

DOJ Issues Guidance Clarifying the Scope of Agency Under the Foreign Agents Registration Act

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As part of a continuing effort to promote greater awareness and understanding of registration triggers under the Foreign Agents Registration Act (FARA), the U.S. Department of Justice (DOJ) recently published new guidance entitled *The Scope of Agency Under FARA* (Guidance). The Guidance provides important insight into how the DOJ views “agency” under the statute, which is a key component of the statutory definition of an “agent of a foreign principal.” As a result, the Guidance should help persons engaged in certain covered activity – including public relations, political consultancy, lobbying, and other political activity for a foreign person or foreign entity – to better assess whether that activity could require registration under FARA.

For context, FARA is disclosure statute designed to promote transparency in the U.S. political process, media, and other public affairs work by identifying foreign influence in the United States. FARA requires every “agent of a foreign principal” engaging in certain political or quasi-political activities in the United States to register as such with the DOJ, and to periodically – and publicly – disclose certain details of that agency relationship with the foreign principal.

The new Guidance recognizes that: “[B]ecause FARA regulates expressive activities by U.S. persons that implicate the rights protected under the First Amendment, it is important that the standards governing its application be clear.” As a result, the Guidance presents the DOJ’s “understanding of a key threshold determination in assessing when the requirements of the Act apply—i.e., the definition of ‘agent of a foreign principal.’”

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The DOJ's analysis begins by distinguishing between the expression of "views that are favorable to or coincide with the interests of a foreign country or a foreign person," which is protected under the First Amendment and does not implicate FARA, and "statements by and activities of persons in their capacity as agents of foreign principals within the meaning of the statute," which does implicate FARA. The Guidance next makes clear that "whether a person is an agent for purposes of FARA depends on whether the relationship between the foreign principal and the person is such that the latter's enumerated activities within the United States may be fairly attributed to a foreign principal."

After laying this foundation, the DOJ then proceeds to analyze the statutory definition of "agency":

[A]ny person who acts as an agent, representative, employee, or servant, or any person who acts in any other 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[.]

The DOJ concludes that the first clause "lists categories of relationships at common law that tend to have a formal, ongoing character," in terms that "presuppose a formal and agreed-upon relationship between the principal and agent." However, the second clause "broadens FARA's concept of agency to reach less formally defined (and more episodic) behavior," which "goes beyond the common-law definition of agency" and "reach[es] conduct that is undertaken on behalf of a foreign principal even without a formal relationship." This informal arrangement includes, for example, a "request." Nonetheless, the DOJ emphasizes that "[a]lthough the term 'request' is more expansive, ... it too must be read to connote some form of authority by the principal over the agent."

Importantly, the DOJ's "ultimate test for agency under FARA is whether it is 'fair to draw the conclusion that an individual is not acting independently, is not simply stating his or her own views, but is acting as an agent or alter ego of the foreign principal.'" Accordingly, the government looks for evidence of "some level of power by the principal over the agent or some sense of obligation on the part of the agent to achieve the principal's request." As part of this analysis, the DOJ considers the following factors:

- Whether those requested to act were identified with specificity by the principal;
- The specificity of the action requested;
- Whether the request is compensated or coerced;
- Whether the political activities align with the person's own interests;
- Whether the position advocated aligns with the person's subjective viewpoint; and
- The nature of the relationship between the person and the foreign principal.

Although by no means providing a definitive answer as to whether a specific fact pattern may trigger registration obligations under FARA, the Guidance should help facilitate such analysis. Therefore, it is incredibly useful for any individual or entity considering whether a person is an agent for purposes of FARA. The Guidance is also important for DOJ's increasing enforcement efforts with respect to FARA. Indeed, by

clarifying the scope of FARA for industry, the Guidance also bolsters the DOJ's ability to bring criminal prosecutions.

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