

LEGAL ALERT | JUNE 29, 2018

NONPROFITS AND THE FOREIGN AGENTS REGISTRATION ACT

Congressional Committee's FARA Inquiries to Nonprofit Organizations Highlight Legal and Political Issues for Nonprofits Under FARA and Nexus to Tax-Exempt Status

The House Committee on Natural Resources (**HCNR**) this month sent letters to two U.S.-based nonprofit organizations—the Natural Resources Defense Council and the Center for Biological Diversity—questioning whether their foreign activities and relationships require registration under the Foreign Agents Registration Act (**FARA** or the “**Act**”).¹ Also this month, the HCNR sent a letter to Defense Secretary Mattis, raising the same issues and seeking information “from the Defense Department on [the] impact of environmental litigation military readiness.”²

The HCNR letters merit attention as they put into focus legal and political issues under FARA for nonprofits that are based or operating in the United States and have foreign activities and relationships (including funding sources). This Legal Alert briefly discusses FARA, the relationship of FARA to nonprofits' tax-exempt status, and considerations for nonprofits in responding to Congressional inquiries regarding their FARA status.

The Foreign Agents Registration Act

FARA's Recent Rise From Obscurity

FARA was enacted in 1938, but only recently entered the public consciousness through the Special Counsel's investigation of Trump campaign and administration officials. Following the indictment of Paul Manafort for FARA and other violations, and Michael Flynn's remedial registration under FARA after his previously undisclosed work on behalf of foreign governments came to light, lobbyists, public relations professionals and law firms, among others, reportedly were moved to register as foreign agents or assess their FARA registration obligations.³

Foreign Agents Registration Requirement; Administration by DOJ

The Department of Justice states that FARA's purpose “is to insure that the U.S. Government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence U.S. public opinion, policy, and laws.”⁴

Toward that end, FARA requires natural and legal persons who are “agents of foreign principals” to register as such with the Attorney General of the United States.⁵ The Act is administered and enforced by the Department of Justice (**DOJ**) FARA Registration Unit, which is part of the Counterintelligence and Export Control Section, National Security Division.⁶

Foreign Agent and Foreign Principal Definitions; DOJ Advisory Opinions

Under FARA, a person is a foreign agent and required to register as such if, *inter alia*, that person, within the United States, engages in political, public relations, lobbying or certain business activities in the interests and at the direct or indirect instruction or control of a foreign government, political party, or private natural or legal person.⁷

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The language of FARA is plain, but its meaning is elusive. The Act's language is broad on its face and arguably captures a wide range of activities United States conducted on behalf of foreign parties, or that can be construed as such. This ambiguity, coupled with the greater awareness of FARA following the 2016 election, led the DOJ FARA Unit this month to publish, for the first time, its advisory opinions issued since January 1, 2010.⁸

Importantly, and contrary to what appears to be a common assumption, a "foreign principal" under FARA is not just a foreign government or political party: a foreign principal *includes*, in addition to a foreign government or political party, any natural person outside of the United States who is not a citizen of *and* domiciled within the United States, or is a legal person who is organized under the laws of the United States or a place subject to U.S. jurisdiction *and* has its principal place of business within the United States.⁹ Thus, for example, a U.S. citizen or lawful permanent resident who is domiciled outside of the United States would appear to qualify as a "foreign principal." A company, nonprofit organization or other legal entity organized under U.S. law but having its principal place of business outside of the United States would be, on the face of the Act, a "foreign principal."

The recently released advisory opinions, which are redacted and respond to specific facts and circumstances, provide some insight as to how the FARA Unit has interpreted the Act's applicability in specific cases, but they have not provided clarity as to how the Act might apply more generally or in the future. Moreover, the advisory opinions are not binding in similar or seemingly similar circumstances, nor do they create substantive or procedural rights.¹⁰ Parties other than those to whom those advisory opinions were addressed may not and should not rely on them, except for informational purposes.

Link Between FARA and Nonprofit Tax-Exempt Status: Political Activities and Lobbying

Conduct that might require a party to register under FARA might also constitute "lobbying." As noted above, FARA provides that lobbyists registered under the LDA are not required to register under FARA if the lobbying activity for which they are registered is not on behalf of a foreign government or foreign political party.¹¹

Lobbying is also important in the context of tax-exempt entities, as 501(c)(3) organizations may not—as a condition of their tax-exempt status—engage in more than "some lobbying," which the IRS explains is the attempt to "influence legislation."¹² According to the IRS, "legislation" includes actions by Congress and state and local legislative or equivalent bodies, as well as public referenda, ballot measures, constitutional amendments, and similar procedures. Lobbying does not, however, include "actions by executive, judicial, or administrative bodies."¹³

IRS guidance is helpful, but there is ambiguity in terms of the nature and degree of activity that could constitute "lobbying" sufficient to jeopardize a 501(c)(3)'s tax-exempt status, as "some" lobbying is not quantified or otherwise delineated and the line between advocacy and lobbying is not entirely clear. Where a "foreign principal" is in the mix, including indirectly where a foreign government or other party has an interest in issues that are the subject of a nonprofit organization's advocacy, links may be drawn (even if attenuated) between "lobbying" and foreign agent activities, potentially raising not only issues under FARA, but also about the tax-exempt status of a targeted nonprofit entity (*i.e.*, if a nonprofit is found to be required to register as a foreign agent under FARA, its activities, if "lobbying," would raise questions about its tax-exempt status).

