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# Navigating U.S. Regulatory, Legal & Communications Hurdles

## A Guidebook for Foreign Companies


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# Table of Contents

# Tough U.S. Hurdles for Foreign-Based Companies



# Foreword

**by Richard S. Levick, CEO, LEVICK**

The obstacles facing foreign companies seeking to establish or expand operations in the U.S. are formidable. Not only are there a host of *federal* regulatory rules that must be observed but foreign companies must also comply with *state* and, in certain markets, *local* regulations.

On top of that, there's adhering to the Foreign Corrupt Practices Act (FCPA), the Foreign Agents Registration Act (FARA), plus trying to keep abreast of the CFIUS process (the Committee on Foreign Investment in the U.S.), which can be numbing in its complexity.

Not all rules governing the practices of foreign companies are hard and fast. Their relevance depends on what administration is in charge, how zealous their principals are about enforcement, and the views they hold toward particular nationalities and corporate entities.

Regulatory concerns often pale, however, compared to the perils of the U.S. legal system. Foreign companies contemplating a bigger U.S. presence have already faced down stiff competitors. But they've never been up against an opponent as ornery and motivated as the U.S. plaintiffs' bar.

Augmented by contributions from Akin Gump, Dechert LLP, the Berkeley Research Group, and other legal and business consulting firms, I wrote a three-part series for Forbes.com in 2017 that pinpointed these hurdles and suggested ways that foreign companies can overcome them.

In the spring of 2019, we updated the series with a fourth piece that spotlighted the counsel of Noah Brumfield, an Asian trade specialist who heads White & Case's Taiwan practice, and Andrew C. Gratz, an associate counsel at global plastics and chemical giant LyondellBasell. We concluded the series in the summer and fall of 2019 with an article that examines the firestorm surrounding the Chinese behemoth Huawei and outlines steps that companies both foreign and domestic can take to avoid getting themselves and their supply chains entangled in the Huawei blacklist.

We also added a piece in early fall on the Department of Justice's renewed FARA enforcement that highlighted warnings from five FARA experts. Indeed, we're proud that this eBook features a series of sidebars from leading legal and public policy analysts.

Yes, the U.S. market is so potentially lucrative that it is worth foreign companies doing extra homework to figure out how to manage risk and buttress market share. We hope the enclosed insights and recommendations provide a helpful primer.

**Richard S. Levick, Esq.**
Chairman & CEO

# Foreign Companies Face Perils of U.S. Litigiousness and Erratic DoJ/SEC Enforcement

**For foreign-based multinationals, the lure of doing business in the lucrative U.S. market is a little like the mythic Call of the Sirens that caused Ulysses and other smitten seamen to shipwreck on unseen rocks. The U.S. offers so many attractive assets for foreign companies that sometimes they may not realize how jagged our shoals can be.**

With our burgeoning economy, low interest rates, access to capital, and technologically savvy consumers, the U.S. is indeed a fertile market for foreign-based entities, especially veteran companies seeking growth opportunities. But before a foreign firm signs the dotted line on a U.S. acquisition or looks to expand its U.S. product line, it needs to consider these daunting realities: a plethora of legal concerns led by an aggressive plaintiffs' bar that operates by commission and sees no end in possible class-action suits, even in an era of tort reform; a potential minefield of federal, state, and municipal regulations, some in conflict with others and some more lethal than others; and federal agencies of jurisdiction, including the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC), whose enforcement patterns often depend on who's in charge.

This article analyzes the legal and "political" obstacles of foreign-based firms doing business here and suggests certain solutions. The other articles in this eBook examine the multiplicity of U.S. regulations governing foreign companies, as well as the sometimes-erratic enforcement of trade laws and other issues.

The U.S. remains the industrialized world's most litigious society. As the former managing director of FINPRO, Marsh & McLennan's Financial and Professional Liability Practice, put it, "Foreign firms entering the U.S. often worry about becoming a target for litigation, simply because they are domiciled outside the U.S. Recent data indicates, however, that this fear is generally unfounded. Foreign firms are slightly less likely to get a securities class action, for example, but the rate of litigation is simply so much greater in the U.S., it is understandable why they feel as though they have a target on their backs."

A recent analysis by NERA Economic Consulting corroborates this thesis: foreign companies *should* worry about being unduly targeted by U.S. regulators and litigators. Such fears, moreover, can be a deterrent to foreign engagement in the U.S. economy.

Foreign firms' sense of unease has been exacerbated by the Trump Administration's failure to fill senior and mid-level policy positions in the prosecutorial divisions at DoJ and the SEC. "The real problem now," says a former spokesman for DoJ's Criminal Division, "is that there's a battery of leaderless prosecutors looking to ply their trade without any specific senior instruction."

To date, the Trump DoJ has done little in pursuing domestic corporate fraud and malfeasance, a scenario, the former official points out, which may not bode well for foreign entities seeking a greater U.S. presence.

"Government prosecutors are going to bide their time by looking for more foreign targets, simply because they need something to do absent any real direction from the top. Prosecutors have been given no firm direction on priority or process, so the operating theory is that they will look outside the U.S. to stay busy. Foreign-owned medical cannabis companies, for instance, should stay on full alert, given the attorney general's animosity toward marijuana in any form. Many believe that big Canadian companies will be targeted for prosecution, simply because they represent low-hanging fruit and won't likely anger any domestic constituencies in the short term," asserts the former DoJ spokesman.

A recent assessment published by *Law360* confirms the point. It reveals that the one area where DoJ and SEC activity has accelerated under Trump is in enforcement of the Foreign Corrupt Practices Act (FCPA). In 2017, the two agencies "resolved more than 15 cases against corporations and individuals, issued several declinations, and initiated at least five new investigations under the [FCPA] statute." One of those cases was settling corruption charges against Swedish-based telecommunications provider Telia Company AB for just under a billion dollars, among the biggest corporate criminal bribery fines ever imposed by U.S. agencies.

"Despite predictions of a substantial pullback in the FCPA enforcement area," the *Law360* report concludes, "the writing on the wall does not necessarily suggest such a relaxation."

U.S. product liability laws, moreover, are generally more convoluted than most in Asia and a good chunk of Europe. If foreign firms also have a U.S. securities listing, their exposure gets complicated in a hurry, especially for pharmaceutical companies. As the former Marsh executive says, "Foreign pharma firms operating in the U.S. can be taken aback when a whistleblower complaint leads to an FDA investigation, which leads to a shareholder suit and then an employment retaliation matter."

The bottom line is that foreign entities should balance the risk-reward relationship, be aware that in the U.S. litigation can seem like a "team sport," and get the right professional counsel before *and* after an event occurs. Foreign companies need outside litigation counsel, insurance and accounting specialists, lobbyists who can help them with their legislative and regulatory agendas, and public affairs and communications professionals expert at articulating the benefits of foreign investments in the U.S. — and helping them overcome cultural barriers.

All this means that foreign companies should aim high when it comes to governance and transparency, knowing that events may occur at a faster speed and with greater severity when it comes to U.S. business.

When Ulysses heard the Call of the Sirens, he didn't have a "red team" or a coterie of lawyers to run a risk vs. reward analysis. The U.S. economy continues to be the envy of the world; no wonder it's attracting investment from abroad. Specific public affairs and communications recommendations for foreign companies eyeing expansion in the U.S. are outlined below.

Doing business in the U.S. is not without its perils. The last thing a foreign company wants is to run aground.

## CFIUS: AN OFT-FORGOTTEN REVIEW THAT WARRANTS YOUR BOARD'S ATTENTION

**by Andrew C. Gratz, Associate General Counsel, LyondellBasell**

An obscure, 30-year-old piece of legislation is making waves, threatening to delay or kill multi-billion-dollar deals, and is one more issue that investors and corporate lawyers need to consider when evaluating whether to pursue a transaction.

Created in 1988, the Committee for Foreign Investment in the United States (CFIUS) is an interagency committee authorized to review certain transactions involving foreign investment in the United States. Pursuant to this legislation, if a transaction could pose a risk to U.S. national security, the President of the U.S. could suspend or prohibit the transaction or impose conditions on it.

In recent years, with economic and trade concerns taking center stage in America's political discourse, boardrooms and C-suites need to evaluate the risk to any cross-border deal that a CFIUS review could present, especially with regards to timing, reputation, and cost. For example, in mid-2019, CFIUS reportedly directed a Chinese gaming company, Beijing Kunlun Tech Co. Ltd., to divest itself of Grindr, a popular dating app, because of concern the user data it collects could be used to blackmail military and intelligence personnel.

This action by CFIUS is the latest in a series aimed at Chinese companies. While Chinese and Russian entities appear to receive the greatest amount of scrutiny from CFIUS, companies located in other countries must also be aware of the risks and regulatory hurdles presented by this legislation.

Indeed, companies located in Europe and other "U.S.-friendly" jurisdictions that seek to invest in U.S. companies are being impacted by CFIUS's new prominence, whether due to the current backlog at the agency or other national security issues. For this reason, every non-U.S. company needs to evaluate how CFIUS may affect the timing and certainty of pursuing an investment in the U.S.

# Regulatory Labyrinth Can Trap Foreign Companies Doing Business in the U.S.

**The first piece in this eBook described the murky litigation waters that threaten to drown foreign-based companies seeking to expand their operations in the U.S. This article addresses the U.S. regulatory labyrinth that can stymie foreign companies.**

International companies that don't prepare for America's regulatory challenges could find themselves lost in a maze, fated never to realize their U.S. potential. Not only are many of the regulations facing foreign companies difficult, but their erratic enforcement by federal, state, and municipal officials can be scary, too. The uneven application of U.S. trade rules and sanctions, moreover — from the Foreign Corrupt Practices Act (FCPA) and export controls to "antidumping" and "countervailing measures" — has long been a source of frustration for foreign companies.

For many foreign companies, the first hurdle is recognizing that in some ways the U.S. is not a single market but rather 50 different markets, each with different laws and different methods of enforcing those laws. New entrants find themselves navigating a complex web of federal, state, and local regulations.

Spencer S. Griffith, a partner in Akin Gump's international trade practice and an expert in helping Asian companies acclimate themselves to American markets, observes that, "The U.S. is a heavily rule-bound and complex market, with both federal- and state-level regulation. Highly regulated industries, such as healthcare, pharmaceuticals, financial services, real estate, and others, face even more regulatory challenges given the patchwork of overlapping regulation."

"In addition, U.S. trade controls, including controls relating to customs, immigration, tax, export controls and related areas, all impose exacting requirements that must be strictly complied with. Foreign companies investing in the U.S. that are not familiar with these dynamics face particular challenges."

What strikes Harry G. Broadman, the CEO and Managing Partner of Proa Global Partners LLC, an emerging markets-focused investment transaction strategy firm, "is the naiveté of some foreign investors contemplating entry in the U.S. market — not necessarily about the *substance* of U.S. legal statutes, but about the way they are *enforced*, especially the all-too often politicized environment in which their implementation takes place."

In his days as a White House aide, Broadman sat on CFIUS (Committee on Foreign Investment in the U.S.), a multi-agency review process that assesses the potential national security impacts of "inbound" U.S. investment. "The workings of CFIUS are often misunderstood by foreign companies and their advisors, both those abroad and ironically even those in the U.S.," notes Broadman, who also serves as Director of the Council on Global Enterprises and Emerging Markets and as a Senior Fellow in the Foreign Policy Institute at Johns Hopkins University. A misunderstanding about the relevance of CFIUS, Broadman notes, contributed to the tension surrounding a Chinese company's acquisition of Smithfield Foods.

The U.S. remains "one of the world's most open and accessible markets for foreign companies," Broadman believes. As part of what he calls "Globalization 2.0," foreign investors based in emerging markets will increasingly try to enter the attractive U.S. market. "They just need to do so adroitly and with their eyes wide open," he cautions.

The success of French cosmetics conglomerate L'Oréal is testament to Broadman's view. Since entering the U.S. a half-century ago, L'Oréal USA has grown its annual sales to upwards of $6 billion, making the U.S. the multinational's largest market. Yes, the company's eye for smart acquisitions and its early embrace of digital marketing have been huge, but L'Oréal's determination to build a "culture of integrity" has helped distinguish it among U.S. consumers and opinion leaders. L'Oréal's commitment to comply with U.S. Department of Labor Voluntary Protection Program status at *all* its U.S manufacturing plants is not just happenstance but a recognition of the value that public stakeholder perceptions play in brand creation.

How can foreign-based companies emulate L'Oreal's success and gain greater acceptance in the U.S.?

1. **Know the Local Media Rules:** When a company does business in Nigeria or China, the local media rules apply. The same is true when media is centered in the U.S. This rule is easy enough to understand until the foreign headquarters and the new U.S. office disagree on a media matter. This is never truer than when there is a U.S.-based regulatory or high-profile crisis brewing and headquarters demands a home-biased media approach. It may feel like leadership, but it may portend a communications disaster.

2. **Recognize the Role of Headquarters:** Quick, name a Japanese company that handled its U.S. high-profile regulatory dispute or crisis well? There are two, maybe three, that come to mind: Mitsui on the Gulf oil spill; Hitachi on an FCPA matter; and, occasionally, but by no means most of the time, Toyota. This is the hardest lesson for foreign-based companies because their headquarters *should* control their outreach most of the time – but *not* during high-profile matters. The reason for this is two-fold: a) In most foreign markets, the time difference will force the company to be at least a day behind every news cycle, appearing non-responsive; and b) U.S. personnel will have come to appreciate the unique needs of the market. Headquarters is just too far away.

3. **Control the Narrative:** Foreign companies need to recognize the urgency of controlling the narrative that surrounds their company. International companies must forge an *American* narrative, one that's responsive to U.S. traditions, culture, and regulatory processes. Foreign emojis that go viral in the home market are unlikely to develop any marketing traction in America.

   The messages that work in Europe, the Middle East or Asia won't necessarily resonate here. Companies need to err on the side of *over*-communicating, not *under*-. The old axiom about a company doubling its advertising budget to ensure that it reaches key audiences is certainly true here, although now it is much more likely to be digital — and socially-driven — advertising than traditional.

   A company's earned media outreach should trumpet innovation and job creation whenever possible. Price as an advantage is a short-term value that can limit the long-term success of foreign companies and consign them to commoditized margins, hardly worth the effort of entering the U.S. market. When the inevitable regulatory or crisis matter does arise in the media or halls of Congress, job creation and access to innovation will win key allies. Discounted prices will not.

## ASIAN COMPANIES MUST MITIGATE RISK BY THINKING STRATEGICALLY

**by Noah Brumfield, Head of White & Case's Taiwan Practice**

Asian companies confront a host of formidable obstacles as they seek to compete in the U.S. market. The DoJ, the SEC, and other federal agencies remain very focused on enforcement of the antitrust and trade secret laws extraterritorially. Under the Attorney General's "China Initiative," the government is particularly attentive toward product in the supply chain sourced from China.

To mitigate the risk of falling out of compliance with U.S. rules and regulations, we recommend Asian companies considering a greater American presence embrace a three-point program.

- Think strategically and organically about creating and implementing a regulatory compliance program that covers the key areas of risk today, notably these areas: antitrust, export control, trade secrets, anti-bribery/FCPA, and data privacy/cybersecurity
- Educate the business team both in Asia and the U.S., with training on key compliance issues tailored separately for executives and for those on the company's front lines, and
- Proactively assess and monitor compliance effectiveness and risk, assuming that more established competitors will be looking to exploit evidence of compliance failures.

The U.S. plaintiffs' bar remains a wily adversary for Asian companies. The antitrust laws incent plaintiffs to sue with treble damages and attorneys' fees. Plaintiffs' firms are always ready to jump in and sue at the announcement of an antitrust investigation. Companies must be ready to respond.

4. **Respect a Truly Free Press:** Companies that come to the U.S. and are used to a state- controlled media, or one that is subject to the desires of its corporations, are in for a big surprise. A professional lifetime working with media that can be controlled by the state or directly influenced by corporate interest leads to a sense that American media can be influenced in the same way, just to a different degree. Of course, U.S. media of all stripes — traditional and digital — can be influenced by advertising, relationships, history, and other factors — but it will have a far greater independence than perhaps media in all other markets. I've worked in over 70 countries and with hundreds of foreign corporate executives and heads of state. As much as there is an *understanding* of the difference of the American media, there is seldom an *appreciation* for it. More than one foreign corporate executive has been brutally disappointed to learn the consequences of the difference between the "home" and "away" media. Appreciating this difference *after* the regulatory or crisis matter has been tried in the press is particularly bad timing.

