

**Written Testimony for the Senate Committee on Appropriations
Subcommittee on Commerce, Justice, Science, and Related Agencies
Regarding the Department of Justice's FARA Unit
Submitted by Lydia Dennett, Project on Government Oversight, and
Daniel Schuman, Demand Progress Action
on May 25, 2018**

The activities of foreign lobbyists, as collected and recorded by the Department of Justice (DOJ) under the Foreign Agents Registration Act (FARA), is the subject of sustained public and congressional interest. FARA is intended to provide transparency into how foreign governments attempt to influence U.S. policies on everything from foreign aid to multi-billion-dollar arms deals. But when the Department of Justice does not uncover when lobbyists for foreign governments fail to register or properly disclose their activities, the public and even Congress can be left in the dark about how our laws are shaped and influenced. We believe the agency's interpretation of the law must be publicly clarified so Congress can grapple with the underlying issues behind foreign lobbyist disclosure.

To address these issues, we respectfully request that the Committee include the following provisions in its committee report language:

1. A request that FARA advisory opinions be provided to the Committee and the general public;
2. A request that the Department of Justice provide to the Committee and the general public its official guidance on how it interprets the law;
3. Additional items for inclusion in the National Security Division's strategic plan for enforcement of FARA, including a date on when that report must be completed and provided to the Committee and released to the public.

We note the House of Representatives proposed an increase in funding in the FY 2019 budget for the National Security Division to address improper foreign influence issues.¹ We also acknowledge the House Committee report language noting that the National Security Division is developing a strategic plan for FARA.² While we believe this is a step in the right direction, we encourage this Subcommittee to prompt the Justice Department to publicly clarify their interpretation of the law.

¹ 115th U.S. Congress, *Commerce, Justice, Science, and Related Agencies Appropriations Bill Report, 2019*, p. 32. <https://docs.house.gov/meetings/AP/AP19/20180509/108286/BILLS-115HR-SC-AP-FY2019-CJS-SubcommitteeDraft.pdf> (Downloaded May 22, 2018) (Hereinafter *Commerce, Justice, Science, and Related Agencies Appropriations Bill Report, 2019*)

² *Commerce, Justice, Science, and Related Agencies Appropriations Bill Report, 2019*, p. 37.

Recommendations

1. Congressional and Public Access to FARA Advisory Opinions

The Justice Department issues advisory opinions that describe the agency's "present enforcement intentions" concerning the Foreign Agents Registration Act.³ Specifically, the guidance concerns whether the law requires a present or prospective agent of a foreign principal to register or disclose information. A few summaries of these advisory opinions are published online.⁴ Unfortunately, the few publicly available advisory opinion summaries fail to provide clarity on the more nuanced aspects of the law.

We recommend the Justice Department *proactively* publish the full advisory opinions themselves except to the extent it would identify the requester. This is consistent with the suggestions of the DOJ Inspector General (IG) as well as a DOJ statement that it is willing to release certain reports pursuant to FOIA requests. This should not be burdensome since the FARA unit received only 14 requests for advisory opinions from 2013-2016.

In 2016, the DOJ IG recommended the Justice Department consider publishing advisory opinions online with personal information redacted.⁵ "We believe the FARA advisory opinions may be a worthwhile informational resource, and recommend [the Justice Department's National Security Division] consider whether there is value in making them publicly available," the report stated.⁶

The same year the Justice Department stated it would release advisory opinions that have led to a FARA registration pursuant to Freedom of Information Act requests.⁷ However, FOIA requests are time consuming, and the administration should operate under a presumption of openness.

Instead of requiring those interested to formally request these documents, the Justice Department should proactively post them online. Proactive disclosure is a best practice and a common one. For example, the DOJ has published advisory opinions to clarify their interpretation of the Foreign Corrupt Practices Act since 1993.⁸

We recommend the following report language:

³ 28 C.F.R. §5.2, available at <https://www.law.cornell.edu/cfr/text/28/5.2>.

