Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FARA Advisory Opinions Raise Questions For Digital Media

By **Robert Kelner, Brian Smith and Alexandra Langton** (July 5, 2023, 4:15 PM EDT)


Robert Kelner


Brian Smith


Alexandra Langton

The U.S. Department of Justice's Foreign Agents Registration Act Unit recently released several new advisory opinions that could have interesting implications for digital media platforms.

The newly published opinions reflect the FARA Unit's broad reading of when FARA obligations are triggered and the jurisdictional scope of the statute.

When acting as an "agent" of a foreign principal, the obligation to register under FARA is triggered when an agent engages — "within the United States" — in "political activities"; represents the interests of a foreign principal before the U.S. government; collects or disburses money on behalf of a foreign principal; or acts as a "public-relations counsel," "publicity agent," "information-service employee," or "political consultant" unless an exemption applies.

Each of these terms is defined in the statute, and the terms are defined broadly.

These latest advisory opinions shed new light on the FARA Unit's views of the scope of these triggers and the jurisdictional limit on activities conducted within the U.S.

Background on FARA Advisory Opinions

The department issues advisory opinions in response to requests from outside parties for clarifications or interpretations of the FARA statute and its implementing regulations regarding specific factual situations.

The party that receives the advisory opinion can rely on the department's determination, provided that the activities remain within the scope of the opinion request. In addition, to inform the broader public, the FARA Unit releases its advisory opinions periodically, usually a few weeks or months after being issued.

The publicly released versions, however, are heavily redacted to remove identifying information, and the released letters reveal very little about the detailed information submitted by the requestor. These limitations often make it hard to understand fully the department's analysis in applying the statute or difficult to discern actionable guidance.

Given these limitations, attorneys and other stakeholders often puzzle over the potential significance of redacted portions or read between the lines regarding possible negotiations that occurred between the submitter and the department's FARA Unit.

When the DOJ announced a few years ago that it would start releasing advisory opinions — after years of keeping them private — many lawyers cheered, thinking the released opinions could operate a bit like court precedents.

Although releasing the opinions is far preferable to keeping them private, the inherent limitations in the released opinions have made them less useful than the bar once hoped. The newly released opinions exemplify this challenge, as the language could have significant implications and could raise questions for practitioners about the scope of the statute.

Online Platform Required To Register

In one recent advisory opinion, the FARA Unit concluded that a U.S. online platform was required to register under FARA for "creat[ing] a virtual entity presence" for a foreign government agency and "displaying that presence on" the company's platform.[1]

Notably, the online presence was only viewable to other subscribers of the platform and "would contain factual data."

The FARA Unit reasoned that the U.S. company acted as an information-service employee and a publicity agent. The opinion noted that the services to the foreign government agency also included "tailored support," although it is not clear from the heavily redacted opinion the extent to which the company was merely hosting the platform versus creating custom content — or if that distinction even mattered in the FARA Unit's analysis.

The opinion does not offer an explanation of whether the tailored support concerned content, targeting, technical support or something else entirely.

The opinion goes on to explain that if the company were informing or advising the foreign government in any public relations matter, the company would also be a public-relations counsel, which would separately trigger a registration requirement.

This statement implies that the company's request letter, which is not publicly available, described the company as doing something that falls short of providing actual public relations advice.

The FARA Unit further advised that the statute's commercial exemptions do not apply because the foreign government agency did not appear to be engaging in trade or commerce and the agency's mission was to serve "the general public interest of" the foreign government.

The opinion reads the terms information-service employee and publicity agent very broadly, although the redactions complicate the task of understanding the basis for this reading.

In past advisory opinions, the FARA Unit has applied legislative history to cabin an unreasonably broad interpretation of the political consultant registration trigger to include only work that also involves political activities.[2]

But that legislative history does not apply to the sweeping statutory definitions of information-service employee and publicity agent.

Ultimately, the opinion leaves companies that operate online platforms with little clear guidance, though the implications of the opinion are potentially significant.

