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The Foreign Agents Registration Act ("FARA"): A Guide for the Perplexed

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Election and Political Law, White Collar Defense and Investigations

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In 1938, Congress enacted the Foreign Agents Registration Act ("FARA"), requiring "foreign agents" to register with the Attorney General. As amended over the years, it applies broadly to anyone who acts on behalf of a "foreign principal" to, among other things, influence U.S. policy or public opinion. Until recently, it was a backwater of American law—and a very still backwater at that, with just seven prosecutions between 1966 and 2016.

That is changing now. Like the once obscure Foreign Corrupt Practices Act, which prosecutors revived from hibernation more than a decade ago, FARA is receiving its close-up. In the last three years, prosecutors have brought more FARA prosecutions than they had pursued in the preceding half century. In-house lawyers are scrambling to bone up on this famously vague criminal statute, at a time when the nation's tiny bar of experienced FARA lawyers can still hold its meetings in the back of a mini-van.

While recent cases related to Special Counsel Robert Mueller's investigation are the most salient examples, the renewed focus on foreign agents actually began a few years ago, and not all of the recent prosecutions are connected to the Mueller investigation. A significant uptick in audits of registered foreign agents by the FARA Unit (the Department of Justice office that administers FARA), followed by significant staffing changes in the FARA Unit, and then noticeably more aggressive interpretations of the statute in advisory opinions and informal advice from the FARA Unit, all signaled a sea change.

In September 2016, DOJ's Inspector General issued a report suggesting that the Department's enforcement of FARA was too lax, pointedly noting the rarity of prosecutions, and recounting FBI field agents' complaints that it was too hard to secure DOJ approval to file FARA charges. The IG's report recommended that DOJ's National Security Division adopt a comprehensive FARA enforcement strategy. It is likely that the IG's lengthy review encouraged line FARA attorneys at DOJ to toughen their posture, even before the IG's critical report was issued. The report has, in turn, created a feedback loop, emboldening government officials to be more aggressive in response to the IG's criticism. Recent events have further incentivized them to take a harder line.

Below we provide a detailed primer on FARA registration, highlighting the ways in which it is now relevant to a broad cast of characters, including multinational corporations. But first, here are some of the key points to keep in mind:

- FARA is written so broadly that, if read literally, it could potentially require registration even for some routine business activities of law firms, lobbying and public relations firms, consulting firms, nonprofit advocacy groups, charitable organizations, ethnic affinity organizations, regional trade promotion groups, think tanks, universities, media organizations, trade associations, U.S. subsidiaries of foreign companies, and other commercial enterprises;
- There does *not* need to be a foreign government client;
- There does *not* need to be a written contract;
- There does *not* need to be any payment of a fee;
- A mere "request" from a foreign person or entity (such as a foreign government official or, in some circumstances, even a foreign private sector individual or company) for help setting up meetings with U.S. government officials could trigger registration;
- A request from a foreign person or entity to provide advice regarding how best to influence U.S. policy or U.S. public opinion could trigger registration; and
- There are exceedingly few cases clarifying FARA's broadly worded provisions. And, while the DOJ FARA Unit commendably published a subset of its long-secret advisory opinions last year, these short opinions are light on legal analysis and difficult to apply to other situations. This leaves prosecutors ample room to bring novel test cases, and parties who are new to the statute ample room to misjudge its boundaries.

FARA in a Nutshell

FARA is a complicated, arcane, and loosely worded statute. Whether registration is triggered is highly fact dependent, turning on whether agency exists, the nature of the activities conducted by the agent, and whether any of FARA's amorphous "exemptions" apply.

The statute requires "agents of foreign principals" to register with the DOJ and file both detailed disclosure reports and copies of any "informational materials" that are distributed within the United States. Such materials must bear a stigmatizing disclaimer reflecting that they were prepared by a foreign agent. When FARA registration is required, both individuals acting as agents and their employer must register.

While foreign governments and political parties are well understood to be "foreign principals," the term also includes any *non*-U.S. individual, partnership, association, corporation, or "organization." A foreign parent company of a U.S. subsidiary would be a foreign principal, for example.

