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Trends in Government Investigations into  
Foreign Influence in the Private Sector:  
*A discussion of FARA and related  
provisions.*

October 16, 2020

*Panelists:*

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## MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance six weeks following the webcast.
- **Please direct all questions regarding MCLE to [CLE@gibsondunn.com](mailto:CLE@gibsondunn.com).**

# Agenda

- I. The Foreign Agents Registration Act (FARA)
  - A. History, Overview, and Definitions
  - B. FARA Exemptions
  - C. FARA Enforcement
  - D. Compliance Best Practices
- II. Corporate Espionage and “Internal” Exports
  - A. Criminal Enforcement
  - B. Deemed Exports
- III. Investment Restrictions
  - A. Information and Communications Technology Supply Chain Review
  - B. CFIUS Overview

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# The Foreign Agents Registration Act (FARA)

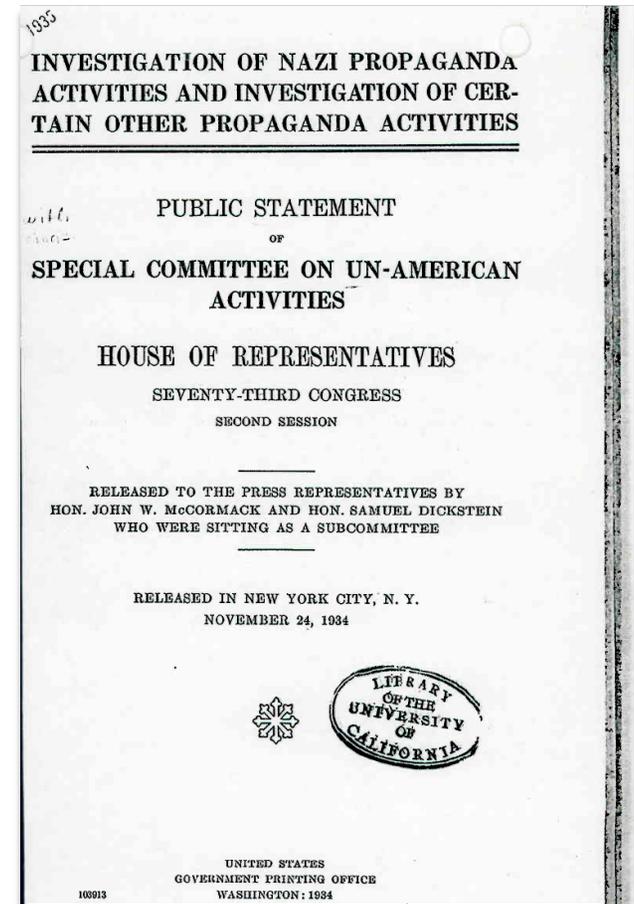
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# History of Foreign Agents Registration Act (FARA)

- The Foreign Agents Registration Act (FARA) was originally enacted in 1938 following a congressional investigation into Nazi propaganda.
- FARA was introduced in 1937 based on committee findings of “incontrovertible evidence” of representatives of foreign governments and foreign political groups in the U.S. “who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country.”

Pub. L. No. 75-583, 52 Stat. 631, June 8, 1938.

House Report No. 75-1381 to Accompany H.R. 1591, July 28, 1937.



# FARA Overview

- FARA requires an “agent of a foreign principal” to register with the Attorney General, and to provide information on its activities and compensation, unless an exemption applies.
- FARA is a disclosure statute, with criminal and civil sanctions for failure to comply.
- The U.S. Department of Justice (DOJ), National Security Division (NSD), FARA Unit manages registrations under FARA and handles enforcement actions.
- Few cases have been decided under FARA; however, since 2018, DOJ NSD has posted its advisory opinions containing interpretations of FARA online.
- Forms filed by active and former FARA registrants and foreign principals are also posted on DOJ’s website.



U.S. Dep’t of Justice, National Security Division – Foreign Agents Registration Act, <https://www.justice.gov/nsd-fara>.

# FARA Overview: When is Registration Required?



# FARA Definition of Foreign Principal

- 22 U.S.C. § 611(b):
  - “The term ‘**foreign principal**’ includes—”
    - “a **government** of a foreign country and a foreign **political party**;”
    - “a **person outside of the United States**,” except U.S. citizens domiciled in the U.S., or a non-individual entity that “is organized under or created by the laws of the United States or of any State . . . and has its principal place of business within the United States;” and
    - “a **partnership, association, corporation, organization**, or other combination of persons organized under the laws of or having its principal place of business **in a foreign country**.”
- Note that a foreign principal can be a foreign government/political party or a foreign private entity (individual or business). This matters for the scope of activity that is covered.

