



U.S. Department of Justice

National Security Division

Counterintelligence and Export Control Section

Washington, DC 20530

February 17, 2023

[Name Redacted]
[Address Redacted]

Re: Request for Advisory Opinion Pursuant to 28 C.F.R. § 5.2

Dear [Name Redacted]:

We write in response to your letter of January 19, 2023 (the “January 19 Letter”) requesting an advisory opinion, pursuant to 28 C.F.R. § 5.2(a), with respect to whether certain activities contemplated by your company, [U.S. Company], will require registration pursuant to the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611, et seq. (“FARA” or “the Act”). Based on the representations made in the January 19 Letter and for the reasons more fully stated herein, we have concluded that these activities do require registration under the Act.

Background

According to the January 19 Letter,

[U.S. Company]’s mission is to [Redacted]. [U.S. Company] develops and operates a custom software platform as a service available to individuals and organizations that agree to [U.S. Company]’s terms and conditions as [subscribers] . . . [U.S. Company] develops [subscriber] profiles and generally allows [subscribers] to claim and manage their profile as a form of virtual or digital presence.

...

Current [U.S. Company] offerings can generally be broken into [Redacted] categories including: [Redacted]; a virtual presence for [subscribers]; and [Redacted].¹

The January 19 Letter requests an advisory opinion² with respect to certain activities [U.S. Company] proposes to engage in pursuant to a proposed agreement between it and [Foreign Government Agency] [Redacted] (collectively, the [Foreign Government Agency Agreement]). The January 19 Letter describes the [Foreign Government Agency] as [Redacted]. The January 19 Letter also states [Redacted]. It is unclear whether the [Foreign Government Agency Agreement] in its final form will be directly between [U.S. Company] and [Foreign Government Agency], or alternatively between [U.S. Company] and the [Foreign Government Agency]’s office in [U.S. Location], which is described in the January 19 Letter as [Redacted].

¹ January 19 Letter [Redacted].

² See 28 C.F.R. § 5.2(a).

According to the January 19 Letter, the following activity is among those contemplated for [Foreign Government Agency]: Provisioning of a virtual entity presence for [Foreign Government Agency] within [U.S. Company's] platform, in congruence with other [subscribers]. Similarly, the [Foreign Government Agency Agreement] includes among its list of services, virtual presence for [Foreign Government Agency] on [U.S. Company's platform], as well as [Redacted] rate for additional tailored support.

Per the January 19 Letter, [U.S. Company] does not provide open public access to individuals that do not agree to become [subscribers]. As such, [Foreign Government Agency]'s virtual presence would not be public and would contain factual data like other [subscribers'] profiles within the platform.

[Redacted].

FARA Analysis

As you may be aware, the term “foreign principal” is defined by FARA to include “a government of a foreign country.”³ According to the January 19 Letter, the [Foreign Government Agency] is a government agency of [Foreign Government]. It therefore constitutes a “foreign principal” for purposes of the Act.

Absent an applicable exemption, the registration requirements of the Act extend, pursuant to Section 611(c), to

(1) any 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 and who directly or through any other person . . .

(ii) acts within the United States as a public relations counsel, publicity agent, [or] information-service employee . . . for or in the interests of such foreign principal[.]⁴

In performing the services listed in the [Foreign Government Agency Agreement], [U.S. Company] would be acting at the order or request of [Foreign Government Agency] as the foreign principal. This analysis would not change if the [Foreign Government Agency Agreement] were not with the [Foreign Government Agency] directly but rather with the [Foreign Government Agency's office in U.S. Location]. In the latter case, [U.S. Company] would be acting at the order or request “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,”⁵ *i.e.*, the

³ 22 U.S.C. § 611(b)(1).

⁴ 22 U.S.C. § 611(c)(1)(ii).

⁵ 22 U.S.C. § 611(c)(1)(ii).

[Foreign Government Agency's office in U.S. Location] at the direction of its parent, the [Foreign Government Agency] in [Foreign Country].

The Act defines an “information-service employee” to include, in relevant part, “any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the . . . industrial, employment, economic, . . . or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country[.]”⁶ The Act defines a “publicity agent” to include, in relevant part, “any person who engages directly or indirectly in the publication or dissemination of . . . visual, graphic, written, or pictorial information or matter of any kind[.]”⁷

We believe that by providing services to the [Foreign Government Agency] to create a virtual entity presence for [Foreign Government Agency] and displaying that presence on [U.S. Company]'s platform, [U.S. Company] would constitute an information-service employee and a publicity agent under the Act, and that the registration requirements of FARA would therefore attach to the services that [U.S. Company] provides to the [Foreign Government Agency]. Depending on the extent to which, in working with the [Foreign Government Agency] to create its virtual presence, [U.S. Company] “inform[s]” or “advise[s]” the [Foreign Government Agency] “in any public relations matter pertaining to . . . [its] public interests, policies, or relations,” [U.S. Company] may also constitute a “public relations counsel” under the Act.⁸

This conclusion is not affected by fact that [U.S. Company]'s platform is only open to subscribers and not to the Internet-viewing public at large. The above-quoted language only requires that an information-service employee, publicity agent, or public relations counsel act “within the United States.”⁹ There is nothing in the January 19 Letter to indicate that [U.S. Company] would perform the [Foreign Government Agency Agreement] entirely outside the United States, and [U.S. Company]'s platform, including [Foreign Government Agency]'s forthcoming virtual presence on it, is clearly viewable in the United States.

