

## FARA in the New Age of Enforcement and Compliance

OCTOBER 24, 2024

### KEY TAKEAWAYS

It is no longer a secret that the U.S. Department of Justice (DOJ) has recently, and in some ways radically, increased its enforcement of the Foreign Agents Registration Act (FARA or the Act) and related foreign influence and lobbying laws that require adequate disclosure and transparency about domestic activities performed on behalf of foreign governments, companies, nonprofits, and other foreign actors. The uptick in recent prosecutions centered around improper foreign influence has been highlighted by the latest indictment of New York Mayor Eric Adams for allegedly receiving bribes and soliciting illegal campaign contributions from foreign sources tied to Turkey. He's the third politician in just the last year who has been charged with crimes involving foreign influence operations—in the case of New Jersey Senator Bob Menendez, it was Egypt, and for Texas Congressman Henry Cuellar, it was Azerbaijan and a Mexican bank.

FARA's aggressive enforcement is a relatively recent development. Enacted in 1938 to shine light on Nazi propaganda and other subversive activities in the United States, FARA was intended to ensure that the U.S. public is made aware of, and domestic actors are transparent about, political and quasi-political activities occurring in the United States on behalf of foreign interests. Despite the age of the statute, its enforcement has been relatively lax until recently and there is relatively little case law construing it. Where overly broad and sometimes vague provisions are paired with the aggressive enforcement, significant statutory constitutional questions may arise.

FARA is broadly worded and may have significant unanticipated consequences for unwitting U.S. companies and individuals, as well as nonprofits, that have dealings with foreign persons. For example, FARA does not require a formal relationship or contract to establish agency. Nor does someone have to be compensated to be an agent. Instead, FARA defines "agents of a foreign principal" to include even those who act "in *any capacity* at the order, request, or under the direction or control" of a "foreign principal," which is also broadly defined and includes even foreign companies and individuals. The Act also expressly includes "persons whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal."<sup>[1]</sup>

There also is a popular misconception that FARA activities are limited to lobbying, but "political activities" are defined to include both lobbying and efforts to "influence in any way . . . any section of the public within the United States." Broad definitions of "public-relations counsel," "publicity agent," and "information-service employee" may require

registration for many individuals who do not engage in lobbying. And, particularly problematic for nonprofit organizations, even the collection of funds in the United States for “or in the interest of” such foreign principal requires registration under FARA.

In June 2024, DOJ’s FARA Unit published 15 new Advisory Opinions offering guidance and further insight on the Department’s interpretation of certain registration triggers and exemptions under FARA, and recent bills to revise FARA legislation and its regulations have been floating through the halls of Congress. Consequently, this is an area where the law and available guidance are evolving quickly.

This alert unpacks the latest trends in FARA enforcement, analyzes the implications for FARA compliance, and provides strategic insights for navigating this evolving area of criminal and civil FARA enforcement. As the stakes continue to rise for individuals, companies, and nonprofit organizations, understanding FARA’s registration and disclosure requirements is essential for mitigating risk and ensuring compliance in an increasingly global and interconnected world.

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## AN UPTICK IN HIGH-PROFILE FARA PROSECUTIONS AND OTHER ENFORCEMENT ACTIONS

2024 has been no stranger to FARA and FARA-related prosecutions and continues a recent surge of such cases from years prior. In September, Linda Sun, a former high-ranking official in New York State’s government (most recently serving as deputy chief of staff for Gov. Kathy Hochul), was charged by federal prosecutors in Brooklyn with violating FARA for allegedly acting as an undisclosed agent of the People’s Republic of China (PRC) and the Chinese Communist Party (CCP).<sup>[2]</sup> Sun, along with her husband, Chris Hu, are accused of leveraging Sun’s position to advance the interests of the PRC and CCP within the United States. The indictment alleges Sun used her position to promote PRC and CCP initiatives by acting at the request of PRC government officials and engaged in “numerous political activities,” such as arranging meetings between PRC officials and New York State government officials, obtaining state proclamations for PRC officials without proper authorization, and violating numerous state protocols to provide benefits to PRC and CCP officials. In return for her actions, Sun and Hu received substantial benefits such as tickets to events, travel accommodations, and employment opportunities for Sun’s family within the PRC.

