CONGRESSIONAL LOBBYING DISCLOSURE LAWS: MUCH NEEDED REFORMS ON THE HORIZON

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Table of Contents

I. INTRODUCTION 420
II. THE FEDERAL REGULATION OF LOBBYING ACT 422
  A. A Brief Account of Events Leading to Passage of the Act 422
  B. The Language of FRLA as Drafted 423
  C. Judicial Interpretation of FRLA 425
  D. FRLA After Harriss 427
  E. Proposed Changes 428
III. THE FOREIGN AGENTS REGISTRATION ACT ... 428
  A. Background 428
  B. FARA's Definition of an "Agent of a Foreign Principal" 429
  C. Registration and Filing Requirements 431
  D. Exemptions 433
  E. Criticism of FARA 436
  F. Proposed Reforms to Amend FARA 439
IV. ANOTHER ALTERNATIVE FOR REGULATING THE DISCLOSURE OF LOBBYING ACTIVITY—THE LOBBYING DISCLOSURE ACT OF 1992 445
  A. Background 445
  B. Purpose, Clarification of Who Must Register, Key Definitions, and Exceptions 446
  C. Registration Requirements and Supplemental Reports 447
  D. Power Allotted to OGE to Enforce the Act 449
  E. Effects on FRLA and FARA 450
  F. Analysis 451
V. CONCLUSION 455

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I. Introduction

It would be hard to overstate the success of various lobbying entities in affecting the formulation and passage of federal legislation, as well as its subsequent execution. Indeed, the role that lobbyists play in the conduct of government is so profound that the term "fifth branch of government" is often used to describe lobbying interests.[1]

Given the enormous influence wielded by private representatives it is not surprising that Congress has long endeavored to regulate lobbying activity in order to ensure that "special interests" will be unable to exert improper or unwarranted sway over lawmakers. Lobbying disclosure laws were devised and enacted with this need very much in mind.

Ideally these laws shoulder lobbying activity into the public view by placing essential information about lobbying in the caldron of popular discourse. By doing this, legislators hoped that the public, with the assistance of the press, would help mediate the relationship between interest groups and the government, especially the Congress, through the powerful instrumentality of public opinion.

The effects of this mediative process were to be at least threefold: first, special interests would never gain political ascendancy over more meritorious, commonly held concerns; second, ethical behavior would be more readily embraced by lawmakers and other government officials now that it would be harder to participate in once clandestine forms of political self-dealing; and third, the public would therefore be justified in placing greater confidence in legislative governance.

For a number of reasons, however, these ideals have never been realized through the use of disclosure laws. Indeed, these enactments have been largely irrelevant and ineffectual. Partly because of this, lobbying remains freighted with an abiding "demonology" that depicts private representatives as "greedy and venal," people whose escapades are reflective of "the dark side of

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[1] JOHN L. ZORACK, THE LOBBYING HANDBOOK 24 (1990). Lobbying is authorized by the First Amendment to the United States Constitution which affirms "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

democracy."[2]

Government officials, particularly legislators, have had to endure related suspicions. Many citizens question the integrity of senators, representatives and their staffs.[3] Others, no doubt with significant overlap, wonder whether confidence in the legislature as a "representative" branch is warranted at all.[4]

Unfortunately, these negative perceptions and stereotypes are not without foundation. Numerous scandals linked to lobbying have rocked the federal government over the years. The recent upheaval on Capitol Hill related to the Savings & Loan Crisis, Koreagate, events at HUD, and the resignation of the former Speaker of the House of Representatives, Jim Wright (D-Tex.), are only a few examples.[5] Additional revelations regarding surreptitious lobbying activities on behalf of competitive foreign interests such as Japanese corporations or repressive regimes in the Third World have only intensified already negative perceptions about lobbyists and those whom they seek to influence.[6]

At least to some degree, this appalling state of affairs is the product of the obscurity which continues to surround lobbying activity. After all, the unethical conduct that fueled these unfortunate events was only able to flourish in an environment shrouded by a level of secrecy that appeared certain to shield the miscreant activity from discovery. Had there been more disclo-

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2 SUBCOMM. INTERGOV'T RELATIONS, COMM. GOV'T AFFAIRS, U.S. SENATE, 99TH CONG., 2D SESS., CONGRESS AND PRESSURE GROUPS: LOBBYING IN A MODERN DEMOCRACY 1 (Comm. Print 1986) [hereinafter PRESSURE GROUPS].

3 *See, e.g.*, Michael Waldman, *Quid Pro Whoa*, NEW REPUBLIC, Mar. 19, 1990, at 22.

4 *See* C. Boyden Gray, *Special Interests, Regulation, and the Separation of Powers, in* THE FETTERED PRESIDENCY 211 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Robert F. Nagel & Jack H. Nagel, *Theory of Choice*, NEW REPUBLIC, July 23, 1990, at 15.

5 All of these events involved allegations that lawmakers were acting unethically by advancing the agendas of special interest groups that had essentially paid for the representation that they received on Capitol Hill. *See* Helen Dewar & Charles R. Babcock, *Senators Heatedly Defend Their Actions*, WASH. POST, Nov. 17, 1990, at A1 (S & L Crisis); Bill McAllister, *New Counsel Is Named In Inquiry on D'Amato*, WASH. POST, Nov. 28, 1989, at A6 (HUD scandal); T. R. Reid, *Korea Led Scheme, Probers Assert*, WASH. POST, Oct. 22, 1977, at A1 (Koreagate); Robin Toner, *Wright Confirms Plan to Resign From House*, N.Y. TIMES, June 27, 1989, at A14 (Jim Wright's resignation).

6 *See, e.g.*, John B. Judis, *The Japanese Megaphone*, NEW REPUBLIC, Jan. 22, 1990; Waldman, *supra* note 3, at 22.

sure at the outset about what groups were trying to influence whom and by what means, scandal might have been averted because the parties may have been less confident that their actions would remain hidden.

This article responds to the present situation by delineating the two most important laws that currently require private representatives to disclose information about their activities,[7] by exploring why they have been ineffective in helping regulate lobbying before the Congress; and by considering feasible modifications to the existing regimen. Part One will focus on the Federal Regulation of Lobbying Act of 1946 (FRLA)[8]—the principal disclosure law affecting lobbying on behalf of domestic interests—and the issues and problems that it raises. Part Two will present a study of the Foreign Agents Registration Act (FARA)[9]—the primary enactment regulating lobbying on behalf of foreign concerns—and its associated questions. This section will also entertain a lengthy deliberation on the many recommendations that have been generated to alter and improve FARA. Part Three will analyze a bill that would create an entirely new regulatory framework for governing lobbying on behalf of both domestic and foreign interests rather than simply amending the current laws.

II. *The Federal Regulation of Lobbying Act*

A. *A Brief Account of Events Leading to Passage of the Act*

It was only at the conclusion of the Second World War that Congress became acutely concerned about pressure group influence on the legislative process.[10] Hearings were held and evidence was gathered that pointed to the need to dismantle the

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[7] Another enactment which may affect disclosure requirements for individuals lobbying the Congress is the Byrd Amendment, 31 U.S.C.A. § 1352 (Supp. 1991). This law requires that certain disclosures be made about lobbying activity when an entity receives over a specified amount of money (in most cases over $100,000) in federal grants, contracts, loans, or loan guarantees. Because, however, this law is far more important to lobbyists' conduct before the executive branch, a full study of the law will not be presented here. *See* Carol Matlack, *Contractors Caught in the Crossfire*, NAT'L J., May 12, 1990, at 1140.

[8] Federal Regulation of Lobbying Act of 1946, 2 U.S.C. §§ 261-270 (1988).

[9] Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621 (1988).

[10] PRESSURE GROUPS, *supra* note 2, at 41.

layers of secrecy surrounding lobbying activity.[11] At the same time statements by major public officials critical of special interests and reports by influential journalists lent added momentum to mushrooming concerns.[12] Speaker of the House Sam Rayburn (D-Tex.), for example, complained that Washington, D.C. had become a city "seething with lobbyists," and President Truman made public his fear that some lobbies were attempting to undermine benefits for returning war veterans.[13] Meanwhile, books like *The Pressure Boys* exposed the less noble side of lobbying before a large public audience.[14]

In response to these pressures, Congress passed the Federal Regulation of Lobbying Act in 1946. Regrettably, however, this "poorly drafted measure" was only "hastily considered" by either house[15] and so, as we shall see, the Act's purpose—to compel disclosure by lobbyists about their conduct—was never realized.

