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MEMORANDUM

From: Joseph M. Birkenstock
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To: Clients and Interested Parties

Date: June 8, 2018

Re: New DOJ Release of FARA "Rule 2" Opinions

As was recommended in 2016 by the Office of the Inspector General at the Department of Justice, and recently announced by the Department, today DOJ released anonymized versions of several dozen opinions it has provided over the last few decades regarding the application of the Foreign Agents Registration Act to particular sets of circumstances. Copies of these opinions are now available here: https://www.justice.gov/nsd-fara/advisory-opinions.

To be sure: the realities of FARA's opinion process and the limits of what DOJ was able to release necessarily limit the depth and range of the conclusions that can be drawn from these opinions. Nevertheless, both individually and as a whole, the opinions provide useful insights into how the Department has interpreted FARA itself and the regulations that implement it in a wide range of particular circumstances.

General Observations about FARA "Rule 2" Opinions

First, it's important to note what these Rule 2 opinions are not. They are not statements of positive law that apply broadly to the regulated community, and they do not create or alter specific FARA obligations in general. While they do provide useful examples of how the Department has viewed a range of different situations in the past, it is important to bear in mind that there is no such thing as violating one of these opinions. The statute and the regulations impose potential obligations on everyone, and those statutory and regulatory obligations can be violated, but these Rule 2 opinions by their terms only provide examples of how the DOJ has interpreted and applied the statutory and regulatory provisions at particular times in the past.

These FARA opinions also are not precedential opinions even in the sense that FEC advisory opinions are. The Federal Election Campaign Act provides that "any person involved in any

specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered" can rely on the conclusion of even an FEC advisory opinion that they had no role at all in requesting.[1] The regulations regarding FARA opinions, however, provide that only "[t]he requesting party or parties" can rely on a written Rule 2 opinion regarding their own potential FARA obligations, and only with respect to the specific facts and circumstances addressed in the opinion.[2]

Finally, it's important to note that DOJ has not released the actual underlying requests and any information accompanying those requests along with these anonymized opinions. In many instances the rationales of the conclusion reached in a particular opinion and the overall context of those rationales in light of the particular facts of the situation in question are hard to ascertain from reviewing just the resulting opinion; whereas that context and the reasoning of the outcome may and likely would often be much clearer in light of the totality of the information available to the DOJ at the time they issued each opinion.

So in short while we certainly welcome the release of these additional opinions and the snapshots they provide about how the FARA Unit has viewed certain circumstances at particular times in the past, we'd also caution anyone against reading too much into the phrasing of particular conclusions or even the specific outcomes reached in specific instances given these realities about the way these Rule 2 opinions actually work in practice.

Specific Observations about the LDA Exemption

While the totality of the guidance available in the dozens of opinions released today will require more attention, several particular pieces do jump out particularly in light of the pending FARA reform bills proposing to repeal the LDA exemption.

First, it's especially notable that out of the eight opinions DOJ listed under the heading for opinions about the LDA exemption, five concluded that the requestor was not entitled to rely on that exemption.[3] It's likewise been our experience as practitioners that DOJ views this exemption much more narrowly than many people in the regulated community believe it to be, and - based on this admittedly small sample size - it appears that that perspective bears out in the opinions released today. Based on today's release, most of the requestors who sought the Department's view on the availability of the LDA exemption were advised that they were not entitled to its protection.

Some of the reasons noted in specific opinions for those conclusions are especially noteworthy.

[1] 52 USC § 30108(c)(1)(B).
[2] 28 CFR § 5.2(j).
[3] And a sixth opinion (again, out of eight) appears to have recognized the availability of the LDA exemption only under narrow and specific circumstances, while cautioning that the requestor should re-evaluate their claim to the LDA exemption if any of the relevant circumstances change.

January 10, 2010 opinion

In the first such example, a US consulting firm that had been retained by a foreign trade association explained to the FARA Unit that the trade association was neither funded by nor otherwise under the control of the government of the foreign country in which that trade association was based. In an opinion dated January 20, 2010, DOJ explained that:

> While you claim that the [foreign government] has no role in the direction, control, or financing of [foreign trade association] activities, an enclosure to your letter specifically indicates that "[foreign trade association] receives funds [text deleted], which is approximately equivalent to 10 million US dollars, from the [foreign government] for undertaking various perennial projects on behalf of the [foreign government], including but not limited to" projects that this Unit finds promote the political or public interests of [foreign country] in the United States. This Unit does not agree with your conclusion that your firm is exempt under 22 U.S.C. § 613(h), and has determined that your firm is an agent of a foreign principal required to register under the Act as representing the [foreign government] through [foreign trade association].

