

ALERT

Attorney General Warns U.S. Tech and Media Companies That Activity on Behalf of a Foreign Entity Could Trigger a FARA Registration Requirement

July 22, 2020

On July 16, 2020, U.S. Attorney General William Barr delivered remarks on the Trump Administration's response to the global initiatives of the People's Republic of China (PRC) and the Chinese Communist Party (CCP). According to Barr, the United States' answer to China's current foreign policy campaign "may prove to be the most important issue for our nation and the world in the twenty-first century." Barr's speech highlighted China's most concerning policy initiatives and described the threats that those policies present to the U.S. economy and national security. Barr also discussed the role American companies play in "resisting the Chinese Communist Party's corrupt and dictatorial rule," and he urged America's corporate leaders to be mindful of activities that might implicate obligations to register under the Foreign Agents Registration Act (FARA).

Specifically, Barr said that the public threats China has traditionally used to exert influence have evolved to include "behind-the-scenes efforts to cultivate and coerce American business executives to further [CCP] political objectives." Barr explained how this form of influence generally materializes:

Their objective varies, but their pitch is generally the same: the businessperson has economic interests in China, and there is a suggestion that things will go better (or worse) for them depending on their response to the PRC's request. Privately pressuring or courting American corporate leaders to promote policies (or politicians) presents a significant

Authors

Tessa Capeloto
Partner
202.719.7586
tcapeloto@wiley.law
Paul J. Coyle
Associate
202.719.3446
pcoyles@wiley.law

Practice Areas

Foreign Agents Registration Act (FARA)
International Trade
National Security

threat, because hiding behind American voices allows the Chinese government to elevate its influence and put a “friendly face” on pro-regime policies. The legislator or policymaker who hears from a fellow American is properly more sympathetic to that constituent than to a foreigner. And by masking its participation in our political process, the PRC avoids accountability for its influence efforts and the public outcry that might result, if its lobbying were exposed.

In a warning to American business leaders as well as American academic and research institutions, Barr said, “you should be alert to how you might be used, and how your efforts on behalf of a foreign company or government could implicate the Foreign Agents Registration Act.” Barr continued, “FARA does not prohibit any speech or conduct. But it does require those who are acting as the ‘agents’ of foreign principals to publicly disclose that relationship and their political or other similar activities by registering with the Justice Department, allowing the audience to take into account the origin of the speech when evaluating its credibility.”

FARA is a disclosure statute designed to promote transparency in the U.S. political process, media and public relations arena, and other areas with respect to foreign influence. In short, the law requires every person engaging in certain political or quasi-political activities in the United States on behalf of a foreign government or entity—*i.e.*, acting as an agent of a foreign principal—to provide periodic disclosures to the U.S. Department of Justice (DOJ) that lay out certain details of the agent’s relationship with and work for the foreign principal.

Barr’s statements underscore the broad nature of the FARA statute. For example, registerable activity under the statute is not limited to lobbying; it also includes public relations, image making, and other less formal activities. It also covers activity for not only foreign governments and foreign political parties, but also private foreign corporations and private foreign persons. Nor must a foreign agent be paid or even have a contract to trigger a FARA registration requirement.

Although FARA is not a new law, in recent years, the DOJ has intensified its FARA enforcement efforts, including pursuing criminal prosecutions for violations of the statute. While ramping up its enforcement of FARA, the DOJ is also working hard to clarify the statute’s registration obligations for entities and individuals. In May 2020, the DOJ issued guidance entitled “The Scope of Agency Under FARA” to clarify the agency’s understanding of the definition of “agency” under the statute, which is a key threshold in determining whether an individual or entity is acting as an “agent of a foreign principal,” such that a registration requirement may apply. In June 2020, the Department made FARA “Letters of Determination” publicly available for the first time, which also provide significant insight into how the DOJ FARA Unit analyzes whether an individual or entity is required to register as a foreign agent.

Barr’s emphasis on FARA in this speech may be an indication that the DOJ recognizes FARA as an appropriate—and perhaps underutilized—tool for addressing Chinese and other foreign influence in the United States through private corporations, think tanks, and academic institutions.

Paul Coyle, a Law Clerk in Wiley's International Trade Practice, contributed to this alert.