Broad Triggers

To become a "foreign agent," an individual or entity must engage—within the United States—in certain FARA-triggering activities as an agent of, or "in any other capacity at the order, request, or under the direction or control" of, a foreign principal. Although there is some law clarifying what would constitute acting under the "direction or control" of a foreign principal, the term "request" is very broad and seems to go well beyond traditional principles of agency law. The one court decision that briefly touches on a "request" that is sufficient to trigger FARA registration does little to offer a practical answer. DOJ's formal response to the 2016 Inspector General's report provided little additional guidance, although the Department took the position

that it looks for evidence of "tasking" by the foreign principal to the agent. A recent advisory opinion seemed to interpret the term "agent" of a foreign principal broadly enough to include working on behalf of a U.S. subsidiary of a foreign company, even when the foreign parent is not involved in the work.

Having a written contract or receiving a payment for services rendered, while not required for FARA registration, are strong evidence of agency, suggesting that the activities are undertaken for the foreign principal. But even without a contract or payment, there may be other indicia of agency, especially in light of the breadth of the term "request."

Assuming that an individual or entity is acting as an "agent" of a foreign principal, the obligation to register under FARA is triggered when the agent conducts, on behalf of the foreign principal, one or more of the following activities within the United States:

1. Engaging in "political activities," a term that encompasses any activity that is intended to, or even "believed" to, influence the U.S. government *or any section of the U.S. public* regarding: (1) formulating, adopting, or changing the foreign or domestic policies of the United States or (2) the "political or public interests, policies, or relations of a government of a foreign country or a foreign political party";
2. Acting as a "public-relations counsel," "publicity agent," "information-service employee," or "political consultant";
3. Collecting or dispensing money; and/or
4. Representing the interests of the foreign principal before an agency or official of the United States Government, generally by making direct contact with government officials.

These triggers for registration are, on their face, extremely broad. And some courts have interpreted them literally. This year, for example, a federal district court in Florida held that a company that agreed to broadcast a government-owned news agency's radio programs was required to register under FARA because it was acting as a "publicity agent." FARA practitioners nonetheless often assume that some of the triggers cannot mean what they say (*e.g.*, collecting or dispensing *any* funds of behalf of any foreign principal?). And DOJ itself—in privately issued advisory opinions, some of which are still unpublished—has often placed a gloss on the FARA registration triggers, reading into them narrowing language that does not appear in the statute. Because such interpretations by the Department are not published or exist merely as lore, the Department can, and recently has, rather abruptly altered its views.

Based on FARA's legislative history, DOJ has in the past sometimes read the definition of "political activities" into other triggers; for example concluding that one could not be acting as a "political consultant" for FARA purposes unless one was also engaging in political activities, as defined in the statute. Indeed, there is some legislative history to support this position, notwithstanding the statute's plain language. In a 1989 letter to Congress concerning Henry Kissinger's activities for foreign clients, DOJ advised Congress that Kissinger was not required to register because "the Department has consistently interpreted the term 'political consultant'…to mean any person who takes steps beyond merely advising the foreign principal, such as arranging meetings with U.S. Government officials on its behalf or accompanying the principal to such meetings." In recent interactions with the FARA Unit, however, staff have called into question the validity of such prior guidance, notwithstanding the legislative history. What's more, several recently published advisory opinions appear to interpret the "political activities" trigger and the "political consultant" trigger somewhat interchangeably. In one opinion,

the FARA Unit emphasized that it viewed the requesting individual "as a political consult[ant] under FARA because he is engaged in political activities that reached the United States."

FARA has no *de minimis* threshold. It can be triggered by even the slightest activity that meets any one of the statutory triggers. A single meeting, for example, with a U.S. official by an executive of a company headquartered outside the United States, or by its U.S. subsidiary on behalf of the foreign parent, might satisfy the "representation" trigger. And the mere act of hosting a conference, distributing a policy report, requesting a meeting, or reaching out to opinion leaders on behalf of a foreign principal could satisfy the "political activities" trigger.

Practitioners have placed great weight on the statutory language specifying that FARA only applies to activities "within the United States." Here too the FARA Unit recently has seemed inclined to take an extremely broad view of what constitutes activity "within the United States," suggesting that even a very limited nexus to the United States is enough to trigger the statute's jurisdiction over related activities outside the United States. Indeed, in one recent advisory opinion, the FARA Unit stated that it did "not concur" with the assertion registration for FARA-triggering activities would not be required if those engaging in the activities were "physically outside the United States at the time of performance or delivery of the service."