B. *The Language of FRLA as Drafted*

As drafted, FRLA required private representatives who fell within the statute's definition of a lobbyist to disclose detailed accounts of their activities. The Act defined a lobbyist as:

> any person . . . who by himself [or herself], or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
> (a) The passage or defeat of any legislation by the Congress of the United States.
> (b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.[16]

If the individual met this definition he or she was required to register with the Clerk of the House of Representatives and the Secretary of the Senate.[17] The registration statement was to contain

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[11] *Id.* at 41-42.
[12] *Id.* at 42.
[13] *Id.*
[14] *Id.*; KENNETH G. CRAWFORD, THE PRESSURE BOYS (1939).
[15] PRESSURE GROUPS, *supra* note 2, at 41, 43.
[16] 2 U.S.C. § 266 (1988).
[17] 2 U.S.C. § 267 (1988).

the following information:

> his [or her] name and business address, the name and address of the person by whom he [or she] is employed, and in whose interest he [or she] appears or works, the duration of such employment, how much he [or she] is paid and is to receive, by whom he [or she] is paid or is to be paid, how much he [or she] is to be paid for expenses, and what expenses are to be included.[18]

In addition, the lobbyist must have filed quarterly reports with the Clerk and Secretary that contained:

> a detailed report under oath of all money received and expended by [the lobbyist] during the preceding calendar quarter in carrying on his [or her] work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he [or she] has caused to be published any articles or editorials; and the proposed legislation he [or she] is employed to support or oppose.[19]

Another section of FRLA created an even more detailed requirement for reporting expenditures and contributions. This declaration, to be submitted to the Clerk of the House only, was to contain:

> an identification of each person making a contribution to the lobbyist or his [or her] organization of $500 or more; [t]he total sum of all contributions made for the year to date; an identification of each person who had been the subject of an expenditure of ten dollars or more, and the amount, date and purpose of the expenditure; [and] the total sum of expenditures made by or on behalf of any person during the calendar year.[20]

Exemptions are provided for those who "merely appear[] before a committee of the Congress" to support or oppose a particular piece of legislation; for public officials acting within their official capacities; and for newspapers or periodicals that publish articles urging the passage or defeat of legislation.[21]

Finally, a violation of the statute was punishable by a misde-

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18 *Id.*

19 *Id.*

20 PRESSURE GROUPS, *supra* note 2, at 43-44; 2 U.S.C. § 264 (1988).

21 2 U.S.C. § 267(a) (1988).

meanor conviction carrying a possible penalty of "not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment."[22] Following conviction, a lobbyist was prohibited "for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation . . . ."[23] Violation of this restriction was classified as a felony.[24]

C. *Judicial Interpretation of FRLA*

Shortly after FRLA's enactment, the government brought suit pursuant to the statute against an agricultural lobby and two individuals, claiming that the defendants had neglected to properly report lobbying activities. The suit was dismissed by the district court on the grounds that the Act was unconstitutional.[25] The case, *United States v. Harriss*,[26] was brought before the United States Supreme Court on direct appeal.

The appellees argued that material sections of the Act were too vague and indefinite to meet the requirements of due process and that the Act violated First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the government.[27]

In its decision, the Court first grappled with the appellees' vagueness challenge. The Court recognized that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[28] Interestingly, the majority did not find FRLA, which is patently ambiguous and difficult to comprehend, unconstitutionally vague. Rather the Court, in essence, redrafted the law to bring it within permissible bounds. In doing so, however, the Justices signifi-

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[22] 2 U.S.C. § 269(a) (1988).

[23] *Id.* § 269(b).

[24] *Id.* A fine may be imposed of no more than $10,000, or a prison term for not more than five years, or both. *Id.*

[25] United States v. Harriss, 109 F. Supp. 641 (D.D.C. 1953).

[26] 347 U.S. 612 (1954).

[27] *Id.* at 617.

[28] *Id.*

cantly narrowed the Act's coverage. Writing for the majority, Chief Justice Warren stated that the language of the statute "should be construed to refer only to 'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation."[29] The Chief Justice went on to posit that under section 307's definition of a lobbyist—(§ 266 codified as amended)—three prerequisites must be met:

> (1) the 'person' must have solicited, collected, or received contributions; (2) one of the main purposes of such 'person,' or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; [and] (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.[30]

The Chief Justice maintained that the statute also applied to those persons covered by section 308 (§ 267 codified as amended) and who "in addition, engage themselves for pay or for any other valuable consideration for the purpose of attempting to influence legislation through direct communication with Congress."[31]

The Court then considered the question of whether FRLA violated the prohibition in the First Amendment of the United States Constitution that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[32] In its consideration the Court noted the following:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.[33]

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29 *Id.* at 620.
30 *Id.* at 623.
31 United States v. Harriss, 347 U.S. 612, 623-24 (1954).
32 U.S. CONST. amend. I.
33 *Harriss*, 347 U.S. at 625 (footnote omitted).

The Court found this a "vital national interest" which outweighed the "remote" restraints placed upon First Amendment rights.[34]

D. *FRLA After Harriss*

One legislator described the aftereffects of the *Harriss* decision in the ensuing terms:

> The Act [now] covers only efforts to influence the passage or defeat of legislation in Congress—not other activities of Members and staff.
>
> The Act [now] covers only efforts to lobby Members of Congress directly, not efforts to lobby congressional staff.
>
> The Act [now] covers only persons whose 'principal purpose' is lobbying—language that has been interpreted by some lobbyists to mean that the Act applies only to people who spend a majority of their time lobbying.
>
> Taken together, these gaps in the coverage of the Act could mean that only a lobbyist who spends a majority of his or her working time in direct contact with Members of Congress is actually required to register. There may not be lobbyists who fit all of these requirements.[35]

Little wonder then that this enactment has been described by lawmakers as a "phantom law . . . [which] has the appearance of requiring meaningful disclosure, but in reality there is nothing there."[36] Another interested party, a leading lobbyist, characterized the Act as "almost meaningless."[37] These criticisms are confirmed by statistics which show that in recent years only "6,000 lobbyists—out of a total of 60,000 to 80,000 who are working in the Washington area—registered with Congress."[38] And many of those who did

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[34] *Id.* at 626.

[35] *The Federal Lobbying Disclosure Laws: Hearings Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Gov'tal Aff.*, 102d Cong., 1st Sess. 55 (1991) (statement of Sen. Carl M. Levin (D-Mich.), Chairman) [hereinafter *Hearings*]; *see also* Jeffrey H. Birnbaum, *Overhaul of Lobbying Laws Unlikely to Succeed Thanks to Opposition of Lobbyists Themselves*, WALL ST. J., May 30, 1991, at A16 (Senate staffers "say that under a strict reading of the rulings, the only people who have to register . . . are those who spend a majority of their time personally asking lawmakers to support or oppose specific bills").

[36] Gary Lee, *Lobbyists Acknowledge Loopholes*, WASH. POST, July 17, 1991, at A21 (quoting Sen. Levin).

[37] *Id.* at A21.

[38] *Id.*

so probably complied only because registration "carrie[d] a cachet with [some] clients."[39]

Another problem with the law as interpreted is that for those who choose to register it requires "not enough disclosure of the right kinds of information."[40] For example, because lobbying has been interpreted to mean only direct contacts with Members of Congress, the registrant need only file expenses "directly associated with such meetings."[41] Accordingly, "only a fraction of the amounts [lobbyists] actually expend in their work" need be disclosed.[42] As a result many lobbying firms report suspiciously low costs.[43] In fact, one major law firm known for lobbying "reported no lobbying expenditures at all for any client in 1989."[44]

Finally, current requirements allow lobbyists "to duck important questions such as who they approached [in Congress] and when."[45] This information is consequential because it would allow the public to gauge the influence of various interests on particular legislators.

E. *Proposed Changes*

Currently there is only one bill which would impact FRLA. The bill, introduced by Senator Carl Levin (D-Mich.), is called the Lobbying Disclosure Act of 1992 and would repeal FRLA in its entirety.[46] This bill will be discussed in detail below.

III. The Foreign Agents Registration Act

A. *Background*

The Foreign Agents Registration Act[47] was promulgated in 1938 "to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities

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[39] Birnbaum, *supra* note 35, at A16.
[40] *Hearings*, *supra* note 35, at 55.
[41] *Id.* at 56.
[42] Birnbaum, *supra* note 35, at A16.
[43] *Hearings*, *supra* note 35, at 56.
[44] *Id.*
[45] Birnbaum, *supra* note 35, at A16.
[46] S. 2279, 102d Cong., 2d Sess., § 12 (1992), 138 CONG. REC. S2547, S2550 (daily ed. Feb. 27, 1992).
[47] Ch. 327, 52 Stat. 631 (1938) (prior to 1942 amendment).

for or on behalf of foreign governments, foreign political parties, and other foreign principals . . . ."[48] More concretely, FARA was formulated to help monitor "Nazi and Communist subversive activity in the 1930s and 1940s."[49]

By the mid-1960s, however, circumstances had changed dramatically enough to warrant an expansion of FARA to help meet a newly perceived threat: "foreign agent activity which attempted to influence American economic policies."[50] This new mode of foreign agent activity was, and continues to be, carried on by lobbyists "seeking . . . to influence American public opinion and government actions along lines that are in some way beneficial to the economic and political interest[s] of [their] foreign principal[s]."[51] Examples of foreign interests that currently rely heavily on lobbyists to represent their concerns before the U.S. government include multifarious Japanese corporations,[52] and various developing nations seeking economic or military assistance of some form.[53]

B. *FARA's Definition of an "Agent of a Foreign Principal"*

FARA compels an "agent of a foreign principal" to register with the Department of Justice, the administrator of the Act, and file detailed reports about his or her activities on behalf of a foreign concern unless exempted by the statute.