# FARA Definition of Agent of a Foreign Principal

- 22 U.S.C. § 611(c)

–Unless an exception applies, “the term ‘**agent** of a foreign principal’ means—”

- “any person who acts as an **agent, representative, employee, or servant**, or any person who acts in any other capacity at the order, request, or **under the direction or control**,”
- “of a foreign principal or of a person any of whose activities are **directly or indirectly supervised**, directed, controlled, financed, or subsidized in whole or in major part **by a foreign principal**,”

–**And** who **directly or indirectly** does one of these **actions** on behalf of the foreign principal (*detailed on following slides*):

Engages in political activities in the U.S. for foreign principal

Acts as public relations counsel, publicity agent, or political consultant in the U.S.

Solicits, collects, or disburses money or things of value in the U.S.

Represents interests before any agency or official of U.S. government

## FARA Exemptions: Commercial Activities

- One of the most commonly cited FARA exemptions is for commercial activities:
  - “Any person engaging or agreeing to engage only (1) in **private and nonpolitical activities** in furtherance of the **bona fide trade or commerce** of such foreign principal; or (2) in other activities **not serving predominantly a foreign interest.**”
  - “**Trade or commerce**” includes “exchange, transfer, purchase, or sale of **commodities, services, or property** of any kind.”
- Actions “in furtherance of bona fide trade or commerce” are considered “**private,**” even for foreign principals “**owned or controlled** by a **foreign government,** so long as the activities **do not directly promote**” the foreign government’s “public or political interests.”
- “**Political activities** on behalf of a foreign corporation” are also **permissible,** if “directly in furtherance of [] bona fide commercial, industrial, or financial operations,” **not directed** by a foreign government/political party, and **not directly promoting** “the **public or political interests**” of a foreign government/political party.

## FARA Exemptions: Practice of Law

- “Any person qualified to **practice law**” who “engages or agrees to engage in the **legal representation** of a **disclosed** foreign principal before **any court of law** or **any agency** of the government of the United States” is exempt from FARA.
- Legal representation falling under this subsection “**does not** include attempts to influence or persuade agency personnel or officials **other than** in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings.”
- The exemption does not cover “attempts to influence or persuade with reference to **formulating, adopting, or changing** the **domestic or foreign policies** of the **United States** or with reference to the **political or public interests**, policies, or relations of a government of a **foreign country** or a foreign **political party**.”



22 U.S.C. § 613(g), 28 C.F.R. § 5.306(a)

# FARA Exemptions: Lobbying Disclosure Act (1/2)

## The Lobbying Disclosure Act “LDA”

- Primary statute governing the regulation and reporting of federal lobbying activities.
- Requires that organizations which employ individuals who qualify as lobbyists register and make quarterly reports of activity/income/expenditures.
- Reports are filed with clerks of the House and Senate and publicly available.

## The “LDA Exemption” to FARA registration

### Available *unless*:

1. The entity is an agent of a foreign government or foreign political party;
2. A foreign government/political party is “the principal beneficiary” of the agent’s lobbying activities, regardless of who the client is.

2 U.S.C. § 1602(8)(A); 2 U.S.C. § 1602(3),(4); 2 U.S.C. § 2602(7).

## FARA Exemptions: Lobbying Disclosure Act (2/2)

- Who is required to register under the LDA? The “**2 and 20**” Rule:

Makes **two** or more *lobbying contacts* over a three mo. period on behalf of a client

AND

Spends **20 percent** or more of time (in same three mo. period) engaged in lobbying activities on behalf of the same client

- Report under the LDA is generally *less burdensome* than under FARA:
  - ➔ The LDA registration/reporting generally requires less disclosure of contracts with clients and less record keeping of activities/meetings.
  - ➔ In the current political environment, less stigma registering under the LDA than FARA.

# More Burdensome Obligations Under FARA

## **Registration**

- Sworn registration statement must be provided to DOJ within 10 days of becoming an agent of a foreign principal.
- Elements of the registration include:
  - Details of the registrant’s activities and expenditures.
  - The identity of the foreign principal.
  - Copies of all contracts with foreign principals and a description of any oral contracts.
  - Disclosure of all compensation from foreign principals.

