External pressure: New federal foreign influence transparency registry likely to be established soon in Canada

July 31, 2023

On March 10, 2023, Canada's former Minister of Public Safety, Marco Mendicino, announced the launch of public consultations concerning the potential implementation of a new foreign influence transparency registry in Canada. These consultations followed the Feb. 22, 2022, introduction of a private member's bill in the Senate, Bill S-237, entitled the *Foreign Influence Registry and Accountability Act*.

The purpose of these consultations was to seek feedback on how such a registry might be implemented "to bolster [Canada's] defences against malign foreign influence." The consultations closed on May 9, 2023. Following the closure, former Minister Mendicino indicated in a media interview that the government had concluded that some form of registry should be implemented, but that the existing private member's bill, Bill S-237, was not considered to be an appropriate model.

The former minister did not indicate when new legislation establishing the registry would be tabled, but this is expected to occur sometime this fall.

The nature of the problem: Undue influence

As part of the consultations, Public Safety Canada had released a background paper entitled "Enhancing Foreign Influence Transparency: Exploring Measures to Strengthen Canada's Approach" (the Backgrounder). The Backgrounder outlines the primary issue of concern as being one of "malign foreign influence" – that is, a covert undertaking by, or on behalf of, or with the substantial support of a foreign principal, with the objective of exerting influence or affecting outcomes.

It is the covert nature of these influencing activities which is the primary problem. Some foreign governments, or their proxies, can leverage others within Canada to undertake covert foreign influencing activities that are intended to shape government policy, outcomes, or public opinion, without disclosing their ties to the foreign government. The Backgrounder identifies such covert activities as including:

- attempting to influence MPs, senators, public servants, political parties or candidates;
- making public statements favourable to a foreign government, either directly or through media favourable to the foreign government, while obscuring the true origin or motivation;
- producing communications materials for purposes of societal, political or government influence;
- disbursing money or other valuables on behalf of a foreign government for purposes of influence.

Existing applicable measures

One might ask why is a foreign agent registry required when we already have a number of existing measures that have applicability to various aspects of this problem, such as the federal *Lobbying Act*, the *Conflict of Interest Act*, and the *Canada Elections Act*?

The *Lobbying Act* addresses communicating with public office holders for the purpose of influencing certain types of governmental decisions, including through so-called "grass-roots communications."[1] This includes lobbying activities that are being undertaken on behalf of any foreign government. Some foreign influence activities, as discussed in connection with the prospective new transparency registry, are not caught by the existing legislation. For instance, the *Lobbying Act* only covers paid lobbying activities, and may not cover some or all "malign foreign influence" as defined in the Backgrounder.

Some foreign actors seek to influence public officials and their decisions through activities that fall outside the specific scope of the *Lobbying Act* or without their agents disclosing their underlying foreign connections. A foreign agent registry would presumably require registration of anyone attempting to advance purely foreign interests, regardless of whether the specific influencing activities fell within the scope of the *Lobbying Act*.

Existing foreign models

The Backgrounder notes that one of the government's guiding principles in developing Canada's registry will be alignment: any new measure should, to the extent possible, align with Canada's "like-minded partners" so as to present a united front. Currently, only four of our "like-minded partners" have existing measures in place (the United States, Australia, Israel, and the United Kingdom[2]).

Amongst these existing measures, the approach taken in the United States' *Foreign Agents Registration Act* (FARA) is generally seen as the gold standard. FARA was originally enacted in 1938 to reduce the influence of foreign propaganda then circulating within the United States. Until recently, however, FARA was considered by many to be a "backwater of American law," with only seven prosecutions taking place between 1966 and 2016.

Recent amendments and a much more muscular enforcement approach, along with some high-profile convictions, has meant that FARA has now become much more legally relevant. For example, Robert Mueller's investigation into Russian influence in

the 2016 U.S. federal election resulted in several FARA convictions. These investigations also led to further investigations and enforcement proceedings under other U.S. law.

In its basic construct, FARA is straightforward. It does not attempt to prohibit (or permit) any specific acts or behaviour. Rather, its essence is transparency enhancement. Any person meeting the definition of an "agent" of a "foreign principal" must register with the U.S. government using the specified form, thereby creating a public record of these principal-agent relationships and their essential elements. "Agents" must further maintain certain other private records for inspection.

As one would expect, this straightforward construct has become complicated in practice by a number of definitional uncertainties, exemptions and enforcement issues. That said, FARA still presents Canada with the best model and, given its stated guiding principle of alignment, we expect that the federal government's registry will likely follow the FARA model reasonably closely, at least in its basic framework.

Expected basic elements of a foreign influence transparency registry

Based on the FARA framework and information provided in the Backgrounder, we expect that the registry framework will need to address five separate elements:

1. What "arrangements" between an "agent" and a "foreign principal" will be covered? Any type of arrangement between a "foreign principal" and any person in Canada could be subject to registration where the intent is to undertake influencing activities directed at Canadians. Of course, the definitions of "foreign principal" and "agent" will be crucial here, but FARA does provide some useful guidance.

For example, "foreign principal" is likely to cover any entity that is owned, controlled or directed, in law or in practice, by a foreign government. This would likely capture not only foreign state-owned enterprises, but also any individual or group with links to a foreign government. FARA goes further and includes foreign political parties, all foreign entities, and persons outside of the United States who are not U.S. citizens.