Sun’s case comes on the heels of a federal indictment in New York in July 2024 of former government employee Sue Mi Terry, who was charged for acting as an unregistered agent of South Korea.<sup>[3]</sup> Terry, a former CIA analyst, U.S. National Security Council member, and White House employee, allegedly began acting as an unregistered agent of South Korea in 2013. According to prosecutors, Terry spent over a decade advocating South Korean policy positions, directing South Korean government officials, and sharing nonpublic U.S. government information with South Korean officials. In return, Terry received luxury goods, dinners, and more than \$37,000 in funding for policy programs she managed at the think tanks where she was employed. During this time, and since leaving government service, Terry has testified before Congress regarding U.S. policy towards Korea, worked at various U.S.-based think tanks and academic institutions, made media appearances, and hosted conferences related to South Korean and U.S. policy.

The latest series of high-profile FARA and FARA-related criminal enforcement actions was highlighted most notably by the unprecedented prosecution of sitting U.S. Senator Bob Menendez<sup>[4]</sup> (alongside his wife and three businessmen), who, as a sitting senator, was charged under 18 U.S.C. § 219, prohibiting “public officials” of the United States from serving as foreign agents, even as registered agents under FARA.<sup>[5]</sup> Menendez’s case was the first time that a current public official had been charged with violating Section 219.

And in August 2023, the rapper Prakazrel “Pras” Michel (formerly of the hip hop group *The Fugees*) joined the growing list of individuals convicted for efforts to influence the federal government to send a Chinese national back to China and to drop a DOJ criminal investigation related to the international strategic and development company known as 1Malaysia Development Berhad (1MDB).<sup>[6]</sup> Among other crimes, Michel was convicted of willfully failing to register under FARA and violating the related espionage-lite statute, 18 U.S.C. § 951—a similar criminal statute requiring registration for agents of foreign governments. Among other distinctions, Section 951 has a lower standard of intent, but it is limited to work only on behalf of *foreign governments* rather than the broader foreign interests or principals. While unsuccessful, DOJ brought a failure-to-register prosecution under Section 951 in 2021 against

businessman Thomas Barrack and his associate, Matthew Grimes, both of whom were acquitted after an eight-week trial in New York federal court.<sup>[7]</sup>

Other recent criminal enforcement actions have been resolved without convictions. In 2024, lobbyist Barry Bennett and political consultant Douglas Watts entered into Deferred Prosecution Agreements (DPAs) with DOJ to resolve the government's investigation into FARA violations at Bennett's lobbying firm. In 2017, a foreign government hired Avenue Strategies to perform lobbying services, and at the time, the firm registered under FARA. However, as part of his lobbying strategy for his foreign government client, Bennett allegedly directed Watts to establish a separate company, which Bennett operated covertly. Financed by the foreign government under Bennett and Watts' direction and management, this unregistered company ran a lobbying and public relations campaign designed to disparage the foreign government's regional rival and thereby improve its standing with the U.S. government relative to its rival. Through the DPAs, Bennett and Watts agreed to amend the lobbying firm's FARA filings and pay fines of \$100,000 and \$25,000, respectively.<sup>[8]</sup>

