

“Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations”

**Questions for the Record for the Honorable Michael Horowitz
Submitted August 3, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

- 1. Do you support any changes to the Lobbying Disclosure Act exemption¹ to the Foreign Agents Registration Act? If so, please explain.**

Response: The Office of the Inspector General (OIG) audit report does not recommend any specific change to the Lobbying Disclosure Act (LDA) exemption to the Foreign Agents Registration Act (FARA). However, the OIG did recommend that the Department of Justice (Department) National Security Division (NSD) perform a formal assessment of the LDA exemption, along with the other current exemptions from FARA and determine whether a formal effort to seek legislative change is warranted. This recommendation remains open, and we will continue to assess NSD's efforts to complete this assessment.

- 2. Do you support legislation amending the Foreign Agents Registration Act to provide the FARA unit with civil investigative authority? Why or why not?**

Response: The OIG recognizes that civil investigative demand authority could provide NSD with a very useful additional tool for enforcing FARA. Among other things, civil investigative demand authority could allow the Department to compel the production of records, or responses to written interrogatories or oral testimony concerning such records during its FARA-related investigations without needing to initiate a criminal investigation or proceeding. However, the OIG believes that should the Committee decide to provide this authority to NSD, appropriate controls and oversight should be established to ensure that the authority is being used appropriately and civil liberties are protected. For example, the Committee might consider non-delegable approval by the Assistant Attorney General of NSD, requiring yearly reports on usage of this authority, and possibly even a sunset provision.

- 3. Do you support amending the Foreign Agents Registration Act to authorize the levying of civil fines for failure to register under FARA? Why or why not?**

Response: Our audit report did not specifically review the issue of whether there should be civil fines for failure to register under FARA during our audit. Nevertheless, the OIG believes that NSD should pursue both criminal and non-criminal means of deterrence and enforcement of FARA. In addition to the criminal enforcement options, the

¹ 22 U.S.C. § 613 (h).

Committee might consider allowing NSD to impose a non-criminal monetary fine for late or incomplete registrations. The effectiveness of this option, however, will ultimately depend on the Department's use of the penalty.

4. Do you support updating the amount of criminal fines that can be assessed under the Foreign Agents Registration Act? Why or why not?

Response: During our audit, we did not make a determination as to whether the amount of criminal fines that can be assessed under FARA should be updated. Nevertheless, as mentioned in the response to question 3, the OIG believes it necessary to explore other options for ensuring appropriate enforcement, and updating the amount of criminal fines is one such option. The effectiveness of this option, however, will ultimately depend on the Department's use of the fine.

5. What are the differences between the Foreign Agents Registration Act and 18 U.S.C. §951 in terms of what they require, and how they are used and enforced? Would you recommend any changes to either the Foreign Agents Registration Act or 18 U.S.C. §951 to clarify those differences, or to make it easier to utilize and enforce those statutes?

Response: Our audit did not address the differences in how the Department uses and enforces FARA and 18 U.S.C. §951. That being said, under FARA, individuals who act as an agent of a foreign principal, (i.e., a foreign government, political party, partnership, association, corporation, organization, or individual) and engage in political activities on behalf of that principal are required to register with NSD's FARA Unit. The Act includes a definition of the term "agent of a foreign principal" and outlines the types of activities that would require an individual to register under the Act. In contrast, 18 U.S.C. §951 only requires individuals who act as an agent of a foreign government to notify the Attorney General. While the statute does define the term "agent of a foreign government" as, subject to certain exceptions, "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official," the statute does not include a comprehensive description of what types of activities constitute acting as an agent of a foreign government. Although the Department is required to promulgate rules and regulations establishing the requirements for notifications made pursuant to the statute, the regulations do not describe the types of activities that would trigger a requirement to notify the Department.

