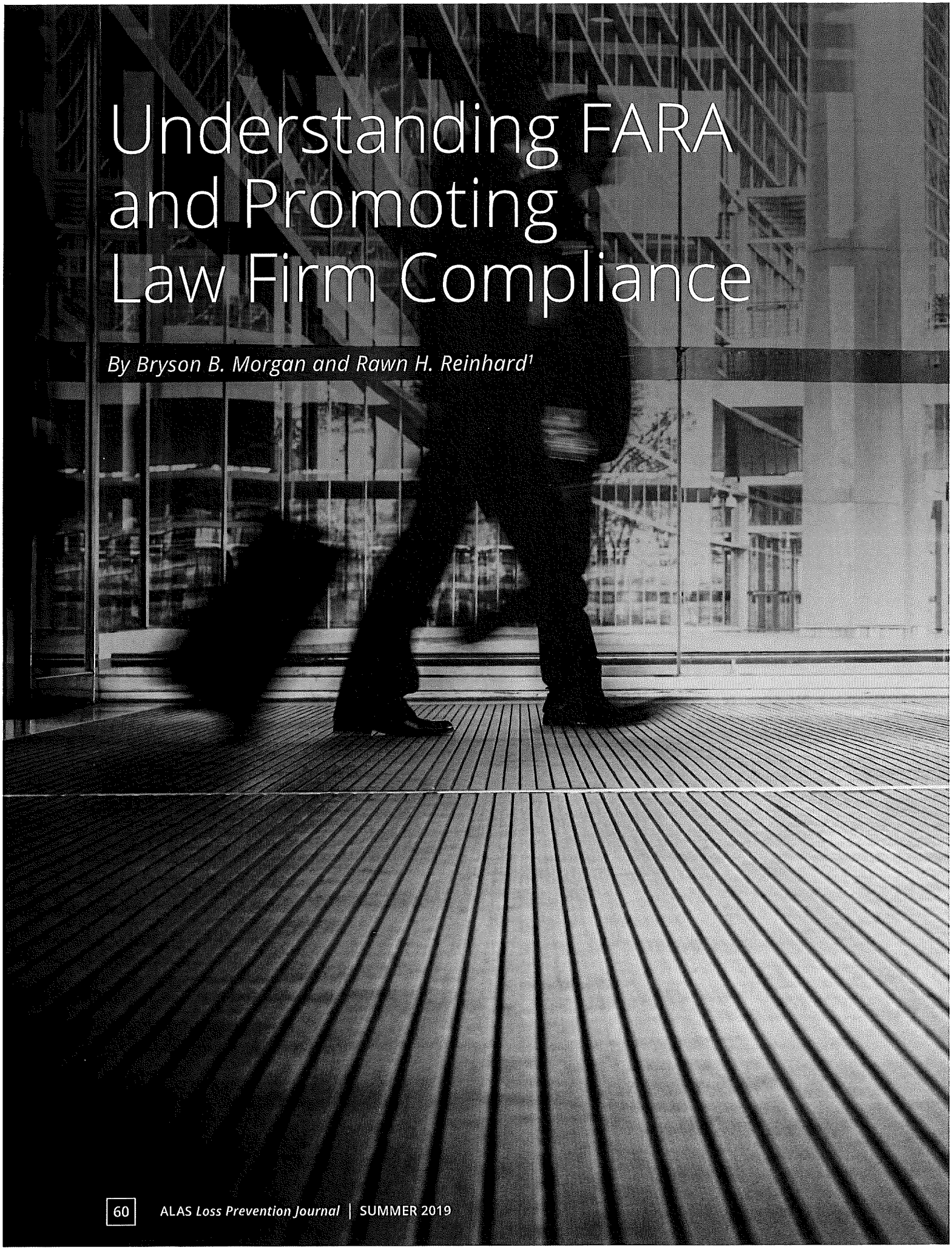
# Understanding FARA and Promoting Law Firm Compliance

*By Bryson B. Morgan and Rawn H. Reinhard*[1]



## I. INTRODUCTION

> The G-man apologized in his educated voice. "I didn't know you were engaged, Mr. Wolfe ... I don't want to interrupt—"
>
> "I'll be engaged for some time. Do you need to see me alone?
>
> That seemed to stump him. He frowned and took a quick survey of the crowd. "Perhaps not," he decided. "It's only ... about that statute requiring the registration of agents of foreign principals."
>
> "What about it?"
>
> —Rex Stout, *Over My Dead Body* (1940).

At the time the Foreign Agents Registration Act (FARA)[2] was enacted, there was some general public awareness of the law's provisions—sufficient at least to interest Rex Stout, a popular mystery author at the time. FARA has always been a peculiar law.[3] Under FARA, foreign agents must register with the federal government unless an exemption applies. They must also periodically disclose information about their finances and file materials that they distribute. FARA, however, doesn't actually forbid foreign propaganda, advocacy of foreign interests, or much of anything else. FARA simply establishes certain mechanisms that give the American public the opportunity to learn about foreign agent activity taking place in the United States.

Interest in FARA has generally been sporadic, but the statute is now making headlines once again. On March 6, 2019, John Demers, the Assistant Attorney General for the National Security Division, publicly confirmed the U.S. Department of Justice's (DOJ) shift "from treating FARA as merely an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority."[4] This announcement also coincided with revamping the DOJ's office charged with interpreting and enforcing FARA, referred to as the "FARA Registration Unit," which is now under the leadership of a criminal prosecutor who was recently on assignment to Special Counsel Robert Mueller's office.[5] This is just the latest development in the DOJ's apparent increased focus on FARA. It follows a 2016 audit by

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[2] 22 U.S.C. §§ 611–621.

