

DOJ's New FARA Enforcement Focus Could Be Far-Reaching

By **Richard Beizer and Dalal Hasan** (September 27, 2019, 4:20 PM EDT)

Until recently, the Foreign Agents Registration Act of 1938 was a little-known public disclosure statute. However, FARA has gained spotlight attention in recent months with a number of high-profile prosecutions and settlements arising out of the Robert Mueller Special Counsel investigation. Given the statute's broad language, the U.S. Department of Justice's renewed focus on enforcement could impact more than just lobbyists and public relations firms.

This article provides an overview of the DOJ's renewed focus on FARA, whom it might impact and key compliance considerations.



Richard Beizer

Background Leading Up to Heightened Enforcement

FARA is a public disclosure statute that requires any person acting as an "agent of a foreign principal" in certain covered activities to register as an agent, unless covered by an exemption." The statute is enforced by the FARA unit of the National Security Division of the DOJ.[1]

At its core, FARA's purpose is to inform the public and government of the identities of persons working on the behalf of foreign principals to influence U.S. policy. That purpose has evolved since the statute's 1938 enactment, which was originally aimed at foreign propagandists in the World War II era. The original statute had a much broader definition of "agents," which allowed for prosecution even if the activities were not done for or on behalf of a foreign principal.



Dalal Hasan

The DOJ successfully prosecuted 23 criminal cases under FARA during the World War II era. However, since 1942, the DOJ has engaged in a practice of sending administrative letters to obtain voluntary compliance with the statute in cases that did not warrant prosecution. FARA was significantly amended in 1966 to narrow the definition of "agent" to those actually acting or holding themselves out to be acting on behalf of foreign principals and to expand attention on lobbying activities.

Criminal enforcement of FARA has increased dramatically in recent years. There were only four successful criminal prosecutions under FARA in the 50 years between FARA's 1966 revision and 2016. Three of these matters were resolved under guilty pleas,[2] and one defendant was convicted at trial.[3] However, in the nearly three years since 2016, the DOJ has indicted at least 25 defendants in matters

stemming from FARA investigations,[4], secured guilty pleas in five[5] and obtained one jury trial conviction.[6]

In addition, the FARA unit reached an unprecedented \$4.6 million civil settlement with the law firm Skadden Arps Slate Meagher & Flom LLP in connection with its failure to register under the statute.[7] Along with charges related to willful failure to register, a common thread in these cases includes prosecution under the FARA false statement provision and related statutes, such as the federal false statements provision, 18 U.S.C. Section 1001(a), for false or misleading statements or omissions made to the FARA unit in response to its inquiries to determine whether the person was required to register under the statute. Many of these cases also included charges for other crimes, such as money laundering, mail and wire fraud, which facilitated the concealment of facts related to the failure to register.

The DOJ is also ramping up its use of civil enforcement authority, which allows the DOJ to enjoin any person who is engaged in or about to engage in any acts that violate the act or its regulations, or whenever any agent of a foreign principal fails to comply with the same. In May of this year, the DOJ used its civil enforcement authority for the first time since 1991 to obtain a court order requiring RM Broadcasting LLC to register as the agent of a Russian state-owned media enterprise.[8]

The DOJ's renewed focus on FARA enforcement predates the Mueller Investigation, dating back to September 2016, when the Office of the Inspector General for the DOJ issued an audit report critical of the FARA unit's lack of enforcement.

Nevertheless, in the aftermath of the March Mueller investigation report, the DOJ has publicly stated that it intends to ramp up FARA enforcement and is enhancing its resources to do so. In March, Assistant Attorney General for National Security John C. Demers publicly announced the appointment of Brandon Van Grack as Deputy Chief responsible for the FARA unit. Mr. Demers noted that the appointment signaled the DOJ's shift "from treating FARA as an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority." [9]

The DOJ's efforts have resulted in a marked increase in FARA registrations and in the FARA unit's auditing activity to ensure compliance with record-keeping and reporting obligations. As reported by the DOJ in a recent press release, the DOJ is on track to double the number of new registrants and new foreign principals registering annually as of 2016.[10] Almost twice the number of individuals who work for registrants (known as "short-form registrants") have registered since 2016.[11] Moreover, the FARA unit has increased the number of inspections of FARA registrants by over 30%, from an average of about 14 a year (from 2010-2018) to 20.[12]

Who Is Impacted?