Nonprofits Should Add FARA to Their Lexicons and Compliance Radars

Increased awareness of FARA and its potentially wide applicability have rendered the once obscure law a tool not only for traditional “foreign agent” disclosure and monitoring, but also for championing or stifling policy perspectives and gathering information about nonprofit or other entity activities related to foreign parties or international issues.

Nonprofit organizations should take note of the FARA inquiries issued to environmental advocacy groups, as it is likely that additional inquiries will be directed to other nonprofit (or other) entities, including outside of the environmental law and policy areas. Tax-exempt organizations that are based or active in the United States and have international activities—*e.g.*, foreign funding sources or relationships—should as a starting point familiarize themselves with FARA. Information about FARA within such organizations should not only be obtained by legal or compliance personnel, but should also be disseminated, as appropriate, to management and to staff or entity representatives with direct or indirect contacts with parties who might constitute “foreign principals” under FARA.

Responding to Congressional Inquiries as to FARA Status: Considerations and Approaches for Nonprofits

Nonprofit entities that receive Congressional or similar requests for information about their foreign activities or relationships should, in crafting responses, consider the following matters, among others:

- (1) Whether FARA is likely applicable to their activities (including, where necessary, by seeking an advisory opinion from the DOJ’s FARA Unit).
- (2) Whether the inquiring Congressional committee or other body’s request is within its jurisdiction (*e.g.*, as spelled out by the Committee’s rules and/or House or Senate rules).
- (3) Whether the Congressional or other request is of an oversight, investigative, or other nature.
- (4) The scope of the Congressional or other request, both in terms of information clearly or immediately requested and any potential follow-up requests that might result.
- (5) The potential for subpoenas or other measures compelling responses (or fuller responses); and,
- (6) The potential wider implications of any response to Congressional or other requests, such as:
 - a. The nonprofit’s interests in confidentiality of information;
 - b. Attorney-client privilege and confidentiality, where applicable;
 - c. Tax exempt status;
 - d. Any potential reputational risk; and,
 - e. How the request might implicate or affect donor and other perceptions and relationships.

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For more information about this update and the issues it covers, contact [Hdeel Abdelhady](mailto:Hdeel.Abdelhady@masspointpllc.com) at habelhady@masspointpllc.com.

NOTES

¹ 22 U.S.C. §§ 611-621.

² Letter dated June 13, 2018 from the Committee on Natural Resources to James N. Mattis, https://naturalresources.house.gov/uploadedfiles/2018.06.13_bishop-westerman_letter_to_dod.pdf.

³ See, e.g., Tessa Berenson, *Paul Manafort's Indictment Could Have Some Washington Lobbyists on Edge*, Time (Nov. 1, 2017), <http://time.com/5005142/paul-manafort-indictment-foreign-agents-registration-act-fara/>; Jennifer Williams, *Disgraced Trump adviser Mike Flynn admits he worked as a "foreign agent" for the Turkish government*, Vox (March 9, 2017), <https://www.vox.com/world/2017/3/9/14868680/trump-adviser-michael-flynn-foreign-agent-turkey-lobby>. Notwithstanding news reports of raised concern among and registration by lobbyists and others, a comparison of statistical information contained in the first semi-annual reports of the Attorney General to Congress from 2013-2017 do not indicate a significant increase in the raw numbers of total FARA registrants or new registrations. Department of Justice, FARA Reports to Congress, available at <https://www.justice.gov/nsd-fara/fara-reports-congress> (Section 621 of the FARA requires the Attorney General to report every six months to Congress on his or her administration of FARA, including as to registrations filed).

⁴ Department of Justice, Foreign Agents Registration Act, General FARA Frequently Asked Questions, <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions#2>. This statement of FARA's purpose, on its face, is broad when compared to common understandings of the Act and judicial renderings of its purpose. For example, in 1972, a federal appellate court stated that FARA's purpose "is to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature." *Att'y General of the United States v. Irish N. Aid Comm.*, 346 F.Supp. 1384 (S.D.N.Y. 1972), *aff'd mem*, 465 F.2d 1405 (2d Cir. 1972).

⁵ 22 U.S.C. § 612(a). Registration must be made within ten days after a person becomes a foreign agent and the registration must include, *inter alia*, information as to the foreign agent's business and nature of the relationship with the foreign principal.

⁶ Department of Justice, Foreign Agents Registration Act, <https://www.justice.gov/nsd-fara>.

⁷ *Id.* at §§ 611-612. Some activities that might appear to require registration are expressly exempt from FARA's registration requirements, such as those of certain U.S. news organizations that are excluded from the definition of "agent of foreign principal" (§ 611(d)); certain private and non-commercial activities (§ 613(d)); and, lawyers and law firms that provide legal representation to *disclosed* foreign principals, so long as such legal representation does not include lobbying and certain other activities designed to "influence or persuade" certain judicial and administrative proceedings or investigations or inquiries (§ 613(g)). A person who is engaged in "lobbying" and registered under the Lobbying Disclosure Act (LDA) is exempt from FARA registration only if the LDA-registered lobbying activity is *not* on behalf of a foreign government or foreign political party.

⁸ Department of Justice, Foreign Agents Registration Act, Advisory Opinions, at <https://www.justice.gov/nsd-fara/advisory-opinions> (stating that the opinions released are "advisory opinions that the FARA Registration Unit has issued pursuant to requests under 28 C.F.R. § 5.2 since January 1, 2010, as well as three opinions issued prior to that point (which were previously summarized on this website.)")

⁹ *Id.* at § 611(b).

¹⁰ *Id.*

¹¹ See note 7 above.

¹² IRS, Charities and Nonprofits Lobbying, at <https://www.irs.gov/charities-nonprofits/lobbying>.

¹³ *Id.*