

PLI Current

The Journal of PLI Press

Vol. 2, No. 3, Summer 2018

The Foreign Agents Registration Act: A New Wave of Enforcement

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For decades, the Foreign Agents Registration Act (FARA) has been an obscure and often dormant specialty of a small handful of Washington D.C. political lawyers. Enacted in 1938 in response to concerns about Nazi propagandists operating in the United States, FARA requires “foreign agents” to register and file disclosure statements with the U.S. Department of Justice or face criminal penalties.¹ For the better part of a century, however, FARA was rarely enforced, with the Department of Justice bringing only a handful of prosecutions, typically in egregious cases involving another underlying policy concern such as foreign espionage. This has now changed. Over the past two years, the Department of Justice has become increasingly aggressive in its enforcement and interpretation of the statute. In this article, we address the recent changes in the Justice Department’s

enforcement posture, discuss the key provisions and ambiguities inherent within this broad and potent criminal statute, and highlight ongoing legislative initiatives to reform the statute.

The Shifting FARA Enforcement Landscape

The recent shift in the Justice Department's attention to and interpretation of FARA did not begin with the appointment of Special Counsel Robert Mueller in May 2017. Rather, the increased focus on FARA enforcement is owed largely to a highly critical "Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act," published in September 2016.² The report, issued by the Department of Justice's Inspector General, determined that the National Security Division's enforcement of FARA was too lenient, highlighting the infrequency of prosecutions and noting complaints by FBI agents regarding the difficulty to obtain Justice Department approval to file FARA charges.³ The report noted, for example, that between 1966 and 2015, the Justice Department "only brought seven criminal FARA cases, and it has not sought civil injunctive relief under FARA since 1991."⁴

This criticism has incentivized government FARA attorneys to take tougher stances in interpreting the statute and has led to more aggressive criminal enforcement. While recent cases related to the Special Counsel's investigation are notable examples, the Department of Justice has also initiated broad criminal inquiries into myriad other firms and individuals, including persons already registered under the statute. Since 2016, the FARA Unit (the component of the Department of Justice's National Security Division that administers FARA) increased its audits of FARA registrants, made significant staffing changes, began to adopt noticeably more aggressive interpretations of the statute in advisory opinions and informal advice, and initiated more criminal inquiries involving FARA. And in June 2018, the FARA Unit, for the first time, published dozens of long-secret advisory opinions explaining its interpretation of the statute, a decision that seems to acknowledge the reality that many more companies, consulting firms, and practitioners are now trying to understand this vague statute.⁵

What Is FARA?

FARA, at its core, is a disclosure statute. It requires that an "agent of a foreign principal" register with the Justice Department and file detailed activity reports

every six months.⁶ Additionally, registrants must file copies of so-called “informational materials” distributed within the United States within forty-eight hours of publication.⁷ These materials must bear a stigmatizing disclaimer indicating that the materials were distributed on behalf of a foreign principal.⁸

“Foreign Agents” and “Foreign Principals”

Determining whether registration is triggered under FARA is not easy. The statute is broadly written, and only a small body of interpretive guidance is available for practitioners to consult. Very few court cases interpret the statute, and many questions remain, even after the FARA Unit’s recent release of dozens of formerly unpublished advisory opinions. The absence of clear interpretative authority gives prosecutors great flexibility to test the limits of the statute and make examples of those who push the outer boundaries of FARA.

Under the statute, any “foreign agent” must register unless an exemption applies.⁹ A foreign agent is an individual or entity who engages—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.¹⁰ A foreign principal does not need to be a foreign government or a foreign political party, although both would clearly be covered under the statute.¹¹ In fact, a foreign principal includes any non-U.S. individual, partnership, association, corporation, or “organization.”¹² A foreign parent company of a U.S. subsidiary, for example, is a foreign principal.¹³ Notably, the test for whether an individual or entity is a foreign principal includes acting on a mere request from a foreign principal.¹⁴ Consequently, no payments or written contracts are required to create an agency relationship under FARA.

