

Investigations, Compliance and Defense

The Revival of the Foreign Agents Registration Act: What You Should Know and What to do Next

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If recent events are any indication, the days of lax enforcement of the Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 *et seq.*, may be over. Companies and individuals—including lawyers, public-relations firms, and United States subsidiaries of foreign companies—should take note of the Department of Justice’s increased enforcement of FARA and ensure that they are familiar with the law’s provisions.

FARA has been on the books for nearly 80 years. Although initially aimed at Nazi and communist propagandists in the United States, FARA was amended in 1966 to focus on “protecting the integrity of the government’s decision-making process” and identifying the “sources of political propaganda.”^[1] Still, “historically there have been hardly any FARA prosecutions,” and the Department of Justice (DOJ) brought only seven criminal FARA cases between 1966 and 2015.^[2] A 2016 DOJ Inspector General (IG) report found that many prosecutors and law enforcement agents appear to misunderstand “what constitutes a ‘FARA case’” as opposed to a case under 18 U.S.C. § 951, a distinct statute that prohibits agents of foreign governments from operating in the United States without first notifying the attorney general.^[3]

Today, however, in the wake of the IG report, Special Counsel Robert Mueller’s investigation into Russian interference in the 2016 presidential election, and attention from the Senate Judiciary Committee, FARA is suddenly in the forefront. In October 2017, the Special Counsel unveiled indictments charging President Trump’s former campaign manager Paul Manafort and his associate Richard Gates with, among other crimes, failing to timely register as “agents of a foreign principal,” as required by FARA, and filing false and misleading FARA statements.^[4] Then, in November 2017, former National Security Adviser Michael Flynn admitted in his guilty plea that he had made false statements on a FARA registration form.^[5] And, just this month, the Special Counsel’s indictment of 13 Russian individuals and three companies for interfering with the US political and electoral process alleged that the defendants “fail[ed] to register as foreign agents carrying out political activities within the United States.”^[6]

DOJ has also taken steps recently to enforce the FARA statute outside of criminal prosecutions. DOJ required the American arm of a Russian-state-funded media company to register as a foreign agent for the first time in November 2017,^[7] prompting Russian government retaliation threats against US media companies.^[8] Members of Congress have similarly asked DOJ about plans to require Chinese state-controlled media outlets to register under FARA.^[9] And news reports have indicated that other FARA-related investigations are underway.^[10]

To the extent that the government is increasing scrutiny of FARA disclosures and stepping up FARA-related enforcement, it may not need to look hard for targets. The 2016 DOJ IG report found that, among a sample of files it reviewed, 62% of initial FARA registrations were late, 50% of FARA registrants filed at least one supplemental statement late, and 15% of active FARA registrants “had ceased filing altogether or were over six months delinquent.”^[11] The IG also noted that DOJ and the FBI are aware that individuals and entities may actively seek to evade FARA registration and take advantage of any perceived “loophole” for avoiding registration.^[12]

As a result, companies and individuals that are involved with foreign clients—including lawyers, public-relations firms, and US subsidiaries of foreign companies—should take a fresh look at FARA. Anyone who conducts activities arguably within the statute’s ambit should consider (or reconsider) whether they

have any obligations under FARA, revisit any past disclosures to ensure they are accurate, and establish procedures to ensure compliance going forward.

To aid in that effort, we have provided a brief overview of the FARA regime and how it may be changing in light of the activity described above.

What Is FARA?

- FARA is a criminal statute that requires any individual or entity that acts as an “agent of a foreign principal” in a political or quasi-political capacity to periodically disclose their relationship with the foreign principal, as well as their activities and receipts and disbursements in support of those activities.^[13]
- According to DOJ, “[t]he purpose of FARA is to insure that the US Government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence US public opinion, policy, and laws.”^[14]

Who Must Register Under FARA?

