

Written testimony for the Record

Before the

**United States Senate
Committee on the Judiciary**

Hearing On

**Oversight of the Justice Department's (Non) Enforcement of the Foreign Agents
Registration Act: Lessons from the Obama Administration and Current Compliance
Practices**

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INTRODUCTION

The Department of Justice's (DOJ) collection and disclosure of information on the activities of foreign lobbyists under the Foreign Agents Registration Act (FARA) is the subject of sustained public interest. We urge Congress to take additional steps to satisfy the purpose of the statute—providing transparency for the government and the American people into how foreign entities try to influence US policies. Specifically, the implementation of FARA must be modernized to better facilitate enforcement of the law. Furthermore, the Department's National Security Division should receive increased funding in the FY 2018 budget to hire more staff, modernize IT resources, and address long-standing enforcement deficiencies.

Our recommendations are based on our experiences using FARA, including efforts to republish FARA data online in ways that support greater access and meaningful analysis.¹ *The Project On Government Oversight* (POGO), the *Sunlight Foundation* in conjunction with *ProPublica*, and the *Center for Responsive Politics* (CRP) have each built databases containing foreign lobbying documents. Our reviews of the DOJ's available foreign lobbying information found significant problems with how the data is currently structured. Moreover, we found that loopholes in the law, in addition to a lack of resources and staff, can make enforcement difficult if not impossible.² We've designed our databases to make up for some of the shortfalls in how foreign lobbying information is currently made available to the public. The government could proactively provide this information in an accessible form. Furthermore, there are steps the FARA Unit could take now to make FARA work better without increased funding.

Our recommendations are also based on a recent audit, at this Committee's request, by the Department of Justice Inspector General (DOJ IG) of the DOJ's National Security Division's Enforcement and Administration of FARA, which found several ways to improve the enforcement and implementation of the law.³

¹ Project On Government Oversight, "Foreign Influence Database."

<http://www.pogo.org/tools-and-data/foreign-influence-database/>; The Sunlight Foundation, "Foreign Influence Explorer." <http://foreign.influenceexplorer.com/>; The Center for Responsive Politics, "Foreign Lobby Watch." <https://www.opensecrets.org/fara>.

² The Sunlight Foundation, "Sunlight FARA Recommendations," April 21, 2014.

https://docs.google.com/document/d/19S-UJNx2KyJLOBROA8P_jUbiPV1zIS1GZR7MgBRaD38/edit; Project On Government Oversight, *Loopholes, Filings Failures, and Lax Enforcement: How The Foreign Agents Registration Act Falls Short*, December 16, 2014. <http://www.pogo.org/our-work/reports/2014/loopholes-filing-failures-lax-enforcement-how-the-foreign-agents-registration-act-falls-short.html>; Demand Progress, "Tracking Lobbying by Foreign Governments," August 2, 2016. <https://medium.com/demand-progress/tracking-lobbying-by-foreign-governments-a8d870a12c95>

³ Department of Justice Inspector General, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, September 2016.

<https://oig.justice.gov/reports/2016/a1624.pdf> (Hereinafter, Audit of the National Security Division's Enforcement and Administration of FARA)

The DOJ IG found that the lack of compliance with FARA is “unacceptable.” The auditors stated that documents were routinely submitted late and some foreign lobbyists stopped submitting required documentation entirely. Additionally:

- 62 percent of new registrants from 2013-2015 filed their registration documents late.
- 50 percent of registrants failed to file in a timely manner their supplemental statements describing their activities, as is required every six months.
- 61 percent of informational materials reviewed were not filed on time and 47 percent did not include the required disclosure statement indicating the materials were distributed on behalf of a foreign client.

What these numbers show is that the system clearly isn’t working, and as a result the public is left in the dark about how US policies are being influenced.