The Act defines a "foreign principal" as:

> (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of

48 22 U.S.C. § 611 (1988), *as amended by* Act of Apr. 29, 1942, 56 Stat. 248-49 (1942).

49 Phillip J. Perry, Note, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L L.J. 133 (1990) [hereinafter *Proposed Reforms*] (citing JOSEPH E. PATTISON & JOHN L. TAYLOR, THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE 18-19 (1981) [hereinafter PATTISON & TAYLOR]).

50 *Proposed Reforms*, *supra* note 49, at 133-34.

51 Randall H. Johnson, Note, *The Foreign Agents Registration Act: When is Registration Required?*, 34 S.C. L. REV. 687, 687-88 (1983) (author concludes that FARA has now become a trap for the unwary trying to maintain competitive edges).

52 *See, e.g.*, PAT CHOATE, AGENTS OF INFLUENCE (1990); Judis, *supra* note 6, at 24; Gary Lee, *Lobbyists' Clout Helped Deliver MCA to Japanese*, WASH. POST, Dec. 29, 1990, at A1.

53 *See, e.g.*, Christopher Madison, *Diving for Dollars*, NAT'L J., Apr. 7, 1990, at 832.

> and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.[54]

This expansive definition of "foreign principal" covers "nearly all foreign political organizations as well as a wide range of international companies conducting business within the United States."[55]

The definition has been even further expanded by the Department of Justice, which has stated in its regulations that "[t]he term 'foreign principal' includes a person any of whose activities are direct[ly] or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal . . . ."[56] Commentators have suggested that this gloss was added to make it even more difficult for agents to falsely claim "they represent only domestic entities when they are in fact controlled by foreign interests."[57]

To fall within the statutory definition of an "agent," the lobbyist has to meet two criteria. First, he or she must have a "specified agency relationship with a foreign principal."[58] Generally, "agent" is given the traditional common law meaning, under the statutory scheme, as one who acts at the order, request, direction, or control of another.[59] Second, the individual must engage in specified activities on behalf of the foreign entity. Such conduct would include en-

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54 22 U.S.C. § 611(b) (1988).

55 *Proposed Reforms*, *supra* note 49, at 136.

56 28 C.F.R. § 5.100(a)(9) (1990); *Proposed Reforms*, *supra* note 49, at 136.

57 *Proposed Reforms*, *supra* note 49, at 136 (citing PATTISON & TAYLOR, *supra* note 49, at 47, 49 (foreign principal might contract with a domestic agent through a domestic shell entity or interpose a separate foreign private group as principal, with its agent registering representation under the separate group)).

58 *Proposed Reforms*, *supra* note 49, at 137.

59 22 U.S.C. §§ 611(c)(1) and (2) also specify in full that "agent of a foreign principal" means:

> (1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person —

gaging in " 'political activities;'[60] acting as a 'public relations counsel,' publicity agent or political consultant; collecting or disbursing contributions for the foreign principal; and representing the interests of the foreign principal 'before any agency or official of the Government of the United States.' "[61] Most lobbying activities would clearly fall within these categories.

C. *Registration and Filing Requirements*

Those who fall within the ambit of FARA must register with the Attorney General within ten days of agreeing to become an agent of a foreign principal.[62] The registration statement must include the following: (1) the registrant's name, and all business and residence addresses; (2) the status of the registrant, whether an individual, partnership, corporation, etc., and in the case of a

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(i) engages within the United States in political activities for or in the interests of such foreign principal;
(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

See also Jack Maskell, *Legal and Congressional Ethics Standards of Relevance to Those Who Lobby Congress*, CONG. RES. SERVICE, Feb. 9, 1991, at 3 [hereinafter *Standards*].

60 The term "political activities" is defined as "the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States." 22 U.S.C. § 611(o) (1988). "Political propaganda" is in turn described as:

> any oral, visual, graphic, written, pictorial, or other communication or expression . . . which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests . . . of a government of a foreign country . . . or with reference to the foreign policies of the United States.

22 U.S.C. § 611(j) (1988).

61 *Standards*, *supra* note 59, at 3; *see also* 22 U.S.C. §§ 611(c)(1)(i)-(iv) (1988).

62 22 U.S.C. § 612(a) (1988).

business organization, lists of partners, directors or officers and copies of foundational documents such as articles of incorporation and, finally, a statement of the ownership and control of the business entity must be included; (3) a detailed statement "of the nature of the registrant's business" which includes employee lists, a listing of all other foreign principals for which the party may be acting, with specified information about each one; (4) copies of agreements or terms and conditions of any oral agreement between the parties as well as a statement about what exactly the agent will be doing for the principal; (5) the "nature and amount" of any income or thing of value received from the foreign principal; (6) a comprehensive statement "of every activity which the registrant is performing . . . or has agreed to perform for himself or any other person other than a foreign principal and which requires his registration hereunder, including a detailed statement of any such activity which is a political activity;" (7) detailed statements about parties "other than a foreign principal for whom the registrant is acting . . . under such circumstances as require his registration . . . ;" (8) a complete statement "of the money and other things of value spent or disposed of by the registrant during the preceding sixty days in furtherance of or in connection with activities which require his registration;" (9) copies and statements about the nature of agreements or contracts between the registrant and other parties which require registration under the Act; (10) any other information which the Attorney General may require; and (11) further statements and documents which are necessary to ensure that the registration statement is not misleading.[63]

In addition, the agent must file a supplemental statement every six months containing whatever information "the Attorney General, having due regard for the national security and the public interest, may deem necessary" to guarantee the continuing accuracy of the original filing.[64] However, certain changes in the nature of the relationship between the agent and the foreign entity may necessitate some form of notification to the Attorney

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[63] 22 U.S.C. §§ 612(a)(1)-(11); *see also* 28 C.F.R. § 5.201 (1991) (requires exhibits to be filed for foreign principals).

[64] 22 U.S.C. § 612(b) (1988); *see also* 28 C.F.R. § 5.203 (1991) (requires that supplemental statements be filed on a specified form that demands particular, updated information).

General within ten or thirty days after the change occurs.[65]

The Act also compels an agent to maintain "books of account and other records available for inspection by the officials responsible for enforcing the Act;[66] provides for public examination of all agents' registration statements, reports, and political propaganda filed with the Justice Department;"[67] and "has specific filing and labeling requirements for political propaganda disseminated by registered agents[68] . . . ."[69]

Finally, FARA provides a schedule of penalties for noncompliance. Filing a deficient registration statement, for example, could result in fines of up to "$5,000 or imprisonment for not more than six months, or both."[70] More serious infringements are punishable by fines up to $10,000 and/or incarceration "for not more than five years."[71]

D. *Exemptions*

FARA provides exemptions for certain individuals and kinds of activity. These exemptions include those for diplomatic and consular officers; officials of foreign governments; staff members of diplomatic or consular officers; private and nonpolitical activities; solicitors of funds for medical or humanitarian aid; religious,

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65 22 U.S.C. § 612(b) (1988). Changes requiring notification within 10 days concern that information contained in clauses (3), (4), (6), and (9) of the registration filing requirements. *See supra* note 62 and accompanying text. However, upon severing his or her relationship with the foreign principal, the registrant has 30 days in which to file a final statement with the Attorney General. 28 C.F.R. § 5.205 (1991).

66 22 U.S.C. § 615 (1988). This section further requires an agent to preserve:

> (1) all communications regarding the agent's activities on behalf of his foreign principal, (2) all communications concerning his or the foreign principal's political activities, (3) all written contracts with the principal, (4) records containing the names and addresses of persons to whom the agent sent political propaganda, and (5) all financial records relevant to his services for the principal.

Proposed Reforms, *supra* note 49, at 142-43 (citing 28 C.F.R. §§ 5.500(a)(1)-(5) (1988)); note further that this information must be kept and preserved "for a period of 3 years following the termination" of the agent's registration. 28 C.F.R. § 5.500(c) (1991).

