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A new era of enforcement for lobby law? Once little-known, FARA sees the limelight



The Foreign Agent Registration Act ('FARA'), administered by the Counterintelligence and Export Control Section ('CES') in the National Security Division ('NSD') of the US Department of Justice ('DOJ'), is a disclosure statute that seeks to ensure that all persons acting politically or quasi-politically on behalf of foreign entities in the US properly disclose their activities. With the US currently in a heightened FARA enforcement environment, Tessa Capeloto and Dan Pickard look at the obligations of registrants and provide an overview of recent developments.

Pursuant to the statute, any person who engages in certain political or quasi-political activities on behalf of a foreign principal (i.e., an agent of a foreign principal) must register under the Foreign Agent Registration Act ('FARA') unless an exception applies. The statute broadly defines a 'foreign principal' to include not only foreign governments and foreign political parties, but also persons and organisations outside of the United States, as well as corporations and other entities that are organised under the laws of a foreign country, or whose principal place of business is in a foreign country. Further, the statute defines an 'agent of a foreign principal' to include any person (i.e., individual, partnership, association, corporation, etc.) who has an agency relationship with the foreign principal, and directly, or through any other person, is engaged in one of four covered activities in the United States. These activities are:

1. Engaging in political activities for or in the interests of such foreign principal.
2. Acting as a public relations counsel, publicity agent, information-service employee, or political consultant for or in the interests of such foreign principal.
3. Soliciting, collecting, disbursing, or dispensing contributions, loans, money,

or other things of value for or in the interest of such foreign principal.

4. Representing the interests of such foreign principal before any agency or official of the government of the United States.

Furthermore, 'political activities' are defined as any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

Notably, the definition of political activities is broad and could include a wide range of activities, such as lobbying US government officials; engaging in public relations activities for the purpose of changing or enhancing the US public's perception of a foreign government; or arranging meetings, planning itineraries, or supplying a forum for foreign officials to promote their programmes.

FARA exemptions

Even if an activity triggers a registration requirement under the statute, an exemption may apply. Specifically, the statute provides registration



exemptions for the following persons/reasons:

1. Diplomatic or consular officers
2. Private or non-political activities/solicitation of funds
3. Religious, scholastic, or scientific pursuits
4. Defence of foreign government vital to US defence
5. Persons qualified to practice law
6. Agents registered under the Lobbying Disclosure Act (provided that the foreign principal is not a foreign government or foreign political party)

Importantly, the party claiming an exemption from the registration requirement bears the burden of demonstrating qualification for exemption under these provisions. When in doubt as to the applicability of a given exception, potential agents of a foreign principal

may pursue a request for a formal advisory opinion. Importantly, the exemptions referenced above can be quite narrow in application and a close reading of the relevant regulation is advised.

The exemption that is possibly the most frequently relied upon concerns activities that involve commercial transactions. Specifically, persons and organisations that engage solely in non-political or private activities can be exempt from registration under FARA. Private and non-political activities include: (1) actions taken solely to further the bona fide trade or commerce of a foreign principal; and (2) other activities that do not predominantly serve a foreign interest.

Under 22 U.S.C. §613(d)(1), an agent of a foreign principal is exempt from registration if the agent is engaged exclusively, 'in private and non-political activities in furtherance of the

bona fide trade or commerce of such foreign principal.' As the FARA regulations state, activities in furtherance of the bona fide trade or commerce of a foreign principal will be considered to be 'private', even though the foreign principal is owned or controlled by a foreign government, so long as the activities, 'do not directly promote the public or political interests of the foreign government' – 28 C.F.R. §5.304(b).

Further, FARA also provides an exemption to registration for an agent of a foreign principal if the agent is engaged exclusively, 'in other activities not serving predominantly a foreign interest.' See 22 U.S.C. §613(d)(2). The FARA regulations state that even if an agent is engaged in political activities, these activities will not be serving, 'predominantly a foreign interest' if they: (1) are not directed by a foreign government or a foreign political party and do not directly promote the public or political interests of a foreign government or a foreign political party; and (2) are directly in furtherance of the, 'bona fide commercial, industrial, or financial operations of a foreign company.'

Again, it bears emphasising that the exemptions can be quite narrow in application and that it is prudent to ensure that the full scope of proposed activity falls under the exemption relied upon.

Obligations of registrants under the Act

An agent of a foreign principal must file an initial registration statement, short forms, and supplemental statements via FARA's electronic filing system. Pursuant to the statute, the agent must also properly label and file 'informational materials' with the the US Department of Justice ('DOJ'). The initial registration statement must be submitted to the DOJ within ten days of when an agent enters into an agreement with the foreign principal (and prior to performing any services).