As noted in one a recent 2019 court opinion, FARA's definition of "agents of foreign principals" can be interpreted to include "almost anyone who undertakes any public-related or financial activity on behalf of a foreign principal." [13]

In fact, the definition of "agent of a foreign principal" under FARA is much broader than traditional notions of agency, which require some level of direction or control over the agent. Agency may be established under FARA when a party engages "in any [] capacity at the order, request, or under the direction or control" of a foreign principal "directly or through any other person" to perform certain

specified activities “within the United States ... for or in the interests of [a] foreign principal.” The statute covers a number of broadly defined activities, including:

- Engaging in political activities;[14]
- Acting as a public relations counsel;[15]
- Acting as a publicity agent;[16]
- Acting as an information-service employee;[17]
- Acting as a political consultant;[18]
- Soliciting, collecting, disbursing or dispensing contributions, loans, money or other things of value; or
- Representing the interests of such foreign principal before any agency or official of the government of the United States.

More broadly, the term “agent of a foreign principal” also includes any person who “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” as described above.[19] This definition, read literally, could render a person an agent of a foreign principal without taking any actual action as an agent.

The definition of “foreign principals” extends beyond foreign government officials and includes a broad definition of political parties, as well as foreign individuals or corporate entities established in or principally operating from foreign countries.[20] By regulation, “foreign principals” also include any person whose “activities are directly or indirectly supervised, directed, controlled, financed or subsidized in whole or in major part by a foreign principal as defined in the Act.”[21]

Thus, FARA implicates the activities of a wide array of actors, including lawyers, lobbyists, consultants, nonprofit organizations, regional trade promotion groups, think tanks, academic institutions, media organizations, trade associations, and U.S. affiliates of foreign companies. It also encompasses a wide range of conduct on behalf of a foreign principal that many impacted persons would consider routine activities, such as responding to requests to set up meetings, making introductions, providing informal advice or disseminating information.

The statute may even be implicated where the intended purpose of the activity is not political, but nevertheless has a significant political impact on the interests of a foreign principal. The potential reach of FARA is compounded when viewed in light of its lack of a de minimus threshold for registerable conduct.

Many actors whose conduct is implicated by FARA have historically taken refuge from registration under one of its numerous exemptions. Some of the most common exemptions include those for certain bona fide commercial, academic and legal activities, as well as an exemption for actors registered under the Lobbying Disclosure Act of 1995 for lobbying activities. However, these exemptions are narrowly defined and apply in very fact-specific circumstances. The DOJ is likely to apply a higher degree of scrutiny over their application as it ramps up its enforcement efforts.

Key Compliance Considerations

Compounding the statute's ambiguity is the dearth of regulatory guidance or court precedent interpreting FARA. The DOJ only recently, in June 2018, publicly released advisory opinions. Even with this guidance, the statute and its regulations remain highly ambiguous. Moreover, while the added transparency is welcome, the advisory opinions are of limited utility because they are highly fact-specific, heavily redacted, and sometimes draw what appear to be contradictory conclusions.

In light of this context and the new enforcement environment, clients whose conduct may be implicated by FARA should keep in mind the following compliance considerations:

- Perform and document a risk assessment to identify whether your conduct triggers FARA's registration requirements (and whether an exemption applies).
- Develop a compliance policy that is tailored to your FARA risk.
- Establish risk-based vetting, documentation, and disclosure policies and procedures to ensure FARA compliance.
- Train relevant staff members on your compliance program to ensure they understand how to identify and manage FARA risk consistent with disclosure obligations and company policies and procedures.
- Be prepared to answer a DOJ inquiry regarding registration compliance truthfully, accurately, and completely.

