
The Foreign Agents Registration Act: A Brief Plain-Language Guide

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FARA Background

- FARA was enacted in 1938 as a legislative response to Nazi and Communist propaganda activities in the United States.
 - FARA was amended in 1966 to account for the advent of global economy.
 - FARA was amended in 1995/1998/2007 to cohere FARA reporting with the Lobbying Disclosure Act and to improve access to filings.
 - Broader terms, no “domestic subsidiary” exemption, tighter “lawyer” exemption



FARA Basic Facts

- FARA is enforced and administered by the Department of Justice's FARA Registration Unit.
- FARA is codified at 22 U.S.C. 611 et seq.
 - FARA Registration Unit Rules are located at 28 C.F.R. 5.1 et seq.
 - FARA advisory opinions, form instructions, and FAQs provide guidance
 - DOJ Enforcement Manual Section 2062 is an additional resource
- **Basic Concept: Becoming an “agent of a foreign principal” triggers legal consequences *unless* an exemption applies.**



Who is a “Foreign Principal”?

- Any foreign government.
- Any foreign political party.
 - A group engaged in any activity devoted in whole or in part to: (1) the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country”; or (2) “the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country”
- Any association, corporation, organization, or “combination of persons” established under the laws of a foreign country or having their principal place of business in a foreign country.
 - Domestic subsidiaries of foreign corporations are not “foreign principals”
- Any individual outside the United States.
 - Does not include a U.S. citizen who is also domiciled within the U.S.

Who is an “Agent”?

- An “agent” must act “within the United States.”
- An “agent” must act at the “order, request, or under the direction or control of” either: (1) a “foreign principal”; or (2) a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a “foreign principal.”
 - The practical indicia of “agent” status are contract language, reporting lines, statements within work product, payment streams, statements in internal files, and internal descriptions in emails and other records.
 - Courts have held that common personnel, shared facilities, and coincidence in views may be insufficient to create “agent” status.
 - Courts have used the Restatements of Agency as a guide in assessing “agent” status.
 - The scope of the terms “control” and “request” are important in a FARA analysis.
 - “Control” is defined in FARA rules as “the possession or the exercise of the power, directly or indirectly, to determine the policies or the activities of a person, whether through the ownership of voting rights, by contract or otherwise.”
 - The Second Circuit stated that “request” is not read to “sweep within the statute’s scope many forms of conduct that Congress did not intend to regulate” (i.e. must be a “command” more than a “plea”).

Who is an “Agent”? (cont.)

- An “agent” must perform an activity specified below “for or in the interests of” its “foreign principal.”
 - Engage in “political activities”
 - “Political activities” are those intended to “in any way influence” *either* “any agency or official of the Government of the United States” *or* “any section of the public within the United States” with reference to “domestic or foreign policies of the United States or ... the political or public interests, policies, or relations of a government of a foreign country or a foreign political party”
 - Lobbying *and* public relations activities are “political activities”
 - “Political activities” is broad enough to cover activities like tourism promotion
 - Act as a “public relations counsel, publicity agent, information-service employee, or political consultant”
 - Informing/advising/representing in a public relations matter about public/political interests
 - Furnishing/disseminating/publishing information
 - Informing/advising on the domestic or foreign policies of the United States
 - Solicit, collect, disburse, or dispense money or other things of value
 - Represent interests before any agency or official of the U.S. Government.

What Exemptions May Apply?

- FARA exempts persons engaged in “private and non political activities” that further “bona fide trade or commerce.”
 - Unavailable to those representing a foreign government or political party
 - Unavailable to those engaging in direct or grassroots lobbying-type activity
 - Can: (1) make a “routine inquiry” about existing policy where policy not in question; (2) engage in normal procurement process; (3) help seek routinely issued permits, certifications, approvals
 - Cannot: seek to influence governmental positions, policies, or appropriations
- FARA exempts persons registered under the Lobbying Disclosure Act.
 - Unavailable to those representing a foreign government or political party
 - Unavailable if “the principal beneficiary” of the representation is a foreign government or political party
- FARA exempts persons engaged only in activities that further the fine arts or “bona fide religious, scholastic, academic, or scientific pursuits.”
- FARA exempts attorneys representing clients before a court or agency.
 - Certain activities related to judicial, civil/criminal enforcement, investigatory, and agency proceedings; must disclose foreign principal to court/agency

What Exemptions May Apply? (cont.)

