

# Beware Foreign Companies Seeking U.S. Support

U.S. is increasing its enforcement to monitor foreign interests.

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## TAKEAWAYS

- ⑫ The U.S. Department of Justice (DOJ) recently announced increased enforcement of the Foreign Agents Registration Act (FARA), which requires public registration and reporting by U.S. persons engaged in political activities on behalf of foreign interests.
- ⑫ FARA's coverage is both broad and ambiguous, and the failure to comply can result in significant penalties for the U.S. "agent," including criminal enforcement, as well as reputational damage to the foreign client of the U.S. person.
- ⑫ Political consultants for companies not government-owned can take advantage of an exception where the consultant registers under a different, less burdensome law, the Lobbying Disclosure Act (LDA). Non-U.S. companies should confirm that their U.S. advisors (including consultants, lobbyists, lawyers, and others) are in compliance with FARA or qualify for one of the exemptions, especially LDA.

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Enacted in 1938, FARA is a disclosure statute that seeks to ensure that persons representing the interests of foreign entities in a "political or quasi-political capacity" in the United States disclose their activities to the U.S. government. Under FARA, unless an exemption applies, any "agent of a foreign principal" is required to register with DOJ and file detailed reports every six months.

### Recent Developments under FARA

Historically, there have been few criminal enforcement cases under the FARA. However, the U.S.

investigation of Russian influence in U.S. politics has spun off several FARA enforcement actions, with the most high-profile settlement being the recent Skadden Arps Slate Meagher & Flom LLP's \$4.6 million disgorgement deal with the DOJ and recent indictment of its former partner, as a result of its lawyers' failing to register their lobbying work for the Ukrainian government. This enforcement case against a high-profile U.S. law firm has brought increased attention to FARA and highlights the need to review engagements with U.S. law firms and consultants that may potentially involve "political activities" as defined in the statute.

FARA covers most lobbying, advertising, public relations, and fundraising for "foreign principals," that is not of a commercial nature, or performed by embassy officials. The statute requires agents to make periodic public disclosure of their identities, agency relationships, activities, receipts and disbursements. Disclosure of the required information facilitates evaluation by the government and the American people of the statements and activities of such persons in light of their status as foreign agents. The news media are the greatest users of the information filed under the Act, and give it further publicity.

The FARA Registration Unit of the Counterintelligence and Export Control Section (CES) in the National Security Division (NSD) is responsible for the administrative enforcement of the Act.

### **The LDA Exemption from FARA**

FARA registration and reporting can be burdensome; however, an exemption in the statute permits a filer to comply using less onerous reporting requirements under the LDA. The LDA requires registration and reporting by federal lobbyists. In cases where agents represent entities such as foreign *corporations* that are not government-owned, there is an exemption from registration under FARA if one instead registers under the LDA. By registering and reporting under the simpler compliance requirements of the LDA, a U.S. representative can minimize compliance burdens under FARA as long as the foreign principal is not a foreign government or political party.

#### *LDA Coverage*

An individual will qualify as a federal lobbyist under the LDA if the individual's services include more than one lobbying contact with a covered federal official and the individual's compensated lobbying activities constitute 20 percent or more of his or her services' time on behalf of his or her employer (or client) during any three-month period.

For purposes of the LDA, "lobbying activities" include lobbying contacts and any efforts in support of those contacts. This includes preparation or planning activities, research and other background work that is intended, at the time of its preparation, for use in contacts and coordination with the lobbying activities of others. A "lobbying contact" includes any oral, written or electronic communication to a covered executive or legislative branch official that is made on behalf of the company with regard to:

- the formulation, modification, or adoption of Federal legislation (including legislative proposals);
- the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
- the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- the nomination or confirmation of a person for a position subject to confirmation by the Senate.

There are some exceptions to the term “lobbying contact,” such as testimony given before a committee or communications submitted for inclusion in the public record of a hearing.

### *Registration and Disclosure under LDA*

Organizations employing in-house lobbyists must file a registration statement within 45 days of the thresholds being met. An organization is exempt from registration if its total expenses for lobbying activities do not exceed and are not expected to exceed \$13,000 during a quarterly period.

An organization or company that does not employ in-house lobbyists, and merely retains services of a federal lobbying firm, does not incur any disclosure obligations. The lobbying firm is required to register and list the organization or company as its client. A lobbying firm is exempt from registration for a particular client if its total income from that client for lobbying activities does not exceed and is not expected to exceed \$3,000 during a quarterly period.

In addition to the submission of the registration statement, the LDA requires the filing of quarterly lobbying activity reports and semi-annual lobbying contribution reports. These reports are submitted electronically with the Clerk of the House of Representatives and the Secretary of the Senate, which is completed simultaneously. The reports filed semi-annually require the filer to certify under penalty of perjury that the filer has not knowingly violated the gift and travel provisions in the Rules of both the House of Representatives and the Senate.

### **Recommendations for Foreign-based Clients**

Taking into consideration FARA’s breadth and ambiguity, and DOJ’s recent new emphasis on enforcement, non-U.S. companies using U.S. advisors may face different approaches by its U.S. advisors who are concerned about their FARA compliance. Be prepared and familiarize yourself with the requirements under FARA and the LDA to avoid unpleasant surprises. Foreign clients should seek a confirmation of FARA or LDA compliance by their U.S. advisors.

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