[3] *See generally* Francis R. O'Hara, *The Foreign Agents Registration Act—The Spotlight of Pitiless Publicity*, 10 Vill. L. Rev. 435, 437 (1965) (discussing circumstances resulting in FARA's enactment).

[4] *See* Erica Orden, *DOJ Appoints ex-Mueller Prosecutor to run Foreign Influence unit*, CNN (Mar. 6, 2019).

[5] *Id.*

the DOJ Office of the Inspector General (OIG) that made various recommendations to enhance FARA enforcement, including increased congressional oversight and various legislative proposals to narrow the available exemptions and expand the FARA Unit's enforcement tools.[6] Consistent with this trend and in response to the 2016 OIG audit, the FARA Registration Unit recently began releasing advisory letters addressing when FARA registration is and is not required.[7]

In addition, the law's more recent focus has been on "the lawyer-lobbyist and public relations counsel whose object is not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of the particular client."[8] For example, as discussed further below, Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) recently settled charges brought by the DOJ relating to the firm's acts as an agent of the Ukrainian government.[9]

Because FARA can apply to a wide range of perfectly legitimate conduct, law firms need to understand FARA's requirements if they're going to represent foreign principals or their agents. This includes knowing who qualifies as a foreign principal or agent under FARA. Further, firms need to be aware of FARA at intake because one of FARA's primary mandates is a registration statement—signed under oath—that must be filed *within 10 days* of accepting an engagement and before any work requiring registration commences on the matter.[10] That's not a lot of time, especially if a firm is unfamiliar with the registration process and the related forms.[11] Nor should firms think FARA registration is a "one and done" issue. Depending on the nature of the engagement, FARA can impose significant monitoring and maintenance obligations that raise the specter of missed deadlines and other compliance pitfalls.

This article provides an overview of FARA, including a discussion of the Skadden case, and offers suggestions for improving new business intake procedures to promote compliance with the statute's provisions.

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[6] *Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations Before the S. Comm. on the Judiciary*, 115th Cong. (2017); *Updates on Congressional Action on FARA Reform*, Caplin & Drysdale, Chartered (2019).

[7] *See* Jimmy Hoover, *DOJ Sheds Some Light on Scope of Foreign Lobbying Law*, Law360 (June 8, 2018). These FARA letters are authorized by 28 C.F.R. § 5.2 and can be found at https://www.justice.gov/nsd-fara/advisory-opinions.

[8] S. Rep. No. 89-143, at 4 (1965).

[9] *See* U.S. Dep't of Justice, Nat'l Security Div., Settlement Letter to Skadden, Arps, Slate, Meagher & Flom (Jan. 15, 2019).

[10] *See* 22 U.S.C. § 612(a).

[11] *See id.* § 612 (describing extensive information that needs to be reported in the registration statement); *see also* 28 C.F.R. §§ 5.1–5.1101 (prescribing forms and procedures and providing additional guidance concerning FARA administration and enforcement).

## II. WHEN DOES FARA APPLY?

FARA is only concerned with "foreign principals" and their agents. However, FARA's definition of foreign principals goes far beyond just foreign governments and foreign political parties. FARA's definition of foreign principal includes *any person or entity outside of the United States*, such as a foreign national or a business headquartered in a foreign country.[12] There are some limits: an entity does not become a foreign principal (or the agent of a foreign principal) just because a non-U.S. entity has a minority stake in the venture.[13] Nonetheless, a firm's representation of foreign clients—and even American citizens no longer domiciled in the United States—could trigger FARA's application depending on the nature of the engagement.

FARA applies to "agents" of these foreign principals. Lawyers are familiar with the legal concept of agency, but the term has a specific definition in the FARA context that extends beyond traditional notions of a principal-agent relationship. Under FARA, an agent is someone who acts as an agent or at the "order, request, or under the direction or control" of a foreign principal or of any person whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or major part by a foreign principal, and who undertakes certain acts for or in the interests of the foreign principal within the Unites States or directed to the United States from abroad. These acts include:

- Engaging in political activities, which includes not only influencing U.S. government officials with reference to domestic or foreign policies, but also influencing any segment of the public with reference to such policies or in a manner that furthers the interests of a foreign government or foreign political party;

- Acting as a public relations counsel, publicity agent, information-service employee, or political consultant;

- Soliciting, collecting, disbursing, or dispensing contributions, loans, money, or other things of value; or

- Representing the foreign principal's interests "before any agency or official of the Government of the United States."[14]

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[12] *See* 22 U.S.C. § 611(b) (exceptions for U.S. citizens living temporarily abroad and U.S. businesses operating abroad but having their headquarters in the U.S.).

[13] *See Michele Amoruso E. Figli v. Fisheries Dev. Corp.*, 499 F. Supp. 1074 (S.D.N.Y. 1980) (holding that American general partnership was not required to register where foreign principal held only a noncontrolling, minority interest).

[14] 22 U.S.C. § 611(c), (g)–(p) (providing precise definitions of "agent of a foreign principal" and other relevant terms); *see also* 28 C.F.R. § 5.100 (broadly defining control to include voting rights and contractual arrangements). The term "political activities" is defined as "any activity that the person engaging therein believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party." 22 U.S.C. § 611(o).

Essentially, FARA applies where: there is a specified degree of foreign involvement *plus* certain kinds of specified conduct. Although courts do not fully agree on how to define the exact parameters of FARA agency,[15] and some have rejected the notion that merely acting at the "request" of a foreign principal is sufficient to trigger agent status, it is clear that a lawyer-client relationship can qualify.[16] Further, FARA does not distinguish between paid and unpaid agents, so the act can apply even to pro bono activities.[17] FARA, however, is limited in application to the United States and areas subject to its civil or military jurisdiction.[18] ALAS firms representing foreign governments solely through non-U.S. offices may be able to make a good faith argument that the statute doesn't apply to them provided that their activities are not directed to the United States, including American media outlets, or to U.S. government officials living abroad.