## **Disclosure and Record-Keeping**

- Every six months, registrants must file a supplemental statement describing activities on behalf of the foreign principal.
- This applies even if “the registrant has not engaged during the period in any activity in the interests of [its] foreign principal.”
- Registrants must also file copies of “informational materials” distributed within the U.S. within 48 hours of transmission.
- Registrants must maintain books and records with respect to all activities requiring FARA registration/disclosure and make them available to U.S. law enforcement.

22 U.S.C. §§ 612(a), 618(e).

# Congressional Focus on Foreign Interference and Implications for Lobbyists (1/3)

- Threats to U.S. Democracy that Congress and other watchdogs have identified in the wake of the 2016 Election:

Election  
System  
Hacking

Social Media  
Ads

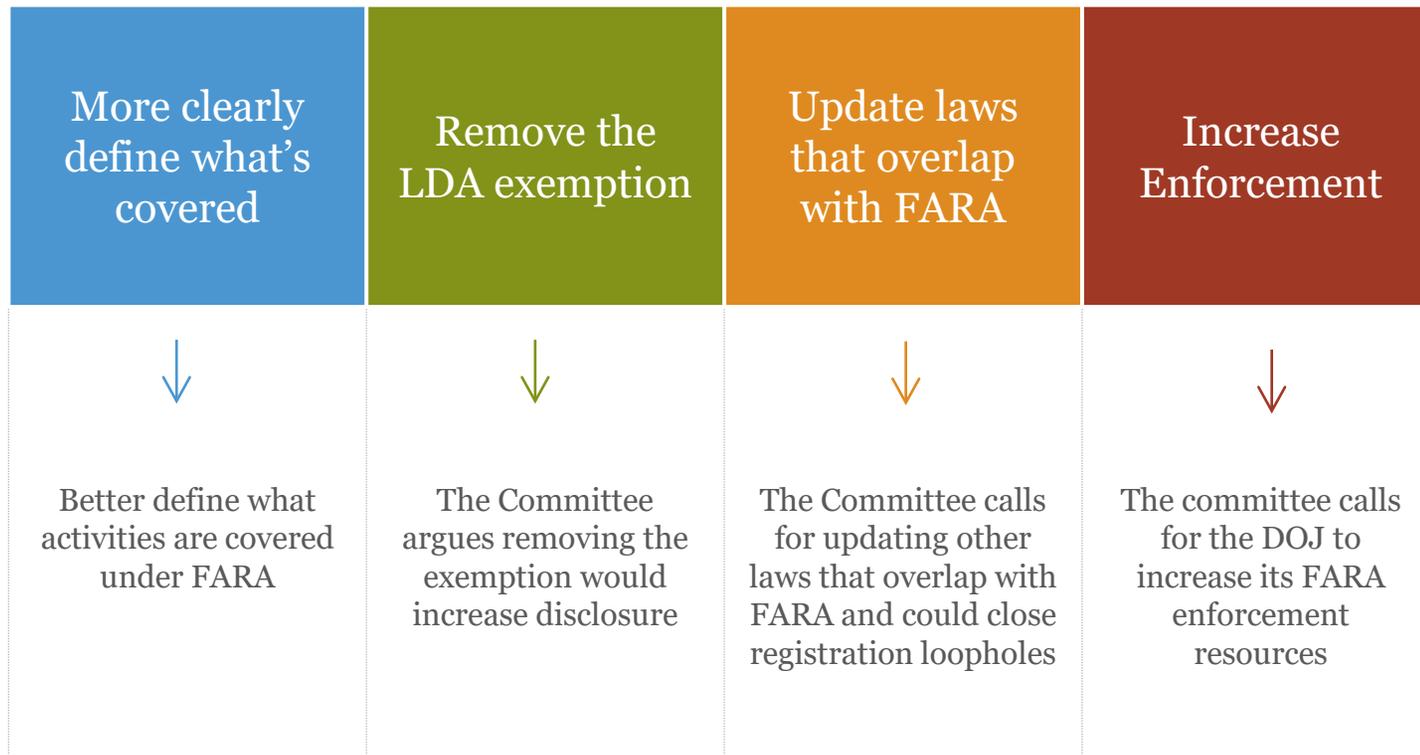
Anonymously  
Funding  
Political  
Groups

