Enforcement of the Foreign Agents Registration Act ("FARA") by the Department of Justice ("DOJ") is the most aggressive in decades. As part of a general crackdown on foreign influence operations in the United States, DOJ has publicly affirmed that it has shifted "from treating FARA as an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority."

Lawyers sometimes believe they are not obligated to register, and are impervious to FARA enforcement action, either because of an exemption from registration relating to legal representation – or simply because they are lawyers being lawyers. But this view reflects a misunderstanding of FARA’s applicability to lawyers. The exemption for legal representation is narrowly framed, and attorneys conducting otherwise registrable activities in the United States outside the limited scope of this exemption are subject to FARA’s registration and disclosure requirements. In light of the government’s surge in FARA enforcement, it is therefore essential for lawyers to understand what types of activities they may engage in on behalf of foreign interests without triggering FARA, and what types of activities could require them to register and make corresponding disclosures to the government.
The Basics of FARA

FARA is a federal law to establish transparency and disclosure regarding the conduct of certain activities in the United States on behalf of foreign interests, and is administered and enforced by the Counterintelligence and Export Control Section ("CES") in DOJ’s National Security Division. Unless eligible for a statutory exemption, any entity or individual coming within the definition of an “agent of a foreign principal” must register with DOJ within ten days after agreeing to become an agent (and before performing any registrable activities), and make subsequent disclosure filings with DOJ approximately every six months thereafter.

To constitute an “agent of a foreign principal” under FARA, an entity or individual (1) must be acting as “an agent, representative, employee, or servant of a foreign principal, or acting “at the order, request, or under the direction or control, of a foreign principal” (either directly or through any other organization or entity); and (2) must be engaged in one of several categories of conduct in the United States on behalf of the foreign principal.

It is not uncommon for work that U.S. law firms perform in the United States on behalf of foreign clients to come within the scope of FARA and to require registration with DOJ. An engagement agreement between a U.S. law firm and a foreign client (whether in writing or oral) would satisfy the agency requirement of FARA, and the term “foreign principal” could apply to practically any client outside of the United States. Under the statute, “foreign principal” is defined to include not only foreign governments and foreign political parties, but also foreign companies and other non-governmental entities, as well as individuals living outside of the United States if they are not a citizen of, and domiciled within, the United States.

Principally at issue for law firms is whether they are engaged in one of the activities in the United States, on behalf of a foreign client, which trigger the requirement to register with DOJ. These activities include: (1) engaging in “political activities,” defined broadly enough to encompass certain advocacy or reputation management services a law firm may provide to a foreign client; (2) acting as a “public relations counsel, publicity agent, information-service employee or political consultant”; (3) collecting or dispensing money; and (4) representing the interests of a foreign principal before an agency or official of the U.S. Government.

Violations of FARA can result in serious penalties, including criminal liability. A willful failure to register, a willful false statement of a material fact, or a willful omission of a material fact, is punishable by up to five years of imprisonment and a fine of up to $10,000. Other willful violations can constitute a criminal misdemeanor punishable by six months of imprisonment and a fine up to $5,000.

Exemption for Legal Representation

Even if a party satisfies the statutory definition of an “agent of a foreign principal,” it is not required to register with DOJ if it comes within a statutory exemption from registration. One of those exemptions provides that a person (defined to be an...
entity or individual otherwise obligated to register is exempt from doing so if the party is “qualified to practice law” and “engage[s] in the legal representation of a disclosed foreign principal before any court of law or agency of the Government of the United States....”

In general policy guidance recently issued, the FARA Unit observes that this exemption applies to “legal advice provided to a foreign principal in connection with [a judicial or administrative proceeding before a court or agency of the U.S. Government], “or generally with respect to the interpretation of the law, or the application of the law to the foreign principal.”

But this exemption is not available to attorneys who “attempt[] to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.” FARA regulations clarify that “attempts to influence or persuade” agency personnel or officials to which the statutory exemption refers are those “attempts to influence or persuade 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 of a government of a foreign country or a foreign political party....”

