

Justice Department Releases Foreign Agent Advisory Letters

June 11, 2018

Last week, the Department of Justice publicly [released](#) for the first time its advisory letters related to the Foreign Agents Registration Act (“FARA”). These advisory letters were issued over the past several years by the Department’s FARA Registration Unit. Although the Department has disclaimed that the letters are not “intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter,” they do offer interesting interpretive insights into FARA, which is widely known as a particularly vague statute. *For those representing foreign governments – individuals, lobbyists, consulting firms, advocacy groups, public affairs firms, political consultancies, and think tanks – these advisory letters are a helpful resource to remaining in FARA compliance.* Below are summary descriptions of some notable advisory letters:

- In an [April 2018 letter](#), the FARA Registration Unit advised the host of a television program produced and distributed in the United States that FARA registration was unnecessary. The host had a contractual relationship with a U.S. company that, in turn, contracted with a foreign state-owned media company to produce media content and was already registered as a foreign agent under FARA for this activity. Despite the fact that the individual was working for a registered agent on its FARA-registrable activity, the FARA Registration Unit found that the “consideration most relevant to our determination that [U.S. person] does not have an obligation to register is ... that [U.S. person] does not have a contractual relationship with [foreign state-owned company] or other foreign principal.” In other words, the FARA Registration Unit suggested that contractual privity (i.e. a direct contractual relationship) with a “principal” that is located outside the United States may be necessary to become an “agent” under FARA. This letter could be of interest to many subcontractors working on behalf of registered foreign agents in the United States.
- The FARA Registration Unit concluded in a [February 2018 advisory letter](#) that a banking compliance firm working on behalf of a foreign state-owned bank could not qualify for FARA registration exemptions for “commercial activities” or for “activities not serving predominantly a foreign interest” because the compliance firm’s efforts to “demonstrate [foreign state bank]’s suitability for establishing commercial relationships with U.S. financial institutions” were “directly promot[ing] the public interests” of a foreign country. This letter is notable because FARA’s exemption for “activities not serving predominantly a foreign interest” was intended specifically to exempt state-owned enterprises’ commercial activities, and yet the letter appears to presume that a state-owned bank’s commercial activities are categorically ineligible for this exemption.
- A [December 2017 letter](#) excused a government relations firm from FARA registration when it was working on behalf of a foreign embassy to introduce a foreign government official “to private industry leaders in the defense and cybersecurity markets.” The FARA Registration Unit concluded that registration was unnecessary because these introductory meetings would be eligible for the

“commercial activities” exemption as “private and non-political activities.” This letter is important because most of the regulated community had previously assumed that the “commercial activities” exemption was available only to those working on behalf of foreign businesses or foreign state-owned enterprises, and not to those working for foreign governments.

- Two companies requesting an [advisory letter in June 2017](#) included their own FARA analysis with their letter request, stating that even if they engaged “in activities that would normally require registration under the Act, they would still not be required to register under FARA because they would be physically outside the United States at the time of performance or delivery of the service.” The FARA Registration Unit responded that it did “not concur with this analysis of FARA” without elaboration, which raises some possibility that the FARA Registration Unit may consider U.S. persons to engage in FARA-registrable activities even if they are outside the United States at the time.
- In a [November 2012 letter](#), the FARA Registration Unit determined that a U.S. charitable organization was required to register under FARA as a foreign agent if it performed the following activities: (1) “convening panels of former senior government officials, analysts from think-tanks and educational facilities, knowledgeable corporate figures, and [foreign government] officials to discuss issues of interest to the [foreign government]”; (2) “hosting [foreign government] officials in Washington to present their views on [foreign government] issues”; (3) “training interns and introducing them to the policy community in Washington”; (4) “working with the [foreign government] embassy in Washington about important issues such as the [text deleted]”; and (5) “conducting educational workshops throughout the United States on [foreign country] issues.” Registration was required even though the U.S. charitable organization had been independently “educating American policymakers, opinion leaders, educators, and citizens about America’s interests and friends in the [region of the world] for over thirty years.” This letter may be of particular interest to think-tanks and other institutions that frequently collaborate with foreign governments and embassies.

Although the analyses contained in these advisory letters can be unclear, conclusory, and perhaps contradictory at times, they offer an additional and helpful resource to the regulated community trying to comply with FARA. [Caplin & Drysdale's Political Law Group](#) is available to assist with any questions that may arise in connection with FARA and potential registrable activities. If you have any questions concerning this alert or would like additional information, please contact:

[Trevor Potter](#)
tpotter@capdale.com
202.862.5092

[Matthew T. Sanderson](#)
msanderson@capdale.com
202.862.5046

[Bryson B. Morgan](#)
bmorgan@capdale.com
202.862.7836

[Emma K. Lewis](#)
elewis@capdale.com
202.862.7844



About Caplin & Drysdale

Having celebrated our 50th Anniversary in 2014, Caplin & Drysdale continues to be a leading provider of [tax](#), [tax controversy](#), and [litigation](#) legal services to corporations, individuals, and nonprofits throughout the United States and around the world. We are also privileged to serve as legal advisors to accounting firms, financial institutions, law firms, and other professional services organizations.

The firm's reputation over the years has earned us the trust and respect of clients, industry peers, and government agencies. Moreover, clients rely on our broad knowledge of the law and our keen insights into their business concerns and personal interests. Our lawyers' strong tactical and problem-solving skills - combined with substantial experience handling a variety of complex, high stakes, matters in a boutique environment - make us one of the nation's most distinctive law firms.

With offices in New York City and Washington, D.C., Caplin & Drysdale's core practice areas include:

- [Bankruptcy](#)
- [Business, Investment & Transactional Tax](#)
- [Complex Litigation](#)
- [Corporate Law](#)
- [Employee Benefits](#)
- [Exempt Organizations](#)
- [International Tax](#)
- [Political Law](#)
- [Private Client](#)
- [Tax Controversies](#)
- [Tax Litigation](#)
- [White Collar Defense](#)

For more information, please visit us at www.caplindrysdale.com.

Washington, DC Office:
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
202.862.5000

New York, NY Office:
600 Lexington Avenue
21st Floor
New York, NY 10022
212.379.6000

Disclaimer

This communication does not provide legal advice, nor does it create an attorney-client relationship with you or any other reader. If you require legal guidance in any specific situation, you should engage a qualified lawyer for that purpose. Prior results do not guarantee a similar outcome.

Attorney Advertising

It is possible that under the laws, rules, or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

© 2018 Caplin & Drysdale, Chartered
All Rights Reserved.