67 28 C.F.R. § 5.600 (1991).

68 22 U.S.C. § 614 (1988).

69 Richard C. Sachs, *Foreign Interest Lobbying*, CONG. RES. SERVICE, Feb. 1, 1993, at 3-4.

70 22 U.S.C. § 618(a)(2) (1988).

71 *Id.*

scholastic, or scientific pursuits; defense of a foreign government vital to the defense of the United States; and in some circumstances, for those qualified to practice law.[72]

Two exemptions in particular have generated heated discussion. These are the private, nonpolitical activities or "commercial" exemption and the attorney exemption.

The relevant section of the commercial exemption applies "to agents making only routine contacts with government officials on matters not concerning policy formulation."[73] It excuses: "Any person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominately a foreign interest."[74]

The exemption contained in the first clause "rests on definitions of 'private,' 'nonpolitical,' and 'bona fide trade or commerce.' "[75] The Justice Department has stated that actions are to be "considered 'private,' despite foreign government ownership of the principal, as long as the activities do not directly promote the foreign government's public or political interests."[76] In determining whether or not the activity is indeed "private," the Justice Department "considers, among other items, the terms of the contractual relations between the agent and the principal and the significance of the trade to the foreign country."[77] By "nonpolitical" the Act refers to activities that are not "intended to influence government policy."[78] Finally, " '[b]ona fide trade or commerce' allows participation in all legitimate commercial activ-

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72 22 U.S.C. § 613(a)-(g) (1988). The Attorney General may also exempt an agent from the Act's requirements. *See Proposed Reforms, supra* note 49, at 139 (citing 22 U.S.C. § 612(f) (1988)).

73 *Proposed Reforms, supra* note 49, at 141.

74 22 U.S.C. § 613(d) (1988). This section also contains a third clause, immaterial to our inquiries, that exempts any person engaging "in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering, if such solicitation or collection of funds and contributions is in accordance with and subject to the provisions of subchapter II of chapter 9 of this title, and such rules and regulations as may be prescribed thereunder." *Id.*

75 *Proposed Reforms, supra* note 49, at 140.

76 *Id.* (citing 28 C.F.R. § 5.304(b) (1988)).

77 *Proposed Reforms, supra* note 49, at 140 (citing S. REP. No. 143, 89th Cong., 1st Sess. 12 (1965); H.R. REP. No. 1470, 89th Cong., 2d Sess. 10 (1966)).

78 *Proposed Reforms, supra* note 49, at 140 (citing PATTISON & TAYLOR, *supra* note 49, at 84).

ities including 'the exchange, transfer, purchase, or sale of commodities, services, or property of any kind.' "[79]

The second clause exempts conduct "not serving predominately a foreign interest." In practical terms this clause was intended to exclude from coverage certain cases where "American companies [and] their foreign subsidiaries [or] foreign companies with their American subsidiaries" are involved.[80] When a United States corporation with a foreign affiliate employs an agent, for example, § 611(q) "specifies that registration requirements will not apply if the foreign affiliate is independent of foreign political control, if the entity discloses its foreign affiliation to the U.S. governmental officer or agency involved, and if the agent is substantially engaged in furtherance of the interests of the [American Parent]."[81] Similarly, if an American subsidiary of a foreign parent is engaged in "substantial commercial, industrial or financial operations" in the United States, neither it nor its agent need register so long as § 611(q) prerequisites are met.[82]

Understanding when the second clause is apposite may at first appear to be a simple task, but as will be made clear below, comprehending its more nuanced applications is far more difficult. For the clause is ambiguous, difficult to apply, and susceptible to various interpretations.[83]

The attorney exemption excludes from registration requirements:

> Any person qualified to practice law, insofar as he [or she] engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: *Provided*, That for the purpose of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal.[84]

If and when "an attorney's activities go beyond sanctioned pro-

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[79] *Proposed Reforms*, *supra* note 49, at 140 (citing 28 C.F.R. § 5.304(a) (1988)).

[80] Johnson, *supra* note 51, at 699-700.

[81] *Proposed Reforms*, *supra* note 49, at 141 (footnote omitted).

[82] 22 U.S.C § 611(q) (1988).

[83] *Proposed Reforms*, *supra* note 49, at 140-41 (citing PATTISON & TAYLOR, *supra* note 49, at 85-86).

[84] 22 U.S.C. § 613(g) (1988) (emphasis omitted).

ceedings, the exempt status ceases."[85] At that point, "previously or otherwise exempt activities will then be subject to the registration and disclosure provisions of FARA."[86] Moreover, at that time records related to both exempt and nonexempt activities "must be maintained and all are subject to inspection."[87]

E. *Criticism of FARA*

In recent years FARA has been the subject of increasing criticism mainly because of its ineffectiveness and sporadic enforcement. Current figures indicate that "[w]hile thousands are . . . actively involved in lobbying on behalf of foreign clients, only 775 are registered under FARA."[88] Because the law lacks "clear guidance as to who is required to register,"[89] many lobbyists interpret it narrowly and conclude that they need not comply.[90] Since the regulation is "self-policing" in the sense that "[a]gents who determine they fall within an exception to the Act need not register . . . [and] . . . have no affirmative obligation to apply for an exemption,"[91] it is hardly surprising that the Act is so often circumvented.

Peter Levine, Counsel to the Senate Subcommittee on Oversight of Government Management, recently offered an example of this phenomenon. In January of 1989, the United States Customs Service "announced that under a new tariff classification system adopted by Congress, virtually all sport utility vehicles would be classified as trucks subject to [a] higher tariff."[92] Numerous lobbyists representing foreign auto manufacturers and their domestic subsidiaries joined forces and convinced the gov-

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85 Johnson, *supra* note 51, at 701.

86 *Id.* at 702.

87 *Id.* (citing Attorney General v. Covington & Burling, 411 F. Supp. 371 (D.D.C. 1976), *inj. denied*, 430 F. Supp. 1117 (D.D.C. 1977)) (attorney-client privilege would be granted for communications from client's agents only to extent that disclosure tended to reveal confidence from actual client to one of them or to attorney). The issue of attorney-client privilege is obviously a factor in this scenario. *See* J.P. Stern, Note, *Foreign Agents Registration Act — Attorney-Client Privilege Exception to Disclosure Requirements*, 19 HARV. INT'L L.J. 329, 335-39 (1978).

88 Gary Lee, *Lobbying Loopholes for Foreign Agents*, WASH. POST, June 21, 1991, at A15.

89 *Id.* (statement of Sen. Levin); *see also Hearings*, *supra* note 35, at 2.

90 *Id.*

91 *Proposed Reforms*, *supra* note 49, at 142.

92 *Hearings*, *supra* note 35, at 10.

ernment to reverse the new rule. "[V]irtually none of the lobbying activity in this case was disclosed under the Foreign Agents Registration Act."[93] When queried, almost all of the lobbyists claimed that they were not obligated to comply because of the commercial activity or attorney exemptions.[94] While it is harder to see how the attorney exemption would apply in this case, a good argument can be made that §§ 611(q) and 613(d) of the Act exempt this activity from FARA's ambit.[95] Yet the Justice Department has since claimed that neither exemption is applicable to this case. The commercial activity exemption "does not apply [here] where the local subsidiary is concerned with U.S. legislation enlarging the U.S. market for goods produced in the country where the foreign parent is located."[96] Moreover, the attorney exemption does not apply either since these activities need not have been performed by an attorney and where, as here, the representations were not at proceedings established by statute or regulation.[97]

Given the honest disagreements about interpretations of FARA it is understandable that the Justice Department has been reluctant to enforce the Act. This reluctance continues to irk other government entities such as the Government Accounting Office which has issued a number of reports critical of the Department's oversight of FARA.[98]

Even if the Justice Department, however, desired to be more

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93 *Id.* at 11.

94 *Id.*

95 A reasonable construction of § 611(q) could easily lead one to assume that the exemption applies in this case. The lobbying activities on behalf of the American subsidiaries and the foreign parent were not "directly or indirectly supervised" by a foreign government, the lobbyists no doubt disclosed who they were representing - car dealerships which sell Japanese made automobiles and are subsidiaries of Japanese companies - and the activities were "substantially in furtherance of the bona fide . . . financial interests of" the domestic subsidiaries. *See* 22 U.S.C. §§ 611(q), 613(d) (1988). The lawyer's exemption might also be construed in such a way that it could apply here. One could argue that the lobbyist/lawyers engaged in "the legal representation" of their clients before an "agency of the Government of the United States" during the course of "informal" yet "established agency proceedings." *See* 22 U.S.C. § 613(g) (1988).

96 *Hearings, supra* note 35, at 11.