In sum, if an attorney – having disclosed that they represent a foreign principal -- represents that foreign principal in litigation, a civil or criminal investigation or proceeding, or an agency proceeding on the record, the attorney is exempt from FARA registration. But if an attorney, outside of one of those specific procedural contexts, engages in activities to “influence or persuade” government officials with respect to U.S. domestic or foreign policy, or the interests of a foreign government or foreign political party, the exemption is unavailable. So, too, if an attorney’s legal services for a foreign client begin in a context which qualifies for the exemption for legal representation, but migrates into non-exempt services, the attorney then must register under FARA. This can happen, for example, if a law firm is representing a foreign client in a criminal prosecution in the United States (exempt from registration), but becomes involved, directly or indirectly, in reputation management-related public relations work. Similarly, a law firm representing a foreign client in a government investigation in the United States (exempt from registration) might seek to garner support for the client by reaching out to policy-level officials in a U.S. Government agency – in which case it may have to register for engaging in “political activities.”

**Consequences of FARA Registration for Lawyers**

When required to register under FARA, lawyers are subject to the same registration and disclosure requirements that apply to lobbyists, public relations firms, and other industries that frequently come within the scope of the statute – and that can be discomforting. Not only do lawyers have to publicly identify their client (as the foreign principal) in a representation which otherwise might be completely confidential, but they also must publicly disclose a copy of their written engagement agreement (or oral understanding) with the client, which typically describes the scope of the work to be performed and the firm’s fee arrangement. In addition, in their filings registrants must “describe fully the nature and method of
performance” of their agreement with a foreign principal as well as “the activities
the registrant engages in or proposes to engage in on behalf of the foreign
principal.”\textsuperscript{xviii} If the engagement involves “political activities,” they must be
described in the initial registration statement and identified in more detail in
subsequent disclosure filings. Registrants also must disclose any funds they have
received from the foreign principal, any disbursements they have made, and details
on content they have disseminated (or caused to be disseminated) in the United
States on behalf of the foreign principal. Registrants must preserve books and
records relating to an engagement for three years following the termination of the
engagement occasioning their registration,\textsuperscript{xix} and such materials are subject to
inspection by DOJ’s National Security Division and the FBI.\textsuperscript{xx}

Protecting information subject to the attorney-client privilege can be challenging for
law firms required to register under FARA. A district court has recognized the
applicability of the attorney-client privilege with respect to attorneys required to
register (at least with respect to documents subject to inspection).\textsuperscript{xxi} DOJ’s FARA
Unit is respectful of assertions of the attorney-client privilege, though it may require
attorneys to submit a privilege log for further consideration. The FARA Unit may
permit certain redactions from an engagement agreement in its discretion, such as
references to hourly rates; but it is not amenable to redacting other types of
confidential information, such as gross rates or flat fees, and as noted above, the
nature of the law firm’s work on behalf of its foreign client must be disclosed. In
other instances, disagreements about information claimed to be privileged may have
to be negotiated, with uncertainty as to the outcome.

\textbf{DOJ’s Consideration of the Legal Exemption}

Advisory opinions\textsuperscript{xxii} issued by the FARA Unit at DOJ shed some light on DOJ’s
interpretation of the FARA exemption for legal representation, although such
opinions are extremely fact-dependent and do not constitute binding precedent. The
FARA Unit has indicated, at a minimum, that the following activities by lawyers on
behalf of foreign principals qualify for the legal representation exemption:

\begin{itemize}
  \item Evaluating the merits of initiating or defending against particular litigation,
even for a foreign government.
  
  \item Conducting litigation for a foreign government in the United States.
  
  \item Representation of a foreign corporation to remove it from the Department of
Commerce’s Entity List, where the law firm proceeded strictly according to the
civil administrative procedures prescribed in the Export Administration
Regulations, the matter did not “involve[] attempts to influence federal officials
outside of established agency proceedings,” and the firm did not otherwise
engage in “political activities,” as defined in FARA.\textsuperscript{xxiii}
\end{itemize}
• Attending meetings at DOJ on behalf of a foreign government to discuss a pending extradition request by that government.

• Participating in requests by a foreign government for legal assistance from the U.S. Government, if made pursuant to an official bilateral treaty on extradition and mutual legal assistance.

