

FAR FROM BEING FARA – CANADA’S PROPOSED FOREIGN INFLUENCE TRANSPARENCY REGISTRY LAW LEAVES THE DETAILS FOR ANOTHER DAY

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The Government of Canada recently introduced a proposed *Foreign Influence Transparency and Accountability Act* (“**FITAA**”),^[1] which the House of Commons is working to push through the legislative process quickly. This new law establishes a registry of persons who enter into “arrangements” with a “foreign principal” to carry out certain defined activities in relation to governmental or political processes in Canada. It will be implemented by a new Foreign Influence Transparency Commissioner (the “**Commissioner**”) who would be appointed by, but independent from, the Government.

Canada’s proposed registry does not closely mirror the problematic aspects of the outdated US *Foreign Agents Registry Act* (“**FARA**”). Under Canada’s regime, most foreign private sector companies will not be classified as foreign principals. This will come as a relief to those companies, their Canadian subsidiaries, and the Canadian lobbyists, lawyers, accountants, consultants and other service providers who work on their behalf and will not have to register to continue to do so.

However, for state-owned enterprises, sovereign wealth funds, public pension funds, infrastructure banks and other quasi-commercial entities with foreign government ties whose “agents” will be required to register, FITAA leaves many details to be specified in future regulations or explained in advisory opinions and interpretation bulletins from the Commissioner.

The context

Bill C-70 was tabled in the midst of the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions.^[2] However, the Liberal government first announced that it would begin public consultations on the creation of “foreign agent registry” in early December 2022,^[3] and public consultations were held between March – May 2023.^[4]

There was speculation whether a Canadian registry would be similar to FARA, which captures “foreign agents” of not only of foreign governments and political parties, but any non-U.S. individual, partnership, association,

corporation, or organization, which includes foreign private sector companies. To the frustration of many global companies doing business in the US, FARA is broadly worded, yet vague and ambiguous, with a range of exemptions relating to commerce, registered lobbying, the provision of legal advice and religious, scholastic, academic, or scientific pursuits or the fine arts. FARA has created a compliance minefield that can capture private sector companies and their representatives unexpectedly when business activity becomes intertwined with government and public policy in seemingly minor ways, such as scheduling a meeting between a foreign business and a US government official.^[5] While Canada's regime will capture similar activity as FARA, the narrower definition of "foreign principal" means far fewer foreign private sector entities doing business in Canada will have to comply with FITAA.

Who will this apply to?

The FITAA registry will apply to persons who enter into "arrangements" with a "foreign principal" and undertake to carry out defined activities in relation to governmental or political processes in Canada.

The term, "foreign principal" encapsulates:

- foreign states and their governments, including any political subdivision (state, province, protectorate, territory, etc.) under the jurisdiction of a foreign state, and any political faction or party operating within that state regardless of their official status;
- an entity exercising or purporting to exercise the functions of a government over territory outside Canada regardless of whether Canada recognizes the territory as a state or the authority of the entity over that territory; and
- foreign economic entities, including foreign states or a group of foreign states, or a corporation or other entity controlled, in law or in fact, or substantially owned by a foreign state or group of foreign states.

An "arrangement" means an undertaking under the direction of or in association with a foreign principal in relation to a political or governmental process to:

- communicate with a public office holder (*i.e.* elected officials and their staff, public servants, employees of Crown corporations, government appointees, members of Indigenous governments, etc.);
- communicate or disseminate information related to the political or governmental process; or
- disburse money or items of value, or provide services or the use of a facility,

A political or governmental process is non-exhaustively defined to include any proceeding of a legislative body; the development of a legislative proposal; the development or amendment of any policy or program; decision-making by public office holders or government bodies such as the awarding of a contract; the holding of an election or referendum; and political nominations or the development of an electoral platform by a political

party.

The definition of political or governmental process will look similar to anyone familiar with the federal *Lobbying Act* or provincial lobbying laws, which capture communications with public office holders about much of the same legislative and policy processes and decision-making by elected officials and public servants. Notably, FITAA captures activity relating to elections, referendums, political nominations and election platform development, which Canada's lobbying laws do not cover.