## III. THE REGISTRATION EXEMPTIONS

Even if a law firm's engagement by a foreign client meets the "agent" standard set out in the statute, there are a number of exemptions that may excuse a lawyer from registering under FARA. In fact, given FARA's expansive definition of "agent" as described above, the analysis of any given representation often results in searching for an applicable exemption rather than concluding that a matter is outside FARA's scope. Some of the available exemptions aren't likely useful to most lawyers in the ordinary course. ALAS member firms and lawyers are rarely going to qualify as diplomatic or consular officers, officials of foreign governments, or diplomatic or consular staff.[19] Nor are they ordinarily engaged in religious,

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[15] *See* Cynthia Brown, Cong. Research Serv., R45037, The Foreign Agents Registration Act (FARA): A Legal Overview, at 3–4 (Dec. 4, 2017) (discussing differing Second and Third Circuit approaches to statutory "agent" definition).

[16] *See Att'y Gen. of U.S. v. Irish People, Inc.*, 796 F.2d 520, 522–23 (D.C. Cir. 1986) (reversing the granting of summary judgment because the Attorney General had not presented "any evidence that [the foreign principal at issue] exercised any formal control"); *see also Att'y Gen. of U.S. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982) (reasoning that an interpretation of FARA requiring registration for acting at a foreign principal's request "would sweep within the statute's scope many forms of conduct that Congress did not intend to regulate").

[17] *See Att'y Gen. of U.S. v. Irish People, Inc.*, 595 F. Supp. 114, 118 (D.D.C. 1984).

[18] 22 U.S.C. § 619.

[19] *See id.* § 613(a)–(c).

scholastic, scientific, or artistic pursuits, or in raising funds to be used for humanitarian causes.[20] And lawyers are unlikely to be engaged in service to foreign countries deemed vital to America's defense, especially since no foreign country has apparently been so designated since 1946.[21] Still, as discussed below, there are some exemptions that may allow law firms and lawyers to avoid incurring FARA's registration and filing obligations as "agents of a foreign principal."

**THE "COMMERCIAL ACTIVITIES" EXEMPTIONS.** In enacting FARA, Congress was not concerned with run-of-the-mill commercial transactions involving foreigners. FARA therefore provides two exemptions from registration for such activity:

> Any person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominately a foreign interest ... [22]

The first commercial activities exemption—for private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal—requires satisfying three conditions. The activities must be (1) private, (2) nonpolitical, and (3) in furtherance of trade or commerce. Commercial activities are "private," even if they are conducted on behalf of a foreign corporation owned or controlled by a foreign government, so long as they do not "directly promote the public or political interests of the foreign government."[23] They are "nonpolitical" so long as they do not fall within FARA's definition of "political activities."[24] For example, making a routine inquiry regarding a government policy or seeking agency action in a matter without seeking to change a policy would not be considered "political activities" under FARA.[25] Finally, the activity must be in furtherance of trade or commerce, which includes "the exchange, transfer, purchase, or sale of commodities, services, or property of any kind."[26] Commercial activity alone, however, is insufficient.

Although legal representation is often viewed today in commercial business terms, this was not always the case. In *Rabinowitz v. Kennedy,*[27] the lawyers agreed to represent Cuba and its agencies in litigation and other legal matters involving mercantile and financial interests. The representation explicitly excluded public relations, propaganda, lobbying, and other nonlegal matters.[28] Looking to a prior version of the commercial activities exemption, the U.S. Supreme Court found that the firm's

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[20] *See id.* § 613(d)(3), (e) (providing an exemption for certain efforts to solicit and collect funds to be used for medical aid and assistance, or for food and clothing to relieve human suffering).

[21] *See id.* § 613(f); U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (May 18, 2012) (noting President withdrew all such designated countries in 1946).

[22] 22 U.S.C. § 613(d).

[23] 28 C.F.R. § 5.304(b).

[24] S. Rep. No. 89-143, at 11 (1964).

[25] 28 C.F.R. § 5.100(e).

[26] *Id.* § 5.304(a).

[27] 376 U.S. 605 (1964).

[28] *See id.* at 606.

representation of Cuba in litigation went beyond "financial and mercantile" activity, and, therefore, the firm in question needed to register under FARA.[29] Congress, however, did not agree with the Supreme Court's decision and subsequently enacted clarifying amendments to FARA.[30] Accordingly, *Rabinowitz* should not unduly discourage firms from relying on the commercial activities exemption. Indeed, the DOJ now agrees that a law firm need not register if it is just bringing a lawsuit on behalf of a foreign government to recover on a commercial contract.[31]

Following the *Rabinowitz* decision, and fearing that the commercial activities exemption in place at the time was too narrow, Congress added an additional commercial activity exemption to FARA in 1965. The addition exempts persons engaging in "activities not serving predominantly a foreign interest."[32] This broader exemption permits persons to engage in political activities on behalf of a foreign corporation, even if it is owned in whole or in part by a foreign government, so long as three conditions are satisfied. The political activities: (1) must directly further the bona fide commercial, industrial, or financial operations of the foreign corporation; (2) must not be "directed by a foreign government or foreign political party"; and (3) must not "directly promote the public or political interests of a foreign government or of a foreign political party."[33]

There are numerous FARA Registration Unit advisory opinions discussing the application of these commercial activities exemptions to transactional representations involving foreign corporations, including foreign state-owned enterprises.

Straightforward economic development activity on behalf of a foreign government, however, is political activity that requires registration.[34] Firms need to exercise caution where an otherwise purely commercial transaction requires government approval, and the law firm could therefore be perceived as engaging in political lobbying when advocating for its client.[35]

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[29] *See id.* at 608–10. Curiously, the opinion also concluded that, although litigation work—from the law firm's standpoint—might be "private and nonpolitical," the Cuban government's interest in the litigation could not be so regarded. *See id.* at 609. Current guidance cited *infra* indicates that the DOJ rejects the view that litigation is always public and political from a foreign government's standpoint.

