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Foreign Agents Registration Act: Lawyers and Law Firms Managing Evolving Risks

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Overview

The Foreign Agents Registration Act (FARA)[1] has been law for more than eighty years, but the compliance and enforcement risks have not been higher since at least World War II. We have seen high-profile prosecutions of individuals connected to a presidential campaign; a well-known global law firm paid more than $4.6 million to reach a settlement with the U.S. Department of Justice; and a prominent Washington lawyer has been indicted.

This article is intended to help lawyers and law firms navigate and manage the evolving risks of FARA. Below, we discuss:

(1) an overview of the history and development of FARA;

(2) the expansive triggers for registration and the "exit ramps" that may exempt a person from FARA;

(3) traps for the unwary; and

(4) tips for law firms seeking to develop a FARA compliance program.

History and Development of FARA

FARA is a criminal statute, but unlike many criminal laws, it does not prohibit conduct, with one exception described below. Instead, FARA imposes registration and disclosure requirements upon any person engaging in certain actions on behalf of a foreign entity, whether an individual, corporation, or government.

FARA was enacted in 1938 out of concern for the activities of Nazi propagandists. In 1942, major amendments to the statute transferred responsibility for enforcement from the U.S. Department of State to the Department of Justice (DOJ). In the 1960s, Congress became concerned with lobbying by foreign governments regarding sugar import quotas. These concerns led Congress to amend FARA in 1966 to expand the scope of the law to apply to efforts to benefit foreign economic interests. The concept of "political activities" was also added to FARA to extend the range of covered activities beyond "propaganda" to cover both traditional lobbying and efforts to influence the U.S. public. For the next thirty years, the focus of FARA was on lobbying by foreign governments and foreign businesses. Enforcement during this period was rare, and DOJ adopted a policy of encouraging compliance rather than focusing on enforcement.

In 1995, Congress enacted the Lobbying Disclosure Act (LDA),[2] which, to simplify a bit, requires registration and disclosure for private-sector lobbying. When Congress enacted the LDA, it provided an exemption from FARA for private-sector lobbying disclosed under the LDA. This exemption, Congress said, was intended to create a bright line between private-sector lobbying, which would be covered by the LDA, and lobbying for foreign governments, which would be covered by FARA. Unfortunately, the legislative amendments did not quite achieve the clear delineations that Congress sought between FARA and LDA. Overlaps between the statutes—discussed in more detail below—remained and continue to cause problems even today, including regarding the most basic of questions: when is the LDA exemption available and, if it is, what should be included in LDA reports?

Today, there is widespread misunderstanding regarding the application of FARA. Perhaps due in part to the statute's roots in combating propaganda and requiring disclosure for lobbying on behalf of foreign governments, many mistakenly conclude that if they do not distribute "propaganda" and do not "lobby" for a foreign government, FARA does not apply. In fact, FARA is incredibly broad in scope, and it is easy to inadvertently become subject to FARA registration requirements due to a series of complex and interrelated registration triggers relating to the nature of activities engaged in, the location of the activity, and more.

FARA-related grand jury subpoenas have become noticeably more common over the last two years

FARA is enforced by the FARA Unit, which is housed within the DOJ's National Security Division. The most common initial outreach a person is likely to receive from the FARA Unit is through an inquiry letter, which will typically recite facts the FARA Unit believes may point to a requirement either to register under FARA or, if a person is already registered, to provide additional disclosure. To generate inquiry letters, the FARA Unit relies primarily on press reports, web and social media posts, and complaints. FARA contains no mechanism for the DOJ to seek civil discovery, so the DOJ may compel discovery only by securing a grand jury subpoena. In the past, it was extremely rare for the DOJ to obtain discovery in FARA matters, but FARA-related grand jury subpoenas have become noticeably more common over the last two years.

On March 6, 2019, the Assistant Attorney General for the National Security Division, John Demers, an appointee of President Donald Trump, announced at an annual American Bar Association conference for white collar lawyers that the DOJ has shifted from treating FARA as an "administrative obligation and regulatory obligation to one that is increasingly an enforcement priority."[3] To implement this shift toward enforcement, the DOJ assigned as Chief of the FARA Unit

a criminal prosecutor who was a member of Robert Mueller's special counsel team. Previously, the FARA Unit had been headed by a long-time civil servant with deep FARA regulatory expertise.

There has been a significant shift in DOJ's priorities from administrative compliance to an enforcement posture.