**The U.S. regulatory and legal systems are indeed convoluted — but it doesn't have to be a labyrinth for foreign companies. Smart companies can not only extricate themselves but end up excelling in the U.S. marketplace.**

5. **Recognize that America is a Hyper-Democracy, not a Republic:** This is a lesson misunderstood by many American executives, so it will certainly be misjudged by most foreign executives. America has been a republic for most of its existence. If you knew the gatekeepers, financial analysts, key Members of Congress, the right journalists, or had a large enough advertising budget, you could control the message. While there is still some truth to this, there is less truth every day. America is increasingly becoming a hyper-democracy. The message is controlled from the grassroots up, not the C-suite down.

   Foreign companies need to develop relationships with third parties and online influencers. Overwhelmingly, Americans do not believe what they read online — until it comes from a trusted source. A company's message is going to be controlled by the *messengers*.

   And when it comes to high-profile regulatory and crisis matters, one reputational mistake in the U.S. can be seized on by opinion leaders and the media — or social activists and NGOs — permanently tainting a company's brand. Citizen activism has a rich tradition in the U.S., made even more powerful in the age of digital democracy.

6. **Understand There Are No Fixers:** There was a time, not so long ago, that America, like many foreign markets, had "fixers": lawyer-lobbyist types who knew all the key players and could, for a fee, take care of a company's problems. Washington is filled with great lawyers, lobbyists, and communicators, but you need a team, not a person. The bias of "who do I need to get to know" is a fruitless search, which takes precious time away from "which team should I be working with to get this done."

7. **Emphasize CSR.** The larger the company, the more diverse its Corporate Social Responsibility. CSR should be driven by strategy, not philanthropy. If you are coming to America, use peacetime wisely: develop your American CSR initiative as part of your expansion strategy.

8. **Recognize that Foreign Correspondents Are Not the American Media:** It is not unusual for foreign executives' first U.S. media experience to be a benign interview with U.S.- based foreign correspondents, often citizens or former citizens of the home country. As a result, it leads to an expectation that all U.S. media will be the same. Once a foreign company moves into working with reporters in other areas — Wall Street, investigations, local media, regulatory, etc. — U.S. "rules" apply and they're often adversarial.

9. **Choose Your Spokesperson Wisely:** Americans like avuncular spokespersons. CEOs can come across as brash, if the financial results are consistently good; a little aloof (for a while) if they are from Silicon Valley; a little counter-cultural (for a while) if they are pre- or post- IPO; etc. But without doubt, American audiences want a CEO they can easily understand and relate to. Your corporate spokesperson in the home market may not be the right spokesperson in America.

   It goes deeper than the spokesperson — Starbucks has been particularly adroit at adopting the local market approach when it enters foreign markets such as China (where it opens a new store every 15 hours). Starbucks presents different models for its stores, involves employee families, offers product choices, provides local management, and, of course, deploys local spokespersons. The same is true for foreign consumer companies coming to America. Americans will buy Kombucha tea and drive Volvos, as long as they think *they* discovered them.

10. **Leave Your Biases at Home:** Every market has its culture and the better we understand it, the more likely we are to think it also applies in the U.S. and other foreign markets, as well. Not only will this not work, it can destroy an expansion effort. The love of identifiable brands as a guarantor of success can ensure that the *best* is replaced by the *best known*, not the most efficient or important. The insistence on respect for roles can ensure that delays to work up the food chain kill efforts. Missing deadlines because a decision has to go through proper channels back at headquarters may meet cultural norms, but it will not be appreciated by regulators.

    The refusal to work outside of a comfortable tribe can ensure you don't have the best team. The most successful companies in the American market are the ones who honestly look in the mirror and know when to dispense with their own cultural biases, no matter how long and how effective that worldview worked in their own domestic market.

The U.S. regulatory and legal systems are indeed convoluted — but it doesn't have to be a labyrinth for foreign companies. Smart companies can not only extricate themselves but end up excelling in the U.S. marketplace.

# U.S. Plaintiffs' Bar Targets Foreign-Based Companies

**For foreign companies entering the U.S. market, our society's litigiousness is something that is understood but not fully appreciated, especially now. Between the Internet, which makes it far easier for the plaintiffs' bar to attract clients, and the unique contingency fee arrangements in the U.S., foreign companies should anticipate litigation at a far higher level than in their home countries. And the trend is getting worse, not better.**

Whether it's complying with the Foreign Corrupt Practices Act or wrestling with regulations in 50 different state jurisdictions *plus* the federal government, foreign-based companies face thorny challenges as they approach the U.S. market. But ask international CEOs to name their biggest apprehension about doing business in the U.S. and most will point to one fear: the specter of being successfully sued by the U.S. plaintiffs' bar.

Other countries have their share of litigious lawyers, but they don't have anything as intimidating or potentially lethal as the U.S. plaintiffs' bar, especially its capacity to file securities class-action lawsuits on behalf of disgruntled shareholders.

Just ask Brazil's state-controlled oil company, Petroleo Brasileiro SA (Petrobras), which earlier this year was forced to pay nearly $3 billion to settle a U.S. class-action securities corruption lawsuit, the largest such payout by a foreign entity in U.S. history. Petrobras has been embroiled for years in a related corruption scandal back home that has tainted two former Brazilian presidents and dozens of executives. Yet, the U.S. securities class-action settlement is *six times greater* than the fines Petrobras has been assessed to date in Brazil.

Petrobras isn't alone. A recent study conducted by NERA Economic Consulting suggests that foreign-based companies are being named in a "disproportionate number" of securities class actions.

In 2017, NERA found that the number of standard securities class actions filed against foreign issuers had significantly increased over previous years. Most of those securities class actions were triggered by supposed "regulatory" violations, another index that is trending distressingly upward for foreign-based companies.

"The U.S. securities litigation plaintiffs' bar have non-U.S. companies squarely in their target zone," confirms David Kistenbroker, Global Co-Leader of Dechert LLP's white collar and securities litigation practice and managing partner of its Chicago office.

"Using the companies' ADRs (American depositary receipts) and ADSs (American depository shares) to obtain jurisdiction in the U.S., the plaintiffs' bar filed 42 shareholder actions in the U.S. in 2017 against non-U.S. issuers. This is nearly double the historical average and there is no cooling off of the trend in sight," he observes.

What is it that makes the U.S. plaintiffs' bar so daunting? And why are foreign companies being so aggressively targeted?

The one-time managing director of Marsh's FINPRO points out that, "While the FCPA does *not* provide individuals with a private right of action, the U.S. plaintiffs' bar is not slow to consider whether the company may have to restate its financials and/or reduce future earnings estimates — which may impact stock price leading to a civil suit. Similarly, substantial settlements may result in follow-on derivative litigation."

Americans are fair-minded: most want a civil court system in which people who have been legitimately harmed can seek and be awarded fair compensation. But too many suits filed by the plaintiffs' bar are precipitated not by genuine grievances but by the depth of pockets of select corporations, especially if those companies happen to be foreign-based.

At the root of this uniquely American quandary are contingency fees — arrangements by which plaintiffs' lawyers decline up-front payment and instead take a healthy percentage of any eventual judgment or settlement. These contingency scenarios, detractors say, create such strong incentives for lawyers that they pervert the process. The plaintiffs' bar pinpoints wealthy corporations, then rummages around for data that documents how the companies have "victimized" people, then aggressively recruits clients who fit the class action profile.

The former FINPRO executive notes that, "The most current data on U.S. directors-and-officers (D&O) securities class actions, especially as to frequency, is particularly surprising when considering the drop in the number of publicly-traded companies and that the stock market had been doing exceptionally well until very recently."

"With stock prices high, one would not anticipate that cases would be up. This may go to show that the plaintiffs' bar has made this a full-time business. Year-in and year-out, one should not expect the number of suits to fall even when evidence would point to the contrary," she predicts.

It's clear that securities class action suits against foreign companies aren't going to disappear anytime soon. How can foreign-based entities lessen the likelihood of being targeted by the U.S. plaintiffs' bar? Here's a quick primer.

- **Know Thy Adversary:** Immerse yourself in the tactics of the plaintiffs' bar. Many plaintiffs' lawyers have media footprints that give you advance warning of their communications strategy. Historically, we have found the plaintiffs' bar and activist investors to be communications-savvy. Once a lawsuit has been filed against you, don't just look at the legal strategies of the plaintiffs' firm, but their media ones, as well. It will often tell you what to expect next. Track the website of the American Association for Justice because it will tell you on a regular basis what the plaintiffs' bar is thinking.

