The federal government is finally creating a foreign influence registry — Are you ready?

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After a long period of public discussion over foreign influence in Canada, on May 6, 2024, the federal government finally tabled legislation to establish a foreign influence transparency registry, under a new *Foreign Influence Transparency and Accountability Act* (FITAA). In addition, Bill C-70 will also amend a number of other national-security-related laws, to provide the federal government with an improved toolkit to counter foreign interference in Canada.

Understanding Bill C-70's implications for foreign influence in Canada

The new FITAA does the following:

- Provides for a new independent foreign influence transparency commissioner (the FIT Commissioner, or the Commissioner);
- Creates an (as of yet unnamed) publicly accessible registry of agents acting on behalf of foreign governments (the FIT Registry);
- Requires foreign agents to provide specific information to the Commissioner about the arrangements that they have entered into with their foreign principals, which will then be posted to the FIT Registry; and
- Provides the FIT Commissioner with certain tools to administer and enforce the Act.

In July 2023, we wrote about the likelihood of such legislation and identified a number of issues and questions we had regarding the content of any legislation, and the structure of any proposed registry. We identified five primary elements that any legislation would need to address: (1) what arrangements would be covered by the registration obligation; (2) what types of activities would be covered; (3) what exemptions would be available; (4) what information would be publicly disclosed; and (5) what mechanisms would be available to ensure compliance? With Bill C-70, the federal government has now addressed most of these questions, although some important details remain to be addressed through future regulations.

We had noted that the U.S. *Foreign Agents Registry Act* (FARA) is widely considered to be the "gold standard" and that we expected Canada would likely adopt something similar. The FITAA follows the FARA model reasonably closely and, in fact, uses a number of the same terms (although with somewhat different meanings). In our view, this is a reasonable approach, given the United States' extensive experience with FARA. This has allowed Canada to use the good in FARA, while rejecting some of its more problematic elements.

FITAA and FARA: Where do they meet, and where do they part ways?

1. What arrangements will be covered by the registration obligation?

The FITAA does not purport to regulate any political activities; its essential purpose is to enhance transparency, and cast sunlight on foreign influencing arrangements where little had existed previously. Subsection 5(1) sets out the Act's fundamental obligation: any person who enters into an "arrangement" with a foreign principal must provide the Commissioner with specified information within 14 days of entering into that arrangement. There must be an "arrangement" with a "foreign principal" to undertake one or more of the covered activities that relate to a "political or governmental process" in Canada before the registration obligation is triggered. The definitions of "arrangement" and "foreign principal," along with the additional incorporated terms of "public office holder" and "political or governmental process," are critical to understanding the scope of the FITAA's registration obligation.

First, much of the substance of the registration obligation is found within the definition of "arrangement." An "arrangement" is any arrangement to carry out, under the direction of or in association with a "foreign principal," any of the following activities in relation to a "political or governmental process" in Canada:

- Communicating with a "public office holder";
- Communicating or disseminating, or causing to be communicated or disseminated by any means, including social media, information that is related to the "political or governmental process";
- Distributing money or items of value, or providing a service or the use of a facility.

Communicating or disseminating information is broad enough to cover "grass roots communications." That phrase is defined in the federal *Lobbying Act* as appeals to members of the public, through mass media or by direct communication, that seek to persuade those members to communicate directly with a public office holder. These communications may already be subject to registration and reporting requirements under the *Lobbying Act* and some provincial legislation. Also, the inclusion of information communicated or disseminated through social media seems essential for the effective functioning of the legislative scheme, but this means that FITAA would presumably apply to arrangements that can be made and wholly performed outside of Canada. How the registration obligation might be monitored and enforced (if it can be) outside the country will be of considerable significance.

Second, the definition of "political or governmental process" establishes the fence around the covered activities or processes that are inherently political in nature. This

definition draws substantially from the definition of lobbying contained in the federal *Lobbying Act*, but expands on that definition in a couple of important areas. Covered processes include:

- Any proceeding of a legislative body;
- The development of a legislative proposal;
- The development or amendment of any policy or program;
- The making of a decision by a public office holder or government body, including the award of a contract;
- The holding of an election or referendum; and
- The nomination of a candidate or the development of an electoral platform by a political party.

The inclusion of elections and referenda, along with candidate nominations and political platform development within the scope of covered processes, means that FITAA will apply deep into underlying secondary political processes in Canada, and far beyond mere dealings with governmental officials.

Third, similar to the processes covered by FITAA, the definition of "public office holder" is broad, covering all three levels of government in Canada, and including any officer or employee of the federal government (including MPs and Senators and their staff, senior public servants, and members of the Armed Forces and the RCMP), provincial MLAs and their staff, provincial employees, mayors, municipal councillors and municipal staff, band councillors and members of any indigenous government, and any officer or employee of any other entity that represents the interests of First Nations, the Inuit or the Metis. Coverage of provincial MLAs and their staff, other provincial employees, and municipal level politicians and staff was not expected, and results in a significant expansion of the Act's practical application.