While the recent surge in criminal FARA and FARA-related enforcement actions has drawn the biggest headlines, DOJ also brought a handful of high-profile civil enforcement actions under FARA—most notably, against casino magnate Steve Wynn. In May 2022, DOJ brought its first affirmative FARA suit in more than 30 years, which sought to compel Wynn to retroactively register as a Chinese agent for allegedly lobbying then-President Trump on behalf of Chinese government officials.<sup>[9]</sup> But after Wynn's lawyers challenged the civil suit in court in October 2022, a federal court in the District of Columbia dismissed the case altogether, finding that DOJ cannot force Wynn to retroactively register as a foreign agent because his alleged lobbying efforts on behalf of China ended years ago.<sup>[10]</sup> And following an appeal, the D.C. Circuit affirmed the lower court decision in June 2024, relying on its 1987 ruling in *United States v. McGoff*, which held that an individual's obligation to register under FARA ends when their foreign influence efforts end.<sup>[11]</sup> Relying on *McGoff*, the three-judge panel said the government can only file lawsuits seeking to compel FARA registration against individuals who are "engaged in or about to engage" in undisclosed foreign influence—a critical caveat that did not apply in Wynn's case.

While the total number of criminal enforcement actions for FARA violations remains relatively low compared to other prosecutions—in part, because criminal violations for FARA require a "willful" violation of the law—the number has been rising steadily in recent years. These cases and developments underscore ongoing concerns about foreign influence operations in the United States and highlight DOJ's ongoing efforts to enforce FARA more aggressively. They also reinforce the importance of ensuring that parties operating in the political and quasi-political space are aware of, and are fully compliant, with FARA.

## **THE BROAD IMPLICATIONS OF FARA, INCLUDING A REVISED FARA LANDSCAPE IN 2024 AND BEYOND, AND ITS IMPACT ON REGISTRATION**

At any moment, DOJ may issue its long-awaited proposal to revise the FARA regulations, which the White House's Office of Information and Regulatory Affairs cleared for release this summer.<sup>[12]</sup> In 2021, DOJ issued an advanced notice of proposed rulemaking soliciting input on 19 questions about how to revise the FARA regulations. Based on remarks (at a December 2023 national FARA forum) by Jennifer Gellie, the acting chief of DOJ National Security Division's Counterintelligence and Export Control Section and former chief of the FARA Unit, the upcoming set of rulemaking seems likely to narrow DOJ's 20-year-old interpretation of one of FARA's broadest registration exemptions, Section 613(d)(2).<sup>[13]</sup> The statutory exemption under (d)(2) is paired with another FARA exemption, Section 613(d)(1)—often referred to together as the "commercial" exemptions. Subsection (d)(1) exempts from registration traditional "private and nonpolitical" commercial activities, while (d)(2) exempts "other activities not serving predominantly a foreign interest."

But this could all soon change. At last year's national FARA forum, Gellie clarified DOJ's new position that (d)(2) only exempts activities that *predominantly benefit* a domestic (or U.S.) interest, rather than activities predominantly benefitting a foreign interest, regardless of whether the foreign interest is governmental, commercial, nonprofit, or otherwise. Gellie described the changes as a "re-branding" of the commercial exemption into an exemption for "domestic activities." Such an interpretation would shift DOJ's FARA analysis away from assessing the kind of foreign interest at issue, and instead toward assessing the relative prominence of domestic interests over foreign interests of any kind. Under DOJ's new position, for example, a private foreign company's public relations campaign about a



proposed U.S. policy that benefits the company might no longer be exempt under (d)(2), and the same campaign by its U.S. subsidiary might only be exempt if it predominantly benefits the subsidiary's own interests, rather than those of its foreign parent. DOJ's new position also potentially contradicts the FARA Unit's existing advisory opinions, which conclude that (d)(2) does exempt activities that solely promote a foreign nongovernmental entity's own interests.

Separately, in the wake of the decision dismissing DOJ's civil enforcement action against Wynn, congressional lawmakers introduced a bill to close what some are calling the "Wynn FARA Loophole," which blocked DOJ from enforcing retroactive registration in certain cases. The bipartisan effort, dubbed "The Retroactive Foreign Agents Registration Act" and led by the Chair and Ranking Member of the House Select Committee on China, Mike Gallagher (R-Wis.) and Raja Krishnamoorthi (D-Ill.), respectively, has a companion bill in the Senate backed by Senators Chuck Grassley (R-Iowa) and Gary Peters (D-Mich.). The new legislation would specify that persons working as agents of a foreign principal have a *continuing* obligation to register under FARA, even when that work has ceased. Signifying its support, DOJ's Counterintelligence Chief, Jay Bratt, told FARA practitioners in 2022 that a legislative fix may be necessary to enable any meaningful enforcement activity under the statute.<sup>[14]</sup>

