

# FARA: 2022 Review and 2023 Preview

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January 19, 2023

The trend in aggressive enforcement of the Foreign Agents Registration Act (FARA) enforcement continued in 2022 with the Department of Justice's (DOJ) first affirmative civil enforcement lawsuit in over 20 years and a number of civil and criminal enforcement actions brought under FARA. Recent FARA indictments also reflect a heightened focus on certain priority regions in which foreign principals are based – *e.g.*, China, Russia, and the Middle East. In addition to enforcement actions, other key FARA developments over the past year include a continued focus on transparency and new FARA-related legislative proposals which are detailed below.

## Continued Focus on Transparency and Enforcement

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. DOJ's FARA Registration 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. These opinion letters provide useful guidance on DOJ's current FARA administration and enforcement intentions.

DOJ published several advisory opinions in 2022. Five of the letters address issues related to agency relationship, while the others center on exemptions – four on the commercial exemption, one on the legal (lawyers') exemption, and another on the Lobbying Disclosure Act (LDA) exemption. Additionally, one advisory opinion was published regarding the application of the exemption for religious, scholastic, fine arts, or scientific pursuits to a non-profit entity.

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These advisory opinions are particularly useful in the current era of heightened FARA enforcement. Additional FARA indictments and trials from 2022 are discussed below. This era of heightened enforcement coincides with a significant uptick in new FARA registrations since 2016 and is likely to continue through 2023.

### **Civil Enforcement Action**

In May 2022, the DOJ sued in the U.S. District Court in D.C. to compel Stephen A. Wynn to register under FARA in its first affirmative civil enforcement lawsuit under FARA in over 20 years. Wynn was advised by DOJ to register in three letters sent between 2018 and 2022. In October 2022, Judge James E. Boasberg dismissed the action for failure to state a claim in a colorful memorandum opinion that quoted The Fugees and made Judge Boasberg's disagreement with D.C. Circuit precedent apparent. The precedential holding in *U.S. v. McGoff* interpreted an ambiguous FARA provision to mean that the continuing criminal offense of a FARA violation ends on the date that lobbying activities cease. If left unchanged, this ruling would limit the DOJ's ability to compel registration for past activity through a civil complaint.

The DOJ notified that it would be appealing the ruling in Wynn's case in December 2022. In remarks the day before the notice of appeal, DOJ commented that although the ruling did appear to limit the DOJ in pursuing lawsuits, litigation risks in D.C. federal court would not preclude DOJ from proceeding with cases in the jurisdiction. The DOJ will continue to litigate this appeal in 2023 and can be expected to utilize the opposing arguments explicated in Judge Boasberg's dismissal to advocate against the D.C. Circuit's interpretation in federal venues outside of D.C.

### **Nexus with Section 951**

18 U.S.C § 951 (Section 951), like FARA, targets activities undertaken by foreign agents in the United States. It centers on criminal enforcement of violations and provides criminal penalties for certain agents of foreign governments who act in the United States without first notifying the Attorney General. Registration under FARA satisfies the notification requirement of Section 951. Notably, while Section 951 defines foreign principals to include foreign governments and officials, FARA defines foreign principals more broadly to include foreign companies and foreign individuals.

Recently, the DOJ has brought several actions under Section 951 in conjunction with or in lieu of charges for FARA violations. One such action was brought in March 2022 against Elena Bransen, a dual Russian and U.S. citizen. Its counts included failure to register under FARA and conspiracy to act as an unregistered agent of a foreign principal in violation of FARA and Section 951. The DOJ brought another case under Section 951, albeit in June 2021, against Thomas Barrack, a friend and former key adviser to former President Donald Trump. The complaint alleged that Barrack and his associates worked to influence U.S. foreign policy at the behest of the United Arab Emirates for two years without informing the U.S. government. In November 2022, Mr. Barrack was acquitted of these charges. We anticipate that prosecutions under Section 951 in conjunction with or in lieu of FARA will become increasingly common in 2023.

## FARA Legislative Developments

Although Congress did not pass significant FARA reform legislation in 2022, legislative activity on the topics of FARA and LDA reform increased. Notably, in December 2022, the DOJ wrote to the chairs of the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary in support of the Foreign Agents Disclosure and Registration Enhancement Act of 2021. This bill was re-introduced by Senator Grassley (R-IA), a longtime champion of FARA reform, in the past two sessions of Congress. DOJ's letter provided comments on the bill's provisions, indicated support for an increase of the maximum fine for a felony violation of FARA from \$10,000 to \$200,000, and noted that provisions that would authorize it to issue civil investigative demands would assist greatly with enforcement efforts.

Another of Senator Grassley's proposals, the Lobbying Disclosure Improvement Act, passed the Senate in December 2022. While the LDA exemption to FARA registration has been routinely subject to criticism for being improperly used, Congressional efforts to remove, amend, or audit the exemption have failed. To help address the LDA exemption "loophole," this bill would create an additional registration requirement under the LDA that compels registrants to indicate as part of their LDA filing whether they are availing themselves of the LDA exemption to FARA registration. Notably, DOJ's letter regarding the Foreign Agents Disclosure and Registration Enhancement Acts pointed to a 2016 conclusion of DOJ's Inspector General and National Security Division to support a statement that it supports the repeal of the LDA exemption entirely.

Other notable proposed legislation included Preventing Adversary Influence, Disinformation and Obscured Foreign Financing Act (PAID OFF Act), introduced by Senators Cornyn (R-TX), Whitehouse (D-RI), Hagerty (R-TN), Fischer (R-NE), and Rubio (R-FL). If passed, it would amend FARA to remove both the trade/commerce and the LDA exemptions to FARA where a foreign principal is deemed to be a foreign adversary, which have been defined by executive order as China, Cuba, Iran, North Korea, Russia, and Venezuela. A fourth bill, the Think Tank Transparency Act of 2022, would require think tanks and nonprofits engaged in influencing U.S. policy or public opinion to disclose to the DOJ funding received from and agreements signed with foreign principals. The agency would then make those disclosures available in an online database similar to the publicly available database for FARA filings. It was introduced by Representative Jack Bergman (R-MI) in the House and Senator Grassley in the Senate.

The Lobbying Disclosure Improvement Act and Foreign Agents Disclosure and Registration Enhancement Act are likely to be re-introduced in the 118th Congress. Because FARA reforms enjoy bipartisan support, these reforms may gain traction even given the slimmer Republican majority in the House and Democrat-controlled Senate.

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We expect FARA to continue to make headlines in 2023 as the Biden Administration and Congress remain focused on FARA enforcement and reform. DOJ is also expected this year to open a comment period through a Notice of Proposed Rulemaking on regulatory changes that would modernize and clarify the scope and meaning of FARA following its request for public comments on possible regulatory modifications through an

Advanced Notice of Proposed Rulemaking issued on the topic in December 2021. Finally, we anticipate developments in appellate litigation regarding the statute of limitations issue as applied to civil enforcements in the Wynn case and potentially others.

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, and recently reissued its FARA Handbook, available [here](#). For more information on FARA and our related capabilities, please contact the lawyer listed on this alert.