[30] *See* O'Hara, *supra* note 3, at 453–55 (discussing impact of subsequently adopted amendments).

[31] *See Advisory Opinion Summaries*, U.S. Dep't of Justice (June 8, 2018) (but noting expansion of representation's scope to political consulting, lobbying, or public relations could trigger registration requirement).

[32] 22 U.S.C. § 612(d)(2). *See* S. Rep. No. 89-143, at 12 (1964) (explaining that this exemption was added to "further assure" commercial interests of the narrow application of FARA).

[33] 28 C.F.R. § 5.304(c).

[34] *See Advisory Opinion Summaries*, *supra* note 31 (noting also that tourism promotion would require registration).

[35] U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Dec. 3, 2012), at 2 (denying registration exemption where, among other things, representation of foreign government entity would require "educating" members of the Committee on Foreign Investment in the United States in hopes of gaining transaction approval).

**THE "LEGAL REPRESENTATION" EXEMPTION.** Although an exemption entitled "Persons qualified to practice law" sounds broad,[36] the exemption does not apply to everything a lawyer might do in the course of representing a client, as demonstrated by the DOJ's settlement with Skadden. The exemption is much more limited than the statutory title suggests and has its origins in the legislative response to the Supreme Court's *Rabinowitz* decision.[37] The exemption excuses from registration:

> Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: *Provided,* That for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.[38]

The DOJ seems to reject an unreasonably crabbed interpretation of the lawyer exemption. By regulation, the DOJ has suggested it is primarily concerned with lawyers' attempts to "influence or persuade with reference to formulating, adopting, or changing the domestic or foreign policies of the U.S. or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."[39] The DOJ currently characterizes FARA as exempting lawyers "engaged in legal representation of foreign principals in the courts or similar type of proceedings, so long as the attorney does not try to influence policy at the behest of his client."[40]

The DOJ's recent advisory letters are in accord with this approach. For example, it doesn't require lawyer registration to represent a foreign government to recover commercial debts.[41] The exemption is likely also broad enough to encompass conversation and negotiation with involved government prosecutors or government defendants concerning the proceeding and remedies.[42] It can encompass a civil proceeding to get a foreign company removed from a government blacklist.[43] Defending a foreign client in investigations, proceedings, and prosecutions that could result in sanctions is also likely covered.[44]

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[36] 22 U.S.C. § 613(g).

[37] *See Schonbrun v. Dreiband,* 268 F. Supp. 332, 335 (E.D.N.Y. 1967) (discussing the lawyer exemption).

[38] 22 U.S.C. § 613(g) (emphasis added).

[39] 28 C.F.R. § 5.306(a). If a particular federal agency lacks an established procedure for disclosing that a representative is acting for a foreign principal, this does not relieve a lawyer from the obligation to make disclosures required by FARA to agency personnel at the time the legal representation is undertaken. *See id.* § 5.306(b).

[40] *Does Everyone Who Acts as an Agent of a Foreign Principal Have to Register?*, U.S. Dep't of Justice: General FARA Frequently Asked Questions.

[41] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Aug. 27, 2003).

[42] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Feb. 16, 2011) (but suggesting discussions could cross over into wider policy discussion that could require registration).

[43] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Sept. 10, 2013).

[44] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (May 3, 2018).

But if the representation crosses over into lobbying a government agency for policy changes—or exemptions from policies—and particularly changes that go beyond their specific application to the law firm's client, then the legal representation exemption is unlikely to apply.[45] For example, the DOJ rejected the applicability of the exemption where the representation at issue would involve helping the client navigate the Committee on Foreign Investment in the United States (CFIUS) process and helping to educate "U.S. policymakers about [foreign company's] business operations and proposed acquisitions of a U.S. company."[46] There also was no exemption available for a law firm seeking relief from the State Department in order to be able to pursue recovery of foreign taxes, although the tax recovery proceeding itself would likely be exempt.[47] In short, lobbying activity will not be exempt just because a lawyer does the work.[48]

In the end, the legal representation exemption is mainly a federal litigation and agency proceeding exemption, and lawyers should steer clear of any efforts to influence or persuade government officials outside the "course of" the exempted proceeding.

**THE LOBBYING DISCLOSURE ACT EXEMPTION.** Finally, lawyers or firms who are registered under the Lobbying Disclosure Act of 1995 (LDA) for a representation may be exempt from registration under FARA, even if they did not trigger a requirement to register under the LDA.[49] This LDA exemption is controversial, and a common target of FARA reform efforts. The exemption applies only to the representation of foreign entities and individuals.[50] LDA registration does *not* exempt lobbying efforts for foreign governments or foreign political parties, both of which are broadly defined by FARA and its regulations.[51] The LDA exemption also does not apply where "the principal beneficiary" of the representation is a foreign government or political party, which makes claiming the LDA exemption tricky where the work to be done will provide an identifiable benefit to a foreign government or foreign political party.[52]

Unless another exemption is available, firms engaged in lobbying on behalf of an actual foreign government or a foreign political party must therefore register under FARA and comply with its provisions. A firm should carefully consider whether the lobbying exemption applies if it is representing an entity that could be viewed as directed, controlled, or financed by a foreign government or political party, or if the representation would provide an identifiable benefit to a foreign

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[45] *Id. See also* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Dec. 7, 2010) (rejecting application of the legal exemption for discussions with the State Department regarding potential waiver of a revenue rule).

[46] U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Dec. 3, 2012), at 2 (only vaguely referencing basis for rejection of exemption by stating that "[t]he anticipated activities . . . exceed the activities permitted under the legal exemption").

