

## U.S. Department of Justice Announces Foreign Agents Registration Act Enforcement Initiative

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Election and Political Law

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Covington issued several client [alerts](#) in recent years warning of a rising tide of enforcement of the once-obscure Foreign Agents Registration Act of 1938 (“FARA”). Signs of this trend emerged [long before](#) the recent, high-profile Special Counsel’s Office investigation. Nonetheless, there was persistent skepticism, particularly among businesses outside the lobbying industry, that this trend was real or significant. Any remaining doubts were decisively answered last week when the Assistant Attorney General for the National Security Division, John Demers, a Trump appointee, for the first time publicly confirmed DOJ’s intention to make FARA a criminal enforcement priority. The predicted enforcement wave is not at an end. It is just beginning.

Speaking at an annual American Bar Association white collar lawyers conference, Demers told the assembled defense bar that DOJ has shifted from treating FARA as an “administrative obligation and regulatory obligation to one that is increasingly an enforcement priority.” The Assistant Attorney General announced that he was revamping the Department’s FARA Unit, which has overseen “administrative enforcement” of FARA for many decades, by appointing a criminal prosecutor to lead enforcement. The prosecutor, Brandon Van Grack, a deputy chief in the National Security Division’s Counterintelligence and Export Control Section, has spent most of the last 18 months assigned to the Special Counsel’s Office. It appears the Department is also making other staffing changes within the FARA Unit, presumably to reorient it toward enforcement. In his remarks, Demers appeared to emphasize the Department’s intention to pursue unregistered foreign agents.

Since at least the 1960s, the FARA Unit has focused on facilitating compliance with FARA and providing guidance to regulated persons. When the Unit identified an unregistered foreign agent, it typically worked with the agent to ensure that it registered and disclosed its activities. The small handful of FARA prosecutions that occurred over the past 50 years (after FARA was amended in 1966 with an expanded focus on economic lobbying) all involved some other kind of egregious criminal activity, such as terrorism, espionage, or violating trade sanctions. The Department now seems focused on enforcing stand-alone FARA violations.

For corporations, nonprofits, law firms, lobbying firms, think tanks and others that deal with foreign governments (or, in some cases, even non-governmental “foreign principals”), Demers’ announcement is a fire bell in the night, signaling that DOJ will be far more aggressive in seeking out high-profile test cases to accomplish general deterrence and to cause corporate America to take FARA seriously. The best analogy here is to DOJ’s decision in the early years of the 21<sup>st</sup> Century to breathe life back into the Foreign Corrupt Practices Act (“FCPA”), another

criminal statute that many companies had ceased to take seriously because of infrequent enforcement. Billions of dollars in settlements and legal fees later, every major corporation in America, and many around the world, are heavily focused on implementing elaborate global anti-corruption compliance programs. But FARA remains absent from the compliance policies of most American corporations, including very large ones whose business models involve frequent contact with foreign governments. Few Chief Compliance Officers at major companies are focused on FARA risks. That is likely to change soon.

One unknown is how the appointment of a dedicated prosecutor to oversee FARA enforcement may alter the FARA Unit's approach to interpreting the statute in advisory opinions and informal guidance provided to the regulated community. Like FCPA, FARA includes vague and barely defined terms. By now, the Department has helped define FCPA through guidance documents and enforcement cases. FARA, in contrast, even after more than 80 years, remains amorphous, with little available case law or guidance. DOJ began publishing its FARA advisory opinions only last year, and there are decades' worth of opinions that have yet to be published. The statute itself is riddled with anachronistic terminology and provisions that, if interpreted literally, would sweep in an astounding range of routine activities by corporations and nonprofits. Unlike U.S. domestic lobbying laws, FARA can be triggered without any payment at all, and it contains no threshold that would exempt incidental and *de minimis* activity from triggering registration. Bills currently pending in Congress to reform FARA focus on toughening it rather than clarifying its meaning and rationalizing its practical impact.

If the Department's announced intention to pivot from facilitating compliance to enforcement follows the arc that defined DOJ's approach to reinvigorating FCPA, we can expect to see the Department look for more high-profile FARA settlements like the one it secured recently against the law firm [Skadden](#). And we can envision that the Department's focus may extend beyond law, lobbying and public relations firms, given the statute's extraordinary reach.

The political nature and domestic focus of FARA (which applies only to activities "within the United States") makes this a rather more dangerous path for DOJ and for the regulated community than was the case with the rebirth of FCPA. FARA's breadth potentially provides prosecutors with a target-rich environment in which to pursue cases against corporations, individuals, advocacy groups, and others, and we are already seeing signs of a cottage industry of groups that are adept at filing FARA complaints with DOJ for their own purposes. We have long described FARA to clients as a "gotcha" statute, which can be invoked by political opponents and dusted off by prosecutors when other statutes are unavailing. The Department's announced enforcement initiative will test its discretion in using this powerful prosecutorial tool.

Follow our blog, [Inside Political Law](#), to keep abreast of further FARA-related developments.

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