

**Written Testimony of Lydia Dennett, Investigator,
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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”
July 26, 2017**

The Foreign Agents Registration Act (FARA) requires Americans representing foreign governments and political parties to register their activities with the Department of Justice (DOJ) and submit regular documentation describing their activities. The law is intended to provide transparency into how foreign governments attempt to influence US policies on everything from foreign aid to multi-billion dollar arms deals. When lobbyists fail to register or to properly disclose their activities, the public and even Congress can be left in the dark about how their policies are shaped and influenced.¹

In 2014, the Project On Government Oversight (POGO)’s report, *Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short*, illustrated a clear pattern of poor compliance with the law and lax enforcement of FARA by the DOJ. We found that the Justice Department office responsible for administering the law is such a record-keeping mess that even though the office has an electronic submission system, documents are still printed out and filed as hard copies. POGO had to bring its own scanner to the FARA office to make those documents electronically available. Not only is the office administering the law in need of an update, the law itself is in need of one: we found loopholes in the law that often make it difficult—if not impossible—for the government to police compliance or to discipline lobbyists who fail to comply.²

FARA requires registered foreign lobbyists to provide significantly more detail about their activities than its domestic lobbying counterpart, the Lobbying Disclosure Act (LDA). Under FARA, lobbyists must register with the DOJ within 10 days of becoming an agent of a foreign principal and file a copy of their contract or conditions of any agreements. After that, every six months the registrants must provide detailed “Supplemental Statements” describing their political activities and political contributions, and an up-to-date client list. FARA further requires registrants to file any “informational materials” distributed to two or more people within 48 hours of distribution. These materials can be anything from press releases to draft legislation and, when distributed, are required to include a conspicuous “Identification Statement” making it

¹ Department of Justice, “FARA: Foreign Agents Registration Act.” <https://www.fara.gov/> (Downloaded May 13, 2013) (Hereinafter “FARA: Foreign Agents Registration Act”)

² Project On Government Oversight, *Loopholes, Filing 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> (Hereinafter *How the Foreign Agents Registration Act Falls Short*)

clear to the recipient that the materials are being sent on behalf of a foreign government.³ But these are the FARA requirements that are most frequently violated by foreign lobbyists, and gaps within the law make some of the requirements nearly impossible to enforce.

A Lack of Compliance

A recent audit by the DOJ Inspector General (IG) found that the lack of compliance with FARA is “unacceptable.”⁴ The auditors studied FARA registrants’ compliance between 2013 and 2015 and found “documents were routinely submitted late, and in some instances, registrants had ceased submitting required documentation entirely.”⁵ Over 60 percent of new registrants in this time period filed their registration documents late, some by only days while others were up to a year later than the required 10 days; 50 percent filed their Supplemental Statements late, 10 percent of whom hadn’t filed any Supplemental Statements in years; 61 percent of informational materials were filed late; and almost 50 percent of materials filed did not include the required disclosure statement.

POGO similarly found that registrants failed to comply with the law, particularly when it came to filing informational materials. Part of the problem is that there is no statutory definition of the term “informational materials,” making it difficult for the FARA Unit, let alone registrants, to be certain they are adequately following the law. The law also does not require registrants to provide the document’s original date of distribution when filing, making it impossible for the DOJ to determine the extent of delinquent filing.

When these informational materials are filed on time they offer fascinating insights into foreign influence in the United States. But informational materials are rarely filed on time. Delayed filing of these materials significantly weakens the transparency that was intended by the law, and can even lead to policy decisions being influenced without the public knowing until it’s too late. For example, documents filed during the 2011 Egyptian revolution by The Livingston Group, who was representing the Government of Egypt at the time, demonstrates how late filing truly undermines FARA.

At the time, Robert Livingston, the former Chairman of the House Appropriations Committee, sent a letter to Members of the House and Senate urging them to oppose a resolution supporting democracy, human rights, and civil liberties in Egypt.⁶ These letters weren’t filed with the FARA Unit until weeks after they were distributed and the resolution had already failed.

If outside observers had been made aware of The Livingston Group’s efforts and seen the letters, they might have been able to counter the efforts to undermine the legislation. We will never know whether, had The Livingston Group filed this material on time as required by the law, the

³ 22 U.S.C. § 614(a); Department of Justice, “FARA Index and Act.” <https://www.fara.gov/indx-act.html> (Downloaded May 13, 2013)

⁴ Department of Justice Office of Inspector General, *Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act*, September 2016, p. 16. <https://oig.justice.gov/reports/2016/a1624.pdf> (Downloaded July 24, 2017) (Hereinafter “Audit of the NSD’s Enforcement and Administration of the Foreign Agents Registration Act”)

⁵ Audit of the NSD’s Enforcement and Administration of the Foreign Agents Registration Act, p. 13.

⁶ Letters from Robert Livingston, founding partner of the Livingston Group, L.L.C., to Members of the House and Senate regarding S. Res. 586, pp. 2-7. <http://www.pogo.org/tools-and-data/foreign-influence-database/data/333053-egypt-the-livingston-group-llc-the-government-of.html>

resolution might have had a fighting chance, or if the resolution might even have influenced the course of events.

The FARA Unit, however, does not believe the 48 rule is reasonable and the Department has not significantly enforced informational materials rules, even when registrants admit to blatantly breaking the law. Registrants are required to answer several questions related to their distribution of informational materials in the semi-annual Supplemental Statements. These questions ask registrants if they distributed any informational materials in the past six months, if they properly labeled them, and if they filed copies with the DOJ as required. POGO's review of Supplemental Statements filed during the first six months of 2010 found that just over 50 percent of registrants had reported filing informational materials and that they had not properly labeled their informational materials.⁷ POGO also found examples of registrants reporting that they did indeed distribute informational materials but did not file a copy with the DOJ. POGO's analysis of all years covered in its database found a similar phenomenon throughout.

Below are two examples of registrants openly admitting on their Supplemental Statements that they did not properly file their materials or disclose their relationships as required by the law.

V - INFORMATIONAL MATERIALS

16. During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials¹²?
Yes No

IF YES, RESPOND TO THE REMAINING ITEMS IN SECTION V.

22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period? Yes No

23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?
Yes No

Excerpts of a 2010 Supplemental Statement in which FARA registrant China National Tourist Office reported that it distributed informational materials without labeling them as is required by the law.

V - INFORMATIONAL MATERIALS

16. (a) During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials?¹²
Yes No

If Yes, go to Item 17.

(b) If you answered No to Item 16(a), do you disseminate any material in connection with your registration?
Yes No

If Yes, please forward the materials disseminated during the six month period to the Registration Unit for review.

22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period? Yes No

23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?
Yes No

⁷ *How the Foreign Agents Registration Act Falls Short*

*Excerpts of a 2011 Supplemental Statement in which FARA registrant Transitional National Council of Libya reported that it distributed informational materials without filing them with the Justice Department as is required by the law.*⁸

It is clear that registrants often disregard parts of the law. To address these compliance problems, the FARA Unit needs to better enforce the current law, and Congress needs to update and amend it to ensure it has the teeth necessary to punish law-breakers.

“Voluntary Compliance” Leads to Weak Enforcement

The FARA office has not adequately enforced any of the law’s filing requirements, instead relying on “voluntary compliance” from its registrants. Perhaps part of the reason for this is that the Department does not have adequate enforcement mechanisms. Currently under FARA, the DOJ has two enforcement mechanisms available to deal with violations: pursuing criminal charges or filing a civil injunction. The DOJ has only pursued criminal charges for FARA violations seven times in the last 50 years. The civil injunction option, which can include a temporary or permanent restraining order forbidding the violator from continuing to lobby, has not been utilized by the Department since 1991.⁹ In addition to those enforcement mechanisms, the FARA Unit also has the authority to conduct compliance inspections, which would allow them to review any communications or documents related to the registrant’s activities on behalf of their foreign clients. The Unit told POGO in 2014 that it typically only conducts 12 to 15 compliance inspections per year.¹⁰ For reference, there were 2,847 registered foreign lobbyists in 2014, meaning the DOJ conducted compliance inspections on just .5 percent of registrants.¹¹

POGO believes that Congress should amend the law to give the 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. This would give FARA the teeth it needs to ensure that registrants are complying with the disclosure requirements which are so vital to the transparency intent of the law.

Significant Loopholes

POGO’s review of FARA and of the DOJ’s administration of it found several loopholes that could allow many Americans representing foreign interests to fall through the cracks. The most notable loophole is the LDA exemption. A change to FARA in 1995 allows lobbyists who are working solely on behalf of a foreign commercial interest, rather than a foreign government or political party, to register under the far less strict LDA and be exempted from FARA requirements.