97 *Id.*

98 *See, e.g.*, GEN. ACCT. OFF., FOREIGN AGENT REGISTRATION - JUSTICE NEEDS TO IMPROVE PROGRAM ADMINISTRATION (July 1990), *reprinted in Hearings, supra* note 35, at 464.

zealous in its enforcement of the Act it would still be at a disadvantage since it has little power to do so.[99] The Department's influence is limited "to powers of inspection [as to the documents of those already registered] and injunction."[100] For the time being, it has "no authority to summon individuals to appear, testify, or produce records."[101] Further, the Act's criminal provisions for noncompliance are not an effective threat. Such a charge is hard to substantiate because intent to violate the Act must be established, so administrators rely on civil/injunctive remedies instead.[102]

Others inveigh against FARA because its public disclosure requirements inhibit "full and honest compliance."[103] They contend that public disclosure scares away foreign clients who want their activities to remain out of the public domain. This creates a very real dilemma for the lobbyist—to risk losing the client or avoid complying with the Act.[104]

Still others complain that FARA is antiquated since it is often impossible in this day and age to disentangle domestic interests from foreign concerns; they posit that it is wrong to assume that foreign interests are necessarily "pernicious" or that disclosure will protect the country against these forces even if they are at cross-purposes with American concerns.[105]

Finally, some argue that the Act's ineffectiveness can be traced in part to the fact that there is a "stigma associated with registration as a 'foreign agent'."[106] Fearing a xenophobic backlash, lobbyists would rather risk a light penalty for noncompliance than hazard the chance of being pilloried in either the press or other public forums.[107]

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99 Lee, *supra* note 88, at A15.

100 *Proposed Reforms*, *supra* note 49, at 143; *see also* 22 U.S.C. § 618(f) (1988).

101 *Proposed Reforms*, *supra* note 49, at 143.

102 *Id.* at 143-44 (citing GEN. ACCT. OFF., REPORT ON IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF FOREIGN AGENT REGISTRATION (1980), *reprinted in* 134 CONG. REC. 28870 (1988)).

103 *Hearings*, *supra* note 35, at 23.

104 *Id.* at 25.

105 *Id.* at 20.

106 *Proposed Reforms*, *supra* note 49, at 147.

107 *Id.* at 147-48.

F. *Proposed Reforms to Amend FARA*

A number of legislators have authored bills which would amend FARA in significant ways. These changes, if enacted, would: (1) alter the language of the Act in the hope of lessening the stigma of registering as a foreign agent; (2) further limit the attorney and commercial exemptions; (3) require a party to notify the Justice Department about reliance on any exemption as a basis for nonregistration; (4) provide the Justice Department with additional enforcement powers; (5) modify filing requirements; (6) more carefully define at what point a domestic entity may be considered under the control of a foreign principal; and (7) mandate the use of strict civil penalties in the case of noncompliance.

In attempting to remove the stigma, two bills, one issued by Representative Barney Frank (D-Mass.)[108] and the other by Representative Dan Glickman (D-Kan.)[109] would change the name of FARA to "The Foreign Interests Representation Act" and would strike the term "agent of a foreign principal" and replace it with "representative of a foreign principal."[110] Both bills would also strike the word "propaganda" and supplant it with one of two descriptions: "advocacy or informational materials"[111] or "promotional or informational materials."[112]

While this approach might appear to be a useful step in ending the negative connotations associated with the Act, it is difficult to believe that it would make registration more attractive. Whether labeled "agents" or "representatives" of a foreign principal and whether they distribute "propaganda" or "promotional materials," lobbyists will always arouse public ire and garner negative press for representing alien economic and political interests. This is particularly true during periods in history when discourse about foreign competition has become strident and polemicized. For this reason, lobbyists will continue to avoid compliance regardless of how their activities are termed.

Some lawmakers want to dramatically limit the attorney exemption. The Frank and Glickman bills, and another bill intro-

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108 H.R. 3597, 102d Cong., 1st Sess. (1991).

109 H.R. 1725, 102d Cong., 1st Sess. (1991).

110 H.R. 3597, *supra* note 108, at 15-17; H.R. 1725, *supra* note 109, at 8-11.

111 H.R. 3597, *supra* note 108, at 16.

112 H.R. 1725, *supra* note 109, at 9.

duced by the late Senator Heinz (R-Pa.), propose to do this by restricting the exemption to those cases where the attorney is representing his or her client before either a court of law or the Patent and Trademark Office.[113]

This amendment would add enormously to the overall efficiency of the Act. Far fewer individuals would be able to avoid registering. But, as one critic noted, this change will only be realized at the price of substantially burdening the attorney-client relationship. For example, this modification would probably compel the lawyer to disclose, within ten days, his or her intent to represent an entity before a specified government agency perhaps days or weeks before that agency would normally be contacted.[114] If the Justice Department or another source transmitted this information to the agency it might be damaging or prejudicial in some way to the client.[115] Thus the lawyer must worry about the possibility that his or her decision to accept the case will compromise the client's position *ab initio*. For this reason the issue of attorney-client privilege would come into play. How this problem might be resolved, however, is unclear.

Another possible amendment, which is part of the legislation introduced by both Senator Heinz and Representative Glickman, sought to impact the commercial exemption's second clause, which excuses agents engaging in activities "not serving predominantly a foreign interest" on behalf of an American enterprise that is owned by a foreign parent or that owns a foreign subsidiary.[116] Legislators expect to accomplish this transformation by adding another restrictive clause to the definition of "serving predominately a foreign interest" contained in § 611(q) of the Act. If changed, the definition would require, in addition to the three other conditions adumbrated above,[117] that lobbying

> activities [ ] not involve the representation of the interests of the foreign principal before any agency or official of the Government of the United States other than providing informa-

[113] *Id.* at 6-7; H.R. 3597, *supra* note 108, at 13; S. 346, 102d Cong., 1st Sess. § 1(d) (1991).

[114] *Proposed Reforms*, *supra* note 49, at 156 (quoting PATTISON & TAYLOR, *supra* note 49, at 325-26).

[115] *Id.*

[116] 22 U.S.C. § 613(d) (1988).

[117] *See supra* notes 80-82 and accompanying text.

tion in response to requests by such agency or official or as a necessary part of a formal judicial or administrative proceeding, including the initiation of such a proceeding.[118]

The problem with this clause is that, like the law it would recast, it is susceptible to multiple interpretations. Lobbyists, for instance, may argue, in situations like the aforementioned sport vehicle case, that they are not directly representing "foreign interests," but rather the interests of their domestic clients despite the fact that the interests of the two may be identical. Therefore, the current language should be altered in such a way to make clear that one is representing "the interests of a foreign principal" for the purposes of the clause, while at the same time having been hired and paid to represent only the stated interests of the related domestic entity.

One of the more practical proposals would require those parties who refrain from registering in reliance on an exemption to notify the Attorney General in a manner to be prescribed by the Justice Department.[119] This approach would help eliminate unjustified utilization of exemptions by lobbyists, especially if "buttressed by sanctions" in the case of unwarranted reliance.[120] Further, by publishing a series of rulings on exemption claims the Department could assist in clarifying existing regulations.

Another intelligent proposal is to entrust the Department with greater enforcement powers with which to administer the Act. The current bills, sponsored by Representatives Frank and Glickman and Senator Heinz, would provide the Attorney General with the authority to issue a "civil investigative demand" to a person under investigation for failing to comply with FARA. This "demand" would require individuals to produce materials relevant to the inquiry.[121] Still another bill, introduced by Representative Guarini (D-N.J.), would allow an administrative law judge, assigned to hold hearings on an alleged infraction, to subpoena the attendance of witnesses and the production of evidentiary materials at the proceedings.[122]

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[118] S. 346, *supra* note 113, at 2; H.R. 1725, *supra* note 109, at 5.

[119] H.R. 1725, *supra* note 109, at 7; H.R. 3597, *supra* note 108, at 13-14; *see also* H.R. 806, 102d Cong., 1st Sess. (1991), at 10 (requiring an agent to affirmatively request an exclusion based on the attorney exemption).

[120] *Proposed Reforms*, *supra* note 49, at 159.

[121] S. 346, *supra* note 113, at 4; H.R. 3597, *supra* note 108, at 15; H.R. 1725, *supra* note 109, at 8.

[122] H.R. 806, *supra* note 119, at 11.

Either of these propositions would be essential. The Department of Justice cannot effectively administer FARA without greater authority to investigate possible violations. Without this change any other amendments to the law will be nugatory.

There are manifold suggestions for altering filing requirements which would affect both when an agent would have to file statements and what information would have to be disclosed as well.