In addition, as we noted in our 2016 report, officials at NSD, the FBI, and certain United States Attorney's Offices did not have a common understanding of the intent of FARA and of what constituted a prosecutable FARA case, particularly as it related to the relationship between FARA and 18 U.S.C. §951. It is NSD's opinion that a key difference between FARA and 18 U.S.C. §951 is that FARA covers agents of foreign principals who engage in political activity on behalf of that principle, while 18 U.S.C. §951 covers agents of foreign governments who engage in non-political activity, such as "espionage-lite" or clandestine behavior. NSD officials have further opined that even

though criminal penalties are available under FARA, the primary goal of FARA is in fact to ensure appropriate registration and public disclosure. During the audit, we found that many FBI agents and prosecuting attorneys in the Department either disagreed with or were unaware of NSD's opinions on these issues. As a result, we made two recommendations to try to address this issue. The OIG closed both recommendations because of actions taken by NSD and the FBI. First, we recommended that NSD update its current training for FBI investigations and prosecutors to include information about the time it takes and the process used by NSD consider FARA cases for prosecution. In response, NSD advised the OIG that NSD included a session on FARA as part of its annual training course at the National Advocacy Center beginning in March 2017. In addition, similar training sessions were held with a Criminal Division section and an FBI counterintelligence unit that included a discussion of the differences between the FARA statute and 18 U.S.C. § 951.

6. Do you believe that creating a dedicated FARA enforcement unit in the Department of Justice would help identify a greater percentage of those individuals not in compliance with FARA?

Response: During our 2016 audit, the OIG did not assess whether creating a dedicated FARA enforcement unit in the Department of Justice would help identify a greater percentage of those individuals not in compliance with FARA. We did, however, find that the current structural organization of the FARA Unit, where FARA registrations are managed and administered by a FARA unit within the NSD's Counterintelligence & Export Control Section (CES), was sufficient to manage and administer FARA. The OIG also found that CES provided sufficient oversight of both FARA-related criminal investigations, which are conducted by the responsible FBI field office and the FBI Counterintelligence Division, and FARA-related prosecutions, which are prosecuted by the responsible U.S. Attorney's Office.

7. Do you have any recommendations on how the Department of Justice can better identify and respond to strategic efforts by foreign nations to influence U.S. policy and the American public, particularly with respect to FARA?

Response: We believe that the implementation of the recommendations we made in our 2016 audit report will improve the Department's ability to identify and respond to strategic efforts by foreign nations to influence U.S. policy and the American public. In particular, we recommended that the NSD develop a comprehensive strategy for the enforcement and administration of FARA, which we believe would assist both investigators and attorneys in understanding what activities are being targeted by the NSD in enforcing the statute. With a comprehensive strategy in place, we believe it will be easier for the various components of the Department tasked with enforcing FARA to work together to identify and respond to efforts by foreign nations to influence policy or the American public. This recommendation remains open.

We also recommended that NSD expand the sources of information it uses to identify potential foreign agents. With the ever increasing ability of foreign agents to influence both the public and policy decisions through such means as social media and other informal information sharing platforms, we believe taking advantage of all sources of information available, including both open source information and information uniquely available to government agencies, is critical to identifying and responding to possible attempts to influence both the public and policy decisions. This recommendation is now closed because NSD has begun outreach efforts to other federal agencies in order to obtain new sources of information. However, we believe that NSD should continuously seek to improve and expand its sources of information in order to ensure that it will continue to be able to identify potential foreign agents and the strategies of foreign actors to influence U.S. policy and the American people.

Finally, we recommended that NSD perform an assessment of the FARA exemptions to determine if any changes are necessary, particularly to ensure that actions of foreign agents under FARA are not characterizing their activities under the LDA, thereby possibly not disclosing their activities to influence policy or the public. This recommendation remains open.

**Questions for the Record from Senator Charles E. Grassley
for Michael Horowitz
U.S. Senate Committee on the Judiciary
“Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S.
Elections: Lessons Learned from Current and Prior Administrations”
Submitted on August 3, 2017**

1. In your September 2016 audit of the Justice Department’s enforcement of the Foreign Agents Registration Act, your office found differing understandings between FBI field agents, prosecutors, and NSD officials as to the intent of FARA and what constitutes a prosecutable case.¹ For example, the IG found there was confusion between two laws in particular:

22 U.S.C. § 611, *Foreign Agents Registration Act*, which requires persons acting as agents of foreign principals in a political or quasi-political capacity to make disclosure with the Justice Department.

