

October 13, 2022

# DOJ FARA Loss in Stephen Wynn Action May Signal More Aggressive Enforcement to Come, Not Less

On October 12, 2022, the U.S. District Court for the District of Columbia granted a motion by casino magnate Stephen A. Wynn to dismiss a civil suit filed against him by the U.S. Department of Justice under the Foreign Agents Registration Act (FARA).<sup>1</sup> The DOJ's suit sought an injunction requiring Wynn to register as a foreign agent for his efforts in 2017 to lobby members of the Trump Administration, including then-President Trump himself, to deny or revoke the visa of a prominent Chinese dissident located in the United States. The DOJ's lawsuit was the first affirmative civil suit under FARA in over 30 years. Although the ruling by District Judge James E. Boasberg acknowledged that the DOJ's efforts were in line with the policy goal underlying FARA of ensuring public disclosure of foreign-sponsored lobbying activities, Judge Boasberg concluded that binding D.C. Circuit precedent compelled the Court to dismiss the suit because any agency relationship between Wynn and the People's Republic of China (PRC) had been terminated before the DOJ's suit seeking an injunction was filed.

## Practice Points

- The targeting of lobbying on behalf of China by the DOJ is further evidence of the Biden Administration's intention to use all of the legal tools at its disposal in a multi-faceted strategy to counter the perceived threat posed by China. The Biden-Harris National Security Strategy, announced on October 12, 2022, recognizes China as "the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it."<sup>2</sup> Even before that most recent announcement, the DOJ had adopted a new strategy for "Countering Nation-State Threats," that called for a "comprehensive approach that draws on the full extent of [the government's] tools and authorities to address the alarming rise in illegal activity from hostile nations," including, in particular China.<sup>3</sup> The Biden Administration's recent efforts to counter China also include the imposition of controls on semiconductor exports to China by the U.S. Commerce Department.<sup>4</sup>
- The DOJ is taking an aggressive approach to enforcement under FARA. This may lead the Department to bring civil and criminal actions under FARA that rely on novel, or untested, legal theories.

<sup>1</sup> Memorandum Opinion, *United States v. Wynn*, No. 22-1372 (JEB), (D.D.C. Oct. 12, 2022), available [here](#).

<sup>2</sup> The White House, "National Security Strategy (October 2022)," (Oct. 12, 2022), available [here](#).

<sup>3</sup> Dep't of Justice, "Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats," (Feb. 23, 2022), available [here](#).

<sup>4</sup> Dep't of Commerce: Bureau of Industry and Security, Press Release, *Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC)*, (Oct. 7, 2022), available [here](#).

## DOJ Suit and Dismissal by the D.D.C:

According to the DOJ's lawsuit, over the course of multiple meetings and conversations in 2017, Mr. Wynn conveyed to the Trump Administration that the Chinese government maintained an interest in the repatriation of Guo Wengui, a noted critic of the Chinese Communist Party who had sought asylum in the United States after fleeing China in 2014. The DOJ alleged that Mr. Wynn asked U.S. government officials to deny or revoke Guo Wengui's visa and that Mr. Wynn received favorable treatment of his casino properties in Macau from the PRC government in exchange for these lobbying efforts. Before filing the lawsuit, the Department had repeatedly informed Mr. Wynn of his obligation under Section 612(a) of FARA to register as a foreign agent. Wynn moved to dismiss the suit on the grounds that, even if he had been required to register under FARA in 2017 (a requirement he disputed), FARA did not allow the government to force him to register retroactively, after any agency relationship with the PRC government ended in 2017.

Judge Boasberg held that the resolution of Mr. Wynn's motion was governed by the D.C. Circuit's decision in *United States v. McGoff*,<sup>5</sup> which concluded (in the context of a criminal action under FARA) that the obligation to register under Section 612 of FARA expires when an alleged foreign agent ceases his agency relationship. Applying the holding in *McGoff*, Judge Boasberg concluded that any responsibility Mr. Wynn had under FARA to register as a foreign agent had ended with the conclusion of his lobbying activities in 2017. While the Court explicitly stated that it disagreed with *McGoff's* interpretation of Section 612, it concluded that it was bound by the decision, even in the context of a civil action, and dismissed the lawsuit.

The DOJ indicated that it is "considering options in the litigation and more generally."<sup>6</sup> However, because the District Court's decision is grounded in existing D.C. Circuit precedent, a reversal in favor of DOJ may ultimately require *en banc* review.

## Key Implications of the D.D.C. Decision:

- **Impacts on DOJ tactics:** By clarifying that a civil injunctive action under FARA to compel registration must be commenced during the period in which the requestee is acting as an agent of a foreign nation, Judge Boasberg's opinion creates new challenges for the DOJ in enforcing FARA. If the decision holds, it may lead DOJ to seek injunctive relief more expeditiously, and it may even cause DOJ to consider pursuing criminal prosecutions in a greater range of situations given that seeking retroactive registration is no longer available as a remedy.
- **FARA may have been narrowed as a tool to expose and limit foreign influence over U.S. policy:** By restricting the situations in which DOJ can compel registration, Judge Boasberg's opinion places new limits on the U.S. government's ability to enforce FARA. If the ruling survives a possible appeal, the challenges posed by the decision may increase the likelihood of congressional action in favor of FARA reform.
- **DOJ continues its aggressive stance with respect to China:** This case is but one example of the Biden Administration's willingness to deploy a variety of legal tools to confront and disrupt perceived efforts by the government of the People's Republic of China to expand and exercise influence over domestic affairs in the United States. Although the DOJ was not successful in this civil suit, it is likely to continue pursuing FARA actions as part of a multi-pronged strategy to address the threat perceived to be posed by China, as well as similar perceived threats from other countries.

We will continue to monitor developments in this space and provide further updates as appropriate.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

---

<sup>5</sup> 831 F.2d 1071 (D.C. Cir. 1987).

<sup>6</sup> Spenser S. Hsu, The Washington Post, *Judge Rejects DOJ Bid to Compel Steve Wynn to Register as China Agent*, (Oct. 12, 2022), available [here](#).

**H. Christopher Boehning**  
+1-212-373-3061  
[cboehning@paulweiss.com](mailto:cboehning@paulweiss.com)

**John P. Carlin**  
+1-202-223-7372  
[jcarlin@paulweiss.com](mailto:jcarlin@paulweiss.com)

**Roberto J. Gonzalez**  
+1-202-223-7316  
[rgonzalez@paulweiss.com](mailto:rgonzalez@paulweiss.com)

**Loretta E. Lynch**  
+1-212-373-3000

**David K. Kessler**  
+1-212-373-3614  
[dkessler@paulweiss.com](mailto:dkessler@paulweiss.com)

*Associates Neil Chitrao and Cole A. Rabinowitz contributed to this Client Memorandum.*