FITAA is intended to apply to activities undertaken in relation to political or governmental processes at all levels of government in Canada, including municipal, provincial and territorial governments as well as Indigenous governments.

The precise scope of the concept of providing services in relation to a political or governmental process is not yet defined. A clear example would be arranging for a bus to transport people to cast a vote at an electoral candidate nomination meeting. "Providing services" could also capture merely providing legal or government relations advisory services to a foreign principle on a public policy topic, or regarding government programs or procurement processes, even where there is no communication with a public office holder or any communication or dissemination of information to any one other than the foreign principal. Guidance in the form of interpretation bulletins or advisory opinions from the Commissioner will hopefully provide clarity on how they will interpret and enforce this aspect of FITAA, but such guidance will not exist anytime soon.

How will the law be administered?

The Commissioner will be appointed for a term of up to seven years. Their mandate will be to administer and enforce the FITAA independently, similar to how the Commissioner of Competition and the Superintendent of Bankruptcy operate.

In terms of enforcement, FITAA establishes the following offences:

- failing to register an arrangement or activity;
- failing to update information on the registry pursuant to the timeframe set out in the regulations;
- knowingly providing false or misleading information to the Commissioner; and
- obstructing the Commissioner in the operation of the registry.

If a person is non-compliant, the Commissioner has the discretion to either issue a notice of violation and levy an Administrative Monetary Penalty ("**AMP**") or refer the matter to the Prosecution Service of Canada as an offence. An offence carries the potential for a fine of up to \$5 million and/or a term of imprisonment up to 5 years.

Upon receiving a notice of violation, a person may make representations justifying their actions to the Commissioner. The Commissioner may then determine whether to proceed with the penalty, reduce the penalty, or issue no penalty.

Violations are made public, including information regarding the nature of the violation, the name of the person who is non-compliant, and the amount of the penalty imposed.

The range of AMPs the Commissioner could impose will be set by regulation, so this is currently unknown. Similarly, the specific disclosure obligations that registrants need to comply with will also be established by regulation and are currently unknown. Based on the wording of FITAA, registrants will need to register within 14 days of merely agreeing to enter into an “arrangement” with a “foreign principal”, regardless of whether any activity under the arrangement has begun.

A further unknown is whether there will be registration exemptions established by regulation for certain classes of persons, such as lawyers providing privileged legal advice. The only exemptions under the FITAA itself are for diplomats or employees of foreign principals who are acting openly in their official capacity as employees. However, Bill C-70 does not exempt foreign principals who are Canadian allies, such as foreign principals from the United States. It remains to be seen if there will be any amendments to FITAA during the legislative process that will expand or narrow its scope, including by adding categories of persons and entities to which FITAA will not apply.

What happens next?

Canadian Parliamentarians are working to enact the law before Parliament’s summer recess in late June, so that the registry and the other aspects of the FITAA can be up and running before the next federal election scheduled to take place no later than October 2025. With such a short timeframe to complete the legislative review process, things will move very quickly and all private sector companies would be well-advised to stay apprised of developments.

McMillan will continue to monitor the progress of the FITAA and, together with its public affairs arm, McMillan Vantage, is here to help companies advocate for their interests. For more information, please contact Timothy Cullen or Stevie O’Brien.

[1] Bill C-70, the [Countering Foreign Interference Act](#), would enact the FITAA.

[2] [Foreign Interference Commission](#).

[3] See [A Foreign Affair at Home Not Abroad - Canada to Consult on the Merits of a Foreign Agent Registry - McMillan LLP](#). The Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions began in September 2023.

[4] See [Canada Will Introduce A Foreign Influence Transparency Registry - Government of Canada Opens Consultations on the Registry Thru May 9, 2023 - McMillan LLP](#)

[5] See, for example, [Covington & Burling LLP, The Foreign Agents Registration Act \(FARA\): A Guide for the Perplexed](#), January 31, 2023.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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