Directing U.S.  
Subsidiaries to  
Make  
Campaign  
Contributions

Engaging  
Unregistered  
Lobbyists

# Congressional Focus on Foreign Interference and Implications for Lobbyists (2/3)

- Senate Intel Committee proposed a number of FARA Congressional reforms to address potential unregistered lobbying on behalf of foreign agents:



# Congressional Focus on Foreign Interference and Implications for Lobbyists (3/3)

- Numerous bills also seek to strengthen enforcement, modernize FARA, and/or remove the LDA exemption:

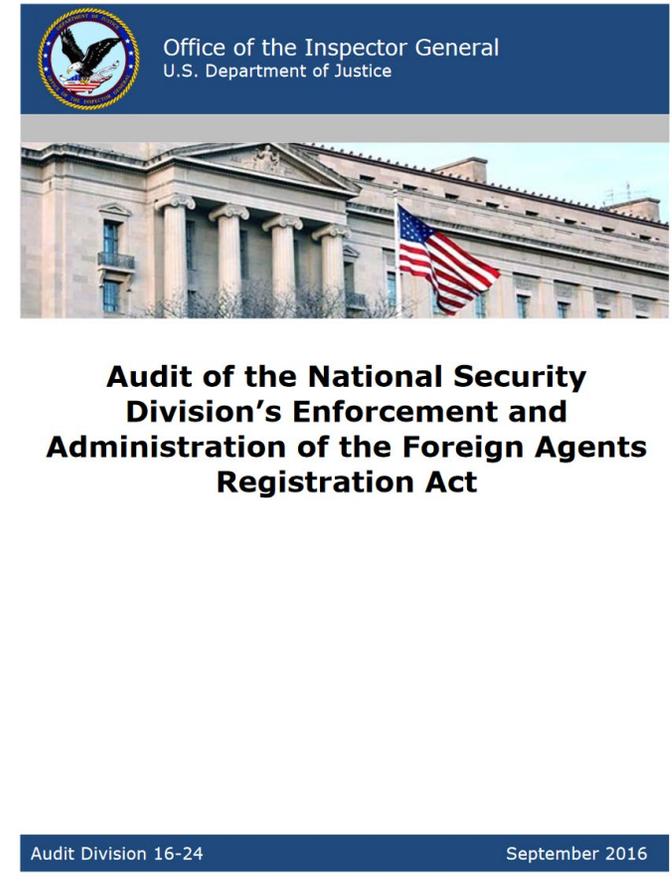


- If the FARA exemption is repealed, registration under *both* the LDA and FARA may be required in certain circumstances:
  - Registration under both laws would increase the compliance burden of registrants and is complicated by the fact that each law is overseen by a different entity (DOJ for FARA and House/Senate Clerks for LDA).
  - Conversely, the DOJ’s heightened oversight of the current regime (and the ambiguity of the DOJ’s recent view of “principal beneficiary”) raises the risk more entities will be found to be (inadvertently or not) in non-compliance with FARA.

# History of FARA Enforcement

- FARA was traditionally viewed as an administrative registration process; almost no enforcement actions.
- Between 1966 (current form of FARA) and 2015, DOJ brought seven criminal FARA cases, only three of which resulted in a conviction (one at trial and two guilty pleas).
- A 2016 report from the DOJ Office of the Inspector General (OIG) criticized NSD for a “lack of a comprehensive FARA enforcement strategy.”
- The OIG found that prosecutors viewed NSD as “reluctant” to approve FARA criminal charges, and that NSD was not using its civil authority to address “widespread delinquencies” in reporting.

U.S. Dep’t of Justice, Office of the Inspector General, *Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act*, Sept. 2016, <https://oig.justice.gov/reports/2016/a1624.pdf>.



