

INCREASED FARA ENFORCEMENT IS HERE TO STAY - A DEBRIEF ON ACI'S SECOND NATIONAL FORUM ON FARA

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Increased Foreign Agents Registration Act (FARA) enforcement is here to stay. That is the consensus view of senior Department of Justice (DOJ) officials responsible for the statute's administration and enforcement who appeared at the American Conference Institute's (ACI) Second National Forum on FARA (the Forum), held virtually on 4 December 2020.

This alert summarizes the salient developments in FARA law and policy that DOJ officials and FARA practitioners discussed at the Forum, including:

- New DOJ guidance on the statute's legal representation exemption;
- The scope of the Lobbying Disclosure Act (LDA) exemption;
- Increased focus on nonprofits and U.S.-based subsidiaries of foreign media companies; and
- Potential developments under the incoming administration.

CONTINUING GROWTH IN FARA ENFORCEMENT

FARA has sprung to prominence in recent years, with high-profile enforcement actions—some more successful than others—partially explaining the increased focus.¹ DOJ's emphasis on FARA enforcement is reflected in the recent, dramatic surge in new registrants and foreign principals under the statute—twice as many in 2019 compared to 2016 and nearly double the number of short-form registrants.

During the Forum's keynote address, National Security Division (NSD) Deputy Assistant Attorney General (DAAG) Adam Hickey put this trend into context. Two data points drove DOJ's renewed focus on FARA, according to DAAG Hickey: (1) a mandate by the U.S. House of Representatives Committee on Appropriations that DOJ's Office of the Inspector General (OIG) audit FARA enforcement, and (2) DOJ's investigations into foreign interference in the 2016 presidential election. Prompted by these developments, DOJ OIG responded with extensive recommendations in September 2016² and NSD created the FARA Registration Unit in 2019, installing former Mueller prosecutor Brandon Van Grack as its first chief.

In Chief Van Grack's nearly two years on the job, there has been no shortage of activity. New areas of FARA enforcement have gained prominence. U.S.-based subsidiaries of foreign media companies have either been persuaded or compelled to register under the statute.³ Requests for voluntary disclosures, notices of deficiency, and inspections have risen. The pace of guidance out of the FARA Unit has also increased significantly during

Chief Van Grack's tenure. In the last 16 months, the FARA Unit released nearly 20 new advisory opinions (AO) and new guidance regarding the scope of agency under the statute,⁴ among other topics. The FARA Unit's focus, Chief Van Grack told the Forum, is on promoting compliance with the statute, rather than enforcement.

THE LEGAL REPRESENTATION EXEMPTION: NEW GUIDANCE AND CONTINUED UNCERTAINTY

Recent developments regarding the statute's legal representation exemption were featured prominently during the Forum. Under limited circumstances, FARA provides an exemption for lawyers who provide legal representation of foreign principals in the course of judicial or administrative proceedings.⁵ On 3 December 2020, the FARA Unit issued new FAQ guidance regarding the exemption's reach:

- The legal exemption is triggered once a person, qualified to practice law, engages or agrees to engage in the legal representation of a disclosed foreign principal before any court or agency of the Government of the United States.... *The scope of the exemption, once triggered, may include an attorney's activities outside those proceedings so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter.*⁶

The last sentence of the new guidance, emphasized above, appears to be DOJ's attempt to provide clarity to practitioners who have asked whether activities ancillary to the legal representation of one's client—e.g., holding a press conference to announce the initiation of a legal action—qualify under the legal representation exemption.

On this point, DAAG Hickey explained how certain activities outside the scope of formal judicial or agency proceedings *may* fall within the exemption, but only to the extent that they do not otherwise qualify as “political activities” under the statute. In particular cases, he said, collateral activities *may not* qualify even if the underlying legal representation activities themselves do. DAAG Hickey stated that the DOJ's new interpretation of the legal representation exemption seeks to strike a balance by distinguishing between political activities and the activities typically associated with legal representation.

THE LDA EXEMPTION: “THE” VS. “A”

Speakers also addressed the extent to which a footnote in an AO on the LDA exemption may limit the exemption's scope.

Unless one is representing a foreign government or foreign political party, FARA generally exempts from registration individuals engaged in lobbying activities who register in connection with their representation of a foreign client under the LDA.⁷ Language glossing the exemption provides that “in no case where a foreign government or foreign political party is *the principal beneficiary* will the [LDA exemption] be recognized.”⁸

In contrast, a footnote in a March 2019 AO⁹ provides that “there are situations in which a foreign government or political party may not be the principal beneficiary, but a principal beneficiary of lobbying activities in which the LDA exemption would not apply.” This footnote has prompted questions among practitioners regarding how the FARA Unit will analyze indirect benefits that accrue to foreign governments or foreign political parties and whether such indirect benefits could bar application of the LDA exemption. For example, in cases involving lobbying activities on behalf of the U.S.-based subsidiary of a foreign corporation, DOJ could claim that the government of the nation where the foreign parent is located also benefits from the lobbying activity. If so, and the foreign

government is deemed to be a principal beneficiary, albeit not *the* principal beneficiary, does the exemption still apply?