Vague Exemptions

By this point, one might wonder why there are not tens of thousands of FARA registrants (currently there are only about four hundred). Apart from non-compliance, which is common, the main explanation is that even when the registration triggers are satisfied, there are several statutory and regulatory "exemptions" that can be relied upon to exempt a person from registration. Unfortunately, the most widely used exemptions are not well defined, DOJ's publicly available regulations and advisory opinions interpreting them are sparse, and there is essentially zero case law regarding the scope of the exemptions. The most commonly invoked exemptions are summarized below.

The Commercial Exemption

Probably the most frequently used exemption to FARA's registration requirement is the so-called "commercial exemption," which exempts "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of a foreign principal. Implementing regulations indicate that trade and commerce includes the purchase and sale of commodities, services, or property. In 2003 regulations, the Department added a second, regulatory commercial exemption for "political activities" 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 outer boundaries of the commercial exemption.

Critically, it does not apply when the activities are directed by, or "directly promote the public or political interests of," a foreign government or political party. There is little published guidance regarding what would constitute "directly promot[ing]" the public or political interests of a foreign government. Over the last couple of years, the FARA Unit has appeared to take a more expansive view of this language, treating contacts in the United States about matters that are also important to a foreign government as potentially falling outside the commercial exemption, even where a foreign corporation has a legitimate commercial interest in the same issue. For example, in a recent advisory opinion, the FARA Unit determined that activities aimed at improving a foreign state bank's suitability for building commercial relationships with U.S. financial institutions directly promotes the interests of a foreign country. On the other hand, in

another opinion, the FARA Unit seemed to interpret the commercial exemption's "directly promote" language narrowly, placing an emphasis on whether there was direct involvement by the foreign government. It therefore is important to analyze the extent to which a foreign government's public interests would be promoted by political activities in the United States even if the impetus for the activities is the commercial objectives of a private sector foreign principal.

DOJ regulations also expressly provide that the commercial exemption is available even to state-owned enterprises that are wholly owned by a foreign government. This is significant given the huge number of state-owned enterprises around the world, many of which have business operations in the United States pursuing commercial objectives that are often separate and distinct from the foreign policy objectives of their governmental owners. In recent years, the FARA Unit has seemed uncomfortable with the fact that its regulations expressly allow state-owned enterprises to avail themselves of the commercial exemption, but the regulation is clear and remains in force, in recognition of the fact that many state-owned enterprises operate with significant commercial independence.

The LDA Exemption

When Congress strengthened federal lobbying disclosure requirements in the mid-1990s through the Lobbying Disclosure Act ("LDA"), it simultaneously added a new exemption to FARA that permits an agent of a foreign private sector principal to satisfy any FARA obligation by registering under the LDA, so long as the agent has engaged in at least some lobbying activities. 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 far less burdensome.

The LDA exemption is *not* available to an agent of a foreign government or political party, however. Moreover, even if the agent is engaged by a private entity, DOJ regulations provide that the exemption is not available if "the principal beneficiary" of the work is a foreign government or political party. There is no definition of "principal beneficiary," and in the recent past the FARA Unit has taken an increasingly broad view of what would make a foreign government the principal beneficiary of actions undertaken by an agent on behalf of a private sector foreign principal. A footnote in a recent advisory opinion, for example, takes the position that "there are situations in which a foreign government or political party may not be *the* principal beneficiary, but *a* principal beneficiary of lobbying activities in which the LDA exemption would not apply." This could have significant implications for U.S subsidiaries of foreign parent corporations. For example, a U.S. subsidiary registered under the LDA may think it has addressed any FARA exposure associated with its foreign parent, but if the subsidiary acts on behalf of its parent with respect to an issue that is of significant interest to a foreign government, there is a risk that the FARA Unit could determine that the LDA exemption does not apply.

As noted, an agent who seeks to take advantage of the LDA exemption also has to engage in at least some "lobbying activities" on behalf of its foreign principal. This means, for example, that if the agent is engaged solely to provide public relations advice, political consulting services, or fundraising within the United States, it could not avail itself of the LDA exemption and would have to register under FARA.

Consistent with the trend of strengthening FARA, several Members of Congress have introduced legislation to eliminate the LDA exemption from FARA or to conduct an audit

addressing how the exemption is used. Indeed, in the IG report, FARA Unit staff expressly urged that Congress eliminate the LDA exemption to "once again require those who lobby for foreign commercial interests to register under FARA."