This initial statement includes a variety of

information, such as: the registrant's contact information; the status of the registrant; the contract between agent and foreign principal or, if no contract exists, a full statement indicating the circumstances by reason of which the registrant is an agent of a foreign principal; the nature and amount of contribution, income, money, or thing of value that the registrant has received; a detailed statement of the activities that the agent is performing in connection with its representation of the foreign principal; and a detailed statement of the money and other things of value spent by the registrant in connection with his/her representation of

FOREIGN AGENTS WHO ARE ENGAGED IN CERTAIN EFFORTS TO HAVE SANCTIONS... REMOVED OR IMPOSED, MAY NEED TO REGISTER.

the foreign principal. A \$305 filing fee per foreign principal is required.

Every six months, registered agents must file a supplemental registration statement with the DOJ. The supplemental registration statement includes the following information: any changes in agent management, personnel, or termination of representation; a description of any activities or services performed on behalf of the foreign principal during the six-month reporting period; any monies or things of value expended and received in connection with the representation; and information concerning any 'informational materials' disseminated. In addition, a \$305 filing fee per foreign principal is required.

Also, every partner, officer, director, associate, employee, and agent of a registrant is required to file a short form, unless: (1) the partner, officer, director, associate, employee, or agent of the registrant does not engage directly in registerable activity that is in furtherance of the interests of the foreign

principal; or (2) the employee or agent of a registrant whose activities further the interests of a foreign principal are provided in a clerical, secretarial, or similar capacity. No filing fee is required to file short forms.

Two copies of all 'informational materials' that are transmitted or caused to be transmitted to two or more persons on behalf of or for the benefit of the foreign principal must also be filed with the DOJ within 48 hours of their distribution. 'Informational materials' include, but are not limited to, the following: radio and television broadcasts, advertising, magazine or newspaper articles, motion picture films, pamphlets or other publications, letters or telegrams, and lectures or speeches. In addition, all informational materials must contain a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal, and that additional information is on file with the DOJ.

Registered agents are required to maintain all records related to the activities subject to registration under the statute for up to three years after the termination of an agent's registration. The recordkeeping requirement covers: financial statements; correspondence between relevant persons; memorandums; written communication; informational materials; bank statements; records containing the names, titles, and contact information of individuals that either provided services to the foreign principal or were contacted by the agent in relation to the foreign principal's agenda; and

any other documents prepared for, distributed to promote, or containing information regarding the agent's representation of the foreign principal. If the registered agent is a corporation or other such entity, then it is also required to retain meeting minutes. Upon request, these records must be made available for inspection by the NSD and the Federal Bureau of Investigation.

The DOJ requires that all registration statements and informational materials be submitted electronically using the agency's eFile system. In order to file documents electronically using eFile, new registrants must submit their registration package by selecting 'New Registration' on the eFile website and then uploading their documents to the system. The DOJ will then review the submission and provide an account number and password via mail. Registrants must use their online user account number and password to upload any subsequent documents. The registration fee associated with the various FARA filings can be paid either online with a credit card or electronic funds transfer, or by mail with a check. Once a document has been successfully submitted, the eFile system will provide a confirmation with a transaction number to track the submission.

Recent developments in FARA

In recent years, the DOJ has begun to enforce FARA more aggressively and as a result FARA has now been thrust into the national spotlight. Given the broad scope of the statute, the potential consequences

PENALTIES FOR NON-COMPLIANCE

The US Department of Justice ('DOJ'), may impose criminal penalties on agents that intentionally and willfully violate any provisions under the statute, including fines up to \$10,000, imprisonment for no more than five years, or both. Agents that willfully make false statements or intentionally fail to provide material information in support of their registration or supplemental statements are also subject to these sanctions. In the majority of cases, however, the DOJ has found non-compliance with registration requirements to be unintentional, permitting agents to remedy any deficiencies instead of instituting criminal proceedings. However, as described further below, there has been a significant uptick in criminal prosecutions involving violations of FARA.

FIR – FARA FOR UK?

In July 2021, the UK government ('HMG') closed a consultation on the introduction of measures intended to 'counter state threats.' This includes the creation of a scheme, the Foreign Influence Registration Scheme ('FIR'), which it described as an 'important new tool to help combat espionage, interference, and to protect research in sensitive subject areas, as well as to provide a greater awareness of foreign influence currently being exerted in the UK.'

The scheme, says HMG, would 'bolster efforts to combat espionage, interference, and to protect research in sensitive subject areas that is essential to UK national security and prosperity,' and would 'require the declaration of certain activities that are being undertaken for, or on behalf of, a foreign state.'