18 U.S.C. § 951, *Agents of Foreign Governments*, which prohibits persons not officially affiliated with a foreign government or engaged in a legal commercial transaction from knowingly operating as an agent of a foreign government without first notifying the Department of Justice.

- a. Have adequate steps been taken to address this confusion? If not, what additional steps should be taken?

Response: We believe that the Department of Justice’s (Department) National Security Division (NSD) is taking adequate steps, in response to our audit, to address the confusion between 22 U.S.C. § 611 and 18 U.S.C. § 951. In our audit report, the OIG made two recommendations that were intended to assist NSD and the FBI in resolving the confusion about the relationship between and interpretation of FARA and Section 951. The OIG has closed both recommendations.

First, we recommended that NSD update its current training for prosecutors and FBI investigators to include information about the process used by NSD to consider FARA cases for prosecution. In response, NSD advised the OIG that NSD included a session on FARA as part of its annual training course at the National Advocacy Center beginning in March 2017. In addition, similar training sessions were held with a Criminal Division section and an FBI counterintelligence unit that included a discussion of the differences between the FARA statute and 18 U.S.C. § 951.

¹ 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 11* (2016).

Second, the OIG recommended that NSD explore with the FBI the feasibility of distinct classification codes for the two statutes, which involves clearly identifying when a FARA case is being pursued rather than a 18 U.S.C. § 951 case in its record keeping system. We believe segregating these two types of cases in the FBI's classification codes may help advance NSD's efforts to clarify the distinction for case agents. In response to our recommendations, NSD discussed the distinction between the two statutes with the FBI and provided the OIG with an action plan for moving forward with additional options for separate classifications in its record keeping system.

In addition to these two recommendations, the OIG recommended that NSD timely inform investigators and attorneys regarding its reasons for not approving FARA cases for prosecution. While this recommendation was made both to enhance timeliness and lines of communication when not approving cases, we believe the actions taken by NSD may also enhance the understanding of the differences between FARA and 18 U.S.C. § 951 cases. Because NSD provided documentation demonstrating increased communications when cases were not approved, the OIG closed this recommendation.

2. The September 2016 audit mentioned that NSD is currently pursuing civil investigative demand (CID) authority from Congress in order to enhance its ability to assess the need for potential agents to register. The audit noted, “[w]hile we concur that CID could be a useful tool for NSD, there are important competing considerations at stake, and we believe that any expansion of such authority must also include appropriate controls and oversight to ensure it is used appropriately.”
 - a. Please explain what competing considerations are at stake.

Response: If NSD is granted civil investigative demand (CID) authority, a balance must be found between allowing NSD sufficient discretion to be able to use the authority effectively and ensuring that appropriate safeguards are in place to prevent misuse of the authority. According to the NSD's FARA Unit, the primary challenge to identifying FARA violations and enforcing the FARA registration requirements is the Unit's inability to determine whether certain organizations, such as think tanks or non-governmental organizations, that receive funding from foreign governments and subsequently take public political positions that are favorable to those governments are acting as agents of a foreign principal and, therefore, should register under FARA. While CID authority could assist the FARA Unit in overcoming this challenge by providing the Unit with a tool for obtaining the information it needs to determine whether these organizations are acting as agents of a foreign principal, the authority could also be subject to overreach and abuse. As a result, we believe that if NSD is authorized to use CIDs to administer and enforce FARA, the authority should be subject to rigorous controls and oversight to ensure that it is being used appropriately.

- b. What type of “controls and oversight” are needed to ensure CID is used appropriately?

Response: Because NSD has never exercised CID authority in its enforcement of FARA, it is difficult of us to say what controls and oversight are needed with any degree of certainty. However, with respect to types of controls to ensure appropriate use, the Committee might consider non-delegable approval by the Assistant Attorney General of NSD or possibly even a sunset provision. Further, with respect to oversight, the Committee could require NSD to provide regular reports on its use of the CID authority to Congress.