RECOMMENDATIONS

The DOJ IG concluded that there are several steps the agency should take to improve compliance, including conducting a review of the current fee structures, conducting a review of exemptions to the law, and developing an enforcement strategy. We, too, had a number of recommendations, and we submitted them in a public comment to the DOJ earlier this month.⁴

We believe that with increased funding the FARA enforcement unit could hire more staff to oversee compliance with the law and utilize new resources to ensure enforcement when necessary. Both our recommendations and those of the DOJ IG are intended to improve compliance with the law, DOJ’s enforcement of the law, and the transparency of the activities disclosed under FARA; to improve the quality, utility, and clarity of the information collected by the FARA Unit; and to minimize the burden of collection by moving to online mechanisms that reduce the likelihood of error and increase the reliability of the data.

In summary, our recommendations are:

- Perform a formal cost-benefit analysis of the fee structure
- Provide Funds to Make FARA Advisory Opinions Publicly Available
- Incorporate Civil Fines to Improve Enforcement
- Use Modern Tools and Techniques to Gather and Disclose Information
- Clarify Reporting Requirements Under FARA
- Monitor the DOJ’s Formal Assessment of FARA Exemptions
- Digitally Timestamp Filings

⁴ Daniel Schuman, Demand Progress, et al., “Civil Society Comments on FARA,” April 7, 2017. <http://www.pogo.org/our-work/letters/2017/civil-society-provides-comment-fara.html>

Perform a Formal Cost-Benefit Analysis of the Fee Structure

Foreign lobbyists registered under FARA are required to pay fees for every new contract with a foreign client, as well as additional fees every six months. The DOJ IG found that the FARA enforcement unit spends a significant amount of time and resources collecting and processing those fees, but that the fees may actually be deterring people from registering and filing appropriately and “may not be justifiable.”⁵ We and the Inspector General recommend that a formal assessment of the FARA fee structure be performed to determine if the fee requirements should be changed.

Provide Funds to Make FARA Advisory Opinions Publicly Available

When the DOJ discovers a lobbyist who should be registered under FARA but isn't they can send an advisory opinion to inform the lobbyists of their obligation to register. Or if a lobbyist isn't sure if FARA registration is required for their work, they can request an advisory opinion from the Department. These advisory opinions could serve a number of purposes for the public including clarifying how the law is interpreted and ensuring public oversight of FARA registrations. The DOJ IG found that the FARA enforcement unit has received 14 requests for advisory opinions since 2013. Currently these opinions are not publicly available, but there's no reason they can't be posted online with some personal information redacted. We and the DOJ IG believe the opinions are a worthwhile informational resource and could be made available without any change to the law.

Incorporate Civil Fines to Improve Enforcement

DOJ has two available tools for enforcing the law but instead typically relies on “voluntary compliance.” The first enforcement option is to pursue criminal charges for lobbyists who fail to register, submit documents late, or fail to disclose their activities. Although DOJ has this authority, the burden of proof to convince a grand jury that the violations were willful and at the direction of a foreign entity is so high that this method is rarely used. In fact it has only been used seven times in the last 50 years. The other option is for DOJ to use a court injunction to order registrants to comply with the law or even issue a temporary or permanent restraining order. This method has not been used at all since 1991.⁶

We recommend this Committee work with the authorizing committees to amend FARA to give DOJ the authority to levy civil fines to punish offenders who do not properly label their FARA filings, who file late, who don't file if they should have, or who don't register if they should have. These penalties should increase with the severity and number of infractions. We believe that giving the Department a third enforcement option that has more teeth than a court injunction but does not require the same burden of proof as criminal charges would improve compliance.

⁵ Audit of the National Security Division's Enforcement and Administration of FARA

⁶ Audit of the National Security Division's Enforcement and Administration of FARA

Use Modern Tools and Techniques to Gather and Disclose Information

We recommend this Committee direct the FARA Registration Unit to move to a system that requires all filers to use its webforms and to submit data in structured formats, and that outputs the data in nonproprietary, machine-readable formats. Where this data is published in bulk, it should utilize file formats designed for bulk, structured data, such as the CSV format. Digitizing FARA registration documents will make it significantly easier to post them online and improve the public's ability to meaningfully analyze the documents submitted.