- **Redefine Risk:** Most companies still think about risk in historical terms. What was true in the past must be prologue. But the plaintiffs' bar is constantly redefining risk. Assess the enterprise's risk profile through a detailed "map" that moves beyond financial compliance and looks more broadly at potential event-driven and operational-related risks. What liability trends are you seeing? What is happening to your competitors? What is happening in similarly situated industries? Are you seeing new theories of law attempted by the plaintiffs' bar against other companies that could be used against you? View the risk holistically. Sexual harassment, for example, was until recently considered a lower risk; now it is obviously of highest concern. The recent actions of New York State Attorney General Eric T. Schneiderman are beginning to raise the question as to whether ignored behavior is even an insurable risk. Markets change quickly, spend more time looking forward and sideways and less time backwards.

- **Look for the Canary-in-the-Coal Mine:** Institute a sophisticated monitoring and early-warning system that identifies trends in social media, by hashtag, and by issue. Rely on human intelligence to make sense of what you are seeing, not just the "big data." You of course need to track lawsuits to Thomson Reuters litigation software and competitor liability trends, but you also need to track social and digital media key words and terms that relate to your risk. Track these risk terms daily: If you see a term only once on Google or with little impact in social media one week, but an uptick the next, it should set off an alarm. The plaintiffs' bar has to optimize key words to find clients. It should serve as one of your early warning systems. Have appropriate reporting procedures/process in place to alert senior management as quickly as possible to a potential event.

- **Beware of the "Humanizing" Video:** The plaintiffs' bar is genius at taking complex issues and distilling them into emotion-laden videos. Make sure that you're monitoring all platforms that could transmit these videos, since the plaintiffs' bar uses them to recruit potential class action litigants.

- **Understand that Everything is Evidence:** Cultural norms may dictate differently, but "everything" is discoverable in America. If you write it down — including texts and emails — it may come back later as evidence. As a result, try to keep in mind that whatever you write — and many things you say — might someday be read by critical audiences.

- **Strengthen Your Defense:** Mitigate your liability by focusing on disclosure issues in your Securities and Exchange Commission (SEC) filings. The plaintiffs' bar views SEC filings as potential red meat. Keep that uppermost in mind as you prepare SEC documents. Conduct a training exercise to test the company's response to a formal investigation or informal inquiry from the SEC or other regulators. Educate directors annually on their fiduciary duties and make it clear that they will be subject to U.S. law.
- **Preach Transparency, Practice Transparency:** Throughout your organization, at every level, promote a culture of compliance and transparency. Don't pay mere lip service. Reward employees for standout work that reflects those values.

Given America's size, technological savvy, and access to capital, the growing U.S. market remains a lucrative place to do business for foreign companies. But like any attractive market, it has its risk. Foreign companies need to culturally appreciate the difference in an aggressive U.S. plaintiffs' bar and fortify themselves against its machinations.


## FIRRMA HAS FIRMLY CHANGED CFIUS REALITIES

**by Harry G. Broadman, Chair, Emerging Markets Practice, Berkeley Research Group LLC**

The role of CFIUS and its procedures recently changed significantly because of the enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018.

One key change is that under FIRRMA, the *statutory* authority that provides how CFIUS operates has greatly expanded. In other words, Congress now has a far more visible and strengthened role in how the agency works.

Another is that FIRRMA has made the operations of CFIUS and its criteria *more transparent* and regularized. New requirements also were introduced. While in the past, parties to a transaction were not obligated to notify CFIUS prior to the closing of a deal, the new law requires pre-notification.

Frankly, my counsel to parties to a transaction has *always been* to pre-notify since there is the risk of CFIUS unwinding or forcing a divestiture following the closing of a transaction. Finally, CFIUS shortly will get the authority to scrutinize *non-controlling* investments into companies that maintain or collect personal data of citizens that "may be exploited in a manner that threatens national security."

If there is one thing that FIRRMA makes clear, it is that CFIUS is no longer a legal matter. Those naïve enough to still see it that way will not fare well. CFIUS is now, ultimately, an issue of business strategy: in sum, how best to structure a transaction and execute risk-mitigation protocols.

This is not your grandfather's CFIUS. Businesses — whether in the US or abroad — would do well to understand the implications of these changes.

# Amid Escalating Trade Tensions, Asian Companies Need Help Navigating U.S. Market

**In the spring of 2017, I wrote a multi-part series in Forbes.com on the challenges facing foreign-based companies seeking to increase their business presence in the U.S. The advice that a host of experts offered back then could be distilled into one line:**

*"Beware: U.S. rules and regulations tough. U.S. plaintiffs' bar even tougher. Get help."*

Little has changed in the ensuing two years to alter that dynamic. The Trump Administration has done more than just talk tough on trade: it has slapped tariffs and duties on some $200 billion worth of Chinese goods — so many items, in fact, that it takes 194 pages to list them all! — exacerbating an already tense relationship.

Moreover, complying with the muddled patchwork of federal, state, and local regulations that has long been the cost of doing business in the U.S. has not gotten any easier. U.S. trade controls, especially those relating to customs, immigration, and tax, continue to demand strict adherence. Foreign companies still find themselves the target of rugged regulatory and legal actions.

The Foreign Corrupt Practices Act (FCPA), the CFIUS (Committee on Foreign Investment in the U.S.) process, export controls, antidumping, and countervailing measures, are a just few of the sometimes erratically imposed trade rules and sanctions that frustrate foreign companies. Asian-based companies, especially, often find themselves flummoxed trying to keep up with their uneven enforcement.

CFIUS, an arcane interagency process aimed at reviewing the risk of certain foreign investments in the U.S., was adopted in pre-Internet days. Now, CFIUS threatens to block or even derail multi-billion-dollar deals, many of them in the technology arena. It's yet another issue that investors and corporate counsel need to consider when evaluating potential transactions.

Andrew C. Gratz, an Associate General Counsel at global plastics and chemicals giant LyondellBasell, points out that CFIUS recently directed Beijing Kunlun Tech Co. Ltd., a Chinese gaming company, to divest itself of Grindr, a popular dating app, because of concern that its user data could be weaponized to compromise military and intelligence personnel.

CFIUS's action against Beijing Kunlun is the latest in a series aimed at Chinese companies, Gratz points out. Indeed, confusion over CFIUS aggravated the strain surrounding Shuanghui International's acquisition of Smithfield Foods, although the transaction eventually went through.

"While Chinese and Russian companies appear to receive the greatest amount of scrutiny from CFIUS, companies located in other countries must also be aware of the risks and regulatory hurdles presented by CFIUS and other trade laws. Indeed, companies located in Europe and other 'U.S.-friendly' jurisdictions that seek to invest in U.S. companies are being impacted by CFIUS's new prominence, whether due to the current backlog at the agency or other national security issues. For this reason, every non-U.S. company needs to evaluate how CFIUS may affect the timing and certainty of pursuing an investment in the United States," Gratz says.

Now that global trade concerns have become flashpoints in American political discourse, board members and C-suite executives need to recognize the potential volatility of CFIUS reviews — and factor them into both short- and long-term planning, he advises.

Asian companies confront other formidable obstacles as they compete in the U.S. market, maintains Noah Brumfield, an antitrust and trade policy expert who heads White & Case's Taiwan practice.

"The U.S. government is very focused on enforcement of the antitrust and trade secret laws extraterritorially, with particular attention given to products in the supply chain sourced from China under the Attorney General's 'China Initiative'," Brumfield says.

## U.S. DIGITAL CHALLENGES FACING FOREIGN BUSINESSES

**by Sameer Somal, CEO & Co-Founder, Blue Ocean Global Technology**

Expanding a foreign business in the U.S. is challenging in every respect, especially enhancing a company's digital presence, reputation, and search capabilities.

In Korea, the main search engine is Naver. In China, it's Baidu.

But in the U.S., the lead search engine is Google. Smart foreign companies need to tailor their digital outreach to meet Google's standards and requirements, among them data privacy, content appropriateness, and local legal and safety concerns.

Here are six key digital presence considerations that form the basis of our recommendations for foreign companies seeking to increase their U.S. market share.

**Have a regional or geographic focus.** The U.S. is a large country and search engines have evolved to localize results. Establishing your company right away as *the* market leader for the entire U.S. on the Internet is neither practical nor realistic. Leverage your time and resources by focusing on targeted cities or states. Only after building a strong foundational presence and evaluating its success can you expand your message to other target markets.

