

NO LONGER FARA-WAY: HEIGHTENED EXPOSURE OF THE FOREIGN AGENT REGISTRATION ACT

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INTRODUCTION

Recent "above the fold" headlines generated from Robert Mueller's investigation of lobbyists and consultants connected to possible Russian interference in the 2016 presidential election have shined the spotlight on the Foreign Agent Registration Act ("FARA") (22 U.S.C. § 611 et seq.). The harsh light has raised questions about this little known law, which has had little historical enforcement, and that the Department of Justice ("DOJ") had largely administered on the basis of voluntary compliance.

FARA targets the representation of foreign interests or domestic entities controlled or directed by foreign interests. Since such representations are increasingly common in Washington, D.C., and elsewhere in the country, those engaged in these types of activities should be sure to review their possible duties and civil and criminal exposure under the statute. Entities typically engaged in FARA-covered activities include law, public relations, and other consulting firms.

If you or your firm represents foreign governments, corporations, political parties, or entities financed or controlled by such foreign entities, you need to understand FARA and its operation.

THE BASICS

Any person who acts as an "agent" or representative at the request or under the direction or control of a "foreign principal" to represent the interests of the foreign principal in political activities, or as a political consultant, public relations counsel, publicity agent, or financial agent, or represents the principal before the U.S. Government, could be subject to registration and reporting under FARA. A "foreign principal" includes any foreign government, political party, non-U.S. citizen located outside the U.S., or any entity organized under the laws of or having its principal place of business in a foreign country. However, exceptions limit FARA's application to certain entities and activities.

The FARA registration is filed with the Department of Justice and includes information on the registrant and the foreign principal. Once registered, the registrant must file supplemental disclosure reports every six months to DOJ that provide extensive descriptions of the registrant's activities performed on behalf of the foreign principal (e.g., disclosure of meetings with U.S. government officials), an accounting of payments from the foreign principal, and copies of any materials that are likely to be disseminated.

EXCEPTIONS

The statute identifies a number of exceptions to registration, the most significant of which are:

- **Bona fide commerce.** This exception allows entities to carry on ordinary business activities that are "private and nonpolitical." This exception also applies to persons not engaged in activities serving predominantly a foreign interest and to those engaged in fundraising to finance only medical aid or food and clothing to relieve human suffering.
- **Lobbying Disclosure Act ("LDA").** Unless the foreign principal is a foreign government or political party, representatives of foreign interests may avoid registration and reporting under FARA by registering under the Lobbying Disclosure Act. LDA registration and reporting is generally viewed as significantly less burdensome than FARA to many eligible registrants.
- **Other activities.** FARA also exempts foreign agents engaged in bona fide religious, scholastic, fine arts, academic, or scientific activities.

It is important to note, however, that FARA regulations and practice make these and other exceptions, e.g. for persons qualified to practice law, very narrow. For example, regulations further define and narrow the exception for bona fide commerce and other activities noted above. The repeal of the commonly-used LDA exception has also been raised before in times of heightened scrutiny, and there are now legislative proposals to repeal it.

Senate Judiciary Committee Chairman Chuck Grassley (R-IA) and Representative Mike Johnson (R-LA) have introduced identical legislation in the Senate and House, which would increase enforcement of the statute and repeal the often-used exception for filers under the LDA.

Ultimately, any FARA analysis is extremely fact specific and should be done with a very sharp eye and knowledge of possible adverse outcomes from enforcement, publicity, or both.

CONCLUSION

Media coverage of high-profile investigations has shed light on a little-understood and likely under-enforced, but very serious, federal statute. If you represent a foreign government, political party, corporation or other entity, or any entity controlled by such foreign interests, it is advisable to understand FARA, its application, and its consequences.

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