[47] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Dec. 7, 2010).

[48] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Feb. 29, 2012).

[49] 2 U.S.C. §§ 1601–1614.

[50] *See* 22 U.S.C. § 613(h).

[51] *See id.* § 611(e), (f); 28 C.F.R. § 5.307.

[52] 28 C.F.R. § 5.307.

government or political party.[53] The recent Michael Flynn situation is a case in point.[54] So is the Skadden settlement, and recently released advisory opinions similarly rejecting the applicability of the LDA exemption if the entity in question is closely affiliated with a foreign government.[55]

### WHICH EXEMPTION SHOULD A FIRM CHOOSE?

Given the practice areas of most ALAS members, the commercial activities exemptions may be the most useful day-to-day basis upon which to support a good faith position that FARA registration is not required. The options to avoid registration are more limited when political or policy work is involved or when significant government approval is required. Firms engaged in lobbying work—except work for a foreign government or political party—can generally rely (for now) on their LDA disclosures. The legal representation exemption should be used with caution because it may be limited to instances where the firm is representing a foreign client in a federal on-the-record judicial or agency proceeding.

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## IV. FARA ENFORCEMENT

FARA is administered by the FARA Registration Unit within the DOJ's National Security Division (Counterintelligence and Export Control Section). In addition to injunctive relief, willful violation of FARA can result in a fine of up to $10,000 and imprisonment for up to five years.[56] The noncomplying foreign agent is not the only possible target for prosecution: the statute also provides for prosecution

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[53] *See* Brian J. Fleming, *Prepare for Big Changes to FARA Enforcement*, Law360 (Nov. 14, 2017), at 2.

[54] *See Oversight of the Justice Department's (Non) Enforcement of the Foreign Agents Registration Act: Lessons from the Obama Administration and Current Compliance Practices Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (written testimony of Lydia Dennett, Investigator, Project on Government Oversight) (noting Flynn filed under the LDA only, even though the primary beneficiary of his work was the Turkish government which triggered the need for FARA registration, and also discussing other examples involving Ukraine and Russia).

[55] *Compare* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Apr. 9, 2013) (finding bank and foreign government were bound together and therefore the LDA exemption was inapplicable), *with* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Nov. 10, 2015) (LDA exemption is applicable where a foreign government "neither owns nor controls" the foreign company).

[56] *See* 22 U.S.C. § 618. The maximum fine for some offenses is only $5,000. *See id.* Could the fine be multiplied by breaking a single course of conduct into multiple incidents that each constituted a violation? The statutory language does not explicitly address this issue, but there is no affirmative indication that the fine applies to each piece of unregistered propaganda distributed or accrues on a daily basis. Indeed, the statute suggests that the failure to file a registration statement is a single, but ongoing, offense. *See id.* § 618(e) (making failure to file a continuing offense for statute of limitations purposes).

of that agent's officers and directors for FARA compliance failures.[57] Law firm management could thus possibly be prosecuted personally for a firm's failure to comply with FARA. It is a crime for a public official to act as an agent of a foreign principal in such a manner as to require registration under FARA.[58]

The Attorney General has discretion to enforce FARA. There is no private right of action.[59] "The FARA Unit seeks to obtain voluntary compliance with the statute."[60] Accordingly, the DOJ has taken the following view in the past: "If the Department receives credible information establishing a *prima facie* registration obligation, where evidence of intent is lacking, the Department usually sends a letter advising the person of the existence of FARA and the possible obligations thereunder. FARA, after all, is a *malum prohibitum* enactment not well known outside the legal/lobbying community."[61] As already noted, however, the DOJ has appointed an experienced prosecutor to lead the FARA Unit and therefore appears to be gearing up for a more aggressive approach to enforcement.[62] The Skadden settlement demonstrates that before responding to a letter of inquiry from the FARA Registration Unit, an independent review and robust due diligence should be conducted to verify that all representations made to the government are correct and comprehensive.

The DOJ is most likely to "continue to undertake criminal investigations and prosecutions where it assesses there is evidence of a willful substantive violation of the statute, or a conspiracy to defraud the United States by impeding the DOJ's ability to enforce FARA ..."[63] As for willfulness, enforcement action seems most likely when dealing with professionals who should have knowledge of FARA, when a registration or response misstates, omits, or falsifies information, or when other postregistration requirements are ignored.[64]

## V. THE SKADDEN FARA SETTLEMENT

So what about the Skadden settlement? How did a well-reputed, U.S.-based international law firm end up paying $4.65 million for FARA violations when the apparent maximum fine is $10,000? The story is a salutary example of how *not* to proceed and merits a brief summary.

In spring 2012, the Government of Ukraine retained Skadden, and the possibility of a FARA problem was immediately apparent. This was not a situation where the involved government actor was cloaked

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[57] *See* 22 U.S.C. § 617 (imposing a duty to ensure FARA compliance).

[58] *See* 18 U.S.C. § 219.

[59] *See Comm. for Free Namib. v. South West Africa People's Org.*, 554 F. Supp. 722, 725–26 (D.D.C. 1982).

[60] *See Are There Criminal Penalties for Violating the Act?*, U.S. Dep't of Justice: General FARA Frequently Asked Questions.

[61] *See U.S. Dep't of Justice, U.S. Att'ys' Manual* § 2062 (withdrawn).

[62] *See* Dan Packel, *DOJ Pivot Suggests no end to FARA Frenzy, Lawyers Say*, *The American Lawyer* (Mar. 10, 2019).

[63] David Laufman, *FARA Enforcement: The Year Ahead*, Law360 (Feb. 7, 2019).

[64] *See, e.g., id.*; O'Hara, *supra* note 3, at 441; *Viereck v. United States*, 318 U.S. 236 (1943) (reversing conviction for omitting factual omissions in registration because items were not required disclosures).