First, the FARA Unit's analysis focuses on the company's efforts to create a "virtual entity presence," without detailing the scope or extent of the services provided by the company.

Efforts to create an online presence can vary greatly, for example, ranging from a company that passively provides a means for any person or entity to post content online, to large and complicated digital media campaigns managed by professional PR teams. Without clarity in the opinion, it is hard to discern the factors that led the FARA Unit to conclude that this particular virtual entity presence crossed into agency.

Second, in determining that the company's activities did not qualify for the commercial exemptions, the FARA Unit cited the "mission" of the foreign government agency. This is potentially a new and noteworthy criteria in the application of the commercial exemptions.

By the terms of the FARA statute and implementing regulations, the determination of the commercial exemptions is supposed to focus on the "activities" of the potential agent, not the mission of the potential foreign principal.

This is at least the second noteworthy time that the FARA Unit has focused on the mission or purpose of the foreign principal to limit the application of the commercial exemptions. In a 2019 opinion, the FARA Unit concluded that the commercial exemptions could not apply to activities undertaken for a sovereign wealth fund because "its core function" is to earn money for the state.

Online Activities Occurring Abroad Are Within the U.S.

Several of the new advisory opinions also offer insights into the FARA Unit's interpretation of the provision in the statute limiting its scope to activities taking place within the U.S.

The text of the statute limits its coverage to activities within the U.S., defining "United States" in a "geographical sense" to mean "the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, and all other places ... subject to the civil or military jurisdiction of the United States."

Recent opinions reflect the DOJ's interpretation of the statute to reach activities occurring outside the U.S. in certain circumstances.

In one opinion, the FARA Unit focused on the location of the service provider that was providing remote communications training to foreign government officials abroad.[3]

The government concluded that the services were within the U.S. even though the services would be delivered to the foreign principal remotely via an online platform because the communications "will originate ... in the United States."

Similarly, in another opinion, the FARA Unit concluded that this element of the statute was satisfied

simply because a company's online platform, including a foreign principal's account, was "clearly viewable in the United States," which would be true for any public website.[4]

The broad geographic reach of the internet and digital media could bring a wide variety of activities within the scope of FARA under the DOJ's logic in these opinions.

Some of these positions are difficult to square with the statute's language and its legislative history, although no party has yet challenged the FARA Unit's conclusions in court.

For instance, it is difficult to reconcile the DOJ's conclusion that publishing online content that is viewable by users in U.S. meets the jurisdictional requirement with the statutory text stating that the activities must occur within the U.S.

Companies, public relations firms, and other organizations outside the U.S. may need to consider the extent to which their communications are reaching an audience in the U.S. and thus potentially implicating FARA.

If FARA is implicated, companies would need to register with the DOJ within 10 days of becoming an agent or prior to engaging in registrable activities — whichever is sooner — and file detailed disclosure reports.

These opinions highlight the challenges associated with applying FARA's antiquated terms to modern digital platforms.

The statute was initially written in the 1930s and the last major update was in the 1960s. There is broad consensus that the statute would benefit from legislative reforms to provide clarity and to bring it in line with modern practices.

The DOJ recently endorsed legislative reform and announced that it plans to issue new proposed regulations. Although the proposed regulations had been expected by this spring, the DOJ has yet to release the proposal. In the meantime, lawyers are left to try to discern nuggets of guidance from heavily redacted advisory opinions.

Robert K. Kelner and Brian D. Smith are partners, and Alexandra Langton is an associate, at Covington & Burling LLP.

[1] https://www.justice.gov/d9/2023-04/20230217_advisory_opinion_commercial_exemption.pdf.

[2] https://www.justice.gov/media/1191031/dl?inline=.

[3] https://www.justice.gov/d9/2023-04/20230214_advisory_opinion_commerical_exemption.pdf.

[4] https://www.justice.gov/d9/2023-04/20230217_advisory_opinion_commercial_exemption.pdf.