

Outside Counsel

Debunking FARA Myths (and Why Lawyers Should Be Paying Attention)

The federal prosecution of Paul Manafort for failing to register under the Foreign Agent Registration Act (FARA) in connection with his work for the Government of Ukraine has certainly elevated the profile of this once-backwater enforcement regime. But, importantly, the Manafort prosecution has also reinforced long-held FARA myths. Prominent among those myths is this: Unless lawyers are engaged in political lobbying on behalf of foreign state-actors, we simply need not be concerned with FARA.

Wrong.

The truth is that FARA is a staggeringly broad and notably vague statute that brings within its ambit services regularly provided by many lawyers and law firms to foreign individuals and companies. FARA requires those who engage in certain activities on behalf of foreign individuals and companies to register with the Department of Justice via publicly-accessible filings. Common

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misperceptions about the scope of FARA combined with lax enforcement—at least until recently—have seemingly led to widespread non-compliance. The fact is that, right now, many lawyers are likely violating this criminal and regulatory regime, at a time when it is the sub-

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Here are some common myths about FARA, debunked, to help practicing lawyers appreciate the

breadth of the statute—and whether it may apply to their own activities:

Myth: *FARA applies only to activities on behalf of a foreign government. I represent foreign individuals and companies, not governments, so FARA isn't a concern.*

Fact: FARA applies to identified activities performed on behalf of any “foreign principal.” A foreign principal includes both foreign individuals and foreign companies—even if they have absolutely no connection to any foreign government or political party. So, if you represent a non-U.S. citizen living outside the United States, you represent a foreign principal. You also represent a foreign principal if you represent a company, partnership, corporation, or association organized under the laws of a foreign country or with its principal place of business in a foreign country. For example, a company headquartered in the United States, but organized under the laws of say, the Cayman Islands, is a foreign principal under FARA. So is a British citizen living in London. And yes: If you represent a foreign government or political party, you also represent a foreign principal.

Myth: *FARA only applies to political lobbying. I don't lobby, so FARA doesn't cover my activities.*

Fact: In broad terms, FARA is intended to require registration for people seeking to influence public opinion and policy in the United States on behalf of foreign principals. In addition to lobbying, among other things, FARA applies to a wide array of public relations and government relations activities. So, if you are communicating with the media, creating social media messages or website content, or conducting public outreach on behalf of a foreign principal, you may be required to register under FARA. And, you should also be considering FARA implications if, outside of meetings directly related to ongoing litigation or agency action, you meet with the government agencies—such as the Securities and Exchange Commission, Department of Justice or State Department—on behalf of a foreign principal.

Myth: *FARA only covers lawyers who engage in these activities directly. I hire PR and lobbying firms to conduct these activities for me, so I don't have to worry about FARA.*

Fact: Further exemplifying FARA's considerable breadth, the statute applies to anyone involved in identified activities—including public relations and lobbying—either directly or “through any other person.” So, you may well have to register under FARA even if you've hired subcontractors to engage directly in the covered activities. And, of course, even if you've retained specialists, you may still be participating in the FARA-covered activities directly by supervising website content, reviewing press statements, approving PR or

lobbying strategies, or participating in developing talking points for meetings with government officials. Simply put, contracting out lobbying and PR work does not necessarily absolve lawyers from FARA registration.

Myth: *FARA has an exemption for lawyers. Since I'm a practicing lawyer, I'm exempt from FARA registration.*

Fact: FARA does contain an exemption for the practice of law. But that exemption is a narrow one, and its contours, ill-defined. To be sure, FARA does not require registration for lawyers engaged in mainline legal representation—such as representing a foreign principal before a U.S. court or

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agency. But deciphering when FARA obligations are triggered by activities that go beyond appearing in court and agency proceedings can entail a detailed, fact-specific analysis. It is clear that the practice of law exemption does *not* cover attempts to influence government officials outside the course of judicial, law enforcement, or agency proceedings, at least where those attempts implicate United States policy or the public interests of a foreign government or political party. Indeed, the Justice Department recently required a large law firm to register under FARA, after that firm met with senior Justice Department officials to discuss certain policy changes advocated by their foreign-principal client. However, whether the exemption covers out-of-court

activities loosely linked to ongoing litigation—for instance, a broad public relations campaign for a client you're defending in a lawsuit—can be far murkier. The bottom line: just because you're a lawyer doesn't mean all of your activities fall into FARA's limited exemption for the practice of law.

While pervasive non-compliance with FARA has seemingly been the norm, the recent uptick in enforcement efforts do appear to be having an effect. Though the numbers of law-firm registrants remain small, more than twice as many law firms registered under FARA in 2017, than had in 2016; and 2018 saw a sustained pace in law firm registrations. These law firm registrations were for a broad array of services that are, these days, commonly provided by lawyers. Some new registrants, for example, were law firms that assisted their clients with developing media strategies, issuing press statements and communicating with media outlets. Others were law firms involved in contacting members of Congress to raise awareness and present briefings about policy issues affecting clients. Still others arranged or facilitated meetings between clients and U.S. government officials. To be sure, many traditional legal services are exempt from FARA registration. But, certainly, in today's enforcement environment, determining whether the scope of your representation of a foreign principal requires FARA registration is an endeavor worth undertaking.