The Frank bill, for instance, seeks to alter current registration practices. It would continue to require a person to register within ten days of becoming an agent or representative of a foreign principal, but makes crucial changes by simplifying what information the statement must contain. Under this law the statement would have to include the following: (1) the identity of the agent or representative and the identities of any and all foreign principals on whose behalf the agent works; (2) detailed information about any employment agreement or contract between the representative and any of the foreign principals listed; (3) the identities "of any law firm[s], public relations firm[s], consultant[s], or any other person[s] with whom the representative . . . or the foreign principal has contracted, retained, or otherwise established a business relationship to perform services related to the registration of the representative;" and (4) disclosures concerning "the scope of activities known or planned" in which the representative plans to engage on behalf of the principal.[123]

These "planned" activities would include: testimony to be given before a government entity; research results to be distributed to Congress or the executive branch; any communications with congressional staff or executive officials; any requests that others communicate with legislators or executive branch officials on behalf of the foreign principal; and any organizational activity or other participation tied to "any coalition, federation, or similar organization established" to further the interests of any foreign principal listed.[124] This law would further command the disclosure of "each bill, rule, regulation, or other executive or legislative action that relates directly to activities for which [] registration under [the] Act is required."[125] Finally, it would also direct that each supplemental

[123] H.R. 3597, *supra* note 108, at 5-6.

[124] *Id.* at 6-7.

[125] *Id.* at 7. Other provisions compel the representative to maintain records of (1) income received from any foreign principal, (2) associated expenditures, and (3)

filing update this information and further disclose the dissemination of any "political advocacy or informational materials during the period covered by the report."[126]

If these regulations are enacted, they will prove to be far more effective at obtaining useful information than present laws. The current registration requirements are difficult to understand and require too much insignificant information, such as complete listings of an agent's employers. In contrast, these proposed rules are understandable and gather data that will allow government officials and the public to measure effectively the impact that foreign interests are having on particular legislators and other government officials.

A problem with these suggested changes, however, is that aside from abrogating the attorney-client privilege as discussed above,[127] they could potentially abridge First Amendment rights by forcing lobbyists to disclose the names of contacts on Capitol Hill who were consulted as part of lobbying activities. An American subsidiary could argue, for example, that this disclosure "chills" its right to lobby by discouraging congressional employees from meeting with its lobbyists. Yet, since the interests being represented here would have to be predominately foreign, it does not seem likely that such an argument would prevail. Still, it is possible that a court might make a finding of unconstitutionality on the basis of the First Amendment rights of lobbyists.[128]

Other proposed changes pertain to the question of when supplemental statements would have to be filed. Some suggest requiring a filing every six months, on January 31 and July 31 of each year.[129] Another bill prescribes that quarterly reports be filed on January 31, April 30, July 31, and October 31.[130] Still yet another mandates filings "not later than 30 days after the end of each 3-

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"[a]ll correspondence, memoranda, and other written communications to and from all foreign principals and all other persons relating to the representative's activities on behalf of any foreign principal." *Id.* at 7-8. These records must be kept available for inspection by the Department of Justice. *Id.* at 8.

[126] *Id.* at 9-11.

[127] *See supra* notes 114-115 and accompanying text.

[128] *Hearings, supra* note 35, at 582 ("[a]lthough lobbyists are paid to represent others before Congress, lobbyists retain their First Amendment rights").

[129] S. 346, *supra* note 113, at 2-3; H.R. 1725, *supra* note 109, at 6.

[130] H.R. 806, *supra* note 119, at 10.

month period occurring in a calendar year."[131]

These standardized filing times would help by making it easier for representatives to keep track of when they must file. They would also assist the Justice Department by allowing it to more efficiently and timely monitor who is complying with the regulations.

More carefully defining at what point a domestic entity may be considered under the control of a foreign principal is another issue. The Heinz and Glickman bills would further define who may be considered the agent of a foreign principal by more carefully delineating the point at which a domestic entity should be considered under the control of a foreign principal. Both laws would modify § 611(c) of the Act—which defines an "agent of a foreign principal"[132]—by adding the following clause at the end of the section:

> [A] foreign principal shall be considered to control a person in major part if the foreign principal holds more than 50 percent equitable ownership in such person or, subject to rebuttal evidence, if the foreign principal holds at least 20 percent but not more than 50 percent equitable ownership in such person.[133]

This language was drafted to " 'broaden the reach of the law' " to encompass those U.S. entities, represented by agents, " 'which are effectively controlled by and represent the interests of foreign corporations.' "[134] Whether this new definition would be of consequence, however, is doubtful. Under either the current commercial exemption or the amended version discussed in this section, agents who represent American subsidiaries of foreign parents may still be able to avoid registering by asserting that they are not serving "predominately a foreign interest."[135] Thus, if lawmakers do not further narrow the terms of the commercial exemption this change will have little impact on the current administration of the Act.[136]

Commentators argue that a second problem with this definition is that it might actually "enable some foreign principals that have a major hand in sponsoring agency activity to evade the reach of the

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[131] H.R. 3597, *supra* note 108, at 9.

[132] *See supra* note 59.

[133] S. 346, *supra* note 113, at 1-2; H.R. 1725, *supra* note 109, at 2.

[134] *Proposed Reforms*, *supra* note 49, at 151 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988) (statement of Sen. Heinz)).

[135] *Proposed Reforms*, *supra* note 49, at 153.

[136] *Id.*

Act."[137] For it is possible that a foreign entity might wield substantial control over a domestic enterprise despite controlling less than twenty percent of the company's stock. An example would be where a foreign nation was contracting with an American company to provide military aircraft.[138] In this scenario, the argument goes, the agent acting on behalf of the American company would be acting chiefly for the benefit of the foreign nation.[139]

This criticism is lacking, however, in that it would appear to argue for registration in any case where a benefit can be shown accruing to a foreign interest arising out of the lobbying conduct of an American company. This method is too inclusive and would only needlessly overburden an already faulty system.

The legislation introduced by Representative Frank prescribes harsh civil penalties for noncompliance. It would allow fines of up to $1,000,000 and penalize late registrants $500 per day for delinquent filings for the first 30 days and $1,000 for each additional day thereafter.[140] The Glickman bill also provides for penalties of up to $1,000,000 but does not specify how much a representative should be assessed for each day he or she improperly fails to file.[141]

Not surprisingly, the threat of a substantial monetary penalty might provide the best of all incentives to comply with the Act. People would be far less likely to avoid registering if their decision could potentially drive them into bankruptcy. Accordingly, this proposition would be a useful step in ensuring that FARA plays a more consequential role in regulating lobbying in the years to come.

IV. Another Alternative for Regulating the Disclosure of Lobbying Activity—The Lobbying Disclosure Act of 1992

A. *Background*

On the basis of a series of hearings and other studies on disclosure laws, Senator Carl Levin has concluded that the current enactments "are badly broken and need to be fixed."[142] In order

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137 *Id.* at 154.

138 *Id.* at 155-56 (Saudi Arabia's AWAC contractual relationship with American builders).

139 *Id.*

140 H.R. 3597, *supra* note 108, at 14-15.

141 H.R. 1725, *supra* note 109, at 7-8 (Attorney General will consider the violation's nature and duration in assessing penalty amount).

142 138 CONG. REC. S2543 (daily ed. Feb. 27, 1992) (statement of Sen. Levin).

to remedy this problem the Senator has drafted a comprehensive bill, the Lobbying Disclosure Act of 1992 (LDA), which would replace the existing laws "with a single, uniform statute, covering the paid lobbying of Congress and the executive branch on behalf of both domestic and foreign persons."[143] I will now focus on how this legislation would affect individuals who lobby the Congress.

