U.S. Department of Justice

National Security Division

Counterintelligence and Export Control Section *Washington, DC 20530*

September 18, 2019

Via FedEx and E-mail

[addressee redacted]

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

Dear [name redacted]:

This is in reference to your letter of April 3, 2019 ("April 3 Letter"), which led to a request for an advisory opinion, pursuant to 28 C.F.R. § 5.2, regarding the possible obligation of your client, [US firm], to register pursuant to the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.* ("FARA" or the "Act"). That request was followed by an exchange of emails on May 24, 2019, and June 5, 2019, a telephone conversation on June 12, 2019, and a letter dated July 15, 2019. Based on our review of your request and communications, we have determined that [US firm] is obligated to register under FARA because it proposes to represent the interests of a foreign principal before an agency or official of the United States Government, *see* Section 611(c)(1)(iv) of the Act, and does not qualify for an exemption under Section 613(d).

In the April 3 Letter, you stated that [US firm] is a strategic advisory firm that is considering an engagement with [foreign corporation], a commercial investment company headquartered in [foreign country] that has a diversified global portfolio, to include commercial investments in U.S. companies. [Foreign corporation] was incorporated to manage assets held by the [foreign government], which may use [foreign corporation]'s funds and spend up to 50% of [foreign corporation]'s expected long term returns (net of inflation). You disclosed that [foreign corporation] does not have private shareholders. It is owned, but not directed, by [foreign finance minister]. You further disclosed that [foreign corporation] currently has [number] members on its Board, none of whom are current officials of the [foreign government]. Board members may be appointed either by the [foreign government finance minister] or the Board, and the President of [foreign country] must concur in any appointments to the Board or of the CEO of [foreign corporation]. The President of [foreign country] must also approve certain transactions that would draw from [foreign corporation]'s reserves.

You stated that the proposed engagement would involve [US firm] advising [foreign corporation] on its investment strategies. Such advice may involve contacting U.S. Government

officials to gather information about the position of the U.S. Government on potential cross-border investments or transactions, specifically, how such transactions would be viewed from the perspective of U.S. national security as well as the Committee for Foreign Investment in the United States ("CFIUS"). The proposed statement of work provides that:

> [US firm] will from time to time contact U.S. Government officials on behalf of [foreign corporation] for the sole purpose of gathering information and gaining understanding of the position of the U.S. Government regarding various types of potential cross-border transactions and how such transactions would be viewed from a national security and CFIUS standpoint. In making these contacts, which may include in-person meetings, [US firm] will not: (1) advocate on behalf of any policy position; (2) advocate in favor of or against any particular transaction; or (3) provide information about [foreign corporation] (other than identifying [foreign corporation] as a client), answer questions about [foreign corporation], or advocate in any way on behalf of [foreign corporation].[1]

Generally speaking, save certain exemptions, a party is an "agent of a foreign principal" that must register under FARA if it acts "in any . . . 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," and within the United States, in pertinent part:

> (i) engages in political activities for or in the interests of such foreign principal;
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> (ii) acts as public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; …
>
> (iv) represents the interests of such foreign principal before any agency or official of the Government of the United States.

See 22 U.S.C. § 611(c)(1).

[Foreign corporation] is a foreign investment company and thus a "foreign principal" as defined by the Act, 22 U.S.C. § 611(b)(3). The [foreign government] is also a foreign principal pursuant to 22 U.S.C. § 611(b)(1). If [US firm] enters into the proposed contractual agreement with [foreign corporation], it would be acting "at the order, request, or under the direction or control, of a foreign principal," 22 U.S.C. § 611(c)(1).

After reviewing the proposed engagement, we have determined that [US firm] would be representing the interests of [foreign corporation] before an agency or official of the U.S.

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[1] Representations concerning the scope and nature of [US firm]'s activities on behalf of [foreign corporation] were also contained other communications with our office.

Government, and thus, an agency relationship under FARA exists pursuant to 22 U.S.C. § 611(c)(1)(iv). Although the proposed statement of work disclaims any effort by [US firm] to advocate for or against any policy or transaction, [2] [US firm] will be representing the interests of its client, [foreign corporation] (and by extension the [foreign government]) in meetings or contacts with U.S. Government officials. Their presence on behalf of [foreign corporation] appears intended to send a message about [foreign corporation], presumably for a positive purpose. In any event, the requirement of Section 611(c)(1)(iv) is not cabined by the intended effects of such meetings or contacts.

We next considered, as you requested, whether [foreign corporation]'s activities would be exempt from registration pursuant to Section 613(d). You assert that the exemptions under Section 613(d) should apply because [foreign corporation] is engaging only in private and nonpolitical activities in furtherance of bona fide trade or commerce. *See* 22 U.S.C. § 613(d)(1), (2). We do not agree with your assessment.

As described in FARA's implementing regulations, a foreign agent's activities on behalf of a foreign principal "in furtherance of the *bona fide* trade or commerce of such foreign principal shall be considered 'private,' even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interests of the foreign government." 28 C.F.R. §5.304(b) (emphasis added). The nature of [US firm]' proposed activities on behalf of [foreign corporation] are not "private" because they directly promote the public interests of the [foreign government]. The interests of [foreign corporation] are inextricably connected to the public interests of the [foreign government]. As you have disclosed, [foreign corporation] was incorporated to manage the [foreign government]'s assets. Stated differently, its core function is to generate funds for the [foreign government]. That fact distinguishes [foreign corporation] from other state-owned enterprises, which often act with a commercial purpose separate from a government's interests. [Foreign corporation] is a type of sovereign wealth fund for the [foreign government], not a commercial business that happens to be state-owned.

Moreover, [US firm]'s proposed representation of [foreign corporation] before U.S. Government officials would directly promote the interests of the [foreign government]. [US firm]'s engagement with those officials would directly aid [foreign corporation]'s decision-making and improve its standing in the eyes of those officials. Such promotion of and benefit to [foreign corporation], and by extension the [foreign government], is evident by the very engagement of [US firm] to conduct such outreach. If [US firm] were merely a conduit for questions and nothing more, [foreign corporation] could obtain the desired information by other means. Accordingly, we have determined that [US firm] cannot avail itself of the exemption under Section 613(d), and thus, would be required to register under FARA.

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[2] Having determined that [US firm] would be required to register pursuant to Section 611(c)(1)(iv), we need not address whether the proposed activities would be considered "political activities," nor whether [US firm] would be acting as a "political consultant."

If [US firm] intends to enter into such an engagement with [foreign corporation] as discussed herein, please effectuate the registration of [US firm] within ten (10) days of such agreement or prior to any activity. If you have any questions regarding this matter, please contact [name redacted] by telephone at (202) 233-0776.

Sincerely,

Brandon L. Van Grack
Chief, FARA Unit