⁴ U.S. Department of Justice, "Advisory Opinion Summaries," <https://www.justice.gov/nsd-fara/advisory-opinion-summaries>.

⁵ Office of the Inspector General, U.S. Department of Justice, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, September 2016, numbered p. 21. <https://oig.justice.gov/reports/2016/a1624.pdf> (Downloaded May 22, 2018) (Hereinafter IG Audit of FARA Enforcement)

⁶ IG Audit of FARA Enforcement, p. 4.

⁷ Letter from G. Bradley Weinsheimer, Acting Chief of Staff, U.S. Department of Justice National Security Division, to Thomas Puerzer, Regional Audit Manager, Office of the Inspector General, regarding NSD's response and implementation of OIG recommendations, December 21, 2016, p. 2. http://www.pogoarchives.org/strauss/POGO_DOJ_Response_to_IG_Audit_on_FARA_12-21-16.pdf (Downloaded May 22, 2018)

⁸ Department of Justice, "FCPA Opinions," June 17, 2015. <https://www.justice.gov/criminal-fraud/opinion-procedure-releases> (Downloaded May 22, 2018)

The National Security Division is requested to provide to the Committee and publish online all Foreign Agent Registration Act advisory opinions for individuals and entities that subsequently registered or disclosed information under FARA, subject to the redactions permissible under FOIA. In addition, the NSD is requested to provide to the Committee and the public all other advisory opinions after redacting information that would identify potential registrants or otherwise would be withheld under FOIA.

2. Clarify Registration Requirements Under FARA

The Justice Department should release any existing official guidance on FARA that explains its interpretation of the law. There are significant portions of FARA that remain undefined or poorly worded, and disclosure of how the DOJ interprets the law would provide Congress and the public with greater understanding.

For example:

- FARA registrants are required to file with the Department any “informational materials” they intend to send to two or more people. We do not know how the Department interprets the phrase informational materials.
- An agent of a foreign principal is defined as “a person any of whose activities are directly or indirectly supervised ... *in major part* by a foreign principal” (emphasis added).⁹ We do not know how the Department interprets the phrase “in major part.”
- Lobbyists who are working solely on behalf of a foreign commercial interest, rather than a foreign government or political party, may register under the far less strict Lobbying Disclosure Act and be exempted from FARA requirements. This exemption does not apply if the “principal beneficiary” of the work is a foreign government or political party.”¹⁰ We do not know how the Department interprets the phrase principal beneficiary.

We recommend the following report language:

The National Security Division is requested to provide to the Committee and publish online all official guidance currently in effect that interprets or further defines terms used in the Foreign Agents Registration Act.

3. The National Security Division’s Strategic Plan

The House report acknowledges that the National Security Division is drafting a strategic plan on FARA. However, the DOJ has been in perpetual review of FARA for more than a decade, which has had the effect of forestalling action. We believe you should establish a deadline by which the plan is released to the Committee and the public. In addition, the plan should include the following:

- An assessment of whether the FARA unit conduct a cost-benefit analysis of the fee structure to determine whether fee requirements should be changed;

⁹ 22 U.S.C. § 611 (c)(1)

¹⁰ Title 28 C.F.R. § 5.307

- Whether civil fines should be available to the DOJ to increase compliance; and
- A plan to improve the FARA website so that it works properly in accordance with recommendations made by civil society in this letter.¹¹

Conclusion

Thank you for the opportunity to submit our testimony regarding FARA. We would welcome the opportunity to discuss this further. For more information, please contact Lydia Dennett at the Project On Government Oversight at ldennett@pogo.org or 202-347-1122.

¹¹ Letter to Heather Hunt, Chief, Foreign Agents Registration Act Unit, from Demand Progress, et. al. regarding FARA reform, April 7, 2017. https://s3.amazonaws.com/demandprogress/reports/2017-04-07_Civil_Society_Comments_on_FARA.pdf