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Have We Reached A FARA "Tipping Point"?

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Election and Political Law

This month, the Foreign Agents Registration Act (FARA), an obscure, almost 80-year old, statute has rocketed to national headlines. FARA, a sweeping federal criminal statute, requires certain individuals and companies acting on behalf of foreign principals to register with the Department of Justice and file regular detailed reports of their activities. As we face a potential "tipping point" in FARA interest and enforcement, this advisory provides a basic compliance primer for those working for or contracting with foreign companies, governments, political parties, and individuals.

The Recent Surge In Interest In FARA

The *New York Times*, earlier this month, reported that "secret ledgers" in Ukraine show $12.7 million in cash payments designated for former Donald Trump campaign chairman Paul Manafort from Ukraine's pro-Russian political party. Days later, the Associated Press reported that Manafort helped the pro-Russian party "secretly route at least $2.2 million in payments to two prominent Washington lobbying firms." These stories sparked a flurry of questions about whether Manafort and others unlawfully failed to register with the Department of Justice as foreign agents. This coverage, in turn, has sent "shockwaves" in Washington, with *Politico* today noting that "reps from multiple firms who lobby for foreign entities think this might be a tipping point, and the feds might take a broader look at other firms and clients."

To some extent, these stories are not new. But we are seeing them with greater frequency. Over the last several years, we have noted – and been tracking for many clients – the growing enforcement of and interest in FARA. In 2014, for example, the *New York Times* ran a lengthy investigative report on foreign government donations to U.S. think tanks and the FARA concerns arising out of those donations. In 2011, a major Boston consulting firm registered and filed back reports under FARA after questions arose regarding its dealings with foreign governments. The Manafort story falls squarely within this pattern of increased enforcement interest and public attention on those representing foreign entities.

FARA In A Nutshell

FARA is a complicated and arcane statute – its application can swing quickly between very different outcomes, depending on the specific factual situation involved. Applying the law requires examining the relationship between the U.S. entity and the foreign entity, the specific activities undertaken, and even the physical location of the activities, among other considerations.

FARA requires "agents of foreign principals" to register and file detailed reports with the U.S. Department of Justice or face criminal penalties. These reports must include, among other things, disclosures itemizing meetings with U.S. officials and income and expenses associated with certain activities in which the registrant engaged, the underlying agreements with the foreign principal, and copies of reports and research materials disseminated by the foreign agent.. Importantly, both individuals and their employers can become foreign agents, subject to these registration and reporting requirements.

It is a common misconception that FARA applies only to work on behalf of foreign governments and political parties. While foreign governments and political parties are "foreign principals," the term also includes any non-U.S. individual or "partnership, association, corporation," or "organization." It is therefore essential that foreign companies with operations or interests in the United States pay special attention to FARA.

Broad Triggers

To become a "foreign agent," an individual or entity must engage — **within the United States —** in certain activities as a representative of, or at the order, request, or under the control of, the foreign principal. FARA-triggering activities include:

1. "political activities," a defined term under the statute that encompasses any activity that is intended to influence the U.S. government *or any section* of the U.S. public on a matter of foreign or domestic policy;
2. acting as a "public-relations counsel," "publicity agent," "information-service employee," or "political consultant;"
3. collecting or dispensing money; or
4. representing the interests of the foreign principal before an agency or official of the United States government, generally by making direct contacts with government officials.

These triggers are extremely broad. Unlike the better known Lobbying Disclosure Act ("LDA"), which has significant *de minimis* thresholds including a 20 percent time threshold, FARA can be triggered even by the slightest activity that meets the statutory tests. A single meeting, for example, with U.S. officials by an executive of a company headquartered outside the United States might satisfy the "representation" trigger. And the mere act of hosting a conference, writing a policy report, or reaching out to opinion leaders on behalf of a foreign client could satisfy the "political activities" trigger.

As a result of these broad registration requirements, it is very easy to trigger the statute unintentionally unless FARA considerations are taken into account when negotiating and drafting the underlying contract documents. Even then, the parties must remain vigilant throughout the relationship to avoid crossing the line and triggering the statute, notwithstanding any legal language in a carefully drafted document.

Vague Exemptions

Even when the registration triggers are satisfied, there are several exemptions from the registration and reporting requirements. Unfortunately, many of these exemptions are poorly defined and the Department of Justice's FARA Unit has issued few regulations or advisory guidance interpreting them.

The Commercial Exemption. FARA's "commercial exemption" exempts "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of the foreign principal. Implementing regulations indicate that trade and commerce includes the purchase and sale of commodities, services, or property. In 2003, the Department extended this exemption to cover political activities (seeking to influence the U.S. government or U.S. public on a matter of policy) undertaken for a foreign corporation "in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation." There remains, however, considerable uncertainty regarding the reach and boundaries of this commercial exemption. And it does not apply when the activities are directed or controlled by a foreign government or political party.

The LDA Exemption. When Congress strengthened lobbying disclosure requirements in the mid-1990s, it simultaneously added an exemption to FARA that permits an agent of a foreign private sector principal to satisfy any FARA obligation by registering under the LDA if the agent has engaged in lobbying activities. This exemption is not available to an agent of a foreign government or foreign political party. Many entities that would otherwise be foreign agents choose to satisfy FARA, where applicable, by registering and reporting under the LDA, which is generally considered less burdensome.

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Although FARA is relatively esoteric, Covington's experience in this area spans more than 50 years. (One of the leading FARA cases is *Attorney General v. Covington & Burling*, where we established that the attorney-client privilege applies to FARA.) We also defended a consulting firm targeted in the Department of Justice's largest FARA investigation of recent memory and have played key roles in some of the most recent high-profile FARA matters.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice:

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