FARA Unit Chief Van Grack addressed this question during a Q&A session. According to Chief Van Grack, the footnote was akin to “dicta”—i.e., the nonprecedential parts of a judicial opinion—intended to clarify, not expand, the scope of the regulatory language. Chief Van Grack noted that, to his knowledge, the FARA Unit has not engaged in the kind of granular analysis that would call for separating one beneficiary from another in order to determine whether registration was required. On the contrary, Chief Van Grack seemed to assert that the key question remained whether the agent acted under the “direction or control” of a foreign principal. Any “principal beneficiary” determination regarding a foreign government or political party, Chief Van Grack asserted, is made *in addition* to a finding of direction or control. Questions regarding the precise contours of the LDA exemption will likely play out during the next administration.

WHAT DOES THE FUTURE HOLD FOR FARA?

Additional clues emerged regarding FARA enforcement and potential changes in store. In response to a question whether cases involving China and Russia receive more intense scrutiny, DAAG Hickey stated that while the statute is country-neutral, DOJ typically concentrates resources commensurate with its other national security priorities, including its far-reaching China Initiative.¹⁰ With respect to foreign-government funding of U.S. think tanks and nonprofit entities, another emerging area of DOJ enforcement, Chief Van Grack stated that funding alone would not be sufficient for a FARA registration obligation to arise. Instead, direction and control remain the key analytical criteria. That pronouncement may provide some comfort to nonprofits in the wake of the March 2020 AO¹¹ finding that an environmental nonprofit that received a grant from a foreign government must register.

Additionally, NSD Assistant Attorney General (AAG) John Demers made a number of comments that could portend changes to the statute and how it is applied, even as AAG Demers' tenure may come to an end at the end of the Trump administration. Regarding the statute's reach, AAG Demers made clear that physical presence within the United States is not required for a FARA registration obligation to exist, so long as the requisite conduct is aimed at the American public. AAG Demers expressed support for legislation that would give DOJ enhanced civil investigative demand authority and suggested that it would be useful for DOJ to have the ability to impose civil monetary penalties for failure to make timely FARA filings. Regarding the frequency of FARA reporting, AAG Demers expressed openness to more frequent reporting, indicating that quarterly reporting, presently the requirement under the LDA, could be beneficial. On the issue of compliance, AAG Demers referenced DOJ's expectations with respect to robust compliance programs in the context of the Foreign Corrupt Practices Act, an indication that the focus on FARA compliance is not going away anytime soon.

For more information or for assistance in determining how these important developments in FARA law impact your registration obligations under the statute, please contact any member of the K&L Gates Political Law and Government Ethics team. We will work with you to design a path forward in light of the reinvigorated enforcement of the statute. Our political law and government ethics team will continue to follow the latest developments, reflected periodically in the latest update to the K&L Gates Guide to Political and Lobbying Activities. You can read the current version [here](#).

FOOTNOTES

¹ Superseding Information (ECF No. 195), United States v. Gates, No. 17-cr-00201-ABJ (D.D.C. Feb. 2, 2018); United States v. Craig, 401 F. Supp. 3d 49 (D.D.C. 2019); Superseding Information (ECF No. 419), United States v. Manafort, No. 17-cr-00201-ABJ (D.D.C. 14 Sep. 2018).

² [U.S. DEP'T OF JUST., AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT](#) (Sept. 2016).

³ See, e.g., [Letter from Brandon Van Grack, Chief, FARA Unit, to Turkish Radio & Television Corporation](#) (1 Aug. 2019); RM Broad., LLC v. U.S. Dep't of Justice, 379 F. Supp. 3d 1256, 1257 (S.D. Fla. 2019).

⁴ [U.S. DEP'T OF JUST., THE SCOPE OF AGENCY UNDER FARA](#) (May 2020).

⁵ 22 U.S.C. § 613(g).

⁶ U.S. DEP'T OF JUST., FARA FREQUENTLY ASKED QUESTIONS (3 Dec. 2020) (emphasis added).

⁷ 22 U.S.C. § 613(h) (2020).

⁸ 28 C.F.R. § 5.307 (emphasis added).

⁹ U.S. Dep't of Just., National Security Div., Advisory Opinion (20 Mar. 2019).

¹⁰ [U.S. DEP'T OF JUST., INFORMATION ABOUT THE DEPARTMENT OF JUSTICE'S CHINA INITIATIVE AND A COMPILATION OF CHINA-RELATED PROSECUTIONS SINCE 2018](#) (Nov. 2020).

¹¹ U.S. Dep't of Just., National Security Div., Advisory Opinion (Mar. 13, 2020).

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