FARA-Triggering Activities

To trigger registration, an agent of a foreign principal must engage in one or more of the following activities within the United States:

1. “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: (a) formulating, adopting, or changing the foreign or domestic policies of the United States or (b) the “political or public interests, policies, or relations of a government of a foreign country or a foreign political party.”¹⁵

2. Acting as a “public-relations counsel, publicity agent, information-service employee or political consultant.”¹⁶
3. Collecting or dispensing money for or in the interest of a foreign principal.¹⁷
4. Representing the interests of the foreign principal before an agency or official of the U.S. government, generally by making direct contact with government officials.¹⁸

These triggers are extremely broad. As a result, on the face of the statute, routine business activities of law firms, lobbying and public relations firms, trade associations, think tanks, U.S. subsidiaries of foreign companies, and other commercial enterprises could potentially require registration. Additionally, FARA has no de minimis exception; even a single email to a U.S. official could constitute “representation” of the interests of a foreign principal, thereby triggering registration. Although FARA-triggering activities are limited to activities “within the United States,” practitioners should be wary that this geographic limitation is a narrow one.¹⁹ FARA Unit staff have recently suggested that even activity with very minimal nexus to the United States is sufficient to trigger this element of the statute.

Exemptions

While the scope of FARA-triggering activity is broad, the statute and regulations provide several exemptions, a few of which are discussed below. As noted, the FARA Unit has tended to interpret these exemptions more narrowly in recent years, and Congress is currently considering legislation to eliminate the popular Lobbying Disclosure Act exemption. As a result, practitioners and potential registrants should carefully consider whether these limited, and sometimes vague, exemptions apply.

1. Commercial Exemptions

Perhaps the most commonly used exemptions to FARA’s registration requirement are a pair of related “commercial exemptions.” The statutory commercial exemption exempts “private and nonpolitical activities in furtherance of the bona fide trade or commerce” of a foreign principal, defining “trade or commerce” as the purchase and sale of commodities, services, or property.²⁰ The Justice Department added a similar but discrete regulatory “commercial exemption” in 2003. This exemption applies to “political activities” performed for a foreign corporation “in

furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation.”²¹ The Justice Department’s regulations explicitly state that the commercial exemption may apply to state-owned enterprises that are wholly owned by a foreign government.²²

Nevertheless, there are significant uncertainties regarding the scope of the commercial exemptions. These exemptions do not apply if the activity is directed by, or “directly promote[s] the public or political interests of,” a foreign government or foreign political party.²³ The term “directly promote” is not defined in the statute, regulations, or publicly available guidance, and the FARA Unit has interpreted this phrase expansively, treating some contacts in the United States that are also important to a foreign government as outside of the scope of the exemptions, even where a foreign corporation also has a legitimate commercial interest in the same issue.

2. LDA Exemption

FARA also provides an exemption for some federal Lobbying Disclosure Act registrants.²⁴ Pursuant to FARA, an agent of a foreign private sector principal may register under the LDA, which requires significantly less disclosure, if the agent has engaged in lobbying activities.²⁵ However, the LDA exemption is not available to an agent of a foreign government or foreign political party.²⁶ Additionally, implementing regulations provide that the LDA exemption is not available if the “principal beneficiary” of the work is a foreign government or foreign political party.²⁷ While there is no definition of “principal beneficiary,” the FARA Unit has taken an increasingly broad view of activity that would make a foreign government the principal beneficiary of activity for a private sector foreign principal. For example, in one of the recently published advisory opinions, the FARA Unit took the position that the LDA exemption does not apply to lobbying for sanctions relief on behalf of a foreign bank because a foreign government would be the principal beneficiary of that lobbying.²⁸

3. Lawyers Exemption

Lawyers engaged in the practice of law on behalf of a foreign client are also exempt from FARA.²⁹ However, this exemption does not apply to lawyers who attempt to influence the U.S. government regarding matters relating to U.S. government policy matters, or the public interests of a foreign government, except as part of judicial proceedings; criminal or civil law enforcement inquiries, inves-

tigations, or proceedings; and agency proceedings required by statute or regulation to be conducted on the record.³⁰ The purpose of this exemption seems to be to require lawyers and law firms to register when they act as lobbyists, public relations consultants, or political advisors rather than as exclusively legal counselors. Navigating this exemption therefore requires careful analysis of the lawyer's activities.