**Educate before selling.** To position your brand for market entry and future growth, take an educational approach. Google will want to learn if your website and business are trusted within your industry. Prioritize writing high-quality articles that share insight, knowledge, and actionable steps for readers. This will attract new people to want to learn more about how your company provides value. Case in point: we published *Online Reputation Management: A Guide for Social Media Marketers* with Social Media Examiner. Clients favorably refer to this article, and we are regularly approached by other digital marketing firms for help on their accounts.

**Build online relationship capital.** Reach out to authors, trusted platforms, and associations that have a vested interest in your industry. Introduce your company's values and mission, focus on building relationships, and connect with leaders who could serve as champions. Consider providing value to them *before* reaching out. For example, in advance of requesting a favor, feature their journey on your blog or social media. A mutually beneficial approach will give you the best opportunity for others to feature you, enhancing the prospects for that sought-after back-link to your website. Feedback and positive confirmation from industry leaders about your product, service, and expertise is a key pillar of building the right digital reputation.

**Create a *Google My Business* page and cultivate 5-star reviews.** First impressions are everything. Before doing business with your new company, a prospective client will likely Google the business name. The right-hand knowledge panel in search results will populate your *Google My Business* listing. Here interested users are provided easy access to your company description, service offering, business hours, and contact information. The listing will also help effectively rank your website in local search, prominently feature positive reviews and provide a medium for learning about customer experience. Make sure you have a process for encouraging happy clients to share their feedback publicly. Consider registering your business on the 100+ listing websites regularly used by American consumers.

**Optimize your website.** Clients expect your website to load within a couple of seconds; 40% of internet visitors will leave your site if it takes more than three seconds to populate. Change is constant with respect to the Internet. Google's algorithm ranks websites based on hundreds of factors, which need constant attention. For example, broken links, outdated software, and mini-applications, including extensions, plug-ins, and CMS require regular updates.

**Partner with experienced firms.** Engage public relations and digital marketing professionals with a track record of delivering results. Ensure that your communication and optimization are filtered through people who understand how to navigate the diverse cultural and business environment in the United States.

Brumfield recommends that Asian companies contemplating a greater U.S. presence institute a three-point program to mitigate risk when it comes to U.S. rules and regulations.

- First, companies should think strategically and organically about creating and implementing a regulatory compliance program that covers the key areas of risk today, most notably in the areas of antitrust, export control, trade secrets, anti-bribery/FCPA, and data privacy/cybersecurity.
- Second, companies should educate their business teams both in Asia and the U.S., with training on key compliance issues tailored separately for executives and for those on the company's front lines.
- Finally, companies should proactively assess and monitor compliance effectiveness and risk, always assuming that more established competitors will be looking to exploit evidence of compliance failures.

## LOST IN TRANSLATION — REFLECTING A CULTURAL DIVIDE, OPEN-SOURCE INVESTIGATIONS IN EUROPE DON'T MIRROR THEIR AMERICAN COUNTERPARTS

**by Juliet Young, Partner, Schillings Partners**

There's a famous saying that Europe was created by history and America by philosophy. The U.S. is a federal republic of 50 states with a single official language; Europe, a continent of 50 or so sovereign nations with 24 official languages. Of these nations, 28 are current members of the European Union (EU), known for its strong stance on data privacy rights. Culturally, Europeans approach the concept of open-source data and public records from very different places.

Some might argue: does this really matter anymore? After all, we're living in an era of instantaneous global information; an unprecedented volume of open-source data and online records can be accessed just as easily from an Internet café in Indonesia as from an office in Ohio. Meta data, social media content, imagery, and the Dark Net are all at an investigator's fingertips. Do geographic boundaries still matter?

Yes, they do. Those cultural and philosophical differences have given rise to a vast divergence in the breadth, depth, and accessibility of open-source data in Europe and the U.S. With litigation taking on an increasingly international dimension, U.S. lawyers and investigators need to understand the art of the possible when it comes to conducting investigations in Europe.

While U.S. legal filings are well organised, and a mine of fascinating information, European legal filings can represent a challenge to even the most sophisticated investigator. It's not uncommon to find that only a small percentage of cases have been reported and only a selection of filings available. Enquiries to obtain more information are often met with suspicion.

Where European open-source intelligence excels is in the area of private company data. In the archives of most European national company registries, you will find details of shareholders, directors, mortgages, and financial statements. Even "offshore" jurisdictions such as Jersey make shareholder filings public. This data is likely to become more informative with the introduction of E.U.-wide "ultimate beneficial ownership" registers. Under the 5th Anti-Money Laundering Directive, these are due to be made accessible to the general public starting in 2020.

European open sources may seem archaic, convoluted, and, at times, impenetrable, yet there are deep seams of information if you know where to look.

In Norway, citizens' tax records are posted online. In the U.K., you can locate a deceased person's will through the probate registry. In the Isle of Man, you can find a list of all aircraft searchable by registration or the owner's name. Malta maintains a detailed database of civil judgements. In Slovakia, you can get a list of all tax debtors and their addresses. In one recent asset search, I identified a chalet held through a *Société Civile Immobilière* (a French property holding company). The corporate filing provided the name and location of the property, shortcutting a lot of work around French land-registry filings.

The key message is that even if you are used to the accessibility of certain data in the U.S., European open-source data, while different, may be just as rewarding. With more corporate data on non-public companies available than in the United States, the key to your case might be filed in an obscure archive — waiting for you to pick it up.

He also warns Asian companies that the U.S. plaintiffs' bar remains a wily adversary. "The antitrust laws incent plaintiffs to sue with treble (three-times) damages and attorneys' fees. So, this means leading plaintiffs' firms are always ready to jump in and sue at the announcement of an antitrust investigation," he says.

The U.S. regulatory and legal systems are indeed challenging for foreign companies. But smart ones not only can overcome those challenges, they can excel in the marketplace.

Despite all these aggravations and hurdles, the U.S. remains, relatively speaking, an open and accessible market.

## WORKING OUTSIDE THE U.S. AND EU? HERE'S WHY YOU NEED A PUBLIC AFFAIRS STRATEGY

**by Matthew A. McMillan, President, BuzzMaker**

Advancing a policy agenda is hard and takes time, patience, and a good strategy. No matter where you are in the world — there are a variety of competing interests and diverse stakeholders to navigate. It doesn't matter if you're in Kingston, Cape Town, Abuja, Bangkok, Brussels, or Washington — effecting changes in public policy require understanding the stakeholder ecosystem, building coalitions, engaging the grassroots and grasstops, developing and driving a media narrative, and effectively engaging with the key decision-makers.

Here are three reasons why public affairs firms can help you:

- For political leaders: ***Win in Washington, Brussels, and beyond***! If you're running a country, a state, or a city, you might need investment, attention, and support for your policies from the largest and most politically powerful blocs in the world. Your embassies are a start, but they often lack the connections to the media houses, the members of Congress/Parliament, and the key members of the administration that you need to advance your agenda. Working hand-in-hand with your embassies, public affairs firms can help you achieve policy objectives.
- For U.S. corporations: ***You can win outside the U.S.***! As this eBook attests, doing business overseas can often be a perilous venture, especially if you don't know the political and media landscape. Public affairs firms can help you position your brand with positive public relations, help you impact policy change and fully understand the political climate you are entering — including risks and opportunities.
- For those in the midst of a crisis: ***Don't just think your crisis comms efforts can be limited to a single jurisdiction***. If you're having a brand crisis, in today's media environment, the reach and impact is truly global – as are your markets! Public affairs firms don't just help you solve the immediate threat but look to see how the crisis is affecting your brand and company in key markets around the world. This includes understanding how various stakeholders are impacted and developing a strategy to mitigate that impact.

We live in a global world. And, governments and corporations that win are thinking about how to influence policy on a truly global level.

# Your Company's Surprising Supply Chain Exposure on Huawei

**U.S. corporate leaders who believe that the firestorm surrounding Huawei won't singe their companies might want to think again. Remember: the Trump Administration, articulating national security concerns, has imposed a trade blacklist on Huawei and *all* its subsidiaries, a maze of networks that spreads across 170 countries and reaches a third of the world's population.**

Your company may not be directly engaged with Huawei or its affiliates — *but there's a strong likelihood your supply chain is.*

As they say (phonetically at least) in Mandarin, *zhù nǐ hǎo yùn*. It means "good luck." If your subsidiaries and affiliates have Huawei entanglements, you may need it.