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as an agent or government-controlled entity. Skadden was retained by an actual foreign government and that fact alone merited a thorough FARA due diligence review before beginning the representation. Indeed, the involved Skadden partner wrote in an email that "the powers that be in NYC ... insist—and I agree—that we should include a provision in the retainer agreement that '[the Law Firm] is not being retained to engage—and will not engage—in political activities as defined by the Foreign Agents Registration Act.'" A provision to this effect was, in fact, included in an April 10, 2012 Engagement Letter.[65]

Skadden's representation eventually focused on drafting a report concerning the 2011 prosecution of Yulia Tymoshenko.[66] Ms. Tymoshenko is a pro-European Ukrainian political activist. She lost the 2010 Ukrainian presidential election by 3.5% to Viktor Yanukovych, and was subsequently convicted in 2011 of embezzlement and abuse of power. These convictions were widely regarded as politically motivated.

Skadden structured the terms of its engagement—at least on paper—as an independent investigation.[67] The Ukrainian government, however, refused to accept delivery of the first version of the report and proposed changes. The final version of the report omitted various things that might negatively impact Ukrainian public relations.[68]

On December 13, 2012, the Ukraine Ministry of Justice released the report to the public on its website. Recall that foreign propaganda is a central concern of FARA. No FARA disclosure was made concerning this report. The involved attorneys had received analyses and advice from many firm attorneys regarding the potential applicability of FARA, including that engaging in public relations work for Ukraine would require registration. Regardless, Skadden attorneys worked to identify a public relations firm to help Ukraine, which resulted in additional emails concerning FARA's applicability. Skadden attorneys then engaged in extensive discussions with the public relations firm and others

[65] Skadden settlement, *supra* note 9, app. ¶¶ 2, 7.

[66] *E.g.*, *id.* ¶ 4.

[67] *Id.* ¶ 7.

[68] *Id.* ¶¶ 7, 12–15.

about releasing the report in the United States[69] The primary Skadden partner involved in the representation even delivered a copy of the report and a quote regarding the report's content to a journalist.[70]

The DOJ's FARA Unit sent an inquiry to Skadden six days after the report was released. Skadden's response did not mention its partner's interactions with the lobbying and public relations firms working with Ukraine, or the firm's contact with the media.[71] Additional attempts at obfuscation followed.[72] The FARA Unit nonetheless concluded that Skadden was obliged to register and demanded that it do so. Skadden chose to contest this determination by way of an in-person meeting on October 9, 2013. During that meeting, the firm provided misleading information about Skadden's involvement with PR and lobbying. These misstatements were documented in an internal Skadden memorandum and also in an October 11, 2013 letter to the FARA Unit.[73]

Based on the October 11, 2013 letter, the FARA Unit withdrew its determination that Skadden had an obligation to register. On February 27, 2014, the primary Skadden partner involved in the Ukraine representation called the FARA Unit to see whether he would be allowed to correct a misleading article in the press. He wanted the FARA Unit to "give us comfort hat [sic]" such activity would not require registration. Again based on misleading information, the FARA Unit confirmed that this work would not require registration under FARA.[74]

How did the DOJ come to realize Skadden was lying? The public papers do not say. The settlement does repeatedly mention involvement by Paul Manafort and Rick Gates, so investigations into their conduct could have provided information revealing the true extent of Skadden's involvement. The settlement also notes that Skadden eventually turned a corner and extensively cooperated with the DOJ.[75]

In the end, the indicia of a FARA violation by Skadden are striking: direct representation of a foreign government, drafting of a report used by that government as propaganda, and involvement with PR firms, journalists, and lobbyists concerning the dissemination and press coverage of that report in the United States. The settlement outlines act after act requiring registration and multiple instances in which the lawyers received warnings of possible FARA violations. The situation, therefore, was unusual because of the amount of evidence available to support a charge of willfulness.

The penalty against Skadden is also striking, but should be evaluated with an eye to the uncharacteristically blatant violation at issue. Notably, the $4.65 million settlement payment is not characterized as a fine

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[69] *Id.* ¶¶ 13, 16, 17, 19–44.

[70] *Id.* ¶¶ 38–45.

[71] *Id.* ¶¶ 47, 51.

[72] *Id.* ¶¶ 33–60.

[73] *Id.* ¶¶ 62, 65, 67.

[74] *Id.* ¶¶ 68–69.

[75] Skadden Settlement, *supra* note 9, at 2.

under FARA Section 618; the payment was just a return of fees received. That said, there's no explicit provision in the act for disgorgement, so it's difficult to categorize this payment. In fact, it probably can't be done. The key here may be a creative use by the DOJ of the statute's potential injunctive and individual liability provisions to extract a "voluntary" disgorgement commitment.

In addition to disgorging its fees, Skadden agreed to revise its policies for responding to government information requests, including formal procedures for when independent diligence should be undertaken. Skadden further agreed to develop FARA compliance policies, consistent with advice from an outside consultant. The FARA policies were to address, "at a minimum," the following areas:

- Client intake procedures to identify the direct or indirect involvement of a foreign principal and/or activities that may trigger potential FARA registration obligations;
- Promoting firm-wide awareness of FARA compliance, including FARA compliance training and messaging to appropriate personnel;
- Establishing guidance concerning conduct or activities that may trigger potential FARA registration obligations in the form of a firm-wide policy on representing foreign principals, which provides information on:
  - The FARA statute in order to assist attorneys and personnel in identifying, tracking, and ongoing monitoring of client relationships and matters that present possible FARA registration obligations;
  - Approval processes for engagements and matters that present possible FARA registration obligations;
  - Review mechanisms to evaluate potential FARA registration obligations at the time of client intake or during the delivery of professional services on behalf of the firm's clients; and
  - Required procedures for responding to inquiries from the FARA Unit.
- Promotion of firm-wide awareness of FARA compliance, including by distributing the Law Firm's FARA policy and conducting FARA compliance training and continued messaging to appropriate personnel.[76]