The Act as written, and especially with the expected broadened scope and potential for the retroactive application of the Act, also raises significant constitutional concerns. First, critics argue that FARA imposes restrictions on free speech and free association. Second, FARA's overly broad application seems to capture activities that were not within the Act's intended scope. Third, some contend that FARA's text is overly vague; for example, what does it mean to act "at the order, request, or under the direction or control" a foreign person? Fourth, there could be a public chilling effect of requiring registration due to a fear of being labeled a "foreign agent" or being subject to enhanced government scrutiny for registering. Fifth, there are concerns that FARA could be applied selectively by targeting specific groups, organizations, or individuals, raising equal protection and due process concerns. And finally, there may be *ex post facto* challenges given the United States cannot make retroactive laws that make conduct illegal after it has occurred.

In short, for this law to be upheld, there must be a compelling interest supporting the action. If the law is not sufficiently narrowly tailored to achieve these risks (here, our national security risks), then FARA may face significant constitutional challenges very soon. Already, there have been recent cases raising serious constitutional challenges to FARA's scope in the criminal context,<sup>[15]</sup> and the specter of ongoing prosecutions will likely continue to result in challenges to key parts of the Act, and could hamper DOJ's enforcement priorities. As it exists currently, there is very little guidance on FARA's constitutional limits, and no guidance on its possible overbreadth. Perhaps a better path would be for Congress to address this brewing crisis soon by reforming FARA to adopt the least restrictive means available when regulating constitutionally protected conduct—for example, balancing the constitutional protections for free speech and association and the right to petition the government.

## **FARA ENFORCEMENT ON THE RISE: WHERE TO LOOK FOR MORE INFORMATION**

With its publication of 15 new Advisory Opinions this summer, DOJ has signaled that FARA enforcement is on the rise in 2024 and beyond, and so too must be compliance efforts. While DOJ's Advisory Opinions are based solely on the facts presented in the underlying request, and are only binding on the submitting party, its most recent batch of Opinions continues to provide important guidance on DOJ's current approach to administering and enforcing FARA and underscores the breadth of FARA's scope.<sup>[16]</sup>

DOJ has made its focus on FARA enforcement and compliance patently clear, and individuals, companies and other entities would be wise to heed the notice. For more information on enforcement and compliance efforts, DOJ regularly publishes new Advisory Opinions, and DOJ's [FARA Index](#) provides further information on FARA, as well as the relationship between FARA and its statutory counterparts, such as the Lobbying Disclosure Act. To learn more about FARA, visit DOJ's [FARA homepage](#).

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[1] There are several exemptions to registering under FARA, subject to certain conditions, including: (a) diplomatic or consular offices; (b) officials of foreign governments; (c) staff members of diplomatic or consular officers; (d) private and nonpolitical activities; solicitation of funds; (e) religious, scholastic, or scientific pursuits; (f) defense of foreign government vital to United States defense; (g) persons qualified to practice law; and (h) agents of certain foreign

principals. See 22 U.S.C. § 613. With respect to the exemption for private and nonpolitical activities, the exemption applies to “[a]ny 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 predominantly a foreign interest; or (3) in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering, if such solicitation or collection of funds and contributions is in accordance with and subject to the provisions of subchapter II of chapter 9 of this title, and such rules and regulations as may be prescribed thereunder.” *Id.* § 613(d).

[2] *Former High-Ranking New York State Government Employee Charged with Acting as an Undisclosed Agent of the People’s Republic of China and the Chinese Communist Party*, U.S. Dep’t of Just. (Sept. 3, 2024), <https://www.justice.gov/usao-edny/pr/former-high-ranking-new-york-state-government-employee-charged-acting-undisclosed>.