- c. The Justice Department could convene a grand jury and issue subpoenas, obtain search warrants, and seek injunctive relief. These are very powerful tools. Why are these not enough to get the job done?

Response: These are powerful tools, but at least the first two tools (grand jury subpoenas and search warrants) require prosecutors to open a criminal investigation, and it is apparent from our audit that Department prosecutors do not believe that there is a sufficient basis to open a criminal investigation in most cases. Moreover, seeking injunctive relief is not an evidence-gathering tool, and it is our understanding that the Department believes it needs an evidence-gathering tool that only requires the opening of a civil matter, rather than a criminal investigation.

3. The September 2016 audit recommended “NSD consider the value of making FARA advisory opinions publicly available as an informational resource.” In response, the NSD said it “will make *summaries* of *selected* advisory opinions available on the FARA website...”²

- a. Why did you close this recommendation given that NSD will only make *summaries* of *selected* advisory opinions, rather than complete versions of all advisory opinions, publicly available?

Response: As you note above, the OIG recommended that NSD consider the value of making FARA advisory opinions publicly available as an informational resource. As a result, in order to close the recommendation, the NSD was not required to publish the complete version of its advisory opinions. In order to resolve this recommendation, NSD promised to review its policy and practices regarding FARA advisory opinions and determine how to expand public accessibility of these opinions. In response, we agreed to close the recommendation when we received evidence that review was conducted and that actions were taken as a result of the review. Therefore, NSD’s decision to make summaries of selected advisory opinions available on the FARA website and the fact that NSD has already begun doing so was

² Emphasis added.

sufficient to close the recommendation. Further, NSD informed us that the website will be updated periodically with additional summaries of advisory opinions. The OIG will continue to monitor NSD's efforts to provide this information.

- b. Are summaries of selected opinions enough to provide the guidance potential registrants and the public need to understand how the law is being applied?

Response: Before agreeing to close the recommendation relating to advisory opinions, the OIG reviewed examples of the anonymized advisory opinions that have been publicly posted. We believe that these opinions will prove to be a helpful resource for potential registrants. However, NSD would be better able to comment on any feedback from users of these materials and whether the materials are sufficient for understanding FARA.

- c. By what criteria will the "selected" opinions be chosen for public disclosure?

Response: The selection of opinions is at the discretion of the NSD, and the OIG did not determine what should be considered for disclosure.

- d. Should all advisory opinions be made publicly available rather than merely summaries of selected opinions? If not, why not?

Response: As stated above, the OIG has reviewed the examples of summarized advisory opinions posted on the FARA website and believes that the opinions are a helpful source of information for potential registrants to determine their responsibility, if any, to register under FARA. While we concur that posting additional advisory opinions would likely enhance potential registrants' understanding of FARA requirements, we did not recommend that all advisory opinions be posted publicly for this purpose and left this consideration to the discretion of NSD.

In addition, NSD expressed significant concerns to the OIG about publicly releasing all of its advisory opinions. Specifically, NSD informed us that the Department is obligated to treat requests for advisory opinions in a confidential manner, and that NSD considers advisory opinions to be among its investigative tools. Therefore, the Department told us that it believed that making the entirety of all advisory opinions public would be inconsistent with Department's longstanding position that it will neither confirm nor deny the existence of non-public investigations. NSD told us that in its judgment, to provide the public with access to full advisory opinion letters sent to persons ultimately determined to have no obligation to register under FARA, would compromise the privacy of potential registrants in instances where there is no overarching requirement for public disclosure. NSD believes that disclosure in that situation would not be appropriate and would result in discouraging outreach by potential registrants seeking to understand their obligations. Further, NSD told us that in its judgment, publicly releasing full FARA

advisory opinions would work against achieving a greater number of registrations overall, since potential registrants seeking guidance from the FARA Unit may avoid seeking an advisory opinion for fear of being revealed in the public domain. We did not take issue with this position, and believed it to be a reasonable and adequate explanation.

- e. Will your office continue to monitor and report to the committee on the progress and extent of the actual disclosure of advisory opinions?

