

Global Risks in a Time of Disruption: Trends for FARA and FCPA

Considerations for Tax-Exempt Entities

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Agenda

- **Foreign Agents Registration Act (“FARA”)**
 - FARA in a Nutshell
 - Recent FARA Developments
- **Foreign Corrupt Practices Act (“FCPA”)**
 - FCPA Recent Developments & Basics
 - Consequences & Key Safeguards to Consider

FARA in a Nutshell

FARA – What Is It?

Passed in 1938 to compel disclosure of activities on behalf of foreign interests within the U.S. on eve of World War II

Amendments in 1960s boosted the law's lobbying focus

Advent of malign foreign influence operations brought an enforcement surge:

- More prosecutions, civil suits
- More inspections for persons already registered
- More letters of inquiry for those unregistered

FARA – Why Does It Matter to Me?

- Can apply broadly – e.g., to nonprofits, or domestic subsidiaries of non-U.S. companies.
- The FARA Unit has sought FARA registration in the context of mundane nonprofit activities, e.g.:
 - Domestic nonprofit receives grant from foreign government to engage in activities advancing that government's pro-climate policies
 - Domestic church prints banners for foreign congregants who attend rally on a policy issue
- Blurred distinction between foreign government interests, private commercial interests can bring uncertainty about the application of FARA's commercial exemptions.
- FARA is spawning imitators under foreign law and in various U.S. states.

FARA – Scope, Registration Triggers

FARA requires registration by agents of foreign principals who engage in registrable activities to whom no exemption applies.

Foreign principal → a foreign government, political party, or individual, or an entity having its principal place of business in a foreign country or organized under the laws of a foreign country.

Agent of a Foreign Principal → anyone who acts at the order, request, or under the direction or control of a foreign principal

Registrable activities →

- Engaging in **political activities** for the foreign principal in the US; or
- Acting as a **public relations counsel**, publicity agent, or **political consultant** for the foreign principal in the US; or
- Soliciting or dispensing money for the foreign principal in the US; or
- Representing the foreign principal before any US agency or official.

FARA – Exemptions

FARA registration is *not* required for certain LDA registrants who engage in lobbying activities on behalf of a foreign principal.

- To apply, the foreign principal **cannot** be a foreign government or foreign political party, and a foreign government or foreign political party **cannot be** the principal beneficiary of the lobbying activities.

FARA registration is *not* required for persons engaging only in private and nonpolitical activities in furtherance of the foreign principal's "bona fide trade or commerce."

- To apply, the activities **cannot** directly promote the public or political interests of a foreign government or political party.
- “Bona fide trade or commerce” includes exchanges, transfers, purchases, or sales; the exemption does not reach political activity.

FARA – Exemptions

FARA registration is *not* required for persons engaging only in activities not serving a predominantly foreign interest.

Current regulations apply exemption when the activities are:

- directly in furtherance of bona fide commercial, industrial, or financial operations of foreign corporation;
- not directed by a foreign government or political party; **and**
- not directly promoting the public or political interests of a foreign government or political party.

Recent FARA Developments

February 5 Bondi Memo Signals Rollback of FARA Enforcement

Returns FARA enforcement to pre-2017 posture:

- Criminal charges under FARA, 18 U.S.C. § 951 limited to “instances of alleged conduct similar to more traditional espionage by foreign government actors”
- Counterintelligence and Export Control Section, FARA Unit instructed to focus on “civil enforcement, regulatory initiatives, and public guidance.”

Shifting Resources in the National Security Division. To free resources to address more pressing priorities, and end risks of further weaponization and abuses of prosecutorial discretion, the Foreign Influence Task Force shall be disbanded. Recourse to criminal charges under the Foreign Agents Registration Act (FARA) and 18 U.S.C. § 951 shall be limited to instances of alleged conduct similar to more traditional espionage by foreign government actors. With respect to FARA and § 951, the Counterintelligence and Export Control Section, including the FARA Unit, shall focus on civil enforcement, regulatory initiatives, and public guidance.

The National Security Division’s Corporate Enforcement Unit is also disbanded. Personnel assigned to the Unit shall return to their previous posts.

Before Trump, DOJ Released Draft Rules to Curtail FARA Exemptions

Draft rules published January 2 would:

- Curtail FARA's commercial exemption by withholding it when the activities "promote" (rather than "directly promote") foreign government or party interests.
- Curtail FARA's exemption for "other activities not predominantly serving a foreign interest" by –
 - Applying four exclusions: (1) intent or purpose, (2) foreign government or party influence, (3) principal beneficiary is foreign government or party, and (4) foreign government or party directly or indirectly supervises, directs, controls, or finances activities in whole or substantial part, while the activities promote government or party interests
 - Absent exclusion, applying a "totality of the circumstances" test to determine whether the interest served is predominantly foreign or domestic (whether government or not).