So will the rest of us. In its zeal to defend national security (and gain political leverage on the escalating trade war), the Administration has already inflamed global trade tensions and is potentially ceding American leadership in critical technologies. We can all appreciate both the political calculus and significant risks of trade wars, particularly this one with China, but even more serious is the acute and long-term concern of a critical technologies gap. The former risks recession and has already caused a draconian investment decline by Chinese companies in the U.S.; the latter risks a second-place or worse finish in the current technology race, on which hinges global hegemony, defense, and business leadership. We cannot even begin to imagine a world where America is not at the forefront of technological innovation.

Like it or not, U.S. companies and their supply chains are thoroughly dependent on Huawei and its leviathan supply chain — and vice versa. Motorola Solutions (which a decade ago contemplated acquiring Huawei) and its subsidiaries do an immense amount of business with Huawei and its subsidiaries. Those relationships cannot be ended overnight.

The Administration's action puts Motorola and a host of other companies in an uncomfortable and potentially untenable position. What's the current state of play for U.S. companies vis a vis Huawei? It's a bit murky — and it's not likely to get clearer anytime soon.

The Administration in May declared that U.S. companies were forbidden to supply hardware or software to the many devices manufactured or distributed by Huawei. In late spring, Google announced that it would comply with the White House's decree — a move that was soon followed by a Commerce Department ruling that softened the prohibition against trade with Huawei.

Commerce determined that Google and other U.S. tech companies could offer software updates for current Huawei products but would be proscribed from engaging in similar trade with *future* Huawei products, including the Mate X, a foldable phone that the Chinese behemoth has been developing for years in direct competition with South Korea's Samsung.

Confused? You're not alone. And the confusion has gone global.

"The rules governing trade sanctions often are extremely confusing, and that can pose significant challenges for clients who are trying hard to comply," contends Marcus Asner, a former assistant U.S. attorney in the Southern District of New York who co-chairs Arnold & Porter's Anti-Corruption Practice Group.

"To add to the mix, we're also seeing a ramped-up enforcement environment in the trade sanctions area, with a whole slew of regulators focused on these issues. All of this increases the risk and can lead to a great deal of anxiety among clients engaged in cross-border trade," he says.

Certain foreign-based tech providers that rely on "U.S.-origin technology" for their products and services aren't sure but suspect they could be affected by the Administration's Huawei ban. British chip designer ARM is now owned by the Japanese telecom giant Softbank, which, not surprisingly, does considerable work with Huawei. Without divulging details, ARM announced this summer its desire to comply with "all of the latest regulations set forth by the U.S. government."

At least ARM appears to have the semblance of a plan. Careful monitoring and contingency planning are precisely what companies seeking to reduce their exposure on Huawei need to embrace, argues Mark D. Cowan, a veteran of several White Houses and the CEO of Potomac International Partners.

"It is vital for companies to remain aware of the behind-the-scenes actions that Commerce is taking on Huawei, as well as the motivations behind them," Cowan says. "Companies must understand how the government defines national security in such cases to effectively argue that there is *not* a national security threat in using Huawei in their supply chain. To avoid getting caught in the anti-Huawei web companies must show themselves to be cooperating with the government, being transparent about where Huawei does fall in their supply chains, and communicating clearly about what kind of risk this might pose to U.S. national security."

Sage advice, but companies also need to factor both the Administration's political machinations and Huawei's persistent tone-deafness into their calculus. William Plummer, a former vice president in Huawei's Washington office, said that "when substantive and informed experts suggested something that should be done, it filtered way up into some Mandarin star chamber and came back as something we didn't recognize."

For Huawei, with its historical ties to the Chinese government and military, the breakdown in U.S.-Chinese relations, and the leaked documents of its potential involvement with North Korea in violation of U.S. export controls, the challenges are significant.

Huawei has strong cyber security, economic, legal, and political arguments to make, and they have many allies who would echo them, but so far, they aren't making them or letting their American surrogates chime in. Economically, Huawei may not need the American market, but politically, it can't run the risk of permitting one foreign government to undermine its global expansion.

*Zhù nǐ hǎo yùn.* All the protagonists in this convoluted debate could use some good luck. And some careful thinking before they do something we'll all regret.

## AVOID GETTING CAUGHT IN THE ANTI-HUAWEI WEB

**by Mark Cowan, CEO, Potomac International Partners**

As time marches on, it is vital for companies to remain aware of the behind-the-scenes actions that the Commerce Department is taking on Huawei, as well as the motivations behind them. National security, of course, is the primary motivating factor in the Administration's actions, but at the same time, the U.S. government is not seeking to harm businesses. As a result, Commerce has shown some flexibility — take its July 9 announcement that it will issue licenses to private companies to do business with Huawei when there is no threat to national security. It is incumbent upon companies themselves to understand how the government defines national security in such cases in order to effectively argue that there is NOT a national security threat in using Huawei in their supply chain.

We should also always remember the role politics plays in the government's decision-making. The anti-Huawei push is one example of efforts to be "tough" on China while U.S.-China trade negotiations are ongoing. The issue may very well die down once negotiations are concluded, or other trade issues dominate the headlines. However, this does not appear to be happening anytime soon — on July 22, the *Washington Post* obtained documents indicating that Huawei secretly helped North Korea build a wireless network. This will not help the company convince the U.S. government and others worried about national security implications that Huawei is innocent.

While we can expect some politicians to continue vocally pressing on the Huawei issue regardless of the fallout from these revelations and what happens with China, they will likely be quieter and more flexible with private businesses. As Director of the National Economic Council, Larry Kudlow said recently, while the USG would not be doing business with Huawei, "in respect to the private market, I call it general merchandise, we've opened the door and relaxed a bit the licensing requirements for the Commerce Department, where there are no national security influences or consequences." To avoid getting caught in the anti-Huawei web, companies must show themselves to be cooperating with the government, being transparent about where Huawei does fall in their supply chains, and communicating clearly about what kind of risk this might pose to U.S. national security.

# The Foreign Corrupt Practices Act Turns Middle-Aged: No Shortage of Challenges

## The Foreign Corrupt Practices Act (FCPA), the U.S.'s ambitious attempt to deter corruption in international business dealings, is now in its forties. Like a lot of things reaching middle age, FCPA is revered by many and reviled by more than a few.

Even as the FCPA experiences its fifth decade, bribery scandals continue to beleaguer the industrialized and developing worlds, hamstringing growth and contributing to government instability. Every year, the World Bank estimates, businesses and individuals pay $1.5 trillion in bribes — the rough equivalent of two percent of global GDP — and a staggering ten times the value of overseas development assistance.

Proponents of the FCPA point to its success in promoting American values around the world, in cracking down on bribery and fraudulent scheming, and in making international business deliberations more predictable and forthright. It has also generated significant funds for the U.S. Treasury: in 2016 alone, the government collected more than $2.4 billion in penalties from some two dozen companies charged with FCPA violations.

Detractors say its benefits are exaggerated, that it puts American companies at a competitive disadvantage, and that its compliance costs are prohibitive for many companies. Since one of FCPA's most outspoken critics now happens to occupy the White House, its future direction is drawing a lot of scrutiny these days.

What does this all mean for the FCPA?

Lesilie A. Shubert, co-leader of Sidley & Austin's FCPA and anticorruption practice, notes that FCPA enforcement under President Trump has changed in two respects. First, the administration has sought to level the playing field for U.S. companies by subjecting foreign entities to greater scrutiny and possible prosecution.

Second, Shubert points out that those U.S. companies that have instituted concerted compliance programs have received greater deference when the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) exercise prosecutorial discretion.

"Enforcement of the FCPA has been a DOJ and SEC priority for decades now, cutting across both Democratic and Republican administrations," observes Mark Mendelsohn of Paul Weiss, an FCPA expert who served as deputy chief of the Fraud Section of the DOJ's Criminal Division from 2005-2010.

"But the level of resources committed has steadily increased over time. And DOJ and SEC have employed more expansive and novel theories in recent years. While it is highly unlikely that the U.S.'s core commitment to enforcement of the FCPA will wane, we could see some adjustments at the margins that could be significant for companies operating global businesses."

FCPA proponents have no illusions about the difficulties inherent in seeking greater anticorruption compliance. But they know how imperative it is for global economic growth that bribery be curbed. The coming years could prove to be a critical test for international regulators and multilateral institutions to assume leadership positions in the global fight against corruption.

