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FARA Unit Enters Landmark DPAs to Resolve Lobbyists' FARA Violations

Client Alerts

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Earlier this year, the Department of Justice's (DOJ) Foreign Agents Registration Act (FARA) Unit entered into what appeared to be the first publicly announced deferred prosecution agreements (DPAs) to resolve alleged FARA violations. In the two cases at issue, the US Attorney's Office for the District of Columbia (USAO-DC) and DOJ's National Security Division's (NSD) Counterintelligence and Export Control Section announced that Barry Bennett, a lobbyist and consultant, and Douglas Watts, a former Ben Carson and Donald Trump campaign consultant and public relations professional, had entered into DPAs with the DOJ to resolve the government's investigation into their violations of FARA and related offenses. While DPAs are standard agreements used by the DOJ in corporate criminal investigations, they historically have not been used in connection with a FARA investigation.

And most notably, the DPAs used in the two cases provide the DOJ with a creative way to force retroactive FARA registration—a capability recently undermined by the judicial ruling in *Attorney General v. Wynn*.

This alert reviews (1) the FARA violations supporting the DPAs; (2) how NSD uses DPAs for national security criminal enforcement; (3) how this form of DPA allows the FARA Unit to resume enforcement of retroactive registration; and (4) other important takeaways from the terms of the novel DPAs.

United States v. Bennett **and** ***United States v. Watts***

According to the statements of facts for both DPAs, Bennett and Watts ran a large-scale covert public relations campaign on behalf of the government of Qatar without registering their activities with the FARA Unit.

Bennett, a Virginia-based lobbyist, owned and operated the lobbying and consulting firm Avenue Strategies (Avenue). Starting in July 2017, Bennett and Avenue entered into a contract with the government of Qatar, and both Bennett and Avenue registered as foreign agents with the FARA Unit. But soon after the start of the contract, Bennett sought and obtained Qatari government approval to launch and "quietly manage" a public relations campaign highlighting a humanitarian crisis in an unnamed third country (identified as Yemen in Watts's DPA), with the purpose of elevating the

standing of Qatar among the US public and US policymakers. With the financial backing of Qatar, Bennett created a company (referred to as "Yemen Watch" or "Yemen Crisis Watch" in Watts's DPA) to orchestrate a public campaign of articles, news coverage, videos, and other influence operations about the humanitarian crisis in Yemen.

The DPA's statement of facts contends that Bennett directed the creation and operations of Yemen Watch, and the company was funded by Avenue, with money received from an undisclosed expansion of the Qatar contract. Notably though, Watts was listed as the founder and sole member of Yemen Watch on the company's Delaware LLC Declaration. Neither Watts nor Yemen Watch ever registered with the FARA Unit. Bennett also never amended the existing FARA filings for himself or the company to reflect these new activities and the relationship between Bennett, Avenue, and Yemen Watch. According to Bennett's DPA, Bennett admitted that "[t]his information was required to be included in Avenue Strategies' FARA filings because Watts's and [Yemen Watch's] activities were for and in the interests of [Qatar] and did not qualify for an applicable exemption from registration." Based on the DPAs, Avenue Strategies received $773,000—approximately 27% of Avenue Strategies' overall $2.1M contract with Qatar—in exchange for the unregistered services.

As a part of their DPAs, both Bennett and Watts admitted to the allegations set forth in two separate charging documents or informations filed with the district court. Bennett's information charged him with engaging in a scheme to falsify, conceal, and cover up material facts from the FARA Unit, which is in violation of 18 U.S.C. 1001(a)(1). Bennett's information also charged him with making false statements and material omissions in FARA filings, in violation of 22 U.S.C. §§ 612 and 618(a)(2). Watts' information charged him with making false statements to the FBI, in violation of 18 U.S.C. § 1001(a)(2), and with failing to register under FARA, in violation of 22 U.S.C. §§ 612(a)(1) and 618(a)(1).

Under the terms of Bennett's agreement, Bennett may not engage in any conduct requiring registration under FARA (22 U.S.C. §§ 611-618) for the next 18 months. He must also correct Avenue Strategies' inaccurate September 2017 and March 2018 filings with the FARA Unit and pay a $100,000 fine. Under Watts' agreement, Watts may not engage in any FARA-registrable conduct for the next 12 months, and he must retroactively register for his past activities under FARA. Finally, he must pay a $25,000 fine. If Bennett and Watts comply with the terms of their DPAs, the underlying charging documents will be dismissed.

Deferred Prosecution Agreements for National Security Criminal Enforcement

In the national security context, DPAs are exceedingly rare but not unheard of—they may be considered in the face of uncertain litigation risk for the government. In *US v. Baier et al.*, for example, the USAO-DC and NSD entered into a DPA with three former employees of the US Intelligence Community to resolve an investigation into violations of US export control and computer hacking laws on behalf of the government of the United Arab Emirates (UAE). Under the terms of their agreements, the defendants agreed to relinquish their security clearances and submit to

lifetime bans on seeking future security clearances, agreed to financial penalties, and conceded certain future employment restrictions and restrictions on employment by certain UAE organizations. As with all national security prosecutions, the potential risk of inadvertent disclosure of classified information at trial likely played a significant role in the DOJ's decision to seek resolution of the *Baier* case through the use of a DPA.

