

DOJ National Security Division Announces Significant Appointment and Shift on FARA Enforcement

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U.S. Department of Justice official John C. Demers, who heads the Department's National Security Division, announced yesterday that Brandon Van Grack will now lead the team that enforces the Foreign Agents Registration Act ("FARA"). Mr. Demers described the appointment as signaling a shift "from treating FARA as an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority."

This announcement is the prosecutorial equivalent of a ribbon cutting. The Justice Department has been building its FARA staff and signaling a more aggressive posture on FARA over the past 18 months, but this appears to be the official grand opening of a new and muscular FARA enforcement era.

How Did We Get Here?

Historically, the Department has focused its FARA enforcement efforts on "encouraging voluntary compliance" rather than bringing criminal charges. In fact, the Department charged only three individuals in total with criminally violating FARA during the 1990s and 2000s, and it ultimately dropped the FARA charges in two of those cases. But pressure has built steadily for the Department to take a more forceful approach. Here are some of the important factors that led to yesterday's important announcement:

- **Congressional Pressure.** Certain Members of Congress have expressed dissatisfaction over the years with the Department's FARA enforcement efforts. Senator Chuck Grassley (R-NE) in particular has repeatedly pressured the Department to step-up its efforts, both through pointed correspondence (Oct. 2018, July 2017, May 2017, March 2017, June 2015, May 2015) and through congressional hearings (2017).
- **DOJ Inspector General Report.** In 2016, the Department's Inspector General released a report on FARA enforcement, recommending 14 improvements to its FARA enforcement practices and concluding that the Department lacked a "comprehensive FARA enforcement strategy."
- **High-Profile Prosecutions.** The Special Counsel's Office investigation has raised FARA's public profile by securing guilty pleas from Paul Manafort and Rick Gates on FARA charges. GOP operative Samuel Patten also recently entered a guilty plea for violating FARA. Mr. Demers noted that these cases "opened everyone's eyes to how much different foreign governments tried to influence our political discourse in a covert manner."
- **Skadden Settlement.** The law firm Skadden paid \$4.6 million in January 2019 to settle potential FARA charges. This was the first settlement of its kind in at least several decades, which signaled FARA's stepped-up enforcement posture.

Who Is Brandon Van Grack?

Mr. Van Grack, the new lead official who will oversee FARA enforcement, has worked for the Department of Justice since 2014. Mr. Van Grack's past work at the Department includes prosecutions of the Syrian Electronic Army and alleged spies for Iran, China, and ISIS. Mr. Van Grack reportedly led a federal grand jury inquiry in 2017 into FARA violations by former National Security Advisor Michael Flynn and then advocated for the government in Mr. Flynn's notable December 2018 sentencing hearing. He worked on detail with Special

Counsel Robert Muller's Office until October 2018.

It is uncertain whether Mr. Van Grack will displace Heather Hunt, the long-serving Chief of the FARA Registration Unit within the Department of Justice. Regardless of that, though, Mr. Van Grack's significant prosecutorial experience in the past is likely to shape the Department's views of FARA enforcement moving forward, which is a fundamentally different framework than the "voluntary compliance" approach taken previously.

What Happens Next?

Because FARA has rarely been enforced aggressively during its 80-year history, it is difficult to predict precisely what will happen with FARA enforcement moving forward. But here are a few thoughts on what could occur in the near term now that this new era of FARA enforcement seemingly has begun:

- **Representations Involving Chinese, Russian, and Middle Eastern Interests Will Likely Receive More Enforcement Attention.** Because the Department wants to combat foreign powers' activities to influence U.S. politics, it will likely focus its enforcement efforts most intently where those activities might be adversarial. U.S. entities representing interests either that are located in China, Russia, or the Middle East or that espouse the views of the Chinese, the Russian, or certain Middle Eastern governments are likely to be closely reviewed.
- **Representations Involving Foreign Nonprofits and Foreign State-Owned Enterprises Will Likely Be Scrutinized.** The Department will likely probe unregistered representations of foreign nonprofits and state-owned enterprises to identify any possible hidden connections to foreign governments and political parties.
- **The Department Will Generate More "Letters of Inquiry" and Audits.** Each year, the Department has historically conducted around 14 audits of potential FARA registrants and generated roughly 13 Letters of Inquiry, which are communications to potential registrants that solicit voluntary document productions and responses to questions. The Department is likely to increase this activity.
- **The Department Could Seek Additional Skadden-Like Settlement Agreements.** In January 2019, the law firm Skadden settled potential FARA charges for \$4.6 million as part of a larger agreement that included the institution of a new FARA compliance program. The Department has focused in more recent years on a "two-track" enforcement approach to FARA: (1) criminal prosecutions for a limited number of cases involving especially large sums of money, serious misconduct, espionage, or other "bad facts"; and (2) penalty-free voluntary late filings for less serious or self-reported violations. But the Skadden settlement and Mr. Van Grack's appointment may open up a "third track" in the enforcement process, where the FARA Unit could resolve potential violations by securing an agreement that includes a payment to the U.S. Treasury and the implementation of a robust internal compliance program, among other things.
- **Due Diligence for Respondents to FARA Inquiries Will Be More Important.** In the past, some parties that received a Letter of Inquiry about FARA from the Department would expend little effort or conduct only cursory due diligence in crafting a response. This practice is particularly inadvisable now, given Mr. Demers remarks yesterday. He indicated that one reason Skadden was "on the hook" was "the lack of due diligence that went into the work that was done before ... representations were made to the Department." Parties that receive a Letter of Inquiry should therefore conduct all necessary due diligence prior to sending the Department a response.

- **Public Affairs Firms, Lobbying Firms, and Law Firms Will Need to Expand Their “Know Your Client” Intake Processes and Other Compliance Measures.** Federal guidelines on the prosecution of business entities look to a company’s compliance programs as a major factor in deciding whether to exercise prosecution discretion against indictment and more toward deferred or non-prosecution agreements. Thus, even before receiving a Letter of Inquiry or other communication from the Department of Justice, firms must examine their own procedures and implement stricter internal controls to attempt to ensure full compliance. Steps like enhanced client intake procedures, making FARA a specific “box to check” during that intake process, educating and training of staff and professionals, internal compliance reviews and the like are all procedures that, if not in place now, should be considered.
- **The Department Might Have Some Difficulty Successfully Prosecuting Criminal FARA Cases.** A criminal case is brought under FARA when an individual or entity “willfully” fails to register, makes a false statement of material fact, or omits a material fact. A violation is “willful” only when the violator acts with knowledge that the conduct was unlawful. This is a high standard for a prosecutor to establish beyond a reasonable doubt, particularly given FARA’s vague terms. As the Department itself has already recognized, “[t]he high burden of proving willfulness, difficulties in proving ‘direction and control’ by a foreign principal, and exemptions available under the statute make criminal prosecution for FARA violations challenging.” The Department might be enthusiastic about prosecuting FARA cases now, but may later find that the statute makes it difficult to win those cases.

Overall, the Department’s announcement heralds a new approach to FARA enforcement, and affected firms and individuals should examine their current compliance procedures and prepare for more aggressive action in the future. The Department will expect that affected parties are now on notice of their obligation to improve compliance and prevent violations. And when FARA cases do develop, investigative targets may find it harder to get the Department to exercise its discretion and pursue non-prosecution remedies.

Where Is More FARA-Related Information Available?

A new informational website at www.FARA.us provides a centralized location for FARA-related information, including a Plain-Language Guide to FARA, an index of past FARA Advisory Opinions, FARA source materials (e.g., legislative history and government reports), and summaries of past FARA enforcement cases.

For more information, please contact a member of Caplin & Drysdale’s Political Law team or visit our blogsite www.FARA.us.

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