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Prosecutions Under the **Foreign Agents Registration Act**: The Past, Present and Future

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The Foreign Agents Registration Act of 1938 (FARA), 22 U.S.C. §611, was enacted by Congress in response to fears that American citizens were secretly working to influence U.S. public opinion, policy and laws in favor of undisclosed foreign governments or political parties.

In particular, lawmakers were concerned about the many Nazi propaganda agents in the United States who advocated for Hitler's regime during the years before World War II. See General FARA Frequently Asked Questions, Justice.gov. The Supreme Court explained just a few years after FARA's enactment that the "general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or spreading foreign propaganda, and to require them to make public record of the nature of their employment." *Viereck v. United States*, 318 U.S. 236, 241 (1943).

The statute is framed not as a prohibition on speech or conduct. Rather, FARA creates a registration requirement: Any person who "act[s] as an agent of the foreign principal" must register with the Department of Justice (DOJ) and make regular disclosures that are available to the general public. 22 U.S.C. §612(a). The general public is permitted to review FARA registrations, which are available on the DOJ website. The FARA Registration Unit operates within the National Security Division of the Department of Justice and also conducts investigations into FARA violations. See FARA: Foreign Agents Registration Act, Justice.gov. A person who acts as an agent of a foreign principal without registering can be criminally prosecuted, with a maximum sentence of five years' imprisonment.

FARA's Recent Emergence

For most of its history, FARA was rarely invoked by the government and

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was largely ignored by prosecutors and defense attorneys alike. The annotations to FARA in the U.S. Code reflect very few published opinions about FARA during the first half-century of the statute's existence. Between 1966 and 2015, the Department of Justice only initiated seven criminal FARA cases, two of which ended with dismissal of the charges. Office of the Inspector General, Department of Justice, Audit Division 16-24, "Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act" (September 2016) (hereinafter "Audit").

In recent years, FARA has emerged as a notable subject for the white-collar defense bar. What has accounted for this renewed focus? First, there has been a series of FARA investigations growing out of the Mueller investigation. In particular, the prosecution and conviction of Paul Manafort for FARA violations in connection with his work for Ukrainian foreign political figures seemed to spark prosecutors' interest in FARA violations. The Mueller investigation also charged other defendants (such as Michael Flynn and Rick Gates) with FARA violations or with false statements made to DOJ relating to registration. The Manafort trial conviction was followed by the decision of the Skadden, Arps law firm to enter into a nonprosecution agreement with DOJ in order to avoid possible FARA charges relating to its investigative work for the government of Ukraine. The law firm paid $4.6 million in disgorgement of legal fees and its former partner Gregory Craig, who handled the firm's Ukraine work, was charged individually with criminal FARA violations (although as discussed below, Craig was acquitted at trial).

Second, DOJ has signaled that FARA enforcement will be a priority in coming years. A Mueller team veteran, Brandon Van Grack, was recently appointed as the chief of the DOJ unit that handles FARA cases. Theodoric Meyer, "Van Grack discusses how he's running the FARA unit," Politico (Sept. 25, 2019). This appointment followed not only the Mueller-related charges discussed above, but a critical audit report issued in 2016 by the DOJ Office of the Inspector General (OIG). "Audit," supra at 21-22. This report made 14 recommendations to improve FARA enforcement and called for the development of a "comprehensive strategy for the enforcement and administration of FARA … that is integrated with the Department's overall national security efforts." Id. at 21. In recent public comments, Van Grack stated that "[a]lmost every single FARA statistic has risen exponentially since 2016," including the number of foreign agent registrations and the number of advisory opinions on FARA issues by DOJ. Meyer, "Van Grack discusses how he's running the FARA unit," supra. Given that white-collar prosecutions have declined during the Trump Administration, the uptick in FARA prosecutions is notable. Patricia Hurtado, "White-Collar Prosecutions Fall to 20-Year Low Under Trump," Bloomberg (May 25, 2018).

In light of these recent developments, it is important for defense attorneys, in-house counsel, and compliance counsel whose clients are engaged in international business activities to be familiar with FARA.

FARA's Reach and Its Exemptions

FARA is a broad statute. An "agent of a foreign principal" is defined to be anyone who acts "at the order, request, or under the direction or control" of a foreign principal. 22 U.S.C. §611(c)(1). Although the "foreign principal" is often a foreign government or political figure, FARA applies where the principal is *any* foreign individual or entity, whether or not that individual or entity is formally associated with a government or political party.

Registration is required where the agent engages in one of a number of specified actions "while within the United States." 22 U.S.C. §611(c)(1). These actions include:

- engaging in "political activities" for the interest of the foreign principal;
- acting as "public relations counsel, publicity agent, information-service employee or political consultant" for the foreign principal;
- soliciting, collecting, disbursing, or dispending money or things of value for or on behalf of the foreign principal; or
- representing the foreign principal before the United States government.

