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The Impact of DOJ's Charges Against a Former Trump Advisor on Companies Working with Foreign Clients

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On July 20, 2021, the Department of Justice ("DOJ") unsealed a 46-page indictment charging former Trump Administration Advisor Thomas Joseph Barrack and two co-defendants with acting and conspiring to act as unregistered foreign agents of the United Arab Emirates ("UAE").[1] The Indictment alleges, among other things, that Barrack acted on UAE's behalf to influence the foreign policy position of the United States. While media reports have sometimes described these charges as being brought under the Foreign Agents Registration Act ("FARA"), which generally requires agents of foreign principals to register with the DOJ, that is not the case. Barrack was charged under a related but distinct and more serious criminal statute (18 U.S.C. § 951) that makes it unlawful to act within the United States as "an agent of a foreign government" without prior notification of the Attorney General.

Regardless, the charges against Barrack, as well as several other recent FARA prosecutions, reinforce that there is now a real risk of civil and criminal exposure for U.S. individuals and companies assisting foreign clients. It is important that companies working with non-U.S. customers or clients understand the current enforcement environment, including the DOJ's renewed focus on foreign agent investigations and prosecutions. Companies are now facing increased scrutiny when assisting foreign clients, and they must ensure that they have appropriate policies and procedures in place, with board oversight, in order to anticipate and address foreign agent issues.

It was not always this way. For decades, FARA and Section 951 sat idle and largely ignored by U.S. prosecutors, with only seven criminal FARA cases and few Section 951 cases brought between 1966 and 2015. Both statutes, especially FARA, gained newfound prominence in 2016. That year, the DOJ's Office of the Inspector General issued a report criticizing the DOJ's FARA enforcement strategy and noting that some DOJ officials were unaware of the differences between FARA and Section 951.[2] Since that time, several high-profile cases have included FARA or Section 951 charges. In March 2019, the Assistant Attorney General in charge of DOJ's National Security Division, which develops DOJ's foreign agent enforcement strategy and

[1] *See United States v. Alshahhi, et al.*, No. 21 Cr. 371 (BMC) (E.D.N.Y. 2021).

[2] Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act, U.S. Dep't of Justice, Office of the Inspector General (Sept. 2016), *available at* https://oig.justice.gov/reports/2016/a1624.pdf.

approves FARA and Section 951 charges, announced that DOJ was overhauling its FARA Unit and making FARA an enforcement priority.

While it is clear that we are now in a heightened enforcement environment for unregistered foreign agents, there is often confusion about the differences between FARA and Section 951. FARA is a broadly worded statute that requires "agents" of "foreign principals" to register with DOJ and to file periodic reports regarding their work, unless their activities fit within one of FARA's exemptions. FARA defines "foreign principal" to include not only foreign governments and officials, but also foreign individuals and businesses. FARA also broadly defines "agent of a foreign principal" to include anyone who engages in a variety of activities directed at influencing U.S. policy or public opinion on behalf of foreign clients, as well as those who otherwise seek to advance foreign political interests in the United States.

Section 951 is a simpler statute that applies to anyone acting within the United States as "an agent of a foreign power" without notifying the Attorney General. Unlike FARA, Section 951 does not apply to individuals acting on behalf of non-governmental foreign individuals or businesses. Nor does Section 951 require that the activity engaged in by the agent be political in nature. Section 951 is also more punitive: it has a maximum prison term of 10 years, compared to FARA's 5 year maximum.

DOJ has described Section 951 as "espionage-lite" because defendants typically engage in "espionage-like behavior, information gathering, and procurement of technology, on behalf of foreign governments or officials." FARA, on the other hand, "is designed to provide transparency regarding efforts by foreign principals . . . to influence the U.S. government or public through public speech, political activities, and lobbying."[3]

Against this backdrop, U.S. companies may find themselves confronting potential FARA and Section 951 issues when engaged with non-U.S. customers or clients. U.S. individuals and companies should be attuned to these issues when a foreign business contact is or has potential connections to a foreign government, or when the foreign client's representation touches on political or quasi-political matters. In those circumstances, there are numerous steps that individuals or companies can take to address potential FARA or Section 951 issues, including assessing the application of statutory exemptions from FARA or Section 951; limiting the parties' relationship by contract to avoid any potential issues under the statutes; and, under certain circumstances, registering under the Lobbying Disclosure Act, which might exempt the company from FARA registration, or seeking an advisory opinion from DOJ's FARA Unit. Companies who frequently engage with foreign governments or other foreign actors should also take steps to establish a proactive approach to identifying, assessing, and remediating potential FARA and Section 951 issues. These sorts of measures may include standardized contracts and screening procedures.

[3] *Id.* at Appendix 3.