B. *Purpose, Clarification of Who Must Register, Key Definitions, and Exceptions*

The introductory language of the Act asserts that "responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision making process" and that existing laws have failed to meet this purpose "because of unclear statutory language, weak investigative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose."[144] The Act's purpose is in part to help "increase public confidence in the integrity of Government" by more effectively regulating lobbying activity through disclosure.[145]

The law requires that "[n]o later than 30 days after a lobbyist first makes a lobbying contact, such lobbyist [or under certain circumstances described below, the organization employing the lobbyist], shall register with the Office of Government Ethics [OGE]," the entity responsible for administering LDA.[146]

The bill defines a "lobbyist" as "any individual who is employed or retained by another for financial or other compensation to perform services that include lobbying contacts, other than an individual whose lobbying activities are only incidental to, and are not a significant part of, the services for which such individual is paid."[147]

The phrase "lobbying activities" is defined as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended for use in contacts, and coordination with the

143 *Id.*
144 S. 2279, *supra* note 46, § 2(a)(2).
145 *Id.* § 2(a)(3).
146 *Id.* § 4(a).
147 *Id.* § 3(9).

lobbying activities of others."[148] A "lobbying contact" refers to:

> any oral or written communication with a covered legislative or executive branch official made on behalf of a client with regard to the formulation, adoption, modification, or implementation of United States Government legislation, regulations, or policies, or the position of the United States Government on any other matter in which the United States Government has or may have an interest.[149]

"Covered legislative branch officials" would include members of Congress, and other employees of the Senate and House such as staff members.[150]

Exceptions are provided for "communications made by public officials acting in their official capacity;" specified "communications made by the media;" "communications made on behalf of an individual with regard to such individual's benefits, employment, or other similar matters involving only that individual;" activity already disclosed under FARA; "requests for appointments . . . the status of a Federal action, or other similar ministerial contacts;" "communications with regard to ongoing judicial proceedings, criminal law enforcement proceedings, and any other proceedings that are required by statute to be conducted on a confidential basis;" any testimony offered before a "committee, subcommittee or office of Congress or submitted for inclusion in the public record of a hearing" conducted by one of these entities; and finally, for certain, narrowly defined "communications with officials of a federal agency [as used here the term "agency" would not encompass the Congress]."[151]

C. *Registration Requirements and Supplemental Reports*

Those required to register would have to disclose the following: (1) the registrant's "name, address, business telephone number and principal place of business" as well as a description of the registrant's business; (2) the client's "name, address, and principal place of business" including a description of its business activities; (3) "the name of any organization other than the client, that—(A) contributes more than $5,000 toward the lobby-

[148] *Id.* § 3(7).
[149] S. 2279, *supra* note 46, § 3(8).
[150] *Id.* § 3(3).
[151] *Id.* § 3(8)(A)-(I).

ing activities in a semiannual period, (B) significantly participates in the supervision or control of the lobbying activities, and (C) has a direct financial interest in the outcome of the lobbying activities;" (4) basic information about any "foreign entity" which "supervises, controls, directs, finances, or subsidizes the activities of the [lobbyist's] client and any other foreign affiliate of the client that has a direct interest in the outcome of the lobbying activity;"[152] (5) an explanation "of issues on which the registrant expects to engage in lobbying activities on behalf of the client;" and (6) the names of any employee of the registrant "whom the registrant expects to engage in lobbying contacts on behalf of the client."[153]

An individual lobbyist who is not affiliated with an organization or firm must file a separate statement for each client that he or she represents.[154] However, in the case of an organization that has "one or more employees who are lobbyists," the organization itself must "file a single registration for each client on behalf of its employees who engage in lobbying activities on behalf of such client."[155]

The registrant must also submit supplemental reports with the Office of Government Ethics "[n]o later than 30 days after the end of the semiannual period beginning on the first day of each January and the first day of July of each year in which it is registered."[156] These reports must: (1) update any changes in the information in the registration statement; (2) provide a listing of issues upon which the lobbyist worked on behalf of the client which includes lists of related "bill numbers and references to specific regulatory actions, programs, projects, contracts, grants and loans," any houses or committees of Congress contacted, all employees of the registrant who lobbied on behalf of the client, and "a description of the interest in the issue, if any, of any foreign entity" identified under previous provisions of the Act; and (3) a "good faith estimate" of any lobbying related monies re-

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[152] *Id.* § 4(b). The Act states that a "foreign entity shall be deemed to control the activities of a client in major part if the foreign entity holds at least 10 percent equitable ownership in the client." *Id.* § 4(d)(3).

[153] *Id.* § 4(b)(5) & (6).

[154] S. 2279, *supra* note 46, § 4(d)(1).

[155] *Id.* § 4(d)(2).

[156] *Id.* § 5(a). The Director may, for good cause shown, grant an extension of up to 30 days for the filing of a report. *Id.* § 5(d).

ceived from the client, or where the lobbyist is acting on his or her own behalf, "a good faith estimate" of expenditures made in connection with lobbying activities.[157] The method for estimating receipts or costs is provided in the bill.[158]

Both registration statements and reports are to be made available to the public by OGE "in electronic and hard copy formats as soon as practicable after the date on which such registration or report is received."[159] OGE is additionally responsible for compiling and summarizing this information in "a manner which clearly presents the extent and nature of expenditures on lobbying activities . . . [and also for making this] information . . . available to the public in electronic and hard copy formats."[160]

D. *Power Allotted to OGE to Enforce the Act*

When the Director of OGE suspects that there has been a noncompliance he or she is to notify the noncomplying person in writing and provide up to 30 days, or longer, if the director deems an extended period appropriate, for a response.[161] If the individual responds within the allotted time the director may: (1) choose to take no action having determined that there has not been a noncompliance; (2) conclude that there is a noncompliance, but a minor one which the person has agreed to correct and so levy only a light penalty or none at all; or (3) if he or she still suspects a noncompliance, hold hearings and gather data to determine the facts and impose the appropriate penalty, if warranted.[162] If the person fails to respond within the established time frame or makes an inadequate response, the director "may make a formal request for specific additional information that is reasonably necessary for the director to determine whether the alleged noncompliance in fact exists."[163] This request must state the director's reasons for asserting the possible existence of noncompliance, make a request to examine certain "classes" of documents germane to the inquiry, and prescribe a time period within

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[157] *Id.* § 5(b).
[158] *Id.* § 5(c).
[159] S. 2279, *supra* note 46, § 6(5).
[160] *Id.* § 6(8) & (9).
[161] *Id.* § 7(a).
[162] *Id.* § 7(b).
[163] *Id.* § 7(c).

which the documents must be produced.[164]

When the director makes a determination that a noncompliance exists he or she is required to issue a written decision ordering that information about the violation be placed on a list of noncompliances available to the public, directing the person to correct the violation, and assessing penalties of up to $10,000 in the case of a minor noncompliance or $100,000 where there has been a serious violation of the Act, such as a "knowing failure" to register.[165] Civil injunctive remedies are available in cases of continuing violations of the law.[166]

The director is further empowered to penalize late registrants. After information gathering about the reasons for the late filing and a hearing, if the person requests one, the director can make a final determination.[167] If there has been a noncompliance the director must issue a written decision assessing a penalty from $200, for each week of the late filing, up to $10,000.[168] Written decisions issued by the OGE become final sixty days after the date of public issuance unless appealed directly to the appropriate circuit of the United States Court of Appeals within that time period.[169]

E. *Effects on FRLA and FARA*

As mentioned above, if this bill is enacted it will repeal FRLA in its entirety.[170] While not repealing FARA, the Lobbying Disclosure Act would significantly alter the older law and reduce its scope. First, LDA would limit the applicability of FARA in the lobbying context to those situations when a lobbyist is representing either a foreign government or a foreign political party.[171]

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164 S. 2279, *supra* note 46, § 7(c)(1)-(3). The information gathered under this procedure is to remain confidential absent the consent of the person providing the information. *Id.* § 7(d).

165 *Id.* § 8(c)(1)-(3). In "determining the amount of a penalty to be assessed, the Director shall take into account the totality of the circumstances, including the extent and gravity of the noncompliance and such other matters as justice may require." *Id.* § 8(e).

166 *Id.* § 8(d).

167 *Id.* § 9(a) & (b).

168 *Id.* § 9(c)(1).

169 S. 2279, *supra* note 46, § 10(a) & (b).

170 *Id.* § 12.

171 *Id.* § 13(1).

Second, it would further limit the "lawyers' exemption" by mandating that the exclusion apply only for representations before a court of law or before any agency providing that the "agency proceedings [are] required by statute or regulation to be conducted on the record."[172] Finally, the bill would strike the term "political propaganda" wherever it appears and replace it with the term "informational materials."[173]

F. *Analysis*

Within a day of its introduction this draft legislation evoked both criticism and praise. One independent lobbyist stated that the bill "looks like a very balanced and reasonable approach to solving many of the problems with the existing legislation."[174] Another lobbyist, however, objected to what he construed to be a requirement to name specific contacts made with congressional staff.[175] LDA "sends a chilling effect . . . [which] would violate years and years of relationships lobbyists have built up."[176] He therefore argued that the bill violated the First Amendment and that it "is totally unenforceable."[177] Lawmakers refused to comment publicly on LDA but conceded privately that they were "skeptical about the bill's chances."[178]

If the bill in fact required that lobbyists list each member of Congress or staffing whom they contacted, one could understand some degree of disapprobation emanating from the lobbying community. There is nothing in the language of the Act itself, however, that requires this form of disclosure. The controlling section of the bill merely compels each lobbyist to report "the Houses and Committees of Congress . . . contacted on behalf of the client."[179] This interpretation is entirely consistent with the intent of the bill's author who has stated that LDA would not require the disclosure of specific contacts.[180]

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[172] *Id.* § 13(1)(E)(3).
[173] *Id.* § 13(4)(A).
[174] Gary Lee, *Bill Targets Lobbyists' Activities*, WASH. POST, Feb. 28, 1992, at A21 (statement of Howard Marlowe).
[175] *Id.* (statement of John Chwat, Washington lobbyist).
[176] *Id.*
[177] *Id.*
[178] Lee, *supra* note 174, at A21.
[179] S. 2279, *supra* note 46, § 5(b).
[180] 138 CONG. REC. S2543-44 (daily ed. Feb. 27, 1992) (statement of Sen. Levin).