Demers's announcement capped a multiyear trend in which we have observed increased enforcement activity across the board, including audits by the FARA Unit of books and records of registrants, outreach to persons the DOJ believes may need to be registered, and increased efforts to force registration, including through court actions. Nonetheless, the announcement marks a significant shift in the DOJ's priorities, moving from administrative compliance to an enforcement posture.

Triggers and Exit Ramps

There are three levels of analysis to apply in determining whether a person must register under FARA. First, whether FARA applies depends upon the *relationship* between the person and the foreign principal. Second, the person must engage, or agree to engage, in one of four types of registrable *activities*. Finally, even if registration appears necessary, one of the statutory or regulatory *exemptions* from registration may be available, although the exemption may in turn be subject to further limitations.

When considering the various FARA triggers, exemptions, and limitations, it is important to remember that the facts matter. Even a small change in facts could be dispositive regarding the outcome. For example, consider a public relations firm that holds an event regarding a public policy issue that turns out to be wildly successful. A foreign government then hires the same PR firm to repeat the same event regarding the same issue with the same participants. From the outside, these

two events look exactly the same—the only difference is the genesis of the events. This small change in facts, however, may determine whether the PR firm must register under FARA and submit extensive public disclosure regarding activities and finances.

"Agent of a Foreign Principal" Relationship

For FARA to apply, a person must be acting as an "agent of a foreign principal."[4] The use of the word "agent" is somewhat misleading, however, as FARA applies more broadly than a standard, common law agency relationship would contemplate. Under FARA, a person is an "agent" of a foreign principal if the person acts "at the order" or "under the direction or control" of the foreign principal, which is fairly straightforward.[5] Regulations define "control" to include the "possession or the exercise of the power, directly or indirectly, to determine the policies or the activities of a person."[6] More complicated is the application of FARA to persons acting at the order, or under the direction or control of, "a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal,"—*i.e.*, an intermediary.[7] Although there is generally very little case law regarding FARA, there is precedent helpfully clarifying that a grant or gift made without the right to control the actions of the recipient is not covered by FARA.[8] This clarification may be especially relevant for non-profits and think tanks.

To further muddy the waters, the relationship test of the FARA analysis can also be met when a person "acts . . . at the . . . request" of either the foreign principal or the intermediary.[9] Here, too, case law provides some context, explaining that the type of "request" contemplated by FARA falls "somewhere between a command and a plea."[10] To determine whether this test is met, the FARA Unit seems to look for some evidence of tasking or a pattern of conduct indicating that a person is under some obligation to act on behalf of the foreign principal, though the precise standard applied is not clear.

There is also a jurisdictional component to the relationship—that is, the relationship must extend into the United States.[11] The DOJ takes a broad view of what qualifies as being "within the United States" for FARA purposes. Certainly, this includes activities that physically occur within the United States. It may apply to U.S. embassies abroad. It might apply to the United Nations headquarters, which is located in New York but is also international territory. We recommend considering not just whether a specific activity takes place within the physical

boundaries of the United States, but also whether there is a nexus between activities occurring outside the United States and a strategy, plan, or activity within the United States.

Registrable Activities

The "agent of a foreign principal" must also engage, or agree to engage, within the United States, in a registrable activity, of which there are four types:

(1) engaging in "political activities";

(2) acting as public relations counsel, a publicity agent, an information-service employee, or as a political consultant;

(3) collecting or dispensing money or things of value in the interest of the foreign principal; and

(4) representing the interests of a foreign principal before the U.S. government.

Whether an activity is a "political activity" within the meaning of FARA turns on

(a) the belief or intent of the actor,

(b) the target of the activity, and

(c) the subject matter.

Specifically, a person must believe or intend that his or her activity will influence any part of the U.S. government or "any section of the [U.S.] public" regarding U.S. policies or the interests of a foreign government or political party.[12] This test is very broad and uncertain in scope, particularly because it is not limited to any specific kind of activity (*e.g.*, lobbying, advice to clients, media appearances) and it turns on the agent's subjective beliefs or intent.

"Public-relations counsel," "publicity agent," "information-service employee," and "political consultant" are each defined terms.[13] In general, they relate to providing advice regarding PR matters or government relations, or disseminating information on behalf of the foreign principal. A common mistake is to assume that these terms only apply when a person is externally facing, such as someone who speaks directly with the press or the public. A person may also engage in one of these registrable activities by providing "behind-the-scenes" PR or political

consulting advice, such as a lawyer providing comments on a press release, talking points, or media strategy. This can include providing such advice to a person who in turn provides the advice to a foreign principal.