Response: The OIG will continue to monitor the Department's efforts to address the concerns identified in our audit and conduct additional audit work, if necessary. The OIG will also keep the Committee apprised, as appropriate.

- 4. The September 2016 audit "recommend[ed] NSD explore with the FBI the feasibility of distinct classification codes for FARA and Section 951 in its record keeping system." You consider the recommendation closed, noting, "NSD provided documentation of a September 28, 2016, discussion between NSD and FBI officials regarding the distinction addressed in our recommendation and action plans going forward. As a result, we consider this recommendation closed."

- a. Have the Justice Department and FBI actually implemented distinct classification codes for FARA and Section 951 violations? If not, do they plan to do so, and by what date?

Response: In addition to the documentation provided regarding the September 28, 2016, meeting, NSD informed us that the FBI has agreed to review their current coding practices with the intention of categorizing all Section 951 cases as matters separate from FARA. NSD did not provide the OIG a specific date when this would be completed. We closed the recommendation due to our assessment that NSD had sufficiently addressed the recommendation by exploring the issue.

- b. Will your office continue to monitor and report to the committee on the progress of whether and when distinct classification codes are actually implemented?

Response: The OIG will continue to monitor the Department's efforts to address the concerns identified during our audit and conduct additional audit work, if necessary. The OIG will also keep the Committee apprised, as appropriate.

Senate Judiciary Committee - Questions for the Record
July 27, 2017

Hearing entitled: "Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations"

Questions for Mr. Adam Hickey, Deputy Assistant Attorney General, National Security Division, U.S. Department of Justice, and

Questions for the Honorable Michael Horowitz, Inspector General, U.S. Department of Justice,

Questions for Mr. E.W. "Bill" Priestap, Assistant Director, Counterintelligence Division, Federal Bureau of Investigations:

1. In September 2016 the Department of Justice, Office of the Inspector General released a report following a year-long review titled, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*.¹ In this report, the OIG stated that, "NSD officials believe that Congress should act and once again require those who lobby for foreign commercial interests to register under FARA. We agree with the concern that foreign governmental and commercial interests overseas may not always be distinct and we recommend that NSD perform a formal assessment of the LDA (Lobbying Disclosure Act) exemption, along with the other current FARA exemptions and determine whether a formal effort to seek legislative change is warranted". Within this same Office of the IG Report, the National Security Division stated "As noted in the report, the FARA Unit has attributed a decrease in the number of registrants and foreign principals to the enactment of the LDA exemption and has also noted that the reporting requirements of LDA are not as robust as those under FARA. Prior to the OIG Report, NSD embarked on efforts to study the LDA and other FARA exemptions" (OIG Rpt, Pg 35, Bullet Point No. 1). Based on today's hearing and as it pertains to the OIG report please answer the following questions:
 - a. According to this year-long Office of the Inspector General report, exemptions within Foreign Agents Registration Act exist because of changes made in the Lobbying Disclosure Act (LDA). Do you agree that changes made to FARA in the LDA have made it more difficult to understand when it is necessary to comply with FARA requirements?

Response: Yes. As we noted in our September 2016 report, the Office of the Inspector General (OIG) shares the Department of Justice (Department) National Security Division's (NSD) concern that foreign governmental interests and foreign commercial interests may not always be distinct. Accordingly, we agree that the Lobbying Disclosure Act (LDA) exemption that exempts agents working on behalf of foreign commercial interests from FARA's registration requirement could cause uncertainty as to whether an individual or entity is required to register under FARA in instances where foreign commercial interests are largely inseparable from foreign governmental interests. In our report, we recommended that NSD perform a formal assessment of the LDA exemption. This recommendation remains open, and we will continue to monitor NSD's efforts to implement it.

¹ *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, page 19, para 3 - 4, <https://oig.justice.gov/reports/2016/a1624.pdf>

- b. Do you agree that the exemptions provided by changes in the LDA create ample ambiguity for businesses or individuals working with foreign entities to go without registering, potentially without fully understanding that they should register under FARA?