# FARA Enforcement: Increased Activity by DOJ

- In 2019, DOJ announced a shift in approach:
  - NSD created a new FARA enforcement unit
  - Audits of FARA registrants increased by over 30%
  - New registrants and new foreign principals doubled compared to 2016 rate
  - DOJ used civil enforcement power for first time since 1991
  - Establishment of online process for FARA filings



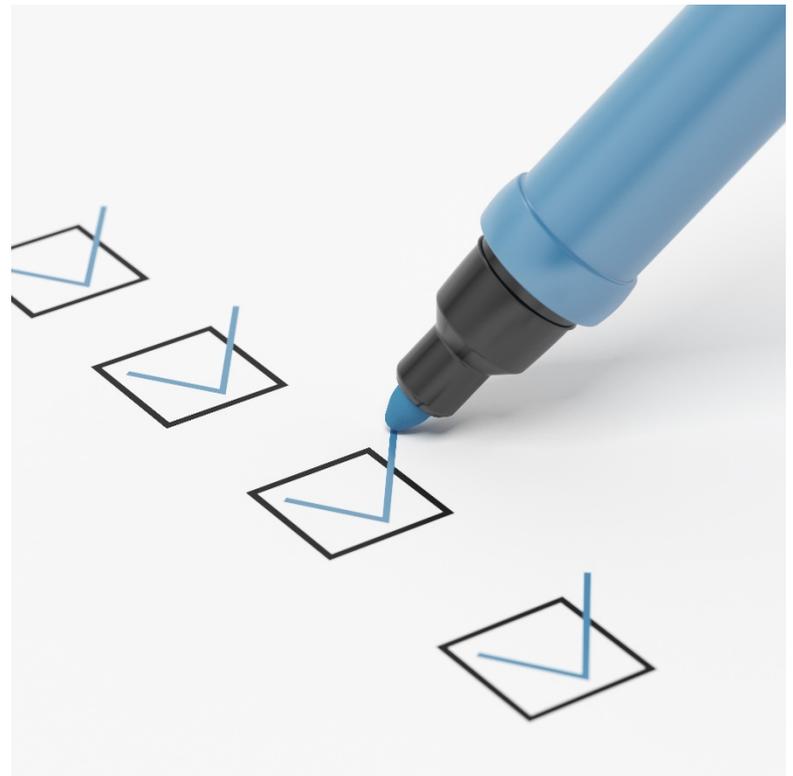
*DOJ has shifted “from treating FARA as an administrative obligation and regulatory obligation to one that is increasingly an enforcement priority.” DOJ is “being more aggressive about who [it is] requiring to register and [it is] confronting registrants who are resistant to registering.”*

*-John Demers, Assistant Attorney General, National Security, March 7, 2019*

*Ex-Muller Prosecutor to Lead DOJ’s Foreign Agent Crackdown, Bloomberg Law (Mar. 7, 2019), <https://bit.ly/3djVVlz>.  
DOJ Announces Launch of New Process for Filing Documents Pursuant to FARA (Sept. 25, 2019), <https://bit.ly/2Fn8LTD>.  
Testimony of DAAG Hickey Before House Judiciary Comm., Oct. 22, 2019, <https://bit.ly/3nFaG7g>.*

# FARA Compliance Best Practices

- Conduct a risk assessment to identify and analyze activities that may have FARA implications.
- Ensure that FARA is integrated into existing corporate compliance programs related to working with foreign governments and firms.
- Train personnel to spot and respond to situations that could lead to triggering FARA, such as requests from foreign clients or business partners to arrange meetings with U.S. government officials, or provide advice on media strategy in the U.S.
- If registered under FARA, establish systems to track compliance with continuing supplemental disclosure obligations and books-and-records requirements.



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# “Internal” Exports and Espionage

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# Criminal Enforcement

- Through the China Initiative, DOJ continues to focus on countering Chinese and China-related trade secret theft cases, including those based on cyber intrusions.
- DOJ continues to prosecute a range of cyber crime cases, which in 2019 resulted in sentencing of:
  - Two members of a Romanian cybercrime enterprise sentenced to 20 and 18 years' imprisonment, respectively, related to infecting more than 400,000 victim computers with malware;
  - A businessman at a Chicago manufacturing firm for attempting to download proprietary electronic information from the company where he was employed, and attempting to bring the information to a new company in China; and
  - A former hedge fund manager to five years' imprisonment for his role in hacking newswire services to steal press releases containing non-public financial information.
- The FBI has begun outreach warning universities of Chinese cybersecurity and espionage threats, and encouraging them to increase oversight of Chinese researchers.

*“China wants the fruits of America’s brainpower to harvest the seeds of its planned economic dominance. Preventing this from happening will take all of us, here at the Justice Department, across the U.S. government, and within the private sector. With the Attorney General’s initiative, we will confront China’s malign behaviors and encourage them to conduct themselves as they aspire to be: one of the world’s leading nations.”*

– John Demers, Assistant Attorney General for National Security, July 2, 2019

# Deemed Export

## What is a *deemed* export?

Put simply: **Releasing technical data, technology**, or source code to a **foreign person**.