Finally, a "foreign principal" includes a foreign state or power (including subnational governments, such as those of states or provinces), a person acting at the direction or for the benefit of a foreign power, political factions or parties operating within a foreign state, and entities that are controlled, in law or in fact, or that are substantially owned by, a foreign state. Importantly, Canada has chosen not to cover all foreign incorporated or established entities as is done under FARA. To avoid being entirely impractical, FARA provides an ambiguous and problematic exception for "commercial activities," which Canada appears to have avoided by focusing only on those foreign entities that are state owned.

Also, on the face of it, Canada has not adopted a distinction between "negative" or "positive" foreign countries in its approach to reporting. All jurisdictions, whether "friend or foe," will be subject to the same registration obligation, although it is perhaps still possible, through one or more regulatory exclusions, that Canada might extend preferential treatment to one or more close allies. Notably, FARA also does not take such an approach, and provides for universal application.

2. What types of activities will be covered?

The scope of registrable activities is to be found within the definition of "arrangement." Covered activities include communicating with a public office holder, communicating or disseminating information that is related to a political or governmental process,

distributing money or items of value, or providing a service or the use of a facility. This definition means that merely assisting a foreign entity or state-owned enterprise in establishing a commercial presence in Canada, or providing general legal or business advice, will not constitute registrable activities **unless** the work to be performed involves one of those activities specifically enumerated within the definition of "arrangement."

3. What exemptions from registration will be available?

The Act provides one specific exception for diplomatic and consular activities, but no other exceptions are specified in the Act, which does allow for further exceptions to be added through regulation. FARA provides a number of specific exemptions from registration, including the provision of legal advice and representation before courts and regulatory bodies, diplomatic and consular activities undertaken by accredited staff, and a "commercial exemption" for private non-political activities in furtherance of *bona fide* trade and commerce.

This may provide some idea of what further exemptions might be added by regulation, although Canada has taken a somewhat different approach to registrable activities. Some of the exceptions that are specifically provided for under FARA, such as that for commercial activities, are not necessary under FITAA given that such activities are not covered by the registration obligation in the first instance. Also note that, absent a specific exception added though regulation, the fact that a given activity may be registerable under other legislation – the federal *Lobbying Act*, for example – will not excuse or exclude registration under FITAA. The FIT Registry will operate independently of all other existing registration or transparency regimes.

4. What information will be publicly disclosed?

Information to be provided to the Commissioner will be publicly available. Subsection 8(1) requires the Commissioner to establish and maintain the (as of yet unnamed) registry. Subsection 8(2) specifically provides that "the registry must be accessible to the public." What we do not yet know is the scope of the information that must be provided. Subsection 5(1) only states that a person required to register under that subsection must provide to the Commissioner "the information specified in the regulations." No guidance has been provided regarding what information will be specified, and we still do not know if the required "information" will include, for example, the amount of any compensation, or copies of any materials that the person disseminated on behalf of the foreign principal, as is the case under FARA.

This lack of specificity regarding the content of information is significant, in that it goes to the very heart of the FIT Registry and makes it impossible to assess the Registry's likely overall impact on registrants, nor its effectiveness in accomplishing its legislative purpose. The work done regarding the broad coverage of the Act can be easily undone by a very narrow information requirement; this is an area that we therefore continue to monitor closely.

5. What "sticks" will be available to ensure compliance?

The FITAA provides a dual-track sanction scheme similar to that found in FARA, providing for both "violations" and "offences" with varying degrees of potential penalties.

Non-criminal “violations” include failing to register, failing to update a registration, or providing false or misleading information. “Violations” can be proven on a balance of probabilities and will attract administrative monetary penalties, or “AMPs” (the specific amount of which are still to be set out in regulation). Presumably, the “violation” track will used only when the actions have been inadvertent or not intentional in nature (or where proof beyond a reasonable doubt may not be possible).

The more serious “offences” also include failing to register, failing to update a registration, or providing false or misleading information, but also include obstruction and perjury. In addition, various offences as set out in the *Criminal Code*, such as conspiracy, aiding and abetting, and accessory after the fact, will also be applicable. An offence can be prosecuted by either summary conviction or indictment, with fines of up to $5 million, or incarceration for up to five years, or both. These criminal sanctions are significant, and prove more onerous than those under FARA.

Of course, effective compliance and enforcement depends on more than just sanctions. Also important are the legal ability to investigate potential offences, and sufficient financial and human resources to complete such investigations on a timely basis. FITAA provides a reasonably robust legal framework for investigations, giving the Commissioner the investigatory powers of a superior court, allowing the Commissioner to summon witnesses, and to compel the giving of written or oral evidence, as well as the production of documents or other evidence.

What we do not yet know is what financial and human resources will be available to the Commissioner, and when. The FIT Registry may be the greatest legal framework in the world, but if the Commissioner is starved of investigatory resources, that framework will be practically useless. The “when” here is also important. With a federal election on the horizon, the Federal Government will have to move with alacrity to ensure that the FIT Registry is finalized, up and running, and properly staffed and resourced if it is to be in effect, and effective, before then.

Contact us

We will continue to monitor and report on developments in this area. For more information about foreign influence in Canada and the FIT Registry, reach out to the contacts below or any BLG lawyer from our Public Policy and Government Relations Group.

By

Jeffrey S. Thomas, Dirk Laudan

Expertise

Government & Public Sector, Public Policy & Government Relations, United States, United Kingdom and Europe, Latin America & the Caribbean, China

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blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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