19, 2022), <https://www.justice.gov/file/1559336/download>.

[20] Id. at 2.

[21] Id. at 2-3.

[22] Letter from Carlos Uriarte, Assistant Att'y Gen., to Robert Menendez, Chair, Comm. on Foreign Relations; Richard J. Durbin, Chair, Comm. on the Judiciary; James E. Risch, Ranking Member, Comm. on Foreign Relations; and Charles E. Grassley, Ranking Member, Comm. on the Judiciary (Nov. 21, 2022), <https://www.justice.gov/ola/page/file/1553341/download>.

[23] Id. at 7.

[24] 22 U.S.C. § 613(h); 28 C.F.R. § 5.307.

[25] DOJ OIG Releases Report on the DOJ's Enforcement of the Foreign Agents Registration Act, Off. of the Inspector Gen. (Sept. 7, 2016), <https://oig.justice.gov/sites/default/files/2019-12/2016-09-07.pdf>.

[26] Lobbying Disclosure Improvement Act, S. 4893, 117th Cong. (2022).

[27] Disclosing Foreign Influence in Lobbying Act, S. 4254, 117th Cong. (2022). See also <https://www.cbo.gov/publication/58413>.

[28] National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117th Cong., amended by S. Amendment 5578 (2022).

[29] Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations, 86 Fed. Reg. 70787, 70787 (Dec. 13, 2021).