Collecting or dispensing money or anything of value on behalf of a foreign principal may also trigger FARA registration. A lawyer might think it is entirely appropriate to raise money for a foreign non-profit organization that is, for example, a pro bono client of the firm, but FARA may be implicated. There is an exemption for funds "used only for medical aid and assistance, or for food and clothing to relieve human suffering,"[14] but not necessarily for other nonprofit or humanitarian purposes. Firms should closely review any activities that involve collecting or dispensing funds within the United States for a foreign entity.

Finally, representing the interests of a foreign principal before the U.S. government is registrable activity. This is probably the most obvious of the covered activities—so much so that it is common for people to conclude incorrectly that FARA covers only lobbying and if they are not lobbying, FARA does not apply. As should be obvious by now, there are many other activities that trigger FARA. There is, however, some uncertainty about what, if anything, beyond lobbying also counts as representing a foreign principal's interests before the U.S. government.

Exemptions

If registration appears necessary, a potential FARA registrant should also assess whether one (or more) of the statutory or regulatory exemptions is available. The four most commonly applicable exemptions—and the ones most likely to apply to law firms—are the *commercial exemption*, the *LDA exemption*, the *lawyer's exemption*, and, perhaps, the *academic exemption*. Each exemption is also subject to further carve-outs, limiting the scope of the exempted activity.

Commercial Exemptions. There are two commercial exemptions—one statutory and one regulatory. The statutory commercial exemption provides that a person engaged in "private and nonpolitical" activities in furtherance of "bona fide trade or commerce" is not required to register under FARA.[15] "Trade or commerce" is defined by regulation to include "the exchange, transfer, purchase, or sale of commodities, services, or property."[16] To simplify, this exemption is available for efforts to promote the buying and selling of goods or services on behalf of a foreign person—commonly, a foreign corporation, partnership, or

other company. Because the statutory commercial exemption covers only "non-political" activities, the exemption does not apply to political activities—efforts to influence the U.S. government or the U.S. public on a matter policy.

The regulatory commercial exemption was adopted by the DOJ in 2003. This exemption allows a person to engage in political activities—for more than just buying and selling—on behalf of a foreign corporation, provided that the activities are "directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation."[17]

Neither commercial exemption is available if the activities "directly promote" the public or political interests of a foreign government, but both commercial exemptions are available to state-owned enterprises. Accordingly, the commercial exemption remains available notwithstanding the fact that a foreign government necessarily will have a generalized ownership interest in the financial success of a state-owned enterprise.

The FARA Unit has recently begun to release to the public redacted advisory opinions the DOJ had provided to individual requesters. Several advisory opinions released by the FARA Unit shed some additional light on the scope of the commercial exemptions, including the following:

- **State-owned company.** Last year, the FARA Unit released an advisory opinion involving a U.S. public relations firm that planned to place op-eds to promote a conference taking place in a foreign country and sponsored by a state-owned company.[18] The DOJ concluded that the activities qualified under a commercial exemption because the activities primarily served the interests of the company and that any benefit to the government owner was indirect and incidental.
- **Central bank.** The DOJ determined that efforts to promote a central bank of a foreign government did not qualify for a commercial exemption because, even though the activities would promote the central bank commercially, doing so was in the interests of the foreign government.[19]
- **Banks in sanctioned country.** The DOJ concluded that a commercial exemption was not available for efforts to promote relationships with banks located in a country subject to U.S. sanctions because the sanctions were imposed as a part of U.S. foreign policy. Although not entirely

clear in the opinion, it appears that the DOJ concluded that the sanctions related activity would directly promote the interests of a foreign government,[20] rendering the activity ineligible for the commercial exemptions.

LDA Exemption. The LDA exemption is available to a person who has lobbied the federal government and who is registered under the LDA. This exemption is only available for private-sector clients. The exemption also does not apply if a foreign government or foreign political party is the client or is "the principal beneficiary" of the activities.[21] In a recent confidential advisory opinion, the DOJ included non-essential text in a footnote (comparable to dicta in a judicial opinion) indicating that the exemption may not be available if a foreign government or foreign political party is "a" principal beneficiary—as opposed to "the" principal beneficiary, as the regulations state. Although it remains to be seen whether the DOJ will maintain this interpretation in the face of the contradictory regulatory text, this approach is in line with a trend we have observed in recent years, where the DOJ is interpreting the exemptions more narrowly and the limitations on the exemption more strictly.