Comments closed in March; wholesale adoption unlikely but prospects unknown

Enforcement Practices Remain Uncertain and Open to Volatility, Inconstancy

- Politically motivated FARA complaints have been increasingly common in recent years, especially when involving ideological, geopolitical adversaries
- FARA Unit has historically sent “letters of inquiry” using undisclosed, subjective criteria
- Project 2025 urged review of FARA exemptions:
 - “In addition, to combat China’s economic espionage, authorities and loopholes in the Foreign Agents Registration Act (FARA) will have to be examined and addressed in conjunction with the Attorney General”
- Enforcement functions may be degraded, but remain open to deployment against perceived threats and adversaries

FCPA in a Nutshell

Recent FCPA Developments



PRESIDENTIAL ACTIONS

Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security

The White House | February 10, 2025

Sec. 2. Policy of Enforcement Discretion. (a) For a period of 180 days following the date of this order, the Attorney General shall review guidelines and policies governing investigations and enforcement actions under the FCPA. During the review period, the Attorney General shall:

- (i) cease initiation of any new FCPA investigations or enforcement actions, unless the Attorney General determines that an individual exception should be made;
- (ii) review in detail all existing FCPA investigations or enforcement actions and take appropriate action with respect to such matters to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives; and
- (iii) issue updated guidelines or policies, as appropriate, to adequately promote the President's Article II authority to conduct foreign affairs and prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources.

(c) FCPA investigations and enforcement actions initiated or continued after the revised guidelines or policies are issued under subsection (a) of this section:

- (i) shall be governed by such guidelines or policies; and
- (ii) must be specifically authorized by the Attorney General.

Recent FCPA Developments



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

June 9, 2025

MEMORANDUM FOR

HEAD OF THE CRIMINAL DIVISION

FROM:

THE DEPUTY ATTORNEY GENERAL

SUBJECT:

Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA)¹

conduct that directly undermines U.S. national interests. Effective today, prosecutors shall focus on cases in which individuals have engaged in criminal misconduct and not attribute nonspecific malfeasance to corporate structures; proceed as expeditiously as possible in their investigations; and consider collateral consequences, such as the potential disruption to lawful business and the impact on a company's employees, throughout an investigation, not only at the resolution phase.

To evaluate whether to pursue FCPA investigations and enforcement actions, prosecutors shall consider the non-exhaustive factors set forth below.² The initiation of all new FCPA investigations or enforcement actions must be authorized by the Assistant Attorney General for the Criminal Division (or the official acting in that capacity) or a more senior Department official. See Order, § 2(c)(ii).

Priority Factors

- Cartels & transnational criminal orgs
- Foreign entities harming US competition
- National security priorities (e.g. defense; intelligence; critical infrastructure)
- Serious misconduct

