THE
NATIONAL LAW REVIEW

Project on Government Oversight (POGO) Report on FARA (Foreign Agents Registration Act) Misses the Larger Point

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Monday, December 22, 2014

Last week, the Project on Government Oversight (POGO) released a report on the Foreign Agents Registration Act with an attention-grabbing title: "Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short." The tone of the title was echoed in several news reports, including in The Hill ("Foreign lobbying enforcement 'lax'") and Legal Times ("Watchdog's Foreign Lobbying Audit Finds 'Lax Enforcement'"). In our view, however, the POGO report and the resulting news coverage missed a larger, more significant point.

In fact, FARA enforcement and awareness are at an all-time high. In each year since 2008, for example, the Department of Justice has conducted more than a dozen audits of FARA registrants. (In contrast, it conducted no audits from 2004 through 2007.) In several high-profile cases, consulting firms and public relations firms have registered retroactively under FARA following media scrutiny or inquiries from the DOJ FARA Unit. And FARA was the subject of a front-page story in the New York Times a few months ago.

In this environment, the issues raised by the POGO report are important not because they indicate lax enforcement. Rather, they demonstrate that the FARA statute is

badly in need of a rewrite to bring the law in line with modern technology and advocacy practices in Washington.

The POGO report focused on late or incomplete public disclosure of "informational materials," including letters sent by a former Congressman and e-mails sent by a lobbyist for Taiwan. Under the statute, FARA registrants are required to file with DOJ within 48 hours materials that are sent on behalf of clients "in the form of prints" or in a form that can be "adapted [to be] disseminated or circulated among two or more persons." The definition of "print" is a laundry list of every conceivable form of printed materials – even capturing "visiting cards" and "patterns to be cut." The antiquated definition, however, excludes materials made by "the copying press, stamps with movable or immovable type, and the typewriter."

It was difficult to apply this extraordinary definition in the 1940s, when FARA was new, and it is nearly impossible to apply it in the modern era of e-mail and Twitter. Generally, FARA lawyers and registrants often draw a distinction between materials that are created for individualized communications (an e-mail, letter, or draft text shared with a congressional office) and materials that are designed for broader dissemination (a brochure, book, or website). Because typewritten letters were not informational materials in the last century, similar individualized communications like e-mail are not informational materials today, they conclude. But ambiguities abound. Can an e-mail be "adapted [to be] circulated among two or more persons" because someone can forward it easily and widely?

The varying interpretations of the statute's "informational materials" requirement thus more likely reflect registrants' good faith attempts to apply a definition that is thoroughly disconnected from modern technology than evidence of loopholes, filing failures, or lax DOJ enforcement.

POGO also appeared to criticize DOJ for not requiring more detailed disclosures of lobbyists' contacts with public officials, observing (incorrectly) that registrants are "not explicitly required to provide specific information about their meetings or contacts with policymakers, such as who they met with or what they discussed, though some registrants choose to provide these details." Under guidance issued by DOJ, however, FARA registrants are required to provide a "description of all activities undertaken on behalf of, and all services rendered to, each foreign principal." When "reporting contacts with U.S. Government officials," registrants must provide "the date of the contact; the name and title of the U.S. Government official contacted," along with "the manner in which the contact was made . . . and a description of the subject matter discussed."

POGO may not have been aware of this guidance because it is not published by the Department and is instead distributed directly to FARA registrants. It would be helpful if the Department simply posted this guidance on its website. Similarly, the Department over the years has issued written guidance in response to advisory opinion requests from registrants, which has been helpful in clarifying FARA's reporting requirements. Those opinions are not publicly available, however. Publishing them on the Department's website might help clarify the agency's interpretation of the statute's more ambiguous provisions.

In the last few years, POGO has been one of the few public interest groups to focus

on FARA, and it has increased transparency and accountability in useful ways. Its recent report, however, incorrectly focused on several symptoms of FARA's inadequacy, while overlooking the fundamental cause of the statute's inconsistent application – it is simply badly outdated. To correct these problems and to improve disclosure, Congress should update the statute so that it makes more practical sense in the 21st century.