The January 19 Letter expresses your belief that a commercial exemption applies to the activities contemplated by the [Foreign Government Agency Agreement] and argues that “the activities do not directly promote the public or political interest of [Foreign Government Agency]. We disagree.

Section 613(d) of FARA provides, in relevant part, that an agent of a foreign principal may be exempt from FARA's registration requirements if it engages “*only* (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or, (2) in other activities not serving predominantly a foreign interest” (emphasis added).¹⁰ Section 5.304(a) of the FARA Regulations further clarifies this language: “As used in section [613(d)], the term *trade or commerce* shall include the exchange, transfer, purchase, or sale of commodities,

⁶ 22 U.S.C. § 611(i).

⁷ 22 U.S.C. § 611(h).

⁸ See 22 U.S.C. § 611(g).

⁹ 22 U.S.C. § 611(c)(1)(ii).

¹⁰ 22 U.S.C. § 613(d).

services, or property of any kind” (emphasis in the original).¹¹

The January 19 Letter describes the [Foreign Government Agency] as [Redacted], whose purpose is to [Redacted]. This seems to be the quintessentially “public” mission of a [Redacted] agency operated by [Foreign Government]. While the [Foreign Government Agency] may be seeking to promote “the bona fide trade or commerce” of [Redacted] private companies, the [Foreign Government Agency] does not itself appear to be engaging in trade or commerce—*i.e.*, “the exchange, transfer, purchase, or sale of commodities, services, or property of any kind.” The exemption stated in Section 613(d)(1) of FARA therefore does not apply to the activities contemplated by the [Foreign Government Agency Agreement].

By similar reasoning, the exemption in Section 613(d)(2) also does not apply because the [Foreign Government Agency]’s mission [Redacted] does in fact “serv[e] predominantly a foreign interest,”¹² *i.e.*, the general public interest of [Foreign Government] in [Redacted].

We are therefore of the view that [U.S. Company] is subject to the registration requirements of the Act for the activities contemplated by the [Foreign Government Agency Agreement], and that no exemptions apply that would relieve [U.S. Company] of its obligation to register if it were to engage in these activities.

Please also keep in mind that “each partner, officer, director, associate, employee, and agent of a registrant [*i.e.*, of [U.S. Company]] is required to file a registration statement under the Act. . . . [T]his obligation may be satisfied by the filing of a short form registration statement.”¹³ A short form registration statement need not be filed if “[a] partner, officer, director, associate, employee, or agent of a registrant . . . does not engage directly in registrable activity in furtherance of the interests of the foreign principal [*i.e.*, of the [Foreign Government Agency].]”¹⁴

As [officer of U.S. Company] will be [Redacted] responsible for the management and administration of the activity associated with [Foreign Government Agency Agreement], [officer of U.S. Company] is clearly subject to the individual registration requirements described above and set forth in Section 5.202 of the FARA Regulations. We take no view as to the individual registration requirements of individuals to whom [officer of U.S. Company] may assign work, except to say that the requirements of the Act and the FARA Regulations, including but not limited to Section 5.202 of the FARA Regulations, must be complied with at all times.

[Redacted]

Please also keep in mind the requirements of Section 5.300 of the FARA Regulations: “The burden of establishing the availability of an exemption from registration under the Act shall rest upon the person for whose benefit the exemption is claimed.”¹⁵ We believe that the same burden

¹¹ 28 C.F.R. § 5.304(a).

¹² 22 U.S.C. § 613(d)(2).

¹³ 28 C.F.R. § 5.202(a).

¹⁴ *Id.* at (b).

¹⁵ 28 C.F.R. § 5.300.

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would be borne by a person who claims to be excepted from the individual registration requirements of Section 5.202 of the FARA Regulations.

The present advisory opinion is expressly limited to the facts, conditions, and conclusions stated herein, and the requirements of the Act and its regulations. If there are any changes in the facts and circumstances you related to us, you should contact us immediately.

The January 19 Letter also requests advisory opinions with respect to potential agreements with [a different Foreign Government Agency] and separately with two different private companies in [Foreign Country]. [U.S. Company]'s conversations with these entities appear, however, to be very preliminary and too hypothetical to be the basis for an advisory opinion.¹⁶ Similarly, we are unable to opine on the possibility of [Redacted] services outside the context of an actual transaction. You may contact the FARA Unit at a later date to request separate advisory opinions if and when such activities become real. The present advisory opinion applies only to the activities contemplated by the [Foreign Government Agency Agreement].

We will treat your submission in accordance with 28 C.F.R. § 5.2(m). Please contact this office by e-mail to FARA.Public@usdoj.gov or by telephone at (202) 233-0776, if you have any questions.

Sincerely,

/s/ Jennifer K. Gellie

Jennifer Kennedy Gellie
Chief, FARA Unit

¹⁶ See 28 C.F.R. § 5.2(b).