Response: Yes. As noted in response to question 1a, the exemptions might make it harder for businesses and individuals to determine whether to consider themselves agents working on behalf of foreign commercial industries or agents working on behalf of a foreign principal, which would require registration under FARA.

- c. Do you agree that changes in LDA and ambiguity in requirements has made it more difficult for your department and others tasked with monitoring foreign agents to carry out intended jobs related to FARA and monitoring of foreign activity?

Response: We have referred this question to the Department's Office of Legislative Affairs, since the OIG is not responsible for administration or enforcement of FARA.

- d. Based off of your expertise, do you believe legislative changes to FARA requirements could help law enforcement to better monitor foreign agents and activity and US enforcement of FARA? Do you believe there is need to provide improved criteria as to what defines a foreign shell corporation?

Response: Yes, we believe that legislative changes to FARA requirements could help law enforcement to better monitor foreign agents and activity and U.S. enforcement of FARA. As noted in response to question 1a, the OIG shares the NSD's concern that foreign governmental interests and foreign commercial interests may not always be distinct. Therefore, legislative changes to provide additional clarity between these two interests might reduce any potential uncertainty as to whether a business or individual is required to register under FARA. To the extent the FARA registration requirements are clear, law enforcement can better determine whether registration under FARA is required, whether noncompliance with FARA registration requirement is intentional and whether further action to enforce the requirement is necessary. In addition, it would make it easier for foreign agents to determine whether they are required to register under FARA. To that end, in our 2016 report, we recommended that the NSD perform a formal assessment of the LDA exemption, along with the other current FARA exemptions and determine whether a formal effort to seek legislative change is warranted. This recommendation remains open, and we will continue to assess NSD's efforts to complete this assessment.

The OIG has no findings related to whether there is need to provide improved criteria as to what defines a foreign shell corporation, because the issue did not fall within the scope of our September 2016 review.

2. In 2008 the Government Accountability Office published an assessment of the Foreign Agents Registration Act, *Post Government Employment Restrictions and Foreign Agent Registration*, which states that "To enhance Justice's ability to ensure that the American people know the identity of persons trying to influence U.S. government policy in the United States on behalf of foreign entities, Congress may wish to consider (1) granting the Department of Justice civil investigative demand authority to inspect the records of persons

Justice believes should be registered as agents of foreign principals and (2) requiring persons claiming certain exemptions to provide advance written notification to Justice before engaging in the exempt activities.”² Considering the clear recommendation on the part of the Government Accountability Office, please answer the following questions regarding the potential effectiveness of civil investigative demand authority:

- a. The Government Accountability Office report, cites that due to the ambiguity of the Foreign Agents Registration Act and the Lobbying Disclosure Agreement, there is often confusion amongst individuals and businesses if they should register and proposes civil investigative demand authority as a possible solution to this. Do you agree with the Government Accountability Office’s assessment that the use of Civil Investigative Demand Authority could add clarity to prospective registrants and improve enforcement?

Response: The OIG agrees with the Government Accountability Office’s assessment that civil investigative authority could be a useful tool for enhancing NSD’s ability to enforce FARA. Civil investigative demand authority could allow the Department to compel the production of records, or responses to written interrogatories or oral testimony concerning such records. This additional information could assist NSD in determining whether a suspected foreign agent is required to register under FARA. However, the OIG believes that should the Committee decide to provide this authority to NSD, appropriate controls and oversight should be established to ensure that the authority is being used appropriately.

- b. Additionally, the Government Accountability Office cites the lack of ability by law enforcement to inspect the records of those suspected to in violation of registration. Do you believe that Civil Investigative Demand Authority could be useful in aiding law enforcement with reducing ambiguity and bolstering enforcement?

Response: As mentioned in the response to question 2a, civil investigative demand authority, if paired with appropriate safeguards for civil liberties, could be a useful tool for NSD to compel information from potential registrants.

² Government Accountability Office *Post Government Employment Restrictions and Foreign Agent Registration*, page 15, para 2, <http://www.gao.gov/new.items/d08855.pdf>.