- Under FARA, any individual or entity must register if (1) it acts as “an agent, representative, employee, or servant, or ... in any other capacity” at the “order, request, or under the direction or control, of a foreign principal” or of any other person “whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal,” and (2) the individual or entity also, directly or through an intermediary:
 - Engages in **political activities**,^[15] including activity that the individual or entity “believes will ... or intends to, in any way influence any agency or official” of the US government or the public as to any policy,^[16] or as a **political consultant**;^[17]
 - Engages in **media or public-relations activities**,^[18] including “informing, advising, or in any way representing a principal in any public relations matter” related to political or public interests, or disseminating books, news, or other materials;^[19] or
 - **Represents the interests** of a foreign principal before an agency or official of the US government.^[20]
- A “foreign principal” is defined as a foreign government or political party, an individual or entity outside the United States that is not a US citizen, or an entity organized under foreign law or with its principal place of business outside the United States.^[21]
- Registration is also required for any individual or entity that “agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal.”^[22]
- FARA’s expansive language covers, among other things, engaging in behind-the-scenes activities that may not constitute lobbying—for example, public relations and political consulting in the United States.

Who Is Exempt From Registering Under FARA?

- FARA includes exemptions for individuals and entities engaged in certain types of conduct. As with the provisions that govern who must register under FARA, the provisions that govern FARA exemptions are also subject to interpretation.
- The statute contains several key exemptions. They may apply, for example, to anyone who is:
 - Representing a foreign commercial interest (rather than a foreign government or political party) and who discloses their activities under the Lobbying Disclosure Act;^[23]
 - Undertaking private and nonpolitical commercial activities on behalf of a foreign principal;^[24]
 - Engaging in nonpolitical and “bona fide religious, scholastic, academic, or scientific pursuits”;^[25]
 - Providing legal representation of a disclosed foreign principal before a court or agency, if the foreign agent does not attempt to influence officials on policy matters outside of the relevant judicial or agency proceedings;^[26] or
 - A member of the media, generally defined to include American news organizations.^[27]
- The statute also contains several other exemptions that should be studied closely if the ones above do not apply.
- The foreign agent has the burden to show that an exemption applies, and may seek a formal advisory opinion from DOJ.^[28]

When Must an “Agent of a Foreign Principal” Register Under FARA?

- Under FARA, an individual or entity must register with DOJ and pay a \$305 fee within 10 days of agreeing to become an “agent of a foreign principal.” The registration must: (1) describe the agent, (2) describe the foreign principal, (3) describe the nature of work to be performed, and (4) include a copy of the agreement between the agent and the foreign principal.[\[29\]](#)
- For every six-month period after the initial filing, the agent must file supplemental statements about the work done during that period and the amounts paid for that work.[\[30\]](#)

Potential Penalties for Violating FARA

- A willful failure to register as an agent of a foreign principal, or willfully making a false statement in connection with registration, may result in criminal prosecution and a sentence of up to five years in prison and a fine of up to \$10,000.[\[31\]](#)
- DOJ may also seek to enjoin actions of a foreign agent or enjoin them from continuing to act as an agent of a foreign principal.[\[32\]](#)

The Outlook Ahead

In light of the IG report and the recent FARA-related publicity, Senate Judiciary Committee Chairman Charles Grassley (R-IA), and Rep. Mike Johnson (R-LA) have introduced legislation to tighten enforcement under the statute.[\[33\]](#) The proposed legislation would, among other things:

- Eliminate the FARA exemption for those who register under the Lobbying Disclosure Act;
- Provide the Justice Department with new civil investigative authority, including the right to compel production of documents and testimony;
- Require DOJ to develop a comprehensive strategy for enforcing FARA; and
- Require new reports, from the DOJ inspector general and the Government Accountability Office, on the enforcement and effectiveness of FARA.[\[34\]](#)

These potential legislative changes, increased scrutiny of FARA enforcement, and DOJ's own recent uptick in enforcement activity may have major implications going forward. In particular, any legislative changes may affect those potentially subject to FARA who have instead opted for the “less stringent” disclosure and registration requirements of the Lobbying Disclosure Act.[\[35\]](#) And all individuals and entities that are connected with foreign governments, foreign political parties, and foreign companies (including US subsidiaries of foreign companies) may wish to consider reviewing whether they have any obligations under FARA or may be exposed to any FARA-related enforcement risk.