As previously noted, the registration and reporting requirements of FARA and the LDA are not cleanly divided, which leads to several areas of potential confusion when applying the LDA exemption to FARA. First, the LDA has de minimis thresholds, whereas FARA does not. Second, the LDA is not triggered unless there are contacts with the U.S. government, whereas FARA can be triggered by activities targeting the public. Third, providing background or behind-the-scenes advice does not trigger the LDA, but it may trigger FARA. Fourth, the LDA is not triggered unless compensation is provided for services, whereas FARA can be triggered without compensation. Also, under the LDA, a person has forty-five days to register after triggering the statute; under FARA, a person has ten days to register after agreeing to take action and is precluded from acting as an agent until registration is completed. Finally, the LDA exemption is not applicable until the person has actually registered under the LDA.[22]

Lawyer's Exemption. There is significant confusion regarding this exemption. Unfortunately, the "lawyer's exemption" does not simply exempt all lawyers from the application of FARA. Rather, the exemption applies when a person provides legal representation of a *disclosed* foreign principal before any court or agency.[23] The exemption contains a significant limitation that excludes from its scope "attempts to influence" government officials outside of the applicable

"judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required . . . to be conducted on the record."[24] In short, lawyers can make policy arguments before the U.S. government within defined legal proceedings, but ancillary attempts to influence will not be covered by the lawyer's exemption. Lawyers therefore should carefully evaluate the law's triggers, exemptions, and limitations, based on the specific facts and circumstances, before assuming the lawyer's exemption will apply.

Academic Exemption. For some lawyers, and for others engaged in teaching or academic pursuits, there is an exemption for persons engaged "only" in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or the fine arts.[25] It would not, however, apply if the person engages in "political activities"—that is, seeking to influence the U.S. government or the U.S. public regarding public policy or the interests of a foreign government or foreign political party.[26]

Traps for the Unwary

By now, it should be apparent that FARA is a complex, nuanced law that contains many potential pitfalls. Some of the more common misconceptions or traps for the unwary include the following:

- FARA is not only about foreign governments. FARA applies to any entity or person outside the United States, including individuals, corporations, associations, and even U.S. expatriates.
- FARA does not require a contract, payment, or a common law agency relationship. Acting on a mere "request" may be sufficient to trigger registration.
- FARA captures more than lobbying, including activities that are common for lawyers.
- FARA captures indirect activities, including advice regarding activities undertaken by another person.

Lawyers and law firms may frequently encounter situations that may implicate FARA. The following are several examples of common situations that may trigger FARA, depending on the facts and circumstances:

- Arranging meetings with U.S. government officials for a foreign client. The FARA Unit considers this to be classic lobbying activity that would trigger FARA unless an exemption applies.
- Providing advice to foreign companies on efforts to influence U.S. policy.
- Advising a foreign entity on a public relations matter that relates to a policy issue.
- Seeking to influence U.S. government officials beyond the narrow bounds of a legal proceeding. When representing a client in the context of a litigation or a government investigation, is not uncommon for attorneys to consider reaching out to engage with other parts of the U.S. government or the U.S. public as part of an overall strategy. Departures from core exempt activities, however, may trigger FARA registration. This area is particularly risky for law firms because matters evolve over time. Even if FARA applicability were assessed at the outset of a matter, and determined inapplicable, developments along the way could lead the lawyers and the firm into areas not covered by the lawyer's exemption.
- Meeting with U.S. government officials to address a concern of a U.S. company's foreign affiliate. In these circumstances, the question arises as to who the client is and whose interests are being served, which may lead to the conclusion that the firm has been acting in the interest of the foreign affiliate. (The activity might or might not nonetheless fall within the commercial exemptions.)
- Seeking to influence the U.S. public, such as Wall Street investors, the business community, trade associations, think tanks, and influencers. It is important to remember that FARA applies to efforts to influence any "section" of the U.S. public, and not just officials and employees of the federal government.

FARA Compliance for Law Firms

Although a law firm's combination of practices, office locations, and clients will impact its FARA compliance risk profile, firms with any international contacts should implement an appropriate FARA compliance program. We recommend a compliance program with the following components.

1. **Written policy.** Each firm should assess its level of comfort with FARA and carefully craft an appropriate written FARA policy tailored to the specific needs of the firm.
2. **Internal controls.** Firms should expand upon existing new client intake procedures to require assessment of whether relevant new business is likely to implicate FARA. When drafting an engagement letter for a FARA-registrable matter, firms should also be aware that FARA prohibits payments that are contingent—even in part—upon the success of any political activities.[27] (This is a rare case in which FARA does actually prohibit conduct rather than simply require disclosure.)
3. **Periodic training.** Firm personnel, particularly those responsible for either onboarding new matters or managing ongoing matters, should be provided with FARA training. This will help the firm adequately assess the FARA implications of new matters and to determine whether activities being contemplated exceed the original scope of the representation and implicate FARA.
4. FARA procedures. Firms with foreign clients should have established procedures for addressing requests and assignments that may implicate FARA, including instances when it is necessary to seek advice from FARA practitioners regarding whether any particular activity may trigger the statue and require registration.