4. Academic Exemption

Persons "solely" engaged in bona fide religious, scholastic, academic, or scientific pursuits or the fine arts are exempt from FARA registration.³¹ However, Justice Department regulations provide that this exemption does not apply if the person is engaged in "political activities." There is little available guidance concerning the scope of the academic exemption.

The Future of FARA: Pending Legislation

Multiple bills currently pending in Congress, including one that the House Judiciary Committee reported out earlier this year, attempt to amend FARA.³² The bills that have received the most attention would eliminate the LDA exemption and strengthen the Department of Justice's FARA enforcement power. Elimination of the LDA exemption would make compliance with FARA even more challenging, as it would require registration for most lobbying activities for foreign private sector companies. As a result, entities and individuals previously registered under the LDA to satisfy the FARA requirements would need to register under FARA, which requires more burdensome disclosure and carries greater stigma. These changes follow the 2016 OIG Report, which recommended that the Department of Justice conduct an assessment of the LDA exemption, given that "foreign governmental and commercial interests overseas may not always be distinct."³³

While the success of FARA reform legislation is far from clear, it is clear that the long period of lax enforcement of FARA is over. Both the Department of Justice and Congress have signaled a clear intent to strengthen FARA and to

clamp down on enforcement. Practitioners and interested parties should be wary of these changes and reevaluate previously accepted axioms regarding FARA. The long-predicted new wave of FARA enforcement is here.

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NOTES

1. 22 U.S.C. § 612(a).
 2. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT (Sept. 2016) [hereinafter OIG REPORT], <https://oig.justice.gov/reports/2016/a1624.pdf>.
 3. *See id.*
 4. *Id.* at i.
 5. United States Department of Justice, Foreign Agents Registration Act, Advisory Opinions, www.justice.gov/nsd-fara/advisory-opinions (last visited June 10, 2018).
 6. *See* 22 U.S.C. § 612(a).
 7. *See id.* §614(a).
 8. *See id.* §614(b).
 9. *Id.* § 612(a).
 10. *Id.* § 611(c)(1).
 11. *See id.* § 611(b).
 12. *Id.* § 611(b)(3).
 13. *See id.*
 14. *Id.* § 611(c)(1).
 15. *Id.* § 611(c)(1)(i), (o).
 16. *Id.* § 611(c)(1)(ii), (g).
 17. *Id.* § 611 (c)(1)(iii).
 18. *Id.* § 611 (c)(1)(iv).
 19. *Id.* § 611 (c)(1)(i)–(iii).
 20. *Id.* § 613(d); 28 C.F.R. § 5.304(a).
 21. 28 C.F.R. § 5.304(c).
 22. *Id.* § 5.304(b), (c).
 23. *Id.* § 5.304(c).
 24. 22 U.S.C. § 613(h).
 25. *See id.*
 26. *See* S. REP. NO. 105-147, at 4 (1997).
 27. 28 C.F.R. § 5.307.
 28. U.S. Dep't of Justice, Nat'l Sec. Div., A.O. 2012-12-03, Request for a Rule 2 Advisory Opinion (Dec. 3, 2012), www.justice.gov/nsd-fara/page/file/1038286/download; *see also generally Advisory Opinions*, U.S. DEP'T OF JUSTICE (June 8, 2018), www.justice.gov/nsd-fara/advisory-opinions.
 29. 22 U.S.C. § 613(g).
 30. *Id.*
 31. *Id.* § 613(e).
 32. Disclosing Foreign Influence Act, H.R. 4170, 115th Cong. (2017).
 33. OIG REPORT, *supra* note 2, at 18.
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