It says that FIR would constitute 'a government-managed register of declared activities that are undertaken for, or on behalf of, a foreign state', and that it has drawn up its proposals 'having reflected on the value and lessons of similar schemes in the United States and Australia, and on the conclusions and recommendations set out by the Intelligence and Security Committee in its recent 'Russia Report'.

FIR would, 'Require individuals in scope of the requirements to register activity within the UK that is being undertaken for, or on behalf of, a foreign state. This could include activities that have been directly commissioned by a foreign state, as well as activities that have been directed by an individual or entity that is subject to foreign state influence or control.

'For any activity that has been registered, the individual would also need to declare the underpinning arrangement with a foreign state or foreign state-related actor. If the individual fails to register or provides false information, they could face enforcement action. A register of activity undertaken on behalf of a foreign state would provide the government with an important tool to disrupt hostile activity. An individual would risk committing a criminal offence by not registering or registering false information. The associated penalties for non-compliance would provide an alternative means to prosecute hostile actors. Such a scheme would increase the risk to foreign states seeking to conduct hostile activity and help to build resilience against being unwittingly drawn into interference.'

The document says that 'through greater transparency, the scheme would also increase understanding of the level of foreign influence in UK affairs, including government and areas of national security interest. The success of state threats against the UK depends on the activity remaining hidden. It also often relies on relationships with individuals in, or working on behalf of, the UK to support and facilitate the activity. A UK scheme would increase the risk to hostile actors that are intent on concealing their activity, as well as those who agree to covertly facilitate such activity.'

FIR, it says, would be intended to address threats from:

- 'Espionage. Which is the covert seeking of sensitive confidential information across a range of areas by means of human intelligence, signals intelligence, technical intelligence and penetration and disruption of computer networks.'
- 'Interference. Examples of interference have been reported on in multiple contexts, including the targeting of democratic events domestically and overseas through information operations and the distribution of funding.'
- 'Transfer of data related to research in sensitive subject areas. The UK enjoys research leadership in many important areas. It is one of the best places to engage in collaborative research. Because of this our research sector is targeted by hostile actors seeking to acquire sensitive information that would be of benefit to foreign states and to the detriment of UK national security and prosperity. They do this by attempting to gain access to the research, or to individuals who work on research in sensitive subject areas and possess relevant expertise and "know how".'

The (now-closed) consultation is at: <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>

of non-compliance, and the DOJ's heightened focus on FARA enforcement, it is important that individuals and companies representing foreign individuals, governments, or companies in the United States in a political or quasi-political capacity carefully evaluate whether their activities may trigger registration under FARA and consult counsel when in doubt.

Specifically, there have been several recent press registrations under the statute. Russian network, RT, was identified in January 2017 as having an impact on the 2016 US presidential election. After months of pressure from the DOJ to register, T&R Productions LLC, the production company

A SIGNIFICANT FOCUS OF FARA ENFORCEMENT HAS INVOLVED FOREIGN MEDIA OUTLETS.

responsible for all English language content on RT, registered with FARA on 10 November 2017. Similarly, in February 2019, Chinese state-run media company, CGTN America (CGTN), registered as a US-based agent of the Chinese government. In August 2019, the DOJ directed the Turkish Radio & Television Corporation to register its US affiliate. Additionally, according to press reports, the DOJ ordered Qatari news outlet, Al Jazeera, to register US operations of its affiliate AJ+ as a foreign agent in September 2020. While the DOJ has not confirmed these reports, AJ Jazeera publicly condemned the move. The move follows a year's long campaign from Congress urging the moves.

These recent registrations underscore the DOJ's continued heightened focus on FARA enforcement ensuring that all entities that trigger a registration requirement and are not eligible for an exemption – whether lobbyists, public relations companies, or even media outlets – are registered under the statute. In addition to the media companies referenced above,

there has also been significantly heightened interest in regard to Chinese entities, especially regarding the technology sector.

FARA scenarios

In a recent publication issued by the DOJ, the agency asks 'How can you tell if someone might be acting as an agent of a foreign principal and might be required by FARA to register with the Department of Justice?' and describes the following scenarios:

- 'A prominent businessman schedules an appointment to discuss energy policy. While you expect the meeting to focus on how US policy affects his company or industry, instead he discusses an unrelated topic: a foreign country's image in the United States. During the discussion, the businessman seems to repeat statements previously made by the foreign country's leaders or spokespeople.'
- 'A lobbyist requests a meeting to discuss telecommunications infrastructure, but when she arrives, she is accompanied by members of a foreign government or political party. They do most of the talking, discussing only the significance of telecommunications infrastructure to the foreign country – not to any US businesses or companies – and highlighting issues significant to their country's relationship with the United States.'
- 'A lobbyist arranges a meeting with you, and you confirm he has registered under the Lobbying Disclosure Act. However, when you meet, the lobbyist discusses topics of interest to foreign entities that are not mentioned in his filings.'