## VI. ENSURING FARA COMPLIANCE

The Skadden settlement is probably intended to be the classic "shot across the bow" to increase law firm awareness of FARA and its requirements. Law firms with similar practices as Skadden may wish to consider similar policy revisions as a protection against prosecution for FARA violations, although the settlement provides no assurances that such action will preclude prosecution. Such robust FARA compliance procedures are particularly appropriate for firms that have regulatory or government

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[76] *Id.* at 2–4, app. ¶ 7.

relations practice groups. For most firms—especially those with limited international clientele—the Skadden settlement likely entails costs and administrative burdens out of proportion to the risk of a FARA violation and the possible penalties. These risks are nonetheless real. We suggest that firms consider the following steps to facilitate compliance and avoid any suggestion that the firm willfully disregarded the statute's requirements.

### 1 Evaluate Foreign Clients at Intake.

Business intake procedures—including those for pro bono representations—should identify foreign client representations or foreign client representation issues, particularly if there is any indication of involvement by a foreign government, foreign political party, foreign political leaders, or if the aim of the representation seems to be to change government policies or bolster the image of a foreign country or political party. This can be done by modifying the new matter intake form or later during the course of the client approval process. Indeed, FARA is only one of several statutes of concern when a firm accepts representation of a foreign individual or entity.[77] Regardless of whether a firm adopts the detailed procedures and training outlined in the Skadden settlement, law firms probably will want to be able to point to *some* procedure or written policy that can be characterized as an effort to comply with FARA.

If a FARA issue is caught during intake, the file should indicate that the suitability of the client was evaluated and that any issue was addressed. If FARA doesn't apply, the note in the file should indicate the reason: e.g., that the client is not a foreign principal; the firm does not meet the definition of an agent of a foreign principal; the engagement is outside the United States; or the firm can claim a specified exemption.[78] If the firm is later accused of a FARA violation, the note will be evidence that no willful violation was intended.

What if the firm really isn't sure whether registration is required and, more importantly, is concerned that its noncompliance could be deemed "willful"? Pursuant to 28 C.F.R. § 5.2 (Rule 2), the firm may present the DOJ with the actual facts and ask for a statement of "present enforcement intentions," including an opinion as to whether registration is required or the situation falls within an exemption. "Anonymous, hypothetical, non-party and ex post facto review requests" will not be considered.[79] Accordingly, firms should note that a Rule 2 inquiry could potentially alert the DOJ of a possible violation. The process, however, also provides some limited protection against a future claim of a violation: "Each review letter can be relied upon by the requesting party or parties to the extent the disclosure was accurate and complete and to the extent the disclosure continues accurately and completely to reflect

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[77] GDPR is now of concern to many firms, and intake forms can catch whether personal data of E.U. residents is going to be received as a result of a representation. *See also* 18 U.S.C. § 951 (criminal penalties for operating as foreign government agent without notifying Attorney General); *Manual*, Tab I, Section 2.1.4 (specially designated nationals); *Is FARA the only Statute Relating to the Registration of Agents?*, U.S. Dep't of Justice: General FARA Frequently Asked Questions.

[78] *Cf.* Fleming, *supra* note 53 ("Those deciding whether to claim an exemption should ensure that their position has been fully vetted and carefully considered.").

[79] *See* 28 C.F.R. § 5.2(b).

circumstances after the date of issuance of the review letter."[80] The information provided will be kept confidential and is not subject to disclosure.[81] The full procedure is set out in the regulation.

The FARA advisory opinions cited in this article are generally the result of this Rule 2 process. Additionally, it is often helpful for outside counsel to consult with the FARA Registration Unit staff on a client-anonymous basis to assess whether a given representation requires registration or whether a Rule 2 advisory opinion is advisable.

## 2 If FARA Applies, Consider the Cost of Compliance.

Before accepting an engagement that requires FARA registration, firms should know that FARA can impose significant disclosure duties and administrative burdens, in addition to imposing various fees on the firm. FARA requires registration forms that outline "agreements with, income from, and expenditures on behalf of the foreign principal."[82] In addition to initial registration, FARA requires periodic supplemental reporting.[83] There also are associated fees.[84] The statute specifically requires agents subject to FARA registration requirements to identify themselves in dealing with government agencies and Congress (both when providing and requesting information) and when giving testimony to Congress.[85]

FARA also requires filing and labeling certain disseminated informational materials.[86] This requirement encompasses modern technologies like websites, social media (e.g., Facebook and Twitter), and online forums and blogs.[87] The filing deadline is again a quick one: within 48 hours of the beginning of the transmittal of the materials.[88] Although identification of written propaganda was an original goal of FARA, one would think that law firm involvement in the creation and dissemination of written public relations material would be rare. The Skadden situation, however, proves this will not always be the case.

In addition, registrants must keep books and activity records, but the requirements are not excessive.[89] The records must be open to government inspection by officials of the National Security Division or by the FBI.[90] Notably, FARA makes no provision for the attorney-client privilege. In two cases involving the

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[80] *See id.* § 5.2(k).

[81] *See id.* § 5.2(m).

[82] *How Does the Act Work?*, U.S. Dep't of Justice: General FARA Frequently Asked Questions; *see also* 22 U.S.C. § 612.

[83] *See* 22 U.S.C. § 612(b) (six-month intervals, certain changes, and at termination).

[84] *See* 28 C.F.R. § 5.5.

[85] *See* 22 U.S.C. § 614(e), (f).

[86] *See id.* § 614.

[87] *See What Are the Filing and Labeling Requirements for Informational Materials?*, U.S. Dep't of Justice: General FARA Frequently Asked Questions.

