

FARA 2021 Year in Review

January 6, 2022

The Foreign Agents Registration Act (FARA) continued to make headlines in 2021 as enforcement and modernization of the law remained a U.S. Department of Justice (DOJ) priority. DOJ maintained its focus on enforcement, published guidance to help clarify registration obligations, and kicked off a rulemaking to update FARA regulations. In the Legislative Branch, Congress introduced several bills that would amend the law to facilitate more transparency surrounding the activities of foreign government efforts to influence U.S. politics and the American public. Below, we outline a few of the most important FARA developments of the past year.

DOJ Begins Rulemaking

The most recent development in DOJ's administration of FARA is perhaps the year's most significant. On December 13, 2021, DOJ National Security Division issued an Advance Notice of Proposed Rulemaking (ANPRM) and request for public comments regarding clarification and modernization of FARA implementing regulations.

The ANPRM contains 19 specific questions for public comment on a range of topics, including: agency, exemptions, Rule 2 advisory opinions, and labeling of informational materials (e.g., social media materials). DOJ's issuance of the ANPRM is the initial step in a rulemaking process that will most likely result in the first revisions of FARA regulations in 15 years.

Comments on the ANPRM are due Tuesday, February 11, 2022. DOJ will review public comments and begin drafting regulatory text to amend and clarify the FARA regulations. That text will then be published as a proposed rule for further public comment.

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Practice Areas

Election Law & Government Ethics
Foreign Agents Registration Act (FARA)
International Trade
National Security

Clarification of Political Consultancy

The FARA Unit issues advisory opinions in response to requests by present or prospective agents of a foreign principal for clarification of registration obligations related to a particular transaction. The DOJ FARA Unit periodically publishes redacted versions of advisory opinions as guidance to the regulated community regarding DOJ's interpretation of the law and its enforcement intentions. One such advisory opinion, dated July 19, 2021, sheds new light on DOJ's understanding of when political consulting services are considered registerable activity, and when they are not.

The advisory opinion acknowledges the wide scope of the definition of "political consultant" under FARA but then leans on legislative history to narrow the types of political consulting services that trigger FARA registration obligations. The letter states that the FARA Unit "follow[s] Congress's intent as reflected in the legislative history to the 1966 FARA Amendments," to require a threshold finding that a political consultant must engage in political activities, as defined under FARA, in order for a registration obligation to arise.

The advisory opinion concludes that the company in question that requested the opinion is not obligated to register under FARA for its advisory services under a certain contract "because it is not engaged in political activities, or any other registrable activity, within the United States on behalf of the [Foreign government]," and the "contract [does not] anticipate that [the company] will advise on U.S. Government programs or represent the foreign principal before U.S. Government officials or agencies."

Continued Focus on Transparency and Enforcement

The FARA Unit's periodic publication of advisory opinion letters provides useful guidance on DOJ's current FARA administration and enforcement intentions. To date, the FARA Unit's advisory opinions webpage includes 14 letters from 2021. Eight of those letters address issues related to agency relationship while the others center on exemptions – three on the legal/lawyers exemption, two on the commercial exemption, and one on the Lobbying Disclosure Act (LDA) exemption.

These advisory opinions are particularly useful in light of DOJ's heightened FARA enforcement over the last several years. The FARA Unit's website also highlights recent FARA enforcement cases, including the 2021 sentencing of Imaad Shah Zuberi, which includes five years in prison and a \$1 million fine for violating FARA. Mr. Zuberi pleaded guilty to violating FARA, tax evasion, illegal campaign contributions, and obstruction of justice. According to DOJ, "Mr. Zuberi admitted to submitting false registration statements that concealed his role in a lobbying effort on behalf of the Government of Sri Lanka, his political contributions, and millions of dollars he received." This era of heightened enforcement coincides with a significant uptick in new registrations since 2016 and is likely to continue through 2022.

FARA Legislation

Congress did not pass significant FARA reform legislation during the first session of the 117th Congress. Nevertheless, several bills with meaningful FARA reform provisions were introduced in 2021, which could become law in 2022. Legislation that was introduced in 2021 generally addresses issues related to the scope

of registration obligations (including covered activities and exemptions), DOJ enforcement and investigation authorities, or simply improving the digital accessibility of FARA filings.

The Democratic majority in the House of Representatives passed the For the People Act (H.R.1), which is a large voting rights, campaign finance, and government ethics bill that contains several significant FARA reforms. H.R. 1 is unlikely to clear the Senate, but its FARA reform provisions may find bipartisan support as stand-alone bills. For example, the Foreign Agents Registration Modernization Act (FARM Act, S.3172, H. R.5859) was introduced in both chambers with Democratic and Republican sponsors and includes FARA reform provisions similar to those in H.R. 1.

Senator Grassley (R-IA) reintroduced the Foreign Agents Disclosure and Registration Enhancement Act (S.1724), which addresses FARA enforcement and penalties and directs the Government Accountability Office to audit the LDA exemption. Senator Grassley's bill has been referred to the Foreign Relations Committee, chaired by Senator Robert Menendez (D-NJ). Senator Grassley has been a champion of FARA reform for several years and his bill may be the most likely to gain traction in 2022.

ABA Task Force Report

In July 2021, the FARA Task Force of the American Bar Association's International Law Section released a report entitled, "FARA: Issues and Recommendation for Reform." The Task Force included FARA compliance attorneys, former DOJ officials responsible for FARA enforcement, and general counsel of various members of the regulated community. The Task Force was established in 2019 to consider possible reforms to FARA and how it is administered and enforced by DOJ.

According to the Task Force, FARA compliance "is bedeviled by an antiquated statutory regime which is expansive in its jurisdictional scope, stigmatizing in its terminology, and laden with key definitions that are unduly broad or vague." Therefore, the Task Force "set out to craft proposed reforms" that "are sound as a matter of law and policy, seeking to strike a reasonable balance between the government's legitimate enforcement interests and the importance of a clearer, more practicable, legal regime for parties engaged in activities within the United States on behalf of foreign interests."

The Report includes a wide range of proposed reforms, some of which could be implemented by the DOJ and others that would require new federal legislation to reform the FARA statute.

Wiley attorneys routinely handle matters on all aspects of FARA compliance, from counseling clients on whether registration is required, to assisting clients with completing and executing their FARA filings. For more information on FARA and our related capabilities, please contact one of the lawyers listed on this alert