Wherever possible, the FARA Unit should use unique identifiers to represent data, and wherever possible draw the identifiers from unique IDs used by other government entities or create crosswalks. This not only allows for the interoperability of data, but also allows for the FARA Unit to validate the data upon entry and mechanically compare it to prior entries. If the system takes advantage of an API-driven architecture and open data, adding additional IDs will make the process easier on the registrant while at the same time increase increasing consistency and accuracy.⁷

Clarify Reporting Requirements Under FARA

Every six months FARA registrants must submit Supplemental Statements to the DOJ with updated information on their foreign clients and lobbying activities. The Supplemental Statements define political activity as “any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting or changing the domestic or foreign policies of the United States or with reference to political or public interests, policies, or relations of a government of a foreign country or a foreign political party.”⁸

While some FARA registrants interpret that to mean they must provide detailed descriptions of all meetings, emails, and phone calls on behalf of their foreign clients, many others do not. Far more commonly, lobbyists provide the bare minimum of information to satisfy the basic requirements of the law without providing useful detail on their goals or how they're working to meet them. This undermines the transparency intent of the law. Without detailed descriptions of the political activity undertaken, the public remains in the dark about how US policies are being influenced. We believe that FARA registrants should be required to provide a more detailed description of their activities, including a list of any meetings conducted with policymakers, who they met with, the dates of the meetings, and the issue or issues discussed. This Committee

⁷ A fuller discussion of what should be done, with examples and greater detail, is available in these civil society comments to the FARA Unit, sent April 7, 2017, and available at https://s3.amazonaws.com/demandprogress/letters/2017-04-07_Civil_Society_Comments_on_FARA.pdf.

⁸ Foreign Agents Registration Act Registration Unit, “Supplemental Statement,” p. 5. https://www.fara.gov/forms/2014/OMB_1124_0002.pdf (Downloaded April 26, 2017)

should instruct DOJ to add this language to the existing requirements for disclosures in Question 12 of the Statements.

Monitor the DOJ's Formal Assessment of FARA Exemptions

As recently demonstrated by President Trump's former national security advisor, Michael Flynn, FARA has a number of exemptions that can sometimes be misunderstood or even exploited. By far the most commonly used exemption is one that allows some foreign lobbyists to register under the far less strict Lobbying Disclosure Act (LDA). Any lobbyists who are working solely on behalf of a foreign commercial interest, rather than a foreign government or political party, may register under the LDA and are exempt from FARA requirements. In the case of Michael Flynn, he worked as a foreign lobbyist for Turkey through a Dutch firm and registered his activities under the LDA instead of FARA. However, even though he wasn't hired directly by the Turkish government, it was the "primary beneficiary" of his work, which makes the lobbying activities fall under FARA. Flynn belatedly registered with the DOJ and cited an "uncertain standard" as the reason he thought he could file under the LDA instead.⁹ While the DOJ does regularly review LDA filings to determine if there are lobbyists who should be filing under FARA instead, clearly some fall through the cracks.

The DOJ is currently performing a review of FARA exemptions and is expected to have specific recommendations for legislative changes in June. We and the DOJ IG recommend that this Committee work with the authorizing committees to monitor this review and make any needed legislative changes after the DOJ finishes their review.

Digitally Timestamp Filings

When FARA registrants file informational materials, they should be required to clearly report the original recipients of the documents and the original date of distribution. This information will significantly increase the transparency of foreign lobbying actions, which was the original goal of the Act. Furthermore, disclosure of the original date of distribution will enable the Justice Department to accurately determine how many registrants are violating the requirement to file informational materials within 48 hours. We recommend the Committee instruct DOJ to add new required fields to capture the original recipients and date of distribution of informational materials.

CONCLUSION

Thank you for the opportunity to submit our recommendations regarding FARA. We would welcome the opportunity to discuss this further. Please contact Daniel Schuman at Demand Progress at daniel@demandprogress.org or 202-792-4550 or Lydia Dennett at the Project On Government Oversight at ldennett@pogo.org or 202-347-1122.

⁹ Foreign Agents Registration Act Registration Unit, "Flynn Intel Group Registration," March 7, 2017. <https://www.fara.gov/docs/6406-Registration-Statement-20170307-1.pdf> (Downloaded April 24, 2017)