



How to stay out of the DOJ's crosshairs

by Nick Lewin, Krieger Kim & Lewin LLP

The Department of Justice is investigating and prosecuting PR pros for FARA violations, says Nick Lewin.

Opinion



The U.S. Department of Justice seal. Getty Images

The FBI and Department of Justice have **recently stepped up enforcement of the Foreign Agents Registration Act**, or FARA, in a very public way. But I am still struck by how many comms pros still fail to appreciate how broadly FARA touches their own activities on behalf of foreign individuals and companies.

There should be no misunderstanding: PR firms are being investigated — and some executives criminally prosecuted — for willful violations of FARA.

Criminal violations can carry substantial fines and prison time. Even unwitting violations of the statute can draw scrutiny from the DOJ and cost firms big bucks.

Fortunately, as enforcement has increased, so too has DOJ guidance about when firms should register under FARA. While there remains vast uncertainty about the scope of FARA's coverage — especially as applied to emerging communications technologies — the DOJ's recent guidance strongly emphasizes that many of the services comms firms routinely provide may fall within FARA's coverage.

This includes growth areas like SEO and related activities designed to enhance the reputation of a foreign individual or organization.

FARA's scope

It is critical to understand at the outset that FARA does not just apply to foreign governments, embassies, or political parties. Non-US companies and private individuals with no governmental connections are also considered "foreign principals." Comms work for them can trigger FARA obligations.

The law sweeps very broadly, especially regarding public relations activities. Recent registrations included creating website content for a company headquartered in the Dominican Republic; assisting tourism authorities with brand development and market research; conducting a US digital campaign to support a Georgian pro-democracy movement, and managing the website and social media accounts of an Azerbaijani oil company's US subsidiary.

Notably, SEO was a component of the PR activities listed in each of these registrations.

The application of FARA can be complicated. But, in general, comms firms may want to consider the following four factors:

Purely commercial vs political activities

The most important exception to FARA's registration requirements is the commercial exemption. Registration is likely not required for communications activities that are designed purely to benefit private, commercial, non-political interests, and do not bear in any way on US policy or directly promote the policies or interests of any foreign government.

But this exemption doesn't provide as much cover as one might hope. For example, one recent DOJ opinion observed that registration would be required because the promotion of a foreign company simultaneously supported the public interests of an associated foreign government.

Moreover, comms campaigns that touch on US policy, or the policy or relations of a foreign government, may also inadvertently wander into FARA-registrable territory.

Influencing content vs. providing logistical support

While working on content intended for public consumption requires registration, executing the logistics of a communications strategy is less likely to require registration.

For example, in May the DOJ said a US company hired by an embassy to assist with the launch of a non-profit did not need to register even though it helped create a “detailed project plan” that included a gala dinner and the provision of educational content on behalf of the embassy.

That work was logistic and did not involve content creation. If, however, a comms firm generates content, even for a social media site or even indirectly, such activities could well be FARA-registrable.

Project Leadership vs. administrative coordination

Although spearheading or guiding a comms strategy for a foreign principal requires registration, coordinating between a foreign entity and other service providers may not.

For example, in 2017 the DOJ said a US company providing “meeting coordination, relationship facilitation, and cross-cultural communications clarification” between a foreign government and two US companies providing FARA-registrable services to that foreign government was not required to register.

The DOJ noted that the company was not involved in any strategic decisions, distribution of written materials, or “substantive work” on behalf of the foreign government. But be cautious: substantive involvement in advising a foreign principal regarding its public interests may well require registration.

Strategic consulting vs. data gathering

The more discretion, analysis, and strategic input are in a firm’s work, the more likely it is that registration is required. In some circumstances, when a PR agency is merely providing data or certain other information to a foreign entity that could indirectly affect the entity’s communications strategy, registration may not be required.

For example, in a 2018 opinion, the DOJ said a firm conducting public records research to identify influencing factors for certain reports, on behalf of a foreign ministry that wanted to improve its ranking in those reports, was not required to register under FARA.

The DOJ relied on the firm’s representation that it wasn’t advising the foreign ministry on PR activities or helping to distribute the work.

Conclusion

Taken together, DOJ’s guidance makes clear that not every connection to a foreign client’s public relations interests — especially if they are purely commercial — requires registration under FARA.

On the other hand, the DOJ also re-affirmed that many core PR activities do require registration, even if some of those activities are technical or logistical. As a result, every comms firm should ask itself three FARA questions.

One, do we provide services to a foreign person or organization?

Two, are we engaged in activities that touch in any way on US policy, or on a foreign country's policy?

Three, are we providing more than simple logistical support, administrative coordination, or pure data gathering?

If the answer is yes, or even maybe, FARA registration might well be required.

Comms firms — including those providing SEO, web traffic analysis, website design and maintenance, event planning, and IT support — should carefully consider whether their activities require FARA registration.

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