- FARA exempts persons engaged in activities “not serving predominantly a foreign interest.”
 - Unavailable to those representing a foreign government or political party
 - Available to those representing state-owned enterprises and allows “political activities”
 - Activities must: (1) further “bona fide commercial, industrial, or financial operations”; (2) not be “directed by a foreign government or foreign political party; and (3) not “directly promote the public or political interests of a foreign government or of a foreign political party”
 - Please note that Lobbying Disclosure Act registration may still be necessary
- Please note for *ALL* exemptions that the burden is initially on the filer to establish the applicability of the exemption.

What Does “Agent” Status Trigger?

- An “agent” who is not exempt must register within 10 days.
 - Legal Trigger: Agreeing to be an “agent” or performing registrable activities
 - An “agent” must file a Long-Form Registration, which includes:
 - Comprehensive descriptions of agent’s business, including organizational docs
 - Specific contact with foreign principal, including title and contact information
 - Copies of any agreements with the foreign principal
 - Income received/disbursements made during the preceding 60 days
 - Schedule of any funds collected or received for a foreign principal
 - Filing fee of \$305 for each registration
 - Individuals involved in the representation must file a “short-form” registration
 - Changes to registration information must be filed within 10 days
- An “agent” must file Supplemental Statements every 6 months.
 - Supplemental Statements include descriptions of activities, a listing of receipts and disbursements during reporting period, any political contributions made during reporting period, and details about informational materials distributed during reporting period
 - Filing fee of \$305/foreign principal

What Does “Agent” Status Trigger? (cont.)

- An “agent” must file all “informational materials” with the FARA Unit within 48 hours of distribution.
- An “agent” must identify itself in communications.
 - Written disclaimer must be included in all informational materials
 - Verbal/written disclaimer must be given in discussions with U.S. officials
- An “agent” must maintain records associated with a FARA representation for three years after terminating the representation.
- An “agent” is barred from working for a “contingent fee.”

Enforcement Standards and History

- **Criminal Enforcement:** A criminal case is brought under FARA when an individual or entity “willfully” fails to register, makes a false statement of material fact, or omits a material fact.
 - “Willful” means acting with knowledge that the conduct was unlawful
 - The government has burden of proof beyond a reasonable doubt
 - Charges are approved by the National Security Division
 - Four criminal cases brought between 2007-2016 (1 conviction, 3 pleas)
 - 2017/2018: Manafort, Gates, Flynn, Chaudhry, Patten, Internet Res. Agency, etc.
 - FARA is commonly confused with a similar provision at 18 U.S.C. 951
- **Civil Enforcement:** A civil or administrative case is brought when there is “sufficient credible evidence of a significant violation.”
 - Civil injunctive authority has not been used since 1991
 - DOJ has pursued 17 civil cases under FARA since 1966
 - Civil penalties have twice been sought unsuccessfully since the 1990s
 - Settlement may be possible through payment of a civil penalty

Enforcement Standards and History (cont.)

- No private right of action is available under FARA.
- Letters of Inquiry and audits are the primary tools of FARA Unit.
 - 130 Letters of Inquiry sent from 2006-2016 resulted in 38 registrations
 - Letters of Inquiry appear to be more common now
 - FARA Unit conducts ~14 audits per year of FARA registrants and may review all correspondence, accounting records, invoices, and files related to a client
- Historically, the FARA Unit has encouraged voluntary compliance over bringing charges.
 - NSD Dep. Asst. Atty. General: “[T]he primary means of achieving FARA’s main purpose of transparency is through encouraging voluntary disclosure in compliance with the Act”
 - DOJ Criminal Resource Manual: “The cornerstone of the Registration Unit’s enforcement efforts is ... voluntary compliance”

Current Enforcement Environment

- Congressional and public pressure have led to a more aggressive pivot in the FARA Unit's enforcement approach.
 - Think-tank “scandal” (2014)
 - Senator Grassley hearings and letters
 - Department of Justice Inspector General Report (2016)
 - Recent high-profile legal investigations
 - The law firm Skadden settled potential charges for late registration in 2019 by disgorging \$4.6M in payments and implementing a new compliance program
- FARA issues are now more likely to receive public scrutiny.
 - The press is now more aware of FARA violations and filings
 - Pending legislation shines a light on FARA
 - Congress has investigated FARA enforcement practices and cases
- FARA is the same vague and ambiguous law it has always been, but now the risks associated with a violation are significant.

Questions and Contact Information

- Questions?
- Contact Information
 - Matthew Sanderson: msanderson@capdale.com, 202-862-5046
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- For more information, please visit www.FARA.us, an online informational resource for individuals and companies who may be impacted by enforcement activities relating to the Foreign Agents Registration Act.

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