

Proposed Legislation Boosts Enforcement of Foreign Agents Registration Act

U.S. Senate Judiciary Chairman Chuck Grassley introduced the "Disclosing Foreign Influence Act" last week, a Senate bill which would amend the Foreign Agents Registration Act (FARA), to remove an exemption from registration and boost enforcement by the U.S. Department of Justice (DOJ). The proposal follows the grand jury indictment of Paul Manafort and Rick Gates for allegedly failing to register on behalf of Ukraine and causing false statements to be made to DOJ's FARA unit. The proposal also follows other recent controversies over foreign lobbying representations and calls from members of Congress on both sides of the aisle for greater FARA enforcement.

Enacted in 1938 to shine a light on pre-World War II propaganda efforts, and amended in 1966 in the wake of controversies involving the sugar industry, FARA requires agents to register within 10 days of becoming an agent and before engaging in any registrable activity; to disclose detailed information about the client and the registrant, including the terms of the representation and any contract; to label and file with the DOJ within 48 hours all informational materials the agent distributes on behalf of the foreign principal; and to file periodic reports disclosing detailed information about the work. One need not engage in federal lobbying nor be paid to trigger registration: FARA can cover "back-end" advice and has no financial trigger for registration.

However, there are multiple exemptions from FARA registration. One common exemption applies when engaging only in private and nonpolitical activities to further a foreign principal's "bona fide trade or commerce." Another exemption—the so-called "LDA exemption"—allows agents to file instead under the Lobbying Disclosure Act of 1995 when engaging in federal lobbying activities, unless the work's principal beneficiary is a foreign government or foreign political party. FARA's registration requirements are sweeping, and its exemptions highly fact-bound, thus making a close review and clear understanding of these requirements critical.

Chairman Grassley's bill would remove the "LDA exemption" from FARA. Unless another exemption applies, foreign agents would have to register and report under FARA, even when they must report also under the LDA. While FARA registration would occur on the normal timetable, FARA reports would be filed on the quarterly LDA schedule. *This appears to mean that foreign agents who lobby under the LDA would file reports under FARA more often than other foreign agents, who file only semiannually.*

The Grassley bill would leave in place other exemptions from FARA registration. These include the "bona trade or commerce" exemption discussed above, and also the exemptions for "other activities not serving predominantly a foreign interest," and for certain legal representation in courts and before federal agencies.

The bill also seeks to strengthen DOJ's authority to investigate potential violations, and these provisions may have the biggest potential impact on the regulated community. The bill would authorize DOJ to issue mandatory "civil investigative demands" to any person when DOJ has reason to believe that the person "may be in possession" of materials or information that are "relevant to an investigation" under the Act. This might extend to a foreign agent's clients overseas, insofar as jurisdiction is available. Respondents must file sworn certificates saying that they have produced all relevant materials and information, which DOJ could then use to support prosecutions and other official proceedings. This would be a substantial departure from current practices under

FARA, in which DOJ normally encourages voluntary compliance through letters and record requests before proceeding to civil actions or criminal prosecutions, which are relatively rare. Unless renewed by subsequent legislation, this new investigative authority would "sunset" within five years of enactment.

The Grassley bill would also create the following benchmarks for coordinating and evaluating FARA enforcement:

- The Attorney General would have to "develop and implement a comprehensive strategy" to improve FARA enforcement.
- The DOJ Inspector General would have to review the development and implementation of the Attorney General's strategy, and his use or abuse of the new "civil investigative demand" authority, and make annual reports to both congressional judiciary committees and the Senate Foreign Relations Committee.
- The Comptroller General would have to "carry out an analysis" of the effectiveness of FARA's administration and enforcement, and then submit it to the Attorney General, the DOJ Inspector General and the congressional committees noted above.

At this writing, the bill's future is unknown. A companion bill was introduced by Representative Mike Johnson in the House. Our Political Law group, which helps companies determine their potential FARA obligations and organize to comply with them, will keep our clients updated on future developments as they occur.

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Authors



[Brian Svoboda](#)

Partner

BSvoboda@perkinscoie.com [202.434.1654](tel:202.434.1654)



[Rebecca H. Gordon](#)

Partner

RGordon@perkinscoie.com [202.434.1676](tel:202.434.1676)

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