[3] *Former Government Official Arrested for Acting as Unregistered Agent of South Korean Government*, U.S. Dep’t of Just. (July 17, 2024), <https://www.justice.gov/opa/pr/former-cia-and-white-house-official-sue-mi-terry-arrested-acting-unregistered-agent-south>.

[4] Winston & Strawn previously represented Senator Menendez in the investigation phase of this case.

[5] FARA Related Statutes, U.S. Dep’t of Just., <https://www.justice.gov/nsd-fara/fara-related-statutes>.

[6] *U.S. Entertainer Convicted of Engaging in Foreign Influence Campaign*, U.S. Dep’t of Just. (Apr. 26, 2023), <https://www.justice.gov/opa/pr/us-entertainer-convicted-engaging-foreign-influence-campaign>.

[7] Winston & Strawn previously represented Mr. Grimes at the trial in this case resulting in his acquittal.

[8] See Recent Cases, U.S. Dep’t of Just., <https://www.justice.gov/nsd-fara/recent-cases>.

[9] *Justice Department Sues to Compel a U.S. Businessperson to Register Under the Foreign Agents Registration Act*, U.S. Dep’t of Just. (May 17, 2022), <https://www.justice.gov/opa/pr/justice-department-sues-compel-us-businessperson-register-under-foreign-agents-registration>.

[10] E. Briseno, *Gov’t Suit To Make Wynn Register As Chinese Agent Is Tossed*, Law360 (Oct. 12, 2022), <https://www.law360.com/real-estate-authority/articles/1539155/gov-t-suit-to-make-wynn-register-as-chinese-agent-is-tossed>.

[11] A. Sullivan, *DOJ Can’t Force Retroactive FARA Registration, DC Circ. Says*, Law360 (June 14, 2024), <https://www.law360.com/real-estate-authority/articles/1848079/doj-can-t-force-retroactive-fara-registration-dc-circ-says>.

[12] The regulations implementing FARA, 28 C.F.R., pt. 5, were last revised in 2007. See OIRA Conclusion of EO 12866 Regulatory Review, *Amending and Clarifying Foreign Agents Registration Act Regulations* (July 11, 2024).

[13] Robert Kelner et al., *DOJ Officials’ Remarks Signal New Trends In FARA Activity*, Law360 (Dec. 14, 2023), <https://www.law360.com/articles/1776917/doj-officials-remarks-signal-new-trends-in-fara-activity>.

[14] C. Oprysko, *Lawmakers Introduce Bill to Close Wynn FARA Loophole*, Politico (July 12, 2023), <https://www.politico.com/newsletters/politico-influence/2023/07/12/lawmakers-introduce-bill-to-close-wynn-fara-loophole-00106012>.

[15] See, e.g., T. Firestone, *Are the Menendez and Cuellar FARA Charges Unconstitutional?*, Bribery Matters (Sept. 17, 2024), <https://www.briberymatters.com/post/are-the-menendez-and-cuellar-fara-charges-unconstitutional>.

[16] Advisory Opinions, U.S. Dep’t of Just., <https://www.justice.gov/nsd-fara/advisory-opinions>.  
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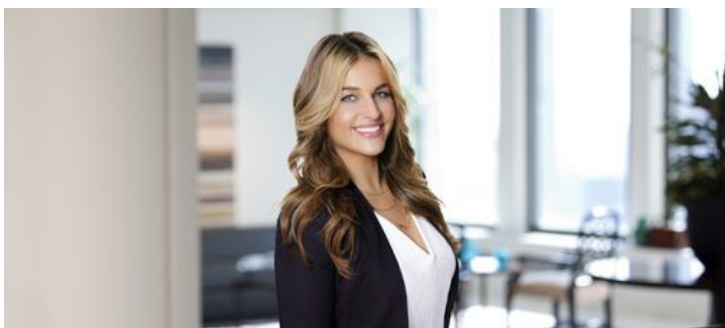
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