[\[1\]](#) Office of the Inspector General, US Dep’t of Justice, *Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act 2* (2016) (hereinafter “DOJ IG Report”). [\[2\]](#) DOJ IG Report at 8. [\[3\]](#) DOJ IG Report at i-ii, 9-10. [\[4\]](#) *United States v. Manafort*, No. 17-cr-00201, Indictment ¶¶ 19, 25, 46-47, 48-49 (D.D.C. Oct. 30, 2017). On February 23, 2018, Gates pleaded guilty to separate crimes. [\[5\]](#) *United States v. Flynn*, No. 17-cr-00232, Plea Agreement & Statement of the Offense (D.D.C. Dec. 1, 2017). [\[6\]](#) *United States v. Internet Research Agency LLC*, No. 18-cr-00032, Indictment ¶¶ 7, 26, 48, 51 (D.D.C. Feb. 16, 2018). [\[7\]](#) Devlin Barret and David Filipov, “RT Files Paperwork with Justice Department to Register as Foreign Agent,” *The Washington Post* (Nov. 13, 2017). [\[8\]](#) Andrew Roth, “Russia Rolls out Plan to Bar American Media from Parliament in RT Retaliation,” *The Washington Post* (Dec. 1, 2017). [\[9\]](#) Letter from Senators Patrick Leahy, Marco Rubio, John Cornyn, Tom Cotton, Amy Klobuchar, Joe Manchin, III, and Ted Cruz, to Attorney General Jeff Sessions (Jan. 16, 2018). [\[10\]](#) See Ken Doyle, “Grassley Bill Would Close Lobbying Disclosure Gap used by Manafort, Flynn,” *Bloomberg Government* (Nov. 2, 2017) (describing other open FARA-related investigations); Letter from Samuel R. Ramer, acting assistant attorney general, US Dep’t of Justice, to Senator Charles E. Grassley, chairman, US Senate Comm. on Judiciary (June 15, 2017). [\[11\]](#) DOJ IG Report at ii, 13-15. [\[12\]](#) See DOJ IG Report at 6, 18. [\[13\]](#) DOJ IG Report at 1. [\[14\]](#) U.S. Dep’t of Justice, *FARA Frequently Asked Questions*, <https://www.fara.gov/fara-faq.html> (last visited Feb. 22, 2018). [\[15\]](#) See 22 U.S.C. § 611(c)(1). [\[16\]](#) See 22 U.S.C. § 611(o). [\[17\]](#) See 22 U.S.C. § 611(c)(1). [\[18\]](#) See 22 U.S.C. § 611(c)(1). [\[19\]](#) See 22 U.S.C. § 611(g)-(h). [\[20\]](#) See 22 U.S.C. § 611(c)(1). [\[21\]](#) 22 U.S.C. § 611(b). [\[22\]](#) 22 U.S.C. § 611(c)(2). [\[23\]](#) 22 U.S.C. § 613(h). [\[24\]](#) 22 U.S.C. § 613(d); 28 C.F.R. § 5.304(a)-(c). [\[25\]](#) 22 U.S.C. § 613(e); 28 C.F.R. § 5.304(d). [\[26\]](#) 22 U.S.C. § 613(g); 28 C.F.R. § 5.306. [\[27\]](#) 22 U.S.C. § 611(d). [\[28\]](#) 28 C.F.R. § 5.2. [\[29\]](#) 22 U.S.C. § 612(a). [\[30\]](#) 22 U.S.C. § 612(b). [\[31\]](#) 22 U.S.C. § 618(a). [\[32\]](#) 22 U.S.C. § 618(f). [\[33\]](#) Disclosing Foreign Influence Act, S. 2309, 115th Cong. (2017); Disclosing Foreign Influence Act, H.R. 4170, 115th

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