Richard Beizer is a partner and Dalal Hasan is counsel at Crowell & Moring LLP.

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[1] Justice Manual 9-90.010. The Counterintelligence and Export Control Section (CES) of the National Security Division conducts, handles, and supervises such prosecutions. *Id.*

[2] *United States v. Siljander*, No. 07-CR-00087-NKL (W.D. Mo. July 9, 2010), ECF No. 539; *United States v. Abdel Azim El-Siddig*, No. 07-CR-00087-06-W-NKL (W.D. Mo. July 9, 2010), ECF No. 538; *United States v. Prince Asiel Ben Israel*, No. 1:13-CR-00572 (N.D. Ill., Oct. 10, 2014).

[3] *United States v. Park*, No. 05-CR-00059-DC (S.D.N.Y. Mar. 2, 2007), ECF No. 251.

[4] These include, Michael Flynn (*United States v. Flynn*, No. 17-CR-00232-PC (D.D.C. Nov. 30, 2017)); Richard Gates (*United States v. Gates*, No. 17-CR-00201-ABJ (D.D.C. Feb. 2, 2018)); Nisar Ahmad Chaudhry (*United States v. Chaudhry*, No. 18-CR-00226-DKC (D. Md. Apr. 19, 2018)); Samuel Patten (*United States v. Patten*, No. 18-CR-00260-ABJ (D.D.C. Aug. 31, 2018)); Paul Manafort (*United States v. Manafort*, No. 17-CR-00201-ABJ (D.D.C. Sept. 14, 2018)); Bijan Rafiekian and Kamil Alptekin (*United*

States v. Rafiekian, No. 18-CR-00457-AJT (E.D. Va. Dec. 12, 2018)); Elena Alekseevna Khusyaynova (United States v. Khusyaynova, No. 18-MJ-464 (E.D. Va. Sept. 28, 2018)); Gregory Craig (United States v. Craig, No. 19-CR-0125-ABJ (D.D.C. Apr. 11, 2019)) and the Internet Research Agency, Concord Management and Consulting, and Concord Catering, plus 13 Russian nationals (United States v. Internet Research Agency LLC, 18-CR-00032-DLF (D.D.C. Feb. 16, 2018)).

[5] Michael Flynn, Richard Gates, Nisar Ahmad Chaudhry, Samuel Patten, and Paul Manafort.

[6] Bijan Rafiekian.

[7] DOJ Press Release: "Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal," available at, <https://www.justice.gov/opa/pr/prominent-global-law-firm-agrees-register-agent-foreign-principal>. (January 17, 2019).

[8] See *RM Broad., LLC v. United States Dep't of Justice*, 379 F. Supp. 3d 1256, 1262 (S.D. Fla. 2019) (citing *United States v. McGoff*, 831 F.2d 1071, 1074 (D.C. Cir. 1987)).

[9] Remarks made at the 2019 ABA Annual Institute on White Collar Crime (March 6-8, 2019).

[10] See DOJ Press Release: "The Department of Justice Announces Launch of New Process for Filing Documents Pursuant to the Foreign Agents Registration Act of 1938 (FARA)", available at: <https://www.justice.gov/opa/pr/department-justice-announces-launch-new-process-filing-documents-pursuant-foreign-agents> (September 25, 2019).

[11] *Id.*

[12] *Id.*

[13] *RM Broad., LLC*, 379 F. Supp. 3d at 1262 (citing *United States v. McGoff*, 831 F.2d 1071, 1074 (D.C. Cir. 1987)).

[14] 22 U.S.C. § 611(o).

[15] 22 U.S.C. § 611(g).

[16] 22 U.S.C. § 611(h)

[17] 22 U.S.C. § 611(i).

[18] 22 U.S.C. § 611(p).

[19] 22 U.S.C. § 612(c)(2).

[20] 22 U.S.C. § 611(b)(1)-(3).

[21] 28 C.F.R. § 5.100(a)(8); see also 22 U.S.C. § 611(c)(1).