Law firms that need to register should seek FARA counsel regarding the filing requirements. Registration is required within ten days of agreeing to engage in the activities and before undertaking any action as an agent.[28] A "short-form" registration is additionally required for each individual engaged in substantive support of the activities.[29] Then, every six months, the firm must submit a "supplemental statement" that discloses the activities performed, contacts with U.S. government officials and U.S. media representatives, income received, expenses, political contributions made by the firm and individuals, and more. The firm is also required to keep records of all relevant documents related to the representation for three years after the end of the engagement.[30] These books and records are subject to an audit by the FARA Unit,[31] although there are some limitations to preserve attorney-client privilege.[32]

* * *

Given the importance of FARA to law firms, and the scarcity of case law or formal DOJ guidance determining how FARA applies to lawyers and law firms, we expect that the current wave of FARA enforcement, if sustained, will lead to a steady uptick in the number of advisory opinions obtained by law firms from the FARA Unit. This should help clarify the law. The advisory opinion process can be slow, however, relative to client demands. And in the past, many advisory opinions have been opaque or, sometimes, even contradictory. So while those opinions can provide certainty with respect to a specific engagement, as a practical matter, law firms will need to make a great many FARA judgments on their own, reading between the lines of the sparse legal authority that is available.

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NOTES

1. 22 U.S.C. §§ 611–21; 28 C.F.R. §§ 5.1–5.1101.
2. 2 U.S.C. § 1601 *et seq.*
3. *See* Katie Benner, *Justice Dept. to Step Up Enforcement of Foreign Influence Laws*, N.Y. TIMES (Mar. 6, 2019), www.nytimes.com/2019/03/06/us/politics/fara-task-force-justice-department.html.
4. 22 U.S.C. § 612(a).
5. *Id.* § 611(c)(1).
6. 28 C.F.R. § 5.100(b) (further providing that this power may arise "through the ownership of voting rights, by contract, or otherwise").
7. 22 U.S.C. § 611(c)(1).
8. Michele Amoruso e Figli v. Fisheries Dev. Corp., 499 F. Supp. 1074, 1082 (S.D.N.Y. 1980); *accord* Attorney Gen. v. Irish People, Inc., 796 F.2d 520, 524 (D.C. Cir. 1986); H.R. REP. NO. 89-1470, at 5 (1966); S. REP. NO. 89-143, at 7 (1965).
9. 22 U.S.C. § 611(c)(1).
10. Attorney Gen. v. Irish N. Aid Comm., 668 F.2d 159, 161 (2d Cir. 1982).
11. 22 U.S.C. § 611(c)(1) (defining "agent of a foreign principal" to apply to persons engaged in actions "within the United States").
12. *Id.* § 611(o).
13. *Id.* § 611(g)–(i), (p).
14. *Id.* § 613(d)(3).
15. *Id.* § 613(d)(1).
16. 28 C.F.R. § 5.304(a).
17. *Id.* § 5.304(c).
18. FARA Unit, U.S. Dep't of Justice, Advisory Op. (Nov. 6, 2018), www.justice.gov/nsd-fara/page/file/1112151/download.
19. FARA Unit, U.S. Dep't of Justice, Advisory Op. (Feb. 9, 2018), www.justice.gov/nsd-fara/page/file/1068636/download.
20. FARA Unit, U.S. Dep't of Justice, Advisory Op. (Dec. 3, 2012), www.justice.gov/nsd-fara/page/file/1123666/download.
21. 28 C.F.R. § 5.307.
22. 22 U.S.C. § 613(h); 28 C.F.R. § 5.307.
23. 22 U.S.C. § 613(g).
24. 28 C.F.R. § 5.306(a).
25. 22 U.S.C. § 613(e).
26. 28 C.F.R. § 5.304(d).
27. 22 U.S.C. § 618(h).
28. *See id.* §§ 611(c), 612(a).
29. 28 C.F.R. § 5.202.
30. 22 U.S.C. § 615.

31. *Id.*
32. *See generally* Attorney Gen. of U.S. v. Covington & Burling, 411 F. Supp. 371 (D.D.C. 1976).