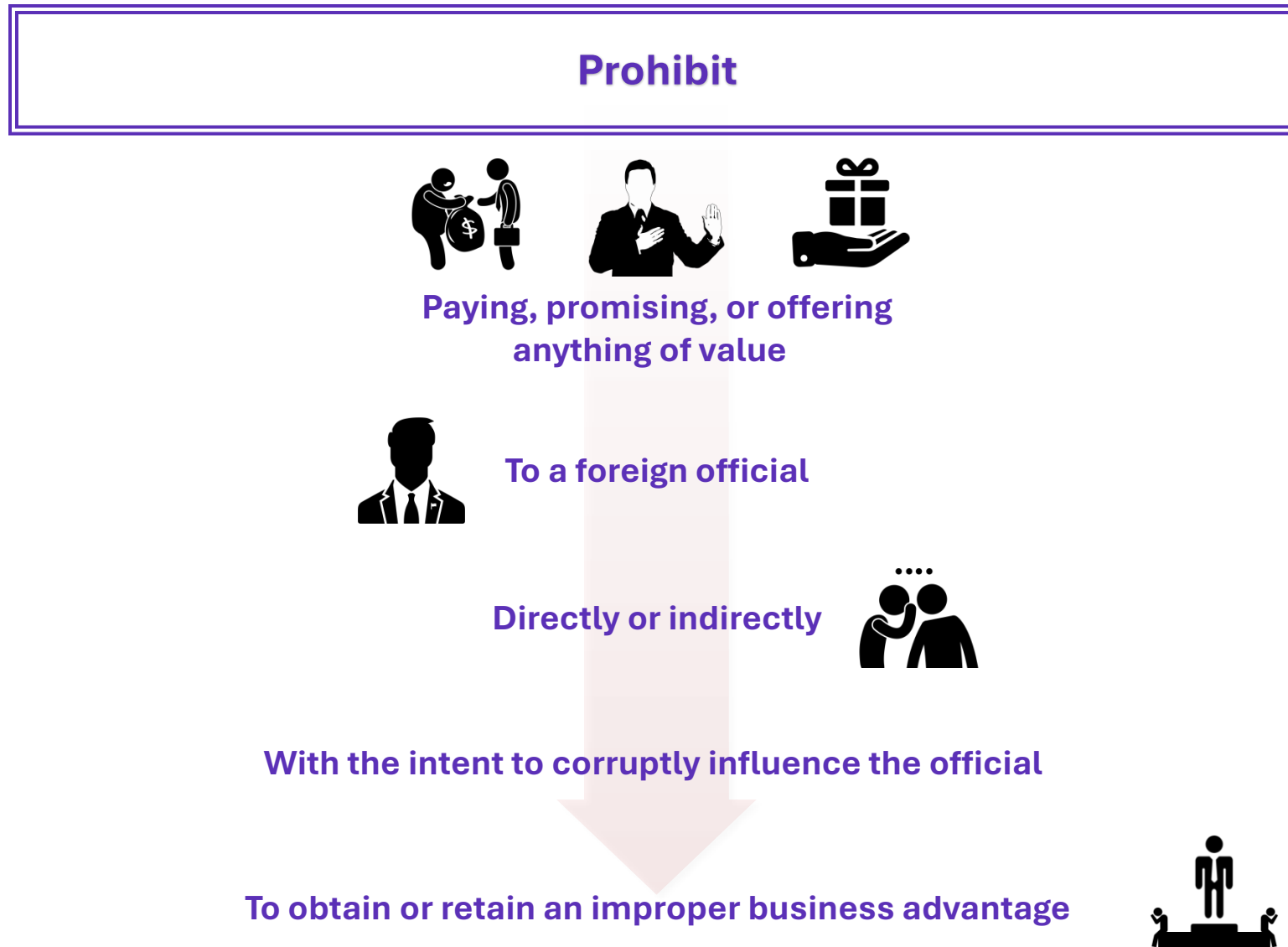
Key Takeaways

- ✓ The FCPA remains good law
- ✓ Statute of limitations is 5 years from the last date of activity linked to bribery (with conspiracy can extend many years into the future)
- ✓ DOJ retains vast discretion under Department guidance to bring enforce actions when it may promote Administration interests

Anti-Corruption Overview

- In general, anti-corruption laws prohibit offering to pay, paying, promising to pay, or authorizing the payment ***of money or anything of value*** to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or ***to secure any improper advantage***.
- **Who is subject to the Foreign Corrupt Practices Act (FCPA)?**
 - U.S. citizens, nationals, and residents and U.S. entities (“domestic concerns”), wherever conduct occurs (i.e. US entities and our personnel worldwide)
 - Any issuer (whether U.S. or non-U.S.) under the federal securities laws (also subject to books & records and internal controls requirements)
 - Any person or entity committing a proscribed act that touches the United States
- Under other laws, including the UK Anti-Bribery Act, it is also a crime to bribe private commercial parties.

FCPA in a Nutshell



Anything of Value

“Anything of Value” should be broadly interpreted to include anything of monetary or non-monetary value.

- Cash or cash equivalents (e.g., gift cards, securities) – Above-market commissions
- Gifts, meals, hospitality, entertainment, or travel support – Medical care
- Charitable or political contributions – Discounts
- Employment opportunities (paid or unpaid) – Forgiveness of a debt
- Personal favors – Loans
- Favors for family members
- Consulting fees for unspecified services
- Opportunities

Who is a Public Official?

While laws prohibit giving improper benefits to any person, bribing a foreign public official typically carries stricter penalties.

Foreign Official means:

- any employee or officer of a government including any foreign federal, regional, or local department, agency, instrumentality, or enterprise owned or controlled by the government
- any official of a foreign political party
- any official or employee of a public international organization, such as the World Bank, United Nations, or World Health Organization
- any person acting in an official capacity for or on behalf of any such entity
- any candidate for foreign political office
- any other person who is defined as a public official under local law.

Anti-corruption laws also apply to offering benefits to family members or business associates of Foreign Officials.

Facilitation Payments

A “facilitation payment” is a payment that is made to expedite or secure the performance by a Foreign Official of any act of a routine nature that is part of the official’s duties or functions, including the issuance of a ministerial, non-discretionary permit, license, or other document to qualify a person to do business or the processing of official documents, such as visas and work permits.