### ITAR

#### §120.17 Export.

(a) Except as set forth in §126.16 or §126.17, *export* means:

(1) An actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner;

(2) **Releasing** or otherwise transferring technical data to a **foreign person** in the United States (a “deemed export”);

(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR by a U.S. person to a foreign person;

(4) Releasing or otherwise transferring a defense article to an embassy or to any of its agencies or subdivisions, such as a diplomatic mission or consulate, in the United States;

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad; or

(6) A launch vehicle or payload shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter. However, for certain limited purposes (see §126.1 of this subchapter), the controls of this subchapter may apply to any sale, transfer or proposal to sell or transfer defense articles or defense services.

(b) Any **release** in the United States of **technical data** to a **foreign person** is deemed to be an export to all countries in which the **foreign person** has held or holds citizenship or holds permanent residency.

### EAR

#### § 734.13 EXPORT

(a) Except as set forth in §§ 734.17 or 734.18, Export means:

(1) An actual shipment or transmission out of the United States, including the sending or taking of an item out of the United States, in any manner;

(2) **Releasing** or otherwise transferring “**technology**” or source code (but not object code) to a **foreign person** in the United States (a “deemed export”);

(3) Transferring by a person in the United States of registration, control, or ownership of:

(i) A spacecraft subject to the EAR that is not eligible for export under License Exception STA (*i.e.*, spacecraft that provide space-based logistics, assembly or servicing of any spacecraft) to a person in or a national of any other country; or

(ii) Any other spacecraft subject to the EAR to a person in or a national of a Country Group D:5 country.

(b) Any **release** in the United States of “**technology**” or source code to a **foreign person** is a deemed export to the foreign person’s most recent country of citizenship or permanent residency.

(c) The export of an item that will transit through a country or countries to a destination identified in the EAR is deemed to be an export to that destination.

# Deemed Export

Deemed Export: Releasing technical data, technology, or source code to a foreign person

## What is a *release*?

- **Visual or other inspection**
- **Oral or written exchanges**

### ITAR

#### §120.50 Release.

(a) Technical data is released through:

(1) Visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person;

or

(2) Oral or written exchanges with foreign persons of technical data in the United States or abroad.

#### § 734.15 Release. EAR

(a) Except as set forth in § 734.18, "technology" and "software" are "released" through:

(1) Visual or other inspection by a foreign person of items that reveals "technology" or source code subject to the EAR to a foreign person; or

(2) Oral or written exchanges with a foreign person of "technology" or source code in the United States or abroad.

(b) Any act causing the "release" of "technology" or "software," through use of "access information" or otherwise, to yourself or another person requires an authorization to the same extent an authorization would be required to export or reexport such "technology" or "software" to that person.

# Deemed Export

Deemed Export: Releasing technical data, technology, or source code to a foreign person

## What is *technical data*?

No easy definition – but, in essence, information about ITAR-controlled items

### ITAR § 120.10

Technical data means:

- “(1) **Information** . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of **blueprints, drawings, photographs, plans, instructions or documentation**;
- (2) Classified **information** relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;
- (3) **Information** covered by an invention secrecy order; or
- (4) **Software** . . . directly related to defense articles.”



# Deemed Export

Deemed Export: Releasing technical data, technology, or source code to a foreign person

## What is *technology*?

No easy definition – but, in essence, information about EAR-controlled items

### EAR § 722.1

Technology means: **Information** necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item.

# Deemed Export

Deemed Export: Releasing technical data, technology, or source code to a foreign person

## Who is a foreign person?

- Any natural person who is not a citizen or lawful permanent resident of the United States.
- Any entity not incorporated or organized to do business in the United States.

*Note: "person" refers to both humans and legal entities.*

ITAR

### §120.16 Foreign person.

*Foreign person* means any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).

EAR

*Foreign person.* Any natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, trust, society or any other entity or group that is not incorporated in the United States or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of a foreign government (e.g., diplomatic mission). "Foreign person" is synonymous with "foreign national," as used in the EAR, and "foreign person" as used in the International Traffic in Arms Regulations (22 CFR 120.16). This definition does not apply to part 760 of the EAR (Restrictive Trade Practices or Boycotts).