Considering the DOJ's recent losses in high-profile FARA and FARA-related cases, including its failed effort to civilly compel Steve Wynn to retroactively register and the acquittal at trial of Thomas Barrack on an 18 U.S.C. § 951 charge,[1] DPAs may offer a substantially easier path for the FARA Unit to obtain admissions of wrongdoing without the trial risk. The flexibility of DPAs, through which the Unit can obtain significant financial penalties and personal restrictions, also allows the Unit to craft substantial and tailored penalties for criminal defendants.

Return of Retroactive Registration in the DC Circuit

The FARA Unit has also used Bennett's and Watts' DPAs to revive retroactive registration, a civil enforcement mechanism currently foreclosed by the US Court of Appeals for the District of Columbia Circuit.

Back in May 2022, DOJ filed an action in the US District Court for the District of Columbia, seeking a civil injunction against Steve Wynn to compel him to retroactively register with the FARA Unit for 2017 lobbying efforts on behalf of the Chinese government. Trumpeted by the DOJ as a landmark effort in FARA enforcement—the first affirmative civil lawsuit under FARA in more than thirty years—the DOJ's hopes for the litigation soon fell flat. In less than six months, on October 12, 2022, District Court Judge James E. Boasberg dismissed the suit on the ground that under the binding DC Circuit precedent of *United States v. McGoff*, 831 F.2d 1071 (DC Cir. 1987), the obligation to register as a foreign agent under Section 612 of FARA expired when the relationship between the alleged agent and foreign principal was terminated. While seeming to invite the DC Circuit to revisit its holding in *McGoff*, the District Court held that DOJ could not require Wynn to retroactively register when his alleged activities on behalf of the Chinese government had long since ceased.

The DOJ has since appealed the decision to the DC Circuit, but because *McGoff* is binding Circuit precedent, reversal will likely require *en banc* review. Separately, a bipartisan group of legislators has proposed new legislation, the Retroactive Foreign Agents Registration Act (RFARA), to close the *McGoff* gap and declare that foreign agents still have an ongoing obligation to register even after ceasing to act on behalf of a foreign principal. However, neither avenue appears likely to grant the FARA Unit any immediate relief. The DOJ is still awaiting a decision from the DC Circuit in *Wynn.* Meanwhile, after being introduced in the House and Senate on July 11, 2023, RFARA was referred for study to the House Committee on the Judiciary and the Senate Committee on Foreign Relations, but neither committee has taken any further action.

While DOJ awaits judicial or legislative relief for the gap in its FARA enforcement authority, the Bennett and Watts resolutions show that the FARA Unit has fashioned a workaround by making retroactive registration a requirement of each of the DPAs.

Further Takeaways from Bennett's and Watts' Agreements

The recent agreements provide a couple of other takeaways.

First, neither of the financial penalties were anywhere close to the maximum fine of $250,000 for a criminal FARA violation, nor did Watts or Bennett disgorge all of the money allegedly received from the foreign principal for the unregistered political activities. Together, Bennett and Watts paid $125,000 in fines, far less than the $773,000 allegedly provided by Qatar for the unregistered activities.

Second, the DPAs bar both defendants from engaging in any conduct that would require FARA registration for a finite period of time. In this case, these restrictions are limited to FARA-registrable activities, but the DPAs in *U.S. v. Baier et al.* suggest that future agreements could include a host of other forms of restrictions on future conduct or activities (for example, agreement to a lifetime ban on any conduct requiring disclosure under the Lobbying Disclosure Act).

In the long term, DPAs have the potential to become a frequently used tool for the DOJ to resolve investigations into corporate and individual violations of FARA and other national security laws, especially as the DOJ increases its focus on corporate enforcement of national security-related crimes. This new enforcement mechanism, paired with proposed legislative authorities for the FARA Unit to issue civil investigative demands, seeks civil penalties and increased maximum fines for criminal violations, and would be a major boost to the Unit's currently limited enforcement capabilities.

Jenner & Block will continue to monitor new developments regarding FARA enforcement. Our team is counseling clients on these issues and is available to provide guidance. Shreve Ariail and Keisha Stanford are partners in the firm's National Security and Crisis Practice, with Shreve serving as co-chair. Philip Chertoff is an associate with Jenner & Block.

Footnotes

[1] Thomas Barrack, a real estate investor and long-time Trump friend, was accused of using his position as a senior outside advisor to the 2016 Trump presidential campaign, and subsequently to senior US government officials, to advance the interests of and provide intelligence to the UAE without first notifying the Attorney General that Barrack's actions were taken at the direction of senior UAE officials, as required by 18 U.S.C. § 951. Among other allegations, Barrack was accused of passing the UAE government internal nonpublic information about the Trump Administration's opinions on UAE officials, altering a campaign speech and an opinion article at the direction of the UAE government, and making public appearances to elevate public opinion on the UAE.

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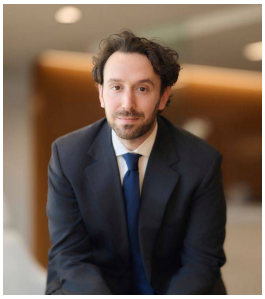

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