The bottom line is that if the FCPA is having a mid-life crisis, it's likely to survive it. Too much is at stake for the global business community to abandon efforts to mitigate corruption worldwide.

# FARA's New "Sheriff" Means Business

**There's a new sheriff in town — the Department of Justice's (DoJ) Brandon L. Van Grack, a former member of Robert Mueller's prosecution team — who's vowing to crack down on violators of the Foreign Agents Registration Act (FARA). FARA is the long-forgotten lobbying disclosure law that disgraced Trump campaign chair Paul Manafort put back on the map. DoJ's renewed focus on FARA enforcement won't lead to hangings at sunrise — but it won't be a game of beanbag, either.**

As Joshua Ian Rosenstein, a FARA specialist at Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., puts it, "DoJ's new emphasis on FARA is a warning shot to foreign companies and their U.S. consultants, who are forced to grapple with a criminal law that is broad and complicated. Now is the time for foreign companies and their U.S. consultants to reexamine their FARA compliance."

"Grapple" is right: FARA is not only convoluted, it's creaky. It was enacted in FDR's second administration, when there was great fear that European fascists were insinuating themselves into U.S. affairs without detection or consequence. It never anticipated the age of instantaneous communications from foreign capital to embassy outpost to lobbying firm to government agency to congressional office — and back again. Complying with the law's arcane and archaic rules can be challenging for "foreign principals" and their "agents," as FARA describes them.

"We need to do a better job defining the work that falls under FARA so there are no blurred lines," says Paul Miller, the president of the National Institute for Lobbying & Ethics. "I'm not a fan of *more* regulations, but I am in favor of *effective* regulations. We need to work with lobbying professionals to close loopholes and create a system that's not so burdensome and expensive that it forces people to take a chance — only to claim ignorance when they get caught."

No matter how gifted, foreign law firms sometimes don't fully appreciate the exigencies of FARA; unlike the Foreign Corrupt Practices Act (FCPA), which has been copied in some 40 other countries, FARA is distinct. It has its own peculiar folkways.

"FARA is a compacted statute to interpret and apply," says Amy Jeffress, a partner at Arnold & Porter. "Many of its terms are not well defined, especially in the language of the exemptions to the statute. Companies whose interests are closely aligned with the foreign government need to seek advice in order to avoid operating outside the bounds of the exemptions without registering."

Matthew T. Sanderson, a FARA expert at Caplin & Drysdale, notes, "We are at the dawn of a whole new era of FARA enforcement, with the DoJ not only actively policing the law but also going after high-profile individuals and firms. Those representing foreign governments, NGOs, companies, and individuals can no longer afford to ignore the law or rely on their prominence to save them. It will be vital in the months and years ahead for those working in this space to both understand FARA and institute a FARA compliance system, particularly as it relates to taking in new clients that are located abroad."

Brian Fleming, a partner at Miller & Chevalier, adds that, "All signs point to more FARA prosecutions on the horizon. Any foreign activities touching upon the 2020 election will certainly get heightened scrutiny. I also expect DoJ to turn its attention to rooting out unregistered foreign influence in a wide variety of other contexts, including law firms and media companies, and to make far more aggressive prosecutorial decisions than it has in the past."

Defying conventional wisdom, FARA's definition of "foreign principals" encompasses not just governments but also institutions and individuals. As Rosenstein points out, "an 'agent' of a foreign principal does not require an actual contract — it merely requires that a consultant act at the direction or control of, at the request of, or funded by, a foreign principal."

That's a big laundry list. FARA, moreover, covers more than "lobbying" for a foreign client. It imposes thorny regulations on a litany of "political" activities designed to influence the U.S. public, from conducting grassroots communications to pamphleteering and distributing "informational materials" to merely counseling a foreign-based client on a U.S. public affairs strategy. Too often, foreign entities fail to understand DoJ's broad interpretation of FARA's political activity statute.

The frustrations don't end there. FARA makes no mention of email or social media, of course; both have become critical tools in interacting with the U.S. public.

Van Grack raised the temperature at a September 25 FARA compliance conference in which Miller, Fleming, Jeffress, and I also participated. Van Grack made news by announcing that he may very well be interpreting the statute to now require *foreign* public relations firms to register under FARA when representing companies, countries, and interests trying to influence policy in the U.S. This means that the DOJ FARA unit may soon go after foreign communications agencies whose activities are directed into the U.S., with an attempt to influence U.S. policy or the U.S. public, particularly via the Internet. This is a broad and unprecedented interpretation of the statute that may or may not survive a legal challenge.

## IGNORE FARA AT YOUR OWN PERIL

**by Joshua Ian Rosenstein, Member, Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.**

The Foreign Agent Registration Act (FARA), which imposes registration and reporting obligations on "agents" of "foreign principals," was for decades largely forgotten, but in recent years has seen an enforcement reawakening. The Department of Justice's (DOJ) new emphasis on FARA is a warning shot to foreign companies and their U.S. consultants, who are forced to grapple with a criminal law that is broad and complicated. Now is the time for foreign companies and their U.S. consultants to reexamine their FARA compliance.

Contrary to conventional wisdom, FARA defines "foreign principal" to include not just foreign governments but also foreign companies and individuals. And to be an "agent" of a foreign principal does not require an actual contract — it merely requires that a consultant act at the *direction or control of*, *at the request of*, or funded by, a foreign principal. And FARA applies to far more than "lobbying" for a foreign client. It regulates a long list of "political" activities that are aimed at influencing the U.S. public with regard to the national interests of any foreign nation, such as grassroots communications; distributing "informational materials" within the U.S.; and simply advising the client on a public affairs strategy. These threshold definitions are extraordinarily broad and commonly misunderstood.

Many other key terms are either absent or ill-defined. FARA makes no mention of email or social media, critical tools used to engage with the U.S. public. It requires a disclaimer be placed on "informational materials" disseminated in the U.S. but defines that term opaquely and circularly. These definitional problems increase the exposure to consultants representing foreign clients in the U.S.

There is a list of exemptions to FARA registration and reporting requirements, including providing legal services; performing humanitarian work (think raising money for Haitian earthquake victims); and engaging in "commercial" activities. But these exemptions are narrowly construed and convoluted. When it comes to the "commercial activity" exemption, where the activities are directed by a foreign government (as may be the case with state-owned enterprises), or where they directly promote the public interests of a foreign government, the exemption is unavailable. This standard, like many others, is unclear. If a foreign state-owned manufacturer hires a lobbyist to oppose trade sanctions, would that directly promote the public interests of the foreign government? If a foreign corporation sought to open U.S. markets and brought its Ambassador along on meetings with investment partners, would that directly promote the government's interests? These complicated questions deserve scrutiny.

While historically, FARA prosecutions have been rare, that appears to be rapidly changing. DOJ has pledged to make FARA enforcement a new priority among its national security arsenal and has implemented internal changes aimed at doing just that. Media and congressional attention on perceived enforcement failures mean that DOJ is under considerable pressure to continue ramping up enforcement. But because FARA is outdated, vague, and complicated, the unaware are increasingly likely to get caught up in DOJ's new dragnet. When engaged in high-profile matters involving the U.S. or a foreign government, the risk increases dramatically. Foreign entities, and those who represent them, need to treat FARA with the seriousness it deserves.

Nevertheless, it demonstrates how the stakes on FARA have abruptly changed on both the civil and criminal fronts. Lobbying and public relations firms should seek U.S. FARA counsel to assist in anything considered a close question. Foreign-based firms can no longer assume that FARA is only a U.S. firm concern.

Even FARA's exemptions for "humanitarian" and "commercial" activities are complex and narrow. If a foreign state-owned manufacturer hires a lobbyist to dilute U.S. trade sanctions, does that advance the interests of the foreign government and therefore trigger FARA? If a foreign corporation seeks to increase its market presence in the U.S. and brings along its ambassador to participate in meetings with potential investment

## PRACTICAL APPROACHES TO VENDOR DUE DILIGENCE TO ENSURE COMPLIANCE WITH U.S. SANCTIONS LAWS,

**by Robin Rathmell and Sean Buckley, Partners, Kobre & Kim, LLP**

The landscape of U.S. sanctions is constantly shifting. Risks of dealing with a sanctioned vendor can become a headache for non-U.S. companies doing business in the U.S., especially due to the frequency of sanctions and relatively fluid nature of the Specially Designated Nationals and Blocked Persons (SDN) list. With current events largely influencing the SDN list, ranging from the U.S.-China trade war to turmoil in Venezuela, it is essential for organizations to develop practical approaches to vendor due diligence to avoid violations of U.S. sanction laws and related asset-freezing and forfeiture actions.