There are a number of issues with this exemption. For example, unlike FARA, the LDA allows those with lobbying income or expenses below a certain threshold to forgo registering. So if a

⁸ China National Tourist Office, “Supplemental Statement,” January 13, 2010. <http://www.fara.gov/docs/3318-Supplemental-Statement-20100113-10.pdf>; Transitional National Council of Libya, “Supplemental Statement,” November 29, 2011. <http://www.fara.gov/docs/6035-Supplemental-Statement-20111129-1.pdf> (All downloaded December 3, 2014)

⁹ Audit of the NSD’s Enforcement and Administration of the Foreign Agents Registration Act, p. 8.

¹⁰ *How the Foreign Agents Registration Act Falls Short*

¹¹ Department of Justice, “Quick Search: Active Short Form Registrants in a Date Range.” <https://www.fara.gov/qs-shortform.html> (Downloaded July 24, 2017)

lobbyist representing foreign commercial interests falls below the LDA threshold, they are exempt from registering under either statute.

Additionally, foreign governmental and commercial interests are not usually as distinct from one another as they are in the United States. This exemption is written assuming the American model, and does not adequately reflect the realities of how often foreign governments and businesses intermingle. This leaves a huge loophole in FARA enforcement that could allow foreign commercial interests that are acting under the direction and control of a foreign government to register under the LDA, or in some circumstances not register at all.

The other FARA exemptions are wide ranging and could allow for a certain amount of personal interpretation. For example, § 613(d) states that lobbyists working on activities that further the trade or commerce of a foreign principal are not required to register. Other subsections exempt lobbyists from registering if they are providing legal representation for a foreign principal or furthering religious, academic, scientific, or artistic pursuits.¹² The FARA Unit has not provided publicly available guidance on how these exemptions are interpreted.

POGO urges the Committee to seek information about how DOJ is interpreting the FARA exemptions to determine if the Department is enforcing the law as Congress intended.

Unclear Requirements

Part of the problem with FARA is that so much of the law is misunderstood or misinterpreted. In particular the LDA exemption is often misused. For example, President Trump's former national security advisory Michael Flynn, filed his foreign lobbying work under the LDA instead of FARA. Before joining the Administration, Flynn had been hired by a Dutch firm in August 2016 to promote Turkish interests in the wake of a failed military coup.¹³ Although Flynn was hired by a private firm, the "primary beneficiary" of the work was the Turkish government thereby triggering the FARA registration requirement.

Flynn cited an "uncertain standard" as the reason he filed his activities under the far less strict LDA instead of FARA, noting that the requirement is "not based on the statutory language, and not defined in the Department's regulations."¹⁴

This is only one of the recent examples demonstrating widespread disagreement about what triggers a FARA registration requirement. Indeed, two prominent foreign lobbying firms, Mercury and the Podesta Group, recently filed retroactive registration forms for work done on behalf of Ukraine. Both firms had received legal counsel stating that FARA registration was not required for their work because they received no funds or support from a foreign government.¹⁵

¹² 22 U.S.C. § 613

¹³ Peter Baker and Matthew Rosenberg, "Michael Flynn Was Paid to Represent Turkey's Interests During Trump Campaign," *The New York Times*, March 10, 2017. <https://www.nytimes.com/2017/03/10/us/politics/michael-flynn-turkey.html> (Downloaded July 24, 2017)

¹⁴ Letter from Robert Kelner on behalf of Flynn Intel Group, to Heather Hunt, FARA Registration Unit, regarding Flynn Intel Group Registration, March 7, 2017. <https://www.fara.gov/docs/6406-Registration-Statement-20170307-1.pdf> (Downloaded July 24, 2017)

¹⁵ Megan R. Wilson, "New registration details Manafort's lobbying for group with pro-Russia ties," *The Hill*, April 28, 2017. <http://thehill.com/business-a-lobbying/business-a-lobbying/331146-new-registration-details-manaforts-lobbying-for-pro> (Downloaded July 24, 2017)

Also in the news is Russian-American lobbyist, Rinat Akhmetshin, who made headlines for his involvement in a June 2016 meeting with Donald Trump Jr. Although he has previously lobbied for Russian interests, Akhmetshin recently told the Associated Press that when he received a notice from the FARA Unit advising him to register, he didn't believe he needed to file and declined to register his activities.¹⁶

This misunderstanding of the law's registration requirements could be mitigated by making FARA's advisory opinions publicly available. The DOJ can send these opinions to anyone they've identified as potential foreign lobbyists who may not be aware of their obligation to register, or individuals can request an opinion from the DOJ if they are unsure if their activities would require FARA registration. We believe that making appropriately redacted versions of these advisory opinions publicly available would help clarify some of the law's requirements.