[88] *See* 22 U.S.C. § 614(a); 28 C.F.R. § 5.400(a).

[89] *See* 22 U.S.C. § 615.

[90] *See id.* § 615; 28 C.F.R. § 5.501.

same law firm, a federal district court held that FARA registrants can withhold documents based on a claim of privilege, but registrants must also retain such documents consistent with the act's record-keeping requirements. Any withholding is subject to court review, and the court may strictly apply the privilege to allow communication of pertinent FARA information to the government.[91] A firm may also presumably withhold—or not even keep—documents relating to areas covered by a FARA exemption.[92] Despite this case law, the government may contest any claim of privilege.

Registration statements are available to the public in an Internet-accessible database.[93] The DOJ may be willing to redact some personal information, such as addresses, but will not otherwise honor any request to keep facts confidential since this is counter to FARA's fundamental purpose.[94] If disclosure is problematic or poses personal danger, the DOJ's recommendation is to avoid the activities that require FARA registration.[95] The public can also view disseminated information, political propaganda, and other material required to be filed under FARA.[96]

The key point here is that although FARA is not intended to stop advocacy for foreign causes, Congress did intend to bring all such activities out into the open.[97] Foreign clients should be warned that they cannot avoid this public exposure of their activities by funneling them through a law firm. The engagement letter should therefore advise the client that the firm will comply with FARA, which may increase the cost of the representation. The client should also be told that the firm's activities will be subject to government inspection and publicly available reporting. Note that FARA also prohibits fees contingent on political success.[98] Fees contingent on litigation success do not violate the act.[99]

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[91] *See Att'y Gen. of U.S. v. Covington & Burling*, 411 F. Supp. 371 (D.D.C. 1976); *Att'y Gen. of U.S. v. Covington & Burling*, 430 F. Supp. 1117 (D.D.C. 1977).

[92] *See Covington & Burling*, 411 F. Supp. at 374.

[93] *See* 22 U.S.C. § 616.

[94] U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (June 29, 2017) (offering only to redact address, not names).

[95] *See id.* ("If [very limited redaction] is not suitable to the needs of your client, we can only recommend that your client not engage in the contemplated activity, thereby obviating the need to register under FARA." *Id.* at 2).

[96] *See* 28 C.F.R. § 5.601.

[97] *See, e.g., United States v. Auhagen*, 39 F. Supp. 590, 591 (D.D.C. 1941).

[98] 22 U.S.C. § 618(h) states, "It shall be unlawful for any agent of a foreign principal required to register under this subchapter to be a party to any contract, agreement, or understanding, either express or implied, with such foreign principal pursuant to which the amount or payment of the compensation, fee, or other remuneration of such agent is contingent in whole or in part upon the success of any political activities carried on by such agent."

[99] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Dec. 7, 2010). This case is significant because in order to recover certain claimed monies, the law firm was going to seek a waiver from the State Department of a rule that precludes using U.S. courts to recover foreign taxes, and the DOJ deemed such activity sufficiently political to require registration. (Ordinarily, litigation activity would be exempt under either the lawyer or commercial exemption, so the § 618(h) prohibition on contingency fees wouldn't apply.) The DOJ approved a contingency fee tied to success in the litigation even though the amount of that fee would presumably be much larger if lobbying the State Department allowed the plaintiff to recover taxes owed.

### 3 Ensure Compliance with Deadlines and Ongoing Requirements.

If the representation goes forward and registration is required, the firm must register before it begins work. The firm has just 10 calendar days to file the required materials and must do so before engaging in the registrable activity.[100] Weekends and holidays are *included* in calculating the 10-day period, but filing is complete upon mailing.[101] The individual lawyers handling the matter—and also nonclerical staff members directly involved in registrable activity—must also register, albeit by way of a "short form" registration statement.[102] Severing ties with a foreign client upon learning of a duty to register does not excuse the filing of an untimely registration.[103]

Going forward, the firm should set up an appropriate administrative mechanism to ensure that all other FARA requirements are also met. Among other things, the firm needs to consider the act's requirements for record retention, periodic reporting, and termination notices.[104] These duties are much more burdensome, of course, if the law firm or foreign client is involved in disseminating informational materials—including by Internet—since FARA requires prompt filing with the DOJ.[105]

If the firm determines that FARA does not apply to the representation of a foreign client, the firm should still remember to periodically reevaluate this conclusion should the scope of the representation change. Remember, FARA does not contain an exemption for a de minimis amount of registrable activity, so the slightest detour in a representation could trigger a registration requirement. Finally, the firm should monitor for legislative strengthening of FARA's terms and increased enforcement by the DOJ.[106] If FARA should be amended, adjust the firm's policies accordingly and also revisit any prior FARA evaluations to ensure ongoing compliance.

## VII. CONCLUSION

FARA can impose penalties and allows for criminal prosecution. For most ALAS firms, the real danger in failing to comply with FARA is reputational. No firm wants the kind of negative publicity that Skadden has received in recent months. Firms and lawyers that keep the above advice in mind should be able to deal confidently with any inquiry or action that the DOJ might initiate and should have no difficulty demonstrating a good faith attempt at FARA compliance.

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[100] *See* 22 U.S.C. § 612(a).

[101] *See* 28 C.F.R. §§ 5.4, 5.800.

[102] *See* 28 C.F.R. § 5.202.

[103] *See* U.S. Dep't of Justice, Nat'l Security Div., Opinion Letter (Aug. 17, 2010).

[104] *See* 22 U.S.C. §§ 612(b), 615.

[105] *See* 22 U.S.C. § 614 (and its accompanying regulations).

[106] *See, e.g.*, Megan R. Wilson, *Congress Mulls Toughening Foreign Lobbying Law*, The Hill (Oct. 31, 2017) (discussing FARA amendments introduced by Sen. Chuck Grassley).