For foreign companies doing business in the U.S., it's vital to gather information on items such as incorporation, ownership, and organizational structure, as well as the key stakeholders, and beneficiaries for all vendors – despite varying perceptions of risk. A vendor providing fuel-shipping services in Northwestern Pakistan carries more risk than a vendor providing catering services in Des Moines, Iowa, but both are still considered "vendors." Taking a uniform approach to due diligence on both "low-risk" and "high-risk" vendors will ensure consistency, meaning that any government review of the firm's compliance program will show a robust program in place rather than individual "special measures," which can look disorganized and inconsistent.

Any lapse in due diligence can lead to civil and criminal penalties, depending on the level of negligence. If a company knowingly does business with a sanctioned vendor, they are subject to criminal charges in the U.S., and could be subject to forfeiture and fines. Alternatively, if a company unwittingly conducts business with a vendor in violation of U.S. sanctions, but reasonable steps could have been taken to identify the role of the sanctioned entity, they could face civil regulatory actions by, among others, the Office of Foreign Assets Control (OFAC) and/or the Department of Commerce, including fines and the disgorgement of profits (similar to the recent e.l.f. Cosmetics case).

Practical approaches to vendor due diligence for non-U.S. companies operating in the U.S. include:

**1. Screening Against the SDN List**

Screening the SDN list for vendor names, as well as the vendor's executives and owners, can help avoid penalties and other enforcement actions by the U.S. government as a result of violations of U.S. sanction laws. In the Exxon case, a sanctioned individual signed a purchase agreement, rather than another owner, which OFAC found to be in violation of U.S. sanctions, thus rendering the transaction unlawful. It is important to note that a vendor can be "clean" if less than 50% of the vendor is owned by an individual on the SDN list (or the combined ownership of multiple individuals). Be sure to adjust the search function's "fuzzy logic" to account for misspellings and names that don't transliterate to English.

**2. Supplement with a Politically Exposed Person (PEP) Screening**

Conducting an SDN check alone may not cover all your bases, so screening of "politically exposed persons" engaged with the vendor is recommended as a supplemental check. PEPs can be prominent individuals who hold a public position, their family members, or even personal/professional associates of a public official. PEP screens increase transparency in vendor relations for issues that may not be visible on the SDN list and are a relatively low-effort but high-security step.

**3. Conduct Periodic Checks**

In addition to an initial OFAC screening, be sure to do periodic checks to maintain confidence in your vendors. Occasionally, individuals or groups will be placed on the SDN list without any warning to you or your company, opening your company up for risk of prosecution and related asset forfeiture proceedings.

Following these steps can position a company for compliance and safeguard their assets, reputation, and personnel.

partners, does that "directly promote" — as FARA puts it — the government's interests? It's unclear — but it's better to be safe than sorry.

FARA prosecutions have been rare over the decades — but all that could be changing. DoJ has pledged to make FARA enforcement a top priority in its national security toolbox. Thanks to Manafort's slipshod ethics, congressional investigators and the U.S. media are suddenly *very* aware of FARA.

Given the considerable pressure that DoJ is now under to deliver FARA convictions, it means that communications firms are likely to get caught in the dragnet. Public relations firms need to anticipate that they could be snared; from day one of their representation — whatever that means — of a foreign entity, they should take concerted steps to be transparent and fully compliant with FARA reporting and registration. Every account should have a designated FARA compliance coordinator working under the aegis of legal counsel.

Remember: FARA scrutiny from the media and non-government organizations (NGOs) is almost always going to be negative. Plan for that contingency so you're not caught unaware. Citing First Amendment freedoms won't do you much good if you're perceived to be flacking on behalf of "illicit" or "secret" foreign interests.

FARA language may be outdated, nebulous, and unduly complicated, but that doesn't mean the new sheriff won't come calling. Indeed, if you're engaged in a high-profile matter involving a foreign government or entity, the prospects of public "scandal" exponentially increase.

View FARA the way residents of Tombstone viewed Wyatt Earp — with a healthy dose of fear and trepidation.


# Conclusion: Best Practices

## America remains among the biggest, wealthiest, and most technologically adept economies in the world. Its rate of growth continues to outpace most of the industrialized West. No wonder it's an attractive market for foreign-based companies.

But the U.S. has more than its share of pitfalls. Foreign companies would do well to appreciate the often-profound cultural, political, and — above all — legal differences that they'll encounter here.

Keep this five-point checklist in mind.

- ***Maintain a wary eye***: Any foreign company is a target for U.S. regulators and the plaintiffs' bar. Remember: a humanizing video could be a canary-in-the-coalmine, an indicator that something big and menacing may be afoot. Institute the best online and conventional media monitoring programs available and pay attention to what gets unearthed.
- ***Understand that everything is a potential weapon*** for the plaintiffs' bar. Try and see things from the plaintiffs' bar perspective. Anything — no matter how innocent or innocuous-looking or sounding — can become an overnight Internet brand-threatening sensation and evidence in a courtroom.
- ***Pick a "team" early – and listen to their counsel***. The solo "fixer" is a thing of the past. Pick the best qualified legal, regulatory, and public affairs team and pay attention to what they tell you.

- ***Remember: financial disclosure issues matter — and can be easily distorted***. Any public filing, especially vis a vis the SEC, can become a lightning rod for both regulators and the plaintiffs' bar. Plan on the worst-case scenario unfolding each time you submit disclosure documents.
- ***For foreign companies, CSR and community outreach count double***. Foreign companies must make a good faith effort to invest in the American communities in which they do business. Tie all company giving and philanthropy to the company's strategic positioning.

## About LEVICK

LEVICK is a crisis communications and public affairs agency representing countries and companies in the highest profile matters worldwide. Comprised of attorneys, former journalists, intelligence officers, authors, and members of governments, we provide our clients with risk intelligence to anticipate forthcoming challenges; crisis remediation; rehabilitation, and reemergence.

On public affairs, we understand how ideas become movements and can inspire viral communications — or help to minimize it. From the Gulf oil spill, AIG, and Guantanamo Bay to the World Cup, multi-jurisdictional class actions, and nation-state kidnappings and ransom, we help our clients implement the strategies and communications on the most complex matters. For regulatory, litigation, financial, crisis, and public affairs matters, LEVICK is the firm of choice for the world's leading law firms and insurance companies.

## About Access Communications & Consulting Co.

Access Communications & Consulting Co. is an independent, seasoned, professional public relations and communication consulting agency based in South Korea. With expertise in sports, life style, IT, automobile industry, and the financial industry for the Korean market, we are trusted by clients, transparent in our management, and fully engaged in service to customers and in relationships with stakeholders.

## About The Korea Herald

The *Korea Herald* is Korea's largest English-language daily with a market share of more than 50 percent. As the country's sole member of the Asia News Network, The Korea Herald is the face of Korean media. Building on its contents distribution network that spans more than 80 countries, The Korea Herald is now looking to become the leading voice on the Korean economy across the globe. The Korea Herald is continuing its efforts to grow as a mobile content producer through new services such as The Investor and Kpop Herald.

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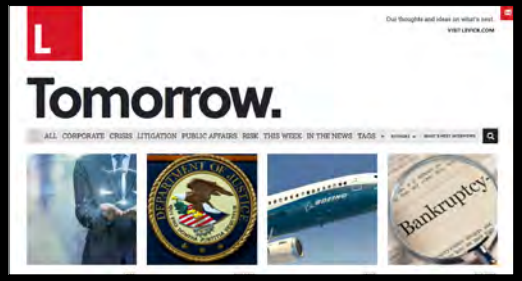


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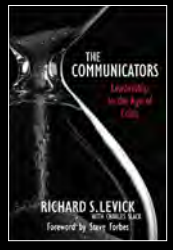


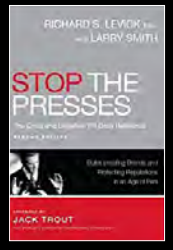


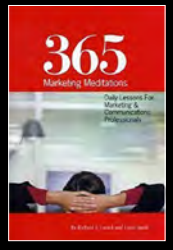


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