# Deemed Export

## RECAP – Deemed Export Definition

Deemed Export: **Releasing technical data, technology,** or source code to a foreign person

- Visual or other inspection
- Oral or written exchanges

by

- Any person who is not a citizen or lawful permanent resident of the United States.
- Any entity not incorporated or organized to do business in the United States.

of

Information about ITAR- or EAR-controlled items

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# Investment Restrictions

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# Information and Communications Technology and Services Supply Chain Review

- On May 15, 2019, President Trump issued an Executive Order declaring a national emergency with respect to the information and communications technology and services (“**ICTS**”) supply chain and allowing the imposition of further restrictions on transactions involving ICTS infrastructure.
- In November 2019, the Department of Commerce published proposed rules giving the Sec. of Commerce broad authority to **review, mitigate, block, or unwind** certain transactions involving ICTS that are owned by, controlled by, or subject to the jurisdiction or direction of a “**foreign adversary.**”
- Specifically, the Secretary has broad discretion to review transactions (i) subject to U.S. jurisdiction, (ii) involves any property in which a foreign person has an interest, and (iii) initiated, pending, or completed after May 15, 2019.
- Review may be **initiated independently** by the Secretary, based on **submissions by private parties**, or **referrals** by other federal agencies.

# CFIUS Overview

- **CFIUS** is an inter-agency committee authorized to review the national security implications of foreign direct investment in the U.S.
- CFIUS is authorized to **block** transactions that fall within its jurisdiction or **impose measures to mitigate** any threats to U.S. national security.
- The Committee was established in 1975, reformed in 2007, and operates pursuant to section 721 of the Defense Production Act of 1950, as amended and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Parts 800-802.
- Historically, CFIUS only had jurisdiction to review, block, or impose mitigation measures on transactions that could result in a foreign person acquiring control of a U.S. business.
- In 2018, the Foreign Investment Risk Review and Modernization Act (“**FIRRMA**”) expanded the category of covered transactions, updated its review process, and made CFIUS review mandatory in certain cases.
- FIRRMA expanded the scope of transactions subject to the Committee’s review to include certain foreign non-controlling (equity) investments in U.S. businesses that deal with **critical technology**, **critical infrastructure**, or the **sensitive personal data** of U.S. citizens (“TID” businesses).

## *Permanent Member Agencies*

1. Treasury (chair)
2. Commerce
3. Defense
4. Energy
5. Homeland Security
6. Justice
7. State
8. OSTP
9. USTR

## *Observer Agencies*

1. CEA
2. HSC
3. NEC
4. NSC
5. OMB

*Other agencies may be added for specific reviews.*

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# Upcoming Webcasts and Contact Information

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# Upcoming Gibson Dunn Webcasts

- **October 22** | **False Claims Act Updates for Drug and Device Manufacturers** | 12:00 – 1:30 pm EDT  
To register, please [click here](#).
- **October 27** | **In-house Guidance for Managing Non-U.S. Antitrust Investigations** | 12:00 – 1:30 pm EDT  
To register, please [click here](#).
- **November 4** | **False Claims Act Updates for Health Care Providers** | 12:00 – 1:30 pm EST  
To register, please [click here](#).
- **November 9** | **Spoofing: What it is, Where it's Going** | 12:00 – 1:00 pm EST  
To register, please [click here](#).
- **November 16** | **Corporate Compliance and Sentencing Guidelines** | 12:00 – 2:00 pm EST  
To register, please [click here](#).

\* Continued on next page

# Upcoming Gibson Dunn Webcasts (cont.)

- **November 18** | **SEC Enforcement Focus on COVID-19 Issues and Recent Accounting Cases** | 12:00 – 1:15 pm EST  
To register, please [click here](#).
- **December 2** | **What's next? The Legislative and Policy Landscape After the 2020 Election** | 12:00 – 1:00 pm EST  
To register, please [click here](#).
- **December 3** | **FCPA 2020 Case Round-Up** | 12:00 – 1:30 pm EST  
To register, please [click here](#).
- **December 8** | **Congressional Investigations and Oversight Post-Election** | 12:00 – 1:00 pm EST  
To register, please [click here](#).
- **December 10** | **International Anti-Money Laundering and Sanctions Enforcement** | 12:00 – 1:30 pm EST  
To register, please [click here](#).

# Contact Information – Today's Panelists



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