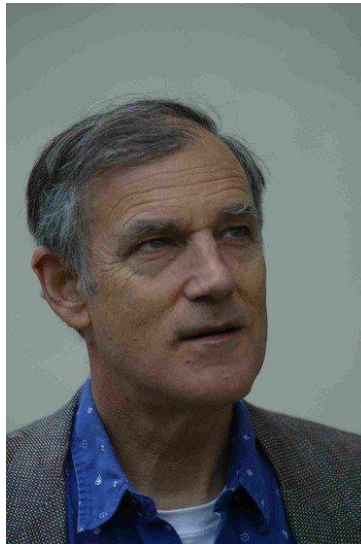


US Justice Department acts to increasingly enforce FARA while practitioners call for clearer rules

13 August 2019



Bruce Zagaris

Bruce Zagaris at Berliner Corcoran & Rowe in Washington, DC argues that the increased enforcement of the Foreign Agents Registration Act along with enhanced enforcement tools and no significant clarification of the ambiguous provisions of the law will produce more enforcement actions and yet not more compliance.

As the US Department of Justice (DOJ) ramps up prosecutions for violations of the Foreign Agents Registration Act (FARA), professionals, academicians, and think tanks who may be in its crosshairs are increasingly seeking counsel on the potential applicability of the act. The law was enacted in 1938 to prevent covert foreign influence and ensure that the US government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence US public opinion, policy, and laws. Meanwhile, on 10 June, a bipartisan coalition of senators introduced S. 1762, the Foreign Agents Registration and Disclosure Act of 2019, which would amend FARA by giving the DOJ more tools and resources to improve FARA enforcement. Simultaneously, the National Security Division (NSD) announced that the FARA unit – which sits within the NSD’s counterintelligence and export control section – intends to enforce, including by criminal prosecutions, violations of FARA. But the regulated community rightly complains about FARA’s wide scope and its lack of clarity, challenging the best efforts to comply in some cases.

Globalisation and the emphasis on unprecedented and questionable uses of United States economic statecraft in the way of trade protection and unilateral economic sanctions require that foreign sovereigns and other foreign persons impacted by US economic measures need to increasingly seek professional advice to understand the impact of the new measures, as well as to challenge and/or seek licences. In many cases the professionals from which they seek advice will need to ascertain whether their work requires registration under FARA. The assistant attorney general for the National Security Division, John Demers, a political appointee, publicly announced the Justice Department's intention to make FARA a criminal enforcement priority on 6 March.

Until now the FARA unit has emphasised facilitating compliance with the law and providing guidance to regulated persons. When the unit identified an unregistered foreign agent, it typically worked with the agent to register and, sometimes retroactively, disclose its activities. Until the last year the few FARA prosecutions that occurred since FARA was amended in 1966 with an expanded focus on economic lobbying involved some other kind of egregious criminal activity.

A major concern for the regulated community that deal with foreign governments is that FARA includes vague and inadequately defined terms, which makes it difficult to know whether a person is exempt or must file. FARA does not have a threshold that would exempt incidental and *de minimis* activity. The interested community includes corporations, non-profits, law firms, lobbying firms, think tanks and others who deal with foreign governments and persons. A new problem for professionals seeking advice from the FARA unit is that it, until recently, readily gave informal advice. Now they are more reticent to give such advice, fearing that, unless callers put their facts in writing and seek formal opinions, the callers may misuse the informal advice. Due to the time and cost of seeking formal opinions, the result is that callers do not obtain any advice. While FARA exempts certain activities, such as normal legal advocacy, the line between normal legal advocacy and "political activities" may not be clear. Even one meeting with the US government (eg, pre- or post-litigation or administrative proceeding) that exceeds the bounds of the legal exemption may trigger a registration requirement.

Another grey area is that FARA exempts persons whose activities are of a purely commercial nature or solely of a religious, scholastic, academic, scientific or fine arts nature. However, some businesses or academic organisations may have a sovereign ownership or control and they in turn may have a US subsidiary. If the sovereign is Chinese or Russian, and the US subsidiary is preparing to engage in activity that may arguably include persons from the US executive or legislative branch or the activity may influence a segment of the US public, then the question arises whether the US persons helping them are potential agents who should register notwithstanding that the activities are of a purely commercial nature or are solely of an academic nature. In particular, the US government has expressed concern about Chinese scholars at US universities and the potential they may steal intellectual property of a sensitive nature.

In its September 2016 audit of the enforcement and administration of FARA, the DOJ's Inspector General recommended that the NSD consider the value of making advisory opinions publicly available. To address the uncertainty, the FARA unit published 50 advisory opinions on its website on 8 June. FARA and its accompanying regulations do not allow anyone other than the requester to rely on a FARA advisory opinion. Since its longstanding past practice is to not release opinions publicly, it is unlikely that the FARA unit originally drafted these opinions with the intent that they would serve as guidance both for the requester and for the conduct of other similarly situated entities. However, the FARA advisory opinions also lack important contextual and factual background in many cases. This is because the DOJ has not posted the request letters that correspond to the opinions (unlike the Federal Election Commission), and the identities of the requestors and foreign entities involved are redacted from the opinions. In some opinions the available record does not contain all the facts that were material to DOJ's conclusions.

Law firm Skadden Arps Slate Meagher & Flom has been a target of FARA enforcement as a result of the special counsel investigation overseen by Robert Mueller. In February 2018 Alex van der Zwaan, a former Skadden lawyer, pleaded guilty to making false statements. Van der Zwaan was involved in the dissemination of an unflattering report on then Ukrainian Prime Minister Viktor Yanukovich's political rival written by Skadden as part of the work of Paul Manafort, a former presidential campaign manager for Donald Trump, for the then-Ukrainian president. The special counsel's office accused

van der Zwaan of lying about his communications with Rick Gates, a partner of Manafort, and Konstantin Kilimnik, a long-time business associate of Manafort.

Skadden entered into a settlement agreement resolving its liability for FARA violations in January. The agreement relates that Skadden acted as an agent of the government of Ukraine within the meaning of FARA by participating in a public relations campaign directed at select members of the US news media in 2012. The DOJ alleged that in 2012 and 2013, in response to multiple inquiries from the FARA registration unit about its role in that campaign Gregory Craig, then a partner at Skadden, made false and misleading statements to the FARA unit.

Thereafter, the FARA unit concluded in 2013 that the firm did not have to register. In fact, Skadden was active in the public relations aspects of the report but misled the FARA registration unit in that regard.

When more facts were known, Skadden should have been required to register in 2012, and ultimately the firm registered retroactively.

Skadden agreed under the settlement to pay the US Treasury more than \$4.6 million, which it received in fees and expenses for its work with Ukraine, and to ensure that it has formal, robust procedures for responding to inquiries concerning its conduct from any federal government entity and ensuring FARA compliance as to its engagements on behalf of foreign clients.

Skadden has taken substantial steps to comply with the terms of the settlement agreement and has cooperated extensively with the DOJ in its investigation, including with the special counsel's office and the National Security Division in relation to the settlement. Skadden has strengthened its internal procedures and processes.

Meanwhile, Craig has been charged with making false statements and concealing material information about his activities on behalf of Ukraine during the Presidency of Viktor Yanukovich from the FARA unit. Craig has said the allegations against him are "unprecedented and unjustified."

In another recent FARA case, US District Court Judge Robin L Rosenberg ruled on 13 May that a Florida-based company, RM Broadcasting, was acting as an agent of a foreign principal and must register as such under FARA. The DOJ argued in a civil counterclaim that RM Broadcasting has been acting as an agent of the Federal State Unitary Enterprise Rossiya Segodnya International Information Agency (Rossiya Segodnya), a Russian state-owned media enterprise created by Vladimir Putin to advance Russian interests abroad. The litigation marked the first civil FARA enforcement action since 1991. The enforcement action exemplifies another formerly exempt area of FARA which now the DOJ has decided to remove. Section 611(d) provides "(t)he term 'agent of a foreign principal' does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication ..." However, the DOJ has decided that, notwithstanding the exemption in the law, RM Broadcasting must register because Rossiya Segodnya is not independent of the Russian government.

Demers' announced intention to enforce FARA, the Skadden settlement, the Craig indictment, the recent convictions for FARA-related violations of Manafort, Gates and former national security adviser Michael Flynn, and US lobbyist Samuel Patten may well cause other law firms and organisations with significant international practices to modify their client intake and training procedures.

Meanwhile, S. 1762, the bill to strengthen the implementation and enforcement of FARA, will permit the DOJ to bring civil enforcement proceedings and broaden civil discovery authority. It will enable DOJ to compel material or testimony it requires to assess if a person must register. At present, the DOJ can only ask persons to volunteer this information. The proposed law increases the ceiling on criminal fines for wilfully making a false statement or material omission from \$10,000 to \$200,000 and introduces civil penalties for faulty registrations, as well as for failing to file a timely or complete FARA statement.

FARA's enormous breadth, its ambiguous definitions, the lack of meaningful guidance and the political nature of FARA, enable opponents of think tanks, non-profits, and others working with foreign

governments, and persons, to increasingly file complaints with DOJ to trigger investigations of their opponents.

With increased enforcement of FARA, Washington lawyers are fielding many inquiries from the persons dealing with foreign governments about whether they need to register under FARA. Many persons hesitate to register under FARA, especially for foreign governments or persons who possess less-than-stellar reputations, because they fear it may sully their firm's reputation. Foreign principals may hesitate to have their agents register because the FARA filings are available to the public. Many foreign principals are wary of having their political strategy available to the public. Nevertheless, the spirit of the legislation is that, when in doubt, persons potentially covered should register or at least try to obtain guidance or even a formal opinion from the FARA Unit.

Since FARA requires registration for political activities and those activities may be advice or the preparation of a press release that impacts a small segment of the US public (e.g., a municipal or regional segment), many foreign persons and US professionals may not realise that their activities require registration and nevertheless may violate FARA.

The recent FARA prosecutions, the warning from Demers about the prioritisation of enforcing FARA, the lack of clarity of the law and the inability to easily obtain informal advice, portends new legal skirmishes about the application of the law.

This article is part of a series provided exclusively to GIR by members of the International Academy of Financial Crime Litigators, a collaboration between public- and private-litigation professionals and the Basel Institute on Governance to expand worldwide access to solutions in cases of economic crime.

THESE ARTICLES ARE PART OF A SERIES

provided exclusively to **GIR** by members
of the *International Academy of Financial
Crime Litigators*.



THE INTERNATIONAL ACADEMY
OF FINANCIAL CRIME LITIGATORS