Key Related Risk Area: Ransoms and Security Payments

Key Concept: Third Party Liability

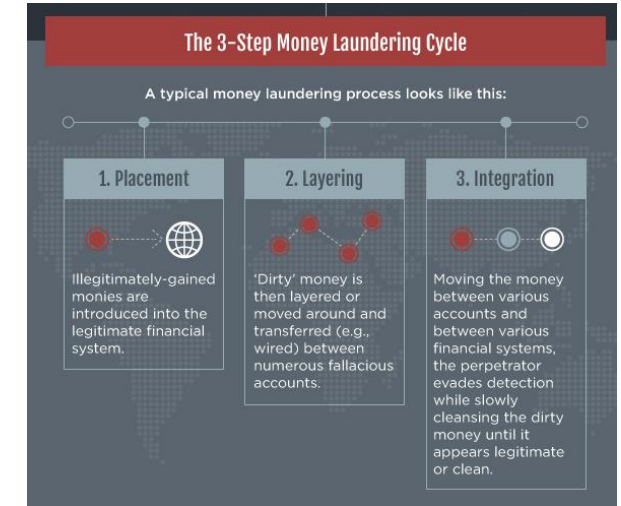
FCPA liability is NOT limited to the activities of your personnel

- You can be liable for the corrupt acts of agents, partners and any other Third Party that may make a corrupt payment that ultimately has the potential to benefit your organization, even where the Third Party was primarily engaging in corruption for its own benefit (e.g. a local partner who acts without authority)
- U.S. law enforcement may pursue FCPA violations on the basis of actual knowledge of a violation or “conscious disregard” of a high-probability that a violation may occur (also known as “willful blindness”)
 - Jury instruction: “knowledge of an FCPA violation may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact.”
 - Government interprets this concept **broadly** to include the absence of diligence in high-risk circumstances and failure to clear red flags
 - Seminal Case: *U.S. v. Kozeny* (2d Cir. 2010), involving FCPA conspiracy conviction of investor Frederic Bourke (co-founder of Dooney & Bourke) on the basis of willful blindness as to his local partner’s corrupt conduct

Anti-Money Laundering & Economic Sanctions

Money laundering, sanctions evasion and terrorist financing can be closely linked to corruption in certain high-risk jurisdictions (e.g. Syria; Venezuela; Russia) and require a similar risk-based approach to prevention and detection.

- **Money laundering** is the act of concealing or disguising the existence, illegal origins, or illegal application of criminally derived income as well as receiving criminal proceeds
- **Sanctions** include comprehensive sanctions on jurisdictions like Iran and Cuba, list-based sanctions targeting individuals and entities around the world and more complex sanctions like those applicable to Russia, Venezuela and increasingly China
- **Terrorist financing** typically involves the use of an organizations accounts or networks to assist terrorist organizations in obtaining funds they could not access through other means
- **Where might it arise?**
 - Donors linked to criminal activity or sanctioned parties
 - Partners engaging with sanctioned parties or jurisdictions [NB: there are broad licenses for humanitarian and democracy building work but they must be strictly followed]
 - High risk regions with a reputation for corruption, terrorism, money laundering or sanctions evasion (i.e. Russia; Turkey; Venezuela; China; Syria, Afghanistan, countries bordering comprehensively sanctioned countries, currently Iran, Cuba, North Korea, and Donetsk, Luhansk and Crimean regions of Ukraine)



Consequences & Key Safeguards to Consider

Consequences of Non-Compliance

Bribery and money laundering are criminal offenses

Violations can result in severe penalties:

- Significant fines and forfeiture of property (as well as costly investigative and legal expenses)
- Legal action by partners/donors
- Reputational damage that could impact fundraising and partnerships going forward
- Tax-exempt status may be at risk on the basis of illegal conduct/ activities contrary to fundamental public policy

Individuals may also be subject to fines and imprisonment.

U.S. law enforcement agencies have heavily prioritized enforcement against individuals involved in corporate misconduct. Entity settlement outcomes are directly impacted by the extent to which individuals involved are identified by the company and the company cooperates with enforcement action against those individuals.

Key Safeguards

1. Management Commitment (e.g. statements during roll out; reminders; escalation)
2. Risk Assessment
3. Written Policies
 - Anti-corruption (foreign and domestic), anti-money laundering & economic sanctions
 - Donor vetting/gift acceptance
 - Third party due diligence (e.g. vendors; partners; etc)
 - Gifts, travel and entertainment expenses
 - Finance payments inbound and outbound screening
 - Employee PEP/sanctions screening
4. Training
5. Testing & Auditing

Questions?