'Any of these scenarios,' it says, 'could indicate you have come in contact with an unregistered agent of a foreign principal.' These scenarios reinforce the reality that determining whether an individual/entity is acting as a foreign agent (whether registered or not under the statute) can be a difficult, fact-intensive inquiry.

FARA and US sanctions

Foreign agents who are engaged in certain efforts to have sanctions, either against a country or an individual/entity, removed or imposed, *may* need to register under the Act. Specifically, provided that all three registration triggers under the statute have been met (*i.e.*, foreign principal, agency, and covered activity), whether FARA registration is required will ultimately depend on whether one of the narrow exemptions to FARA registration applies. These exemptions may include, for example, the legal exemption, Lobbying Disclosure Act exemption, 'trade/commerce' exemption.

The last semi-annual report (2019)¹ published by DOJ on the administration of FARA identified six FARA registrations where sanctions issues were involved in the services provided to foreign principal clients. For instance, one law firm is registered for engaging in the following activity on behalf of the United Arab Emirates ('UAE') embassy: communication with US government officials related to a broad range of issues impacting US-UAE relations, including negotiations and policies relating to the US-UAE Civil Air Transportation Agreement (Open Skies Agreement), foreign policy issues including Iran sanctions,

the war in Yemen, export controls and possible arm sales, compliance with US boycott laws, US human rights reports, and the termination of relations by the UAE and other nations with Qatar. Another firm is registered as being active on behalf of a Congolese businessman, 'analyzing the potential and legal ramifications of oversight and legislative activity in the House and Senate regarding free and fair elections in the Democratic Republic of the Congo, and the need for sanctions to ensure that they occur.'

The connection between registered foreign agents and sanctions is not always direct. For example, one registered law firm 'Provides legal guidance to the foreign principal [Afghanistan] with respect to the impact on the foreign principal of the re-imposition of certain sanctions on Iran following the US withdrawal from the Joint Comprehensive Plan of Action.'

In recent years, cases have emerged where failing to register those interests has led to a settlement or penalty – some involving US sanctions. As one example, 'In 2014, Prince Asiel Ben Israel pleaded guilty in the Northern District of Illinois to failing to register under FARA as an agent for a foreign government. Ben Israel lobbied as an agent of Zimbabwe for lifting sanctions

on Robert Mugabe and other top Zimbabwean government officials. Ben Israel was sentenced to seven months in prison.'²

Nonetheless, there are cases where DOJ has deemed that work pertaining to US sanctions did not require registration because an exemption to FARA registration applied.

For example: In May 2018, DOJ found that certain legal activities by a US law firm were covered under the legal exemption. Specifically, these activities involved 'representing clients in a variety of matters, including issues that relate to international sanctions regimes initiated and administered by the US Department of the Treasury's Office of Foreign Assets Control ('OFAC').' The services also involved providing 'Legal services related to any investigation, proceedings, or prosecutions by the United States Department of Justice, and/or any other relevant US government agency against the clients [foreign bank and foreign person].'

The advisory opinion notes 'That [US law firm], concerned that OFAC would designate its clients, [foreign bank and foreign person], wrote to OFAC on 8 December 2017, asking that OFAC delay any designation of [foreign bank] and [foreign person] until they are afforded an opportunity to present responsive information and documents to address the allegations leading to the designation by OFAC.'

In concluding that the legal exemption to registration applied under these facts, DOJ

found as follows: 'The limited scope of [US law firm]'s 8 December 2017 letter to OFAC appears to stop short of an attempt to influence OFAC's policies regarding its sanctions regime beyond its specific application to [US law firm]'s representation of [foreign person and foreign bank]. If at any point in the future, [US law firm] engages in a discussion or exchange with OFAC that implicates wider policy or political considerations, then it would not be able to avail itself of the exemption and could be required to register.'

Conclusion

FARA, once a little known law, is now frequently the topic of news stories, Congressional debate, and DOJ enforcement actions. FARA is a disclosure statute that seeks to ensure that all persons acting politically or quasi-politically on behalf of foreign entities in the United States properly disclose their activities. The United States is currently in a period of heightened FARA enforcement environment and there are few – if any – signs that this will change in the foreseeable future.

When in doubt whether certain activities may trigger a FARA registration requirement, seeking FARA counsel is a prudent decision.

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LINKS AND NOTES

¹ <https://www.justice.gov/nsd-fara/page/file/1365481/download>

² Recent FARA Cases (justice.gov)

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