An interesting aspect will be foreign state coverage. FARA is general in its application, applying equally to all foreign states without exception. Some have suggested that Canada should exclude some ally countries such as those of the "five eyes" and thus take a "negative list" approach whereby all countries will be covered unless specifically excluded. The private member's bill, Bill S-237, took a "positive listing" approach, under which the registry would only apply to those countries that are specifically listed in a schedule.

The negative and positive listing approaches both appear too impractical and would present clear potential loopholes and enforcement challenges. In light of the FARA example, we would be surprised to see any other than comprehensive, all-inclusive application.

2. What types of activities will be categorized as being registrable? Not all activities will be covered and require registration. Covered activities will need to be defined broadly enough to ensure overall effectiveness and eliminate potential loopholes, but they cannot be defined so broadly as to present unnecessary burdens or valueless enforcement and compliance issues.

For example, simply assisting a foreign investor in establishing a new presence in Canada may be completely benign and need not be covered, whereas assisting a foreign state-owned enterprise new to Canada in shaping public opinion in its favour could clearly have a more sinister purpose.

At the very least, registrable activities are likely to include the following, as these types of activities are at the core of the malign influencing problem: parliamentary lobbying (with obvious overlap with the *Lobbying Act*); more general political lobbying activities directed at various other political actors beyond MPs, senators and federal civil servants, such as federal political parties and candidates; and disbursing money or other valuables intended to influence.

It is an open issue as to whether other types of "communication activities" that are intended to influence government or public opinion should be covered and, if so, to what extent. The coverage of at least some of these "communication activities" appears likely, so as to ensure overall effectiveness.

3. What exemptions from registration will there be? Using FARA for guidance, certain types of exemptions appear reasonable and should be expected, such as the provision of legal advice and representation before Canadian courts and regulatory bodies. An exemption for diplomatic and consul activities undertaken by accredited staff also appears reasonable and likely.

FARA further provides a so-called "commercial exemption" for "private and nonpolitical activities in furtherance of the *bona fide* trade or commerce" of a foreign principal. There is significant uncertainty and debate in the United States regarding the scope and application of this exemption, particularly as it currently applies to foreign state-owned enterprises, so it will be interesting to see if Canada decides to adopt a similar commercial exemption and, if so, its specific scope.

4. What information will have to be disclosed as part of the registration? Bearing in mind that transparency is the *raison d'être* of the registry, it appears essential that the information that must be filed is publicly accessible. This is the case under FARA.[3]

It also appears likely that the information required to be filed will follow the information requirements found in subsection 5(2) of the *Lobbying Act*, which includes the name of the agent, name of the foreign principal and a description of the activities at issue. FARA further requires that the agent disclose the compensation that it is to receive for its efforts; the *Lobbying Act* does not require disclosure of remuneration, so it will be interesting to see which option the federal government chooses here.

FARA contains a further requirement that the agent must file public copies of any "informational materials" the agent disseminates between two or more persons on

behalf of the foreign principal, and these materials must contain a conspicuous statement that they are being distributed by the agent on the foreign principal's behalf. The Backgrounder is generally silent on this issue of potential coverage of such informational materials.

5. What "sticks" will be in place to ensure compliance and provide for enforcement? Given the intentionally covert nature of the problematic activities, without sufficient penalties to act as a deterrent, compliance will plainly be an issue. As the existing legal framework clearly shows, a lack of significant potential penalties would mean that many agents and their foreign principals will simply avoid registration and suffer the consequences, if and when their activities come to light after the influence has been exerted.

FARA generally operates a civil administrative scheme and reserves criminal penalties only for "willful" failures to register and "willfully" making false statements. A person who wilfully violates FARA can face up to five years in prison or a maximum fine of up to US$250,000. As noted, Robert Mueller's investigation into Russian influence in the 2016 U.S. federal election resulted in several criminal convictions. While no doubt flexible enforcement is, in most cases, desirable, with a mix of potential sanctions, it is clear that the ultimate "stick" must still be large enough to sufficiently encourage compliance for the registry to have any material impact. Civil sanctions (such as administrative monetary penalties, or AMPs) may be sufficient to penalize unintentional or minor violations, but the prospect of a significant criminal sanction is likely to prove necessary to ensure adequate compliance.

There is little doubt that a foreign influence transparency registry will have an immediate impact on a wide variety of Canadian businesses and service providers that act for or represent foreign governments and foreign government-owned or -controlled entities operating in Canada. This includes professional services firms such as law, accounting and government relations firms.

Contact us

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

[1] "Grass roots communications" are defined in paragraph 5(2)(j) of the *Lobbying Act* as being "any appeals to members of the public through mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion."

[2] In the United Kingdom, the Foreign Influence Registration Scheme (FIRS) has just been established under the *National Security Act of 2023*, which received Royal Ascent on July 11, 2023. FIRS is a two-tier scheme. Under the "political influence" tier, arrangements to carry out political influencing activities in the United Kingdom at the direction of a foreign power must be registered. Under the "enhanced" tier, the Secretary of State has the authority to require registration of a broader range of activities for specified foreign powers or foreign power-controlled entities, where necessary, to protect the safety of interests of the United Kingdom.

[3] FARA's public database of filings can be accessed and searched here.

By

Dirk Laudan, Jeffrey S. Thomas

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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