Foreign Influence Goes Well Beyond FARA

These recent examples of FARA in the news also serve to demonstrate the varied forms of foreign influence at work today and make it abundantly clear that foreign influence goes well beyond lobbying. Just as the LDA does not properly capture all undue influence outside entities have on policymakers, FARA similarly suffers.¹⁷

For instance, foreign governments have attempted to influence US policy by funding think tanks such as the Brookings Institution and the Center for Strategic and International Studies, and questions of improper influence were raised by the cozy relationship between the Clinton Foundation and foreign donors while Hillary Clinton was Secretary of State.¹⁸ These issues should also be considered when discussing how to strengthen or rewrite FARA to make foreign influence on US policy more transparent.

Additional Recommendations

POGO has not been alone in our efforts to bring attention to the problems with FARA. Demand Progress has been working on several common-sense fixes to the Department's problems with collecting and publishing information.¹⁹ Additional databases of foreign lobbying documents have been built by The Sunlight Foundation in conjunction with ProPublica, and by the Center

¹⁶ Desmond Butler and Chad Day, "Russian-American lobbyist joined Trump's son's meeting, too," The Associated Press, July 15, 2017. <https://apnews.com/dceed1008d8f45afb314aca65797762a/Russian-American-lobbyist-says-he-was-in-Trump-son's-meeting> (Downloaded July 24, 2017)

¹⁷ Andrew Wyner, "Lobbyists Call for Lobbying Reform," May 24, 2012. <http://www.pogo.org/blog/2012/05/lobbyists-call-for-lobbying.html>

¹⁸ Eric Lipton, Brooke Williams, and Nicholas Confessore, "Foreign Powers Buy Influence at Think Tanks," *The New York Times*, September 6, 2014. <https://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html> (Downloaded July 24, 2017); Rosalind S. Helder and Tom Hamburger, "Foreign governments gave millions to foundation while Clinton was at State Dept.," *The Washington Post*, February 25, 2015. https://www.washingtonpost.com/politics/foreign-governments-gave-millions-to-foundation-while-clinton-was-at-state-dept/2015/02/25/31937c1e-bc3f-11e4-8668-4e7ba8439ca6_story.html?utm_term=.ed8a31322bf5 (Downloaded July 24, 2017)

¹⁹ Demand Progress, "Tracking Lobbying by Foreign Governments," August 2, 2016. <https://medium.com/demand-progress/tracking-lobbying-by-foreign-governments-a8d870a12c95> (Downloaded July 24, 2017)

for Responsive Politics (CRP) in an effort to republish FARA data online in ways that support greater access and meaningful analysis.²⁰

These reviews and our own attempts to republish DOJ's available foreign lobbying information ran into significant problems because of how the data is currently structured. There are several things the FARA Unit can do to improve the quality, utility, and clarity of the information it collects, 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.

For example, the FARA Unit could move to a system that requires all filers to use its webforms and to submit data in structured formats, which would output the data in nonproprietary, machine-readable formats. Where this data is published in bulk, the FARA Unit 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 will 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. 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 consistency and accuracy.²¹

By modernizing the way the Department collects and publishes its information it can potentially address the Unit's concerns that the 48-hour requirement for filing informational materials "outdated" and "unreasonable."

The Unit has recommended modifications to the law to allow registrants to file the materials semi-annually in batches with the Supplemental Statements. However, POGO believes that timely access to these informational materials is incredibly valuable: it allows the Department, Congress, and the public to see how lobbyists, in their own words, attempt to wield influence on behalf of their foreign clients. Allowing the filings to be delayed by as much as six months can defeat the openness that is supposed to be afforded by these filings. When information is filed weeks or months after being distributed, the issues it addresses may have already been settled, as demonstrated by the Livingston Group's work on behalf of Egypt. The value of knowing what information is being disseminated decreases as the length of time after dissemination increases. Transparency must be timely if public discourse is to truly benefit from it. We believe there can be a balance of timely disclosure without putting unrealistic burdens on the FARA unit or the registrants if the methods for submission and posting were modernized.

²⁰ The Sunlight Foundation, "Foreign Influence Explorer." <http://foreign.influenceexplorer.com/>; The Center for Responsive Politics, "Foreign Lobby Watch." <https://www.opensecrets.org/fara>.

²¹ 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. Letter from Daniel Shuman, Demand Progress, et. al., to Heather Hunt, Chief Foreign Agents Registration Act, regarding proposed collection activities concerning FARA, April 7, 2017. https://s3.amazonaws.com/demandprogress/letters/2017-04-07_Civil_Society_Comments_on_FARA.pdf.