This conclusion suggests that the referenced $10m worth of funding of "perennial projects" that DOJ found to include some that "promote the political or public interests of" the foreign country in the US is evidently enough to preclude the availability of the LDA exemption. But the opinion itself gives no indication as to what those "perennial projects" actually involved, and it's worth noting that this 2010 opinion does not apply the "principal beneficiary" test from the DOJ's 2003 regulations on the LDA exemption at all.

First December 3, 2012 opinion

In the first of two opinions dated December 3, 2012, a law firm and a related government relations firm requested an opinion about the availability of a range of FARA exemptions for their work for a foreign company that was minority-owned by a foreign municipality. The resulting opinion notes the absence of explanation provided by the requestors about the level of control (if any) that this minority ownership position entailed for the foreign municipality:

> You stated in your request that [US firm 1] is providing legal services to [foreign company], and [US firm 2] provides "government relations services." The only information given about [foreign company] is that it is minority owned by [foreign city investment corporation], "which is controlled by the [foreign municipal government]." You fail to tell us what minority means and who owns the remainder of this [foreign country] company. Furthermore, you do not indicate who directs or controls the company nor do you explain the voting rights

> and privileges of owners or stockholders. In addition, there is no mention of the role of the [foreign government], and what connection the [foreign government] has with the [foreign municipal government].

The opinion specifically concludes that the requestors did not meet their burden of proving their claim to the exemption since the noted factors regarding control were not addressed. Nevertheless, this opinion does stand to show that even minority government ownership can be enough to preclude a claim to the LDA exemption depending on whether and to what extent that ownership position provides opportunities for that minority owner to direct or control the activities of the company.

Second December 3, 2012 opinion

The requestor of a second opinion dated December 3, 2012 was a DC law firm that sought to represent "one of the largest private financial institutions" in a particular foreign country regarding OFAC licensing and sanctions compliance. In response, the DOJ concluded as follows:

> The United States for years has implored [foreign country] to terminate its nuclear development program, to stop its state sponsored aid to terrorism, and to implement better control of anti-money laundering programs. The President of the United States and OFAC have issued numerous sanctions against [foreign country] to have it comply with requests of the United States and its allies. The use of economic sanctions against the [foreign country] government and certain [foreign country] institutions by the United States is part of an unequivocal framework of present day U.S. foreign policy. The proposed work of [US law firm] for this [foreign government] bank is an attempt to promote, within the United States, the political or public interests, policies, and relations of [foreign country].
>
> For the reasons given above, we conclude that the political activities planned by [US law firm] will be serving predominantly the foreign interest of [foreign country] and will directly promote the political and public interests of [foreign country]. In addition, we find that not only [foreign bank], but also the Government of [foreign country] will be principal beneficiaries of the political activities of [US law firm] and therefore, [US law firm] is ineligible for the exemption under 22 U.S.C. § 613(h).

At bottom, this opinion illustrates that some issues (at least including US trade sanctions) are so closely tied to US and foreign national interests that work on those issues on behalf of a "private financial institution" did not qualify for the LDA exemption since DOJ found that a foreign government would nevertheless be a "principal beneficiary" of that work, even though the

opinion noted no foreign government involvement at all in the business operations of the bank or in the advocacy work that the requestor proposed to undertake on its behalf.

None of the opinions included in the LDA Exemption section of today's release dealt with advocacy work regarding tariffs, but based on past DOJ testimony to Congress it's at least still an open question whether the FARA Unit likewise would conclude that advocating against proposed US tariffs on foreign-made goods, even if serviced or distributed by a US subsidiary, likewise would necessarily "principally benefit" the foreign country and therefore not qualify for the LDA exemption.

CONCLUSION

Again, the principal point we would urge people to take away from this release of anonymized opinions is not to draw overly broad or strict conclusions about the application of FARA to particular sets of circumstances today. Each of these opinions is only one data point, and we note that the opinions released today include less than a quarter of the total number of FARA opinions we understand DOJ to have provided pursuant to Rule 2.

Nevertheless, we applaud DOJ for releasing these opinions at this point, since they do shine useful light on the Department's past interpretations of FARA's requirements in particular instances, and we look forward to the ongoing "periodic" release of future opinions going forward.