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Shining the Spotlight of Pitiless Publicity on Foreign Lobbyists?

Charles Lawson

Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act

ABSTRACT

This note discusses the changes made to the Foreign Agents Registration Act (FARA) by the Lobbying Disclosure Act of 1995 (LDA) and evaluates the impact of those changes. FARA's regulatory regime has long been criticized for its loopholes. FARA's historical focus on foreign propagandists has also been condemned as out of step with the modern political environment in the United States, where foreign "lobbyists" are seen as a serious threat to government integrity. In response to such criticisms, the LDA endeavored to reform FARA so as to increase compliance levels among foreign lobbyists seeking to influence the U.S. political process. The changes made to FARA in this reform effort include: important "definitional" changes, the elimination of the lawyer exemption to FARA, and needed improvements in the registration process itself. The author concludes that, while the reforms are laudable and have the potential for bringing more foreign lobbyists under FARA's regulatory imperative, until the further steps of bolstering the ranks and enforcement powers of the FARA administrators are taken, the ideal of a comprehensively-enforced FARA will remain elusive.

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I. INTRODUCTION

The Foreign Agents Registration Act[1] (FARA) was enacted in 1938 to lessen the negative impact of foreign propagandists on

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1. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611-21 (1990 & Supp. 1996) (hereinafter FARA). The purpose of FARA was stated clearly in a 1942 amendment to its provisions:

> It is hereby declared to be the policy and purpose of this Act 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 for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in light of their associations and activities.

U.S. external and internal policies. Such propaganda was seen as potentially "increas[ing] racial and religious discord, subvert[ing] the democratic process, and dominat[ing] the nation's foreign policy decisionmaking with foreign agendas."[2] FARA sought to forestall such dire consequences by requiring that purveyors of such propaganda label their information and register with official agencies.[3] However, the focus of FARA has changed over the years as the perceived source of threats to the internal security of the United States has changed.[4]

FARA's primary purpose is to limit the power and influence of sophisticated foreign lobbyists on the U.S. political process.[5] All lobbyists suffer from the widespread perception that their profession is populated by silver-tongued manipulators of governmental processes. In the case of foreign lobbyists, who are necessarily external to the U.S. national interests and its legislative process in particular, such mistrust may often be well placed.[6] In fact, through various amendments to FARA, Congress

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Act of Apr. 29, 1942, ch. 263, 56 Stat. 248-49 (current version at 22 U.S.C. § 611 (1990)).

2. Mark B. Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat To National Security*, 25 TEX. INT'L L. J. 23, 24 (1990). At its inception, FARA was aimed primarily at Nazi propaganda. After World War II, it was used to monitor Communist propaganda throughout the period of the Cold War. *Id.* at 25.

3. FARA, 22 U.S.C. §§ 611-21 (1990). Such registration was not intended to preclude the introduction of such propaganda in the United States, but to allow the people of the United States to fairly assess the material in light of its origin. Phillip J. Perry, Note, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L L. J. 133, 144-45 (1990). *See also* Baker, *supra* note 2, at 24 (indicating Congress's intent not to prohibit the propaganda altogether (for fear that the censorship would be considered anti-democratic), but rather requiring disclosure of a disseminator's ultimate supporter so that recipients would be able to consider the biased source of propaganda when evaluating its merits.").

4. This focal shift occurred owing to changing goals of the foreign powers attempting to influence U.S. policies. *See* Baker, *supra* note 2, at 25 (noting that instead of seeking to subvert the sovereignty of the United States, foreign entities were seeking to exploit the U.S. political process for economic gain). *See also* Brian C. Castello, Note, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking Meese v. Keene*, 1989 DUKE L. J. 654, 657 ("FARA's purpose shifted over time, however, from that of exposing subversive propagandizing to spotlighting political lobbying and public relations directed at U.S. policy making.").

5. *See, e.g.*, Odile Prevot, *A New Concern In Europe: Lobbyists, the Merchants of Influence*, 5 TRANSNAT'L LAW. 305, 312-13 (1992) (noting the recent focus on powerful lobbyists in Washington and asserting: "[T]here is no question that lobbyists . . . are having an effect on politics and policy [in the United States].").

6. One particularly egregious example will suffice to demonstrate the dangers of unrestrained foreign lobbying. In 1980, a Toshiba subsidiary, Toshiba Machine Co., began to sell precision machine tools to the Soviet Union to produce "quieter" submarine propellers despite the fact that these tools were on a list of

has identified the actions of these professional lobbyists, dealing directly with elected and appointed government officials, as posing the greatest threat to government integrity.[7] Nonetheless, loopholes exist in FARA's regulatory scheme, which have been exploited by lobbyists for the past few decades. Various attempts to reform FARA have been made over the years.[8] Despite several amendments,[9] FARA is considered porous in numerous areas and susceptible to the wiles of foreign lobbyists.

On July 25, 1995, the U.S. Senate passed a reform measure—1995 S. 1060—that sought to limit the ability of agents of foreign principals to take advantage of the weaknesses of FARA. The U.S. House of Representatives passed an identical version[10]

"prohibited exports" promulgated by the Coordinating Committee for Multilateral Security Controls, an informal organization seeking to restrict the sale of military goods and technology to non-member nations. Baker, *supra* note 2, at 30. Efforts by Toshiba to maintain the secrecy of these transactions failed and their discovery sparked a congressional outcry to ban all imports from Toshiba for two to five years. Such a sanