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The New Reality of FARA Enforcement: What DOJ's New Priorities Mean for Your Risk Calculus

Now more than ever, firms and individuals who advise clients that are state-owned or closely affiliated with a foreign government face unprecedented prosecution risk for violations of the Foreign Agents Registration Act (FARA). Those at enhanced risk include law firms, investment firms, and public relations and lobbying firms, as well as individuals. FARA, a statute enacted in 1938 but largely dormant until recently, requires firms and individuals who engage in certain activities on behalf of a foreign principal, i.e., agents of a foreign principal, to register under FARA, unless an exemption applies. Earlier this year, the U.S. Department of Justice announced its intention to treat FARA as an enforcement priority. Indeed, over the past two years, there have been nearly as many criminal prosecutions for FARA violations as there were in the preceding half century, underscoring DOJ's recent commitment to FARA enforcement.

The surge in DOJ's enforcement of FARA has ensnared not only individuals like Paul Manafort, but also an international law firm and its former partner Gregory Craig. The firm previously agreed to settle a DOJ investigation in connection with Manafort and the Ukrainian government. On September 4, Craig was acquitted on charges that he made false statements in connection with the firm's work for Manafort. These recent high-profile investigations have begun to highlight the many nuances and uncertainties surrounding FARA's scope and application.

Although FARA contains several key exemptions, those exemptions are often confusing to parse and may be narrower than anticipated. For instance, of special importance to companies (including U.S. subsidiaries of foreign corporations) is the exemption for those who register under the Lobbying Disclosure Act of 1995 (LDA) (2 U.S.C. 1601), which requires significantly less disclosure than FARA (the LDA exemption) (22 U.S.C. 613(h)). Under the LDA exemption, a person who would otherwise be required to register as a foreign agent under FARA can instead register as a lobbyist under the LDA. The LDA exemption, however, is limited in two principal ways. First, it does not apply to an agent working for a foreign government or foreign political party. Second, it does not apply if a foreign government or foreign political party is "the principal beneficiary" of the activity, regardless of whether the foreign government or political party is the actual client. And a recent [DOJ advisory opinion](#) signaled a further narrowing of the exemption by suggesting that it may not apply if a foreign government or foreign political party is "a principal beneficiary," even if it is not *the* principal beneficiary.

With the key threshold for distinguishing when the LDA exemption will apply in flux, it is more important than ever for potential FARA registrants to perform due diligence on prospective clients and to understand whether a foreign government or foreign political party might have *some* interest in the matter. If there is any doubt about whether FARA registration is required, it is prudent to seek an advisory opinion from the National Security Division of the DOJ, which is tasked with administering and enforcing FARA, in order to ensure FARA compliance throughout the engagement.

On September 25, Washington, DC-based counsel Steven Cash will be a featured speaker at the National Forum on FARA, an event presented by the American Conference Institute and held in Washington, DC. His panel, entitled "Revisiting the Lobbying Disclosure Act (LDA) Exemption: How Practitioners Are Now Interpreting Its Scope of Application," will focus on

due diligence requirements as they relate to FARA registration, use of the LDA exemption, and the status of congressional proposals to eliminate the exemption. The event will gather key stakeholders—including law enforcement agencies, legal practitioners, and public relations and lobbying firms—to discuss the real-life challenges posed by the FARA statute and how best to proceed with new legal, compliance, political and public relations risk factors.

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