The Lawyer's Exemption

FARA also includes a narrow exemption for lawyers engaged in the practice of law on behalf of a foreign client. But in recent years the "lawyer's exemption" has been narrowed considerably. It does not apply to a lawyer's attempt to influence agency personnel with respect to U.S. government policy matters, or the public interests of a foreign government, except in the course of judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; and agency proceedings required by statute or regulation to be conducted on the record. For example, the FARA Unit concluded in a recent advisory opinion that a U.S. law firm had an obligation to register under FARA for representing a foreign company in the acquisition of a U.S. company, reasoning that the representation involved "educating U.S. policymakers" about the foreign company's proposed acquisition of a U.S. company. The intent behind this exemption appears to be to require registration by law firms when they act more as lobbyists, public relations advisors, or political consultants than as legal counselors. But this is a very fine line, requiring careful parsing of the language of the lawyer's exemption.

The Academic Exemption

Universities, think tanks, and other scholarly institutions often look to FARA's "academic exemption" to avoid registration. This exemption applies to persons "solely" engaged in *bona fide* religious, scholastic, academic, or scientific pursuits or the fine arts. DOJ regulations provide, however, that it does *not* apply if the person is engaged in "political activities." There is little available guidance concerning the scope of the academic exemption.

Interestingly, the 2016 IG report noted that the FARA Unit specifically identified think tanks, organizations operating on college or university campuses, and "non-governmental and grass roots organizations" as entities that often claim to be exempt from registration, for which DOJ lacks sufficient investigative tools. In addition to asserting that they are not acting as agents under foreign direction or control, some of these entities look to the academic exemption as a defense.

Practical Implications

Given FARA's breadth and ambiguity, and DOJ's recent shift to interpreting the exemptions very narrowly, lawyers and compliance personnel should be attuned to the following common traps:

- **Requests received by a U.S. company from a foreign business partner or a foreign affiliate to arrange meetings with U.S. officials.** Helping a foreign entity or individual engage directly with the U.S. government, such as by setting up a meeting, is perceived by the Department of Justice as core FARA activity. The statute can be triggered even without a contract or payment, and even if the foreign person is not a government official. Companies may think that they are simply doing a favor for a foreign business partner, when they in fact have waded deeply into FARA territory. To the extent the contact is unrelated to the company's own activities, the commercial exemption will not apply. And even if the company is already LDA registered, it is certainly not registered for the foreign business partner, so the LDA exemption also will not apply.

- **Private sector lobbying on an issue that is deeply connected to a foreign government's interests.** Global companies often face commercial issues that are intertwined with governmental issues. For example, companies often have legitimate business reasons to lobby for or against sanctions on particular countries, or to encourage the United States to adopt specific trade policies directed at particular countries. It may seem natural to coordinate that lobbying with the government of the affected state, but working too closely with a foreign government or its agents can create FARA risks. What if the foreign government "requests" that you target your activities in a particular way? Even if your company has a scrupulous LDA compliance program, the LDA exemption may not be available if the activities principally benefit the foreign government, despite your own parallel commercial interest.
- **Requests from a foreign embassy, or from other foreign government officials, to arrange meetings or to provide strategic advice regarding a policy matter before the U.S. government.** Depending on the particulars, including whether the advice is rendered within the United States, it is possible that advising on influencing U.S. policy or public opinion could trigger registration. Arranging meetings also likely would trigger registration.
- **Business development activities involving foreign clients.** It is not unusual for law firms, public relations firms, consulting firms, and government contractors that do business around the world to be asked by foreign clients for favors, such as making an introduction to officials or thought leaders in the United States, providing advice on a dispute with the U.S. government, or helping with media relations or other staff support for a client's visits in the United States. While these may seem like routine client relations activities meant to strengthen relationships, they could trigger FARA registration, depending on the circumstances.

Although most major corporations have elaborate compliance manuals and training efforts, FARA is often a blind spot that is absent from corporate compliance programs. In light of recent enforcement trends, most companies that have international business operations, or otherwise deal with foreign governments and firms, should include FARA in their compliance programs. Those companies that do have FARA policies often integrate them with their global anti-corruption and government affairs policies.

Covington has one of the nation's most experienced and long-standing FARA practices, which includes attorneys in our Election and Political Law and White Collar Defense practice groups. The firm litigated and won a rare civil case limiting the scope of DOJ's authority under FARA, in *Attorney General of the United States v. Covington & Burling*. The firm routinely advises U.S. and international clients on compliance with FARA, obtains advisory opinions from the FARA Unit, represents clients in FARA audits and internal investigations, and defends clients accused of violating FARA.

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