• Representation of a foreign state-owned company and foreign person before the Office of Foreign Assets Control (“OFAC”) at the U.S. Department of the Treasury with respect to investigative or enforcement proceedings undertaken by OFAC or another U.S. Government agency, and with respect to a letter request to OFAC to stay designation of the firm’s clients until the firm had “an opportunity to present responsive information and documents to address the allegations leading to the [potential] designation by OFAC.” (Importantly, the FARA Unit observed that the law firm’s letter to OFAC “appear[ed] to stop short of an attempt to influence OFAC’s policies regarding its sanctions regime beyond its specific application to [the firm’s] two clients.”)[xxiv]

• Pursuant to an engagement agreement with a foreign government, conducting litigation on behalf of foreign nationals in the United States, funded by – and at the direction and control of – the foreign government, where no facts were presented indicating that the law firm was engaged in “political activities” or other activities in the United States within the scope of FARA.[xxv]

• Pre-litigation discussions with federal, state, or local officials on behalf of a foreign government and foreign nationals with the goal of persuading government officials to enforce existing policies, or to change existing policies or practices, affecting the rights of foreign nationals. (The FARA Unit agreed that these activities, since “limited to litigating cases” for the foreign government and foreign nationals, qualified for the exemption because the advocacy contemplated by the law firm was within the “course of judicial proceedings.”)[xxvi]

Conversely, advisory opinions from the FARA Unit provide examples of activities by lawyers deemed ineligible for the exemption for legal representation. These include:

• Plans to seek a waiver from the Department of State of a rule precluding U.S. courts from enforcing the tax laws of another country, in connection with
pending civil litigation on behalf of a foreign country. (While the litigation itself qualified for the exemption, outreach to the Department of State was deemed to constitute registrable “political activities.”)xxvii

- Providing legal advice and analysis to a foreign government regarding matters that concern bilateral relations between that government and the United States, including pending legislation in the United States and potential policy and action by the Executive Branch of the U.S. Government.

- Attendance at meetings with U.S. lobbyists retained by a foreign government where proposed legislation and legislative strategy are discussed.

- Providing a foreign government with arguments to advance in opposition to legislation pending before the United States Congress.

- Involvement in potential responses by the U.S. embassy of a foreign government to media inquiries concerning litigation in which the law firm is counsel of record, even where the litigation itself is exempt from registration.

Similarly, the FARA Unit determined that a U.S. law firm representing the government of Turkey had engaged in registrable political activities where a partner had written a letter to a senior DOJ official (and had also initiated contact with a U.S. Attorney’s Office), relating to a pending criminal prosecution of other parties, that was “intended to influence DOJ officials with reference to the foreign policy of the United States and its political and public relations with Turkey, to wit, U.S.-Turkey law enforcement cooperation concerning sanctions on Iran.”xxviii The FARA Unit observed that Turkey, the law firm’s client, was not a party to a pending criminal prosecution in which the firm urged DOJ “to take certain action,” and that the firm’s “attempts to influence concerned foreign policy and relations matters well beyond the scope of that criminal case.”xxix

**The Skadden Case**

A civil settlement agreement that DOJ reached with Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) in January 2019xxx underscores DOJ’s intent to hold law firms accountable for compliance with FARA, and its willingness to impose serious sanctions for violations. The case also highlights the FARA registration risks for law firms that participate in public relations work in the United States on behalf of foreign clients.

According to the settlement agreement, Skadden had been hired by the Ministry of Justice of Ukraine in 2012 to write a report on the evidence and procedures used
During the 2011 prosecution and trial of former Prime Minister Yulia Tymoshenko, and to address various questions regarding the fairness of the report. After Skadden began this work, it learned that Ukraine intended to use the report as part of a public relations campaign to influence U.S. policy and public opinion toward Ukraine. Skadden’s lead partner for the Ukraine engagement subsequently took steps to advance the public relations campaign. The lead partner met in New York with a representative of Ukraine’s public relations firm to finalize the report and discuss the media strategy for the report’s rollout. Prior to the report’s release, the lead partner also engaged in direct outreach to a journalist at a U.S. newspaper about the report, arranged for delivery of the report to the journalist, and provided a quotation to the journalist for attribution.

Based on these activities, DOJ found, and Skadden agreed, that Skadden had acted as an agent of the Government of Ukraine by contributing to a public relations campaign in the United States. In addition, as set forth in the settlement agreement, Skadden agreed that the lead partner had made false and misleading statements to the FARA Unit, in response to previous inquiries from the FARA Unit about Skadden’s role in the public relations campaign, which led the government conclude in 2013 that Skadden was not obligated to register under FARA.