22 U.S.C. §611(c)(1)(i)-(iv).

While FARA is broadly written, there are a number of important exemptions to FARA that limit its application. Without these exemptions, FARA's reach would be almost boundless. First, there is a "commercial exemption" which applies to "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of a foreign principal. In addition, political activities that are undertaken for a foreign corporation "in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation" are also exempted from FARA. The commercial exemption does not apply in those instances where the agent is working to advance the "public or political interests" of a foreign government or political party, rather than the commercial objectives of the principal. 22 U.S.C. §613(d); 28 C.F.R. §5.304.

Lobbyists are exempt from FARA registration so long as they comply with the disclosure requirements of the

Lobbying Disclosure Act and are, in fact, engaged in lobbying the government (rather than solely engaging in work covered by FARA). However, this lobbying exemption only applies where the "principal beneficiary" of the agent's work is not a foreign government or political party. 22 U.S.C. §613(h); 28 C.F.R. §5.307.

There is a "lawyer's exemption" but this does not cover all work that an attorney might perform. It only covers more traditional advocacy in judicial proceedings or in administrative proceedings before federal agencies, or in addressing law enforcement inquiries. When a lawyer engages in a public relations campaign—as alleged in the Skadden case—the exemption does not apply. 22 U.S.C. §613(g); 28 C.F.R. §5.306.

In addition, FARA has an "academic exemption" for those who are engaged solely in legitimate religious, scholastic, academic or scientific pursuits or the fine arts. Again, as with the other exemptions, it does not apply to those who are engaged in political activities. 22 U.S.C. §613(e); 28 C.F.R. §5.304.

Advising Clients On FARA Issues

Just as with the Foreign Corrupt Practices Act, the issues raised by FARA are not frequently litigated. Although we have seen some major, well-publicized FARA trials in recent years, there is scant judicial precedent. As a result, attorneys who seek to advise clients considering FARA registration are dependent on DOJ's policy statements and its press releases about recent settlements. In 2018, DOJ provided some additional guidance when it released several "advisory opinions" that it issued to parties who asked for the FARA Registration Unit to comment on contemplated activities that might raise issues under FARA. The FARA Registration Unit will offer such an opinion when the inquiry reflects "actual, contemplated transactions." The inquiry cannot be made anonymously, although the published advisory opinions have been redacted to remove the names and identifying details of the parties requesting guidance. Making these advisory opinions publicly available was a specific step recommended in the DOJ OIG report. "Audit," supra at 21.

A full review of the published DOJ advisory opinions is beyond the scope of this article. It is worth noting, however, that the opinions are short, are sometimes inconsistent with each other, and often do not provide sufficient context for the reader to determine whether their own client's situation is directly parallel to that of the party seeking guidance. Still, anyone advising clients on FARA issues must review this valuable resource. The process of obtaining an advisory opinion is useful for those clients who require a higher level of certainty before undertaking work that may bring the client within FARA's registration requirement.

Recent Events Cast Doubt On DOJ's New FARA Focus

In a dramatic turn of events, DOJ's efforts to enforce FARA encountered notable setbacks in September 2019.

First, Gregory Craig was acquitted at trial in September 2019 after he testified that his public statements about Ukraine were not made on behalf of a foreign principal but rather to defend his firm's investigative work on an issue relating to allegations of wrongdoing in Ukraine.

Second, later in September 2019, the FARA conviction of Bijan Rafiekian was reversed pursuant to Rule 29 due to insufficient evidence. The district court found that there was "no substantial evidence that Rafiekian agreed to operate subject to the direction or control of the Turkish government." Josh Gerstein, "Judge overturns guilty verdicts against Trump transition adviser on foreign-agent charges," Politico (Sept. 25, 2019).

In public statements, FARA Chief Van Grack downplayed these events, stating that "FARA enforcement remains a top priority" and pointing out that these acquittals likely will not change the advice that defense lawyers will give their clients on FARA issues. Meyer, "Van Grack discusses how he's running the FARA unit," supra. Van Grack is probably right that lawyers advising clients on whether to register would not look at the Craig and Rafiekian cases as wholly "successful" outcomes. Both men were indicted and tried, and perhaps in hindsight they wish that they had registered and avoided this terrible experience. At the same time, Van Grack's comments notwithstanding, lawyers who represent clients in FARA Unit investigations may be emboldened by these acquittals to challenge the government's proof at trial. The acquittals may also influence the cases that the FARA Unit selects for investigation and prosecution, avoiding closer cases and looking for cases in which the defendant's work is more plainly in service of a foreign principal. Further acquittals may reveal that DOJ's relative inattention to this area in the past was driven by the challenges in building a meritorious FARA prosecution, rather than by any inattention from the FARA Unit.