

DOJ Floats FARA Overhaul As Enforcement Blitz Rolls On

By Jack Queen

Law360 (December 8, 2021, 7:34 PM EST) -- The U.S. Department of Justice on Wednesday said it will overhaul foreign lobbying registration rules, a move that could add much-needed clarity to a decades-old law that has seen a surge in enforcement in recent years.

An advance rulemaking notice published by the department seeks input on a host of ambiguous, outdated or missing regulations concerning the Foreign Agents Registration Act, a World War II-era law that requires people and companies acting on behalf of foreign entities to register with the government.

The changes could have broad implications for hundreds, if not thousands, of registrants, whose numbers have surged since the DOJ began aggressively enforcing the once-neglected law in the wake of Trump-era foreign influence scandals. Precedent on FARA is sparse, and recent cases have posed novel legal questions about its scope.

"They are contemplating changes that are going to have significant ramifications in an area where compliance is taken very seriously and enforcement has ramped up significantly," Brandon Van Grack, a Morrison Foerster LLP partner and former DOJ FARA unit chief, told Law360 on Wednesday.

The rulemaking comes as the government pursues FARA charges against onetime Trump fundraiser Thomas Barrack, who was indicted in July. Trump's former lawyer Rudy Giuliani is reportedly under investigation for unregistered foreign lobbying but has not been indicted. He insists he is innocent.

The most notable changes under consideration implicate the scope of exemptions for legal work and commercial, religious, academic, scholastic and scientific activities.

The DOJ telegraphed its current thinking on the legal exemption in a nonbinding advisory opinion from earlier this year, offering a more expansive definition that would include out-of-court work, such as holding press conferences. Prior guidance covered only "in-court representation" of foreign entities.

The rulemaking notice signals that the department may narrow the scope of FARA's commercial exemption, which covers private, nonpolitical activities related to business, as well as activities that don't predominantly serve a foreign interest. The carveout applies to state-owned companies, but it's not clear whether it also applies to nonstate entities.

"They're about to draw a line for a group of entities whom they've never drawn a line for," Van Grack said. "It could be an expansion, it could be a narrowing, but it will have implications for a huge number

of individuals and companies working on behalf of nonstate entities."

The commercial exception was the linchpin of a recent appellate decision reinstating a conviction, underscoring the haziness of regulations that have rarely been tested in court. U.S. District Judge Anthony J. Trenga tossed the conviction of onetime Michael Flynn associate Bijan Rafiekian post-verdict but was reversed by the Fourth Circuit, which found that his interpretation of the commercial exception was too narrow.

Other changes under consideration include rules concerning the labeling of information disseminated by registered agents, which hasn't gotten an update for the social media era and provides unclear guidance on internet posts. That rule change could also implicate scores of companies and individuals.

The DOJ's FARA unit, once a quiet outpost, was supercharged after revelations that associates of former president Donald Trump had lobbied on behalf of foreign governments without registering. Former national security adviser Michael Flynn pled guilty, and Trump's former campaign manager, Paul Manafort, was convicted at trial. Trump pardoned both men before leaving office.

--Editing by Steven Edelstone.