Pursuant to the settlement with DOJ, Skadden agreed to register under FARA and to pay the U.S. Treasury approximately $4.6 million which the firm had received in fees and expenses for its work on behalf of Ukraine – a novel financial sanction for a FARA violation. The agreement also imposed several obligations on Skadden. Most notably, DOJ required Skadden “to undertake a review of its policies and procedures for responding to information requests from the federal government,” and to submit a report to DOJ that addressed Skadden’s “procedures for when independent diligence should be undertaken in responding to such inquiries to ensure that the information provided is reliable, accurate and complete.”

DOJ also required Skadden to submit a report certifying the firm’s implementation of a robust FARA compliance regime, including (1) “[c]lient intake procedures to identify the direct or indirect involvement of a foreign principal and/or activities that may trigger potential FARA registration obligations”; and (2) “[p]romoting firm-wide awareness of FARA compliance, including FARA compliance training and messaging to appropriate personnel.”

**Best Practices for Law Firms**

In an era of heightened FARA enforcement, law firms performing engagements in the United States on behalf of foreign interests must now be more mindful of FARA’s applicability - and the Skadden case should serve as a cautionary tale. Law firms which represent foreign interests should institute a FARA compliance program, just as U.S. companies engaged in international trade and financial transactions maintain export control and anti-money laundering compliance programs. A robust compliance program should include training on FARA, commitment from firm leadership, and procedures for new client intake. A careful threshold risk assessment should be conducted to assess whether a proposed engagement comes within the scope of FARA (and, if so, whether the nature of the engagement qualifies for the exemption for legal representation). Where necessary, firms should engage
in heightened due diligence to confirm whether a potential foreign client has any connection to a foreign government. In engagements that are not registrable at their inception, firms should be careful about “mission creep” where additional client taskings are undertaken – such as outreach to U.S. news media or government officials – that may remove the firm from the safe harbor of the exemption and require FARA registration. In matters requiring registration, firms should consider appointing a “FARA gatekeeper” who will be principally responsible for ensuring that all necessary information is maintained and assembled for inclusion in disclosure filings with DOJ. Finally, firms must engage in rigorous review of draft filings with DOJ, and submissions in response to administrative inquiries, to ensure that they are accurate and complete.


[ii] The FARA Unit within CES handles the day-to-day administration and enforcement of FARA.


[iv] Id. § 611(c).

[v] As of May 31, 2020, approximately 69 law firms were registered under FARA with DOJ.


[vii] The term “political activities” is 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.” Id. § 611(o). The terms “formulating, adopting, or changing” “include any activity which seeks to maintain any existing domestic or foreign policy of the United States. They do not include making a routine inquiry of a Government official or employee concerning a current policy or seeking administrative action in a matter where such policy is not in question.” 28 C.F.R. § 5.100(e). The term “domestic or foreign policies of the United States” “relate to existing and proposed
legislation, or legislative action generally; treaties; executive agreements, proclamations, and orders; decisions relating to or affecting departmental or agency policy, and the like.” *Id.* § 5.100(f).


[ix] *Id.* § 618(a).

[x] *Id.*

[xi] *Id.* § 613. A party claiming an exemption from registration, however, has “[t]he burden of establishing the availability an exemption....” 28 C.F.R. § 5.300.

[xii] *Id.* § 611(a).

[xiii] *Id.* § 613(g).


[xv] 22 U.S.C § 613(g).


[xvii] Such disclosures are public because the FARA Unit at DOJ uploads filings by registrants onto a DOJ website at www.fara.gov, where they are accessible to the public.


A party may request a written advisory opinion from the FARA Unit as to whether a proposed engagement would require FARA registration. See 28 C.F.R. § 5.2. The FARA Unit has published selected advisory opinions, in redacted form, on its website at www.fara.gov.


Id.
That partner, Greg Craig, was indicted but ultimately acquitted at trial on charges that he had lied to DOJ regarding Skadden’s work for the government of Ukraine. See https://www.nytimes.com/2019/09/04/us/politics/gregory-craig-acquitted.html


Id. ¶7.

© 1998-2020 Wiggin and Dana LLP

Source URL: https://www.natlawreview.com/article/when-lawyers-become-foreign-agents-how-fara-impacts-law-firms