Consequently, one weakness of the bill is its failure to provide the public with information which would allow voters to measure the influence that special interests have on specific government officials. If, however, the bill is redrafted to require disclosure of specific contacts it will probably be challenged on First Amendment grounds. The argument would be a simple one: the law, by insisting that lobbyists name their contacts on Capitol Hill, discourages lobbyists and congressional employees from interacting, thereby imposing a "chilling effect" on lobbying, a constitutionally protected activity, and hence the provision should be held invalid.

To pass constitutional muster the provision would have to endure strict or "exacting scrutiny" focusing on the question of whether there is a " 'substantial relation' between the governmental interest and the information required to be disclosed."[181] Moreover, a court would have to satisfy itself that the provisions serve a "compelling" or "vital national interest" which outweigh any erosion of First Amendment rights.[182]

A convincing argument can be made that this kind of disclosure meets First Amendment requirements. As mentioned before, the government has a "compelling" interest in providing the public with useful information about lobbying, including such information as who on Capitol Hill is actually being lobbied. Only through the use of this information can the public discern in a comprehensive manner whether confidence in the legislature is warranted or not. Any redraft, however, would have to be meticulously composed to assure that the phrasing of the new language is clear enough to meet the specificity requirements of strict scrutiny.[183]

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181 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (citation omitted).

182 United States v. Harriss, 340 U.S. 612, 626 (1954). *Cf.* Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 546 (1963) (government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest"). Interestingly, the bill appears to acknowledge the possibility that a federal court could find provisions of the Act unconstitutional insofar as it provides that if any provision is "held invalid" other provisions are not to be "affected thereby." S. 2297, *supra* note 46, § 16 (severability provision).

183 *Hearings*, *supra* note 35, at 591 ("[w]hen applying a strict scrutiny test, the Court would most likely require the disclosure requirements to have greater specificity").

Another section of LDA which might be attacked is that part of the registration requirement which directs the lobbyist to provide "a general statement of issues on which [he or she] expects to engage in lobbying activities on behalf of the client and, . . . a list of specific issues that . . . are likely to be addressed."[184] Supplemental reports must contain a similar statement.[185] The problem with these requirements, as was the case with similar provisions in the Frank bill discussed earlier, is that they impinge on attorney-client relations by forcing the attorney to reveal potentially damaging information that the client may want kept confidential. Unlike the Frank bill, however, this law would affect the relationship of wholly domestic clients—in whom full legal rights inhere—and their attorneys. Since a federal court has yet to weigh this precise issue, it is hard to predict what outcome would result were the question to be litigated. One federal court, however, upheld the constitutionality of a state law, challenged on other grounds, which contains nearly identical provisions.[186]

The problem could be avoided altogether by requiring only after-the-fact disclosure about issues that were represented. This would greatly reduce prejudice to the client of a lawyer/lobbyist and would still allow the government and the public to effectively monitor lobbying activity.

A further challenge may be levied against that section of the Act which directs disclosure of parties other than the client who (1) contribute more than $5,000 toward the client's lobbying activities, (2) are involved in supervising or participating in the lobbying activity, and (3) have a "direct financial interest" in the lobbying matter.[187] The likely argument would be that requiring such a disclosure chills First Amendment associational rights and the right to petition government. Nevertheless, it seems likely that these provisions would survive a challenge. Similar requirements have been upheld by state courts on the grounds that they avoid significant "impingement upon first amendment guaran-

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[184] S. 2279, *supra* note 46, § 4(b)(5).

[185] *Id.* § 5(b).

[186] Minnesota State Ethical Practices v. NRA, 761 F.2d 509 (8th Cir. 1985) (upheld a lobby disclosure law, challenged on right of association and equal protection grounds, which required private representatives to divulge the issues on which a "lobbyist expects to lobby"). *See* MINN. STAT. § 10A.03 (1991); *see also* N.Y LEGIS. LAW § 5 (McKinney 1991) (lobbying statute contains the same requirement).

[187] S. 2297, *supra* note 46, § 4(b)(3).

tees" while providing the government and the public with valuable information.[188]

A final problem with the bill is found in its definition of a "lobbyist." The definition would excuse one "whose lobbying activities are only incidental to, and are not a significant part of, the services for which such individual is paid."[189] This potential loophole will be difficult to define in bright-line terms and would be subject to abuse, at least until OGE issued clarifying regulations.[190] Senator Levin has defended the use of a "subjective standard" as being "unavoidable, because many of the issues [LDA is] trying to address are simply not susceptible to simplistic legislative formulas."[191]

LDA's vulnerabilities notwithstanding, the bill does offer constructive solutions to existing problems. One positive change that the Act would effect is placing contacts with congressional staff, not just members, under statutory definitions of lobbying. This change is indispensable to any meaningful regulation of lobbying in an age when contacts with staff members are as important and occur more frequently than meetings with individual legislators. Moreover there is some indication that the Supreme Court would uphold such an expansion of the *Harriss* definition, having since noted in another decision that legislative aides and assistants should now be "treated as the [ ] alter egos" of the various members of Congress.[192]

Another constructive alteration LDA would erect is to regulate lobbying disclosure under one, uniform law. This would

188 Fritz v. Gorton, 517 P.2d 911, 929-30 (Wash. 1974) (upheld Washington law which, among other mandates, required that lobbyists disclose the names of parties, other than the client, who contribute fees of more than $500 to the lobbying activity). *See* WASH. REV. CODE ANN. §§ 42.17.175 & .180 (West 1972 & Supp. 1991).

189 *See supra* note 147.

190 138 CONG. REC. S2544 (daily ed. Feb. 27, 1992) (statement of Sen. Levin). In his statement, the Senator gives a number of examples of situations where he believes the Act would or would not apply. The only examples given where one could avoid registering would be: (1) in the case of a member of a national organization who comes to Washington once a year to meet with his or her Congressperson as part of a "week in Washington" program, and (2) when the director of a charity with no Washington office comes to the Congress to lobby on a single issue for a few days. *Id.*

191 *Id.*

192 Gravel v. United States, 408 U.S. 606, 616-17 (1972).

help reduce present confusion surrounding the topic and perhaps improve overall administrability.

Further, the Act would result in the acquisition of useful kinds of information about lobbying, although the current draft should be modified by inserting a provision that requires the divulgence of specific contacts with members and staff. Yet even if this recommended action is not undertaken, the current informational requirements would be helpful to both the government in its role as regulator and to the People in their role as voters and architects of public opinion. Just as importantly, the Act gives OGE the necessary enforcement powers to ensure that LDA does not become a nullity like the previous statutes.

V. Conclusion

That the current laws which regulate lobbying disclosure are ineffectual seems axiomatic. Both FRLA and FARA have failed to mediate beneficially the relationship between lobbyists, lawmakers and their staffs, to promote ethical behavior, or to provide a basis for greater confidence in legislative governance. The more vexing problem is how to reform this ongoing predicament.

One constructive change would be to create a single statute governing lobbying disclosure along the lines of the draft legislation recently authored in the Senate. Having one law would help reduce confusion while increasing administrative efficiency. This would mean repealing FRLA and altering FARA in such a way that its scope would be drastically reduced.

Whether the current laws are completely superseded or only amended, the kind of information to be sought in the initial registration and later supplements should include: basic information about the lobbyist such as his or her name, place of business, and telephone number; the same basic information about the lobbyist's clients, with mandatory disclosure of any material foreign interest in the lobbying matter; if there is a foreign interest, additional information about that concern; information about any other party acting consciously and directly through the client in the matter; the names of any other parties representing the interests of the client before the government; a statement of the amount of money paid by the client to the lobbyist and how it was

spent; and post-contact disclosure of who the lobbyist approached, the reason for doing so and other relevant disclosures about the scope and nature of lobbying activities already undertaken.

Regardless of what specific changes are eventually implemented, they will have to intelligently negotiate the tension between First Amendment rights, issues of attorney-client privilege, and the government's legitimate interest in regulating lobbying and providing the public with information about it. An acceptable balance may be difficult to find but should nevertheless be sought. Until such time, lobbying abuses will continue unabated, and the government and the public will be poorly positioned to favorably influence lobbying activity.