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Grassley Legislation Would (Re)Impose FARA Obligations on Private Sector Entities

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Election and Political Law

With the Foreign Agents Registration Act ("FARA") in the news and public awareness of this formerly obscure statute at an all-time high, Senator Charles Grassley (R-Iowa), the influential chairman of the Senate Judiciary Committee, introduced legislation last week to revise the statute significantly, including reversing a decision Congress made in 1995 to remove most private sector reporting from FARA and place it instead under the companion Lobbying Disclosure Act ("LDA").[1] In addition, the legislation would increase the Department of Justice's investigative authority considerably by authorizing the government to pursue, for the first time, civil investigatory demands in FARA investigations, creating an obligation for individuals and entities to provide documents, testimony, or written answers to questions under oath.

The proposed change to private sector reporting has significant implications for anyone engaged in the U.S. political system on behalf of entities based abroad, including U.S. subsidiaries of foreign headquartered businesses, U.S. companies with foreign subsidiaries or affiliates operating outside the United States, foreign individuals who travel to the United States to engage the U.S. political system on matters affecting their businesses, and U.S.-based lobbying, law, public relations, and consulting firms that provide services to individuals and companies abroad. This alert provides a summary of FARA's registration and reporting requirements, as they relate to private sector entities, and reviews the Grassley legislation's proposed amendments to the statute.

Private Sector Lobbying Under FARA and the LDA

FARA is a complex and broadly worded criminal statute that requires any "agent of a foreign principal" to register with the Justice Department and file detailed reports disclosing the agent's activities every six months. The registration and reports are publicly available. The statute was originally adopted in response to concerns about Nazi propaganda in the United States in the

[1] Sen. Grassley introduced the legislation, S. 2039, Disclosing Foreign Influence Act, on October 31, 2017. The same day, Rep. Mike Johnson (R-La.) introduced companion legislation in the House, H.R. 4170. Rep. Johnson is a member of the House Judiciary Committee. Notably, the House bill is cosponsored by Rep. Bob Goodlatte (R-Va.), the chairman of the House Judiciary Committee.

years preceding World War II. As a result, Congress designed the statute to require the disclosure of a wide range of political and propaganda activities that were targeted at the U.S. government or U.S. public. The language of FARA is notoriously vague.

Over the years, Congress has revised the statute and redirected its focus. In 1966, Congress amended the statute to focus on political activities such as lobbying on economic interests, reflecting Congress's concern at the time about foreign lobbying related to sugar quotas and other issues. The most significant change for private sector entities occurred in 1995. That year, Congress passed the first comprehensive legislation related to lobbying disclosures, the Lobbying Disclosure Act. Given this new comprehensive disclosure statue, Congress made a conscious decision to move private sector lobbying from FARA to the LDA.

The report accompanying the LDA legislation stated that Congress had made a "determination that the FARA standards are appropriate for lobbying on behalf of foreign governments and political parties, but the LDA disclosure standards should apply to other foreign lobbying."[2] Congress stated that its "intention [was] to reaffirm the bright line distinction between governmental and non-governmental representations."[3]

To accomplish this change, Congress enacted an exemption to FARA that applies to any agent that has engaged in lobbying activity and registered under the LDA, provided that the foreign principal is neither a foreign government nor foreign political party. "Agents of private commercial foreign principals will be exempt from FARA requirements so long as they register under the LDA," Congress said.[4]

Notably, Congress left the underlying private sector FARA obligation in place; Congress merely provided that an LDA registration created an exemption to an otherwise existing FARA obligation.[5] Over the years, this interplay between the statutes has created a number of strange consequences that are in tension with Congress's intent to create a "bright line distinction" that places private sector disclosures under the LDA rather than FARA. For example, unlike the LDA, FARA has no *de minimis* exception. When a corporate executive of a U.S. company spends a day meeting with lawmakers, the executive generally is not required to register under the LDA because the lobbying activity would not constitute a sufficient portion of the executive's work to require registration. Because FARA contains no *de minimis* exception, however, an executive of a foreign-based corporation who spends the same day on the Hill may trigger a FARA reporting obligation.[6] Under FARA's LDA exemption, the executive may be able to satisfy

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[2] S. Rep. No. 105-147, at 4 (1997).

[3] *Id.*

[4] *Id.* The House report contained identical language. H.R. Rep. No. 104-699, at 10 (1996).

[5] By keeping the underlying FARA obligation in place, Congress also made it possible for the Department of Justice to tailor the scope of the LDA exemption through regulations. For example, the Department adopted regulations that provide an exemption to the exemption. The regulations provide that the LDA exemption will not be "recognized" where a foreign government or foreign political party is the "principal beneficiary" of the activities, regardless of the actual client. *See* 28 C.F.R. § 5.307.

[6] This activity may or may not trigger FARA, depending on the application of still other exemptions to FARA. This example merely underscores that the application of FARA is highly

this FARA obligation with an LDA registration, but that leaves the executive of the foreign company in a vastly different position than the executive of the U.S. company—one is registered, the other is not.

Senator Grassley's Proposed Reforms

Senator Grassley's legislation would repeal the LDA exemption from FARA in its entirety. At the same time, the legislation would increase the frequency of FARA reporting for certain private sector entities, making the FARA obligations on those private sector entities even greater than the reporting obligations applicable to agents of foreign governments or foreign political parties.

Senator Grassley's proposed repeal of the LDA exemption would return all foreign related lobbying to disclosure under FARA.[7] This would have a sweeping effect for a number of private sector companies.

First, a U.S. subsidiary of a foreign headquartered business would no longer be able to register under the LDA for certain of its U.S. activities. To the extent that the U.S. political activities were directed by the company's foreign parent or financed by the parent, the U.S. subsidiary would become an agent of the foreign parent corporation. Likewise, even a U.S. company could have FARA obligations if it engaged in political activities related to a foreign subsidiary or affiliate. Even if the U.S. company directs the political activities, acting as a representative of the foreign affiliate on an issue "for or in the interest" of the foreign affiliate could give rise to a FARA obligation. Second, an employee of a foreign company who traveled to the United States to engage the U.S. political system on a matter affecting a foreign business may trigger FARA. Finally, any U.S.-based lobbying, law, public relations, or consulting firm that provided services to individuals and companies abroad could trigger FARA. The scope of activities covered by FARA are very broad and include, for example, providing public relations advice and political consulting services, in addition to political activities and lobbying, within the United States.

Senator Grassley's legislation would also increase the frequency of disclosure reports required under FARA in certain circumstances. Under current law, FARA disclosures are required every six months. For private sector entries, the Grassley legislation would increase the reporting requirement to every three months, consistent with the reporting requirements of the LDA, if the registrant is also registered under the LDA.[8] Although parity with the LDA may seem appealing,

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fact specific, and the statute needs to be considered carefully, by competent counsel, whenever foreign entities are engaged in political activities.

[7] When Congress created the LDA exemption to FARA, it simultaneously repealed a provision that generally exempted from FARA the commercial operations of a U.S. subsidiary of a foreign corporation. Sen. Grassley's legislation does not restore this provision. The legislation may, therefore, make FARA even more broadly applicable than it was before the 1995 amendments.

[8] Applying this increased reporting requirement only to an agent "who has registered under the Lobbying Disclosure Act" is somewhat perplexing. *See* S. 2039, Disclosing Foreign Influence Act, §2. Congress has specified that "representatives of foreign entities must register under either FARA or the Lobbying Disclosure Act, *but not under both statutes*." H.R. Rep. No. 104-339, at 15 (emphasis added). The reasons for this limitation in the legislation is not readily apparent.

the FARA reports are considerably more detailed than those required by the LDA. Reporting every three months under FARA would create new and significant administrative burdens for private sector companies.

The remaining provisions of the Grassley legislation are less problematic for private sector companies. First, the legislation would authorize the Department of Justice to issue civil investigatory demands for documents, testimony, or answers to questions under oath. This authority, which is provided for only five years, is subject to detailed procedural restrictions that consume the bulk of the Grassley bill. Second, the legislation would require the Attorney General to develop a comprehensive strategy to improve the enforcement and administration of FARA. This is consistent with a recommendation contained in a Department of Justice Inspector General report issued in September 2016. The strategy would be required to assess the investigation of alleged FARA violations, the exemptions under FARA, the fee structure associated with FARA filings, and the possible publication of FARA advisory opinions. The strategy, along with further Inspector General reviews, would be due to Congress after one year. Finally, the legislation would require the Government Accountability Office to review and report on FARA enforcement and administration within three years.

Covington's FARA experience spans more than fifty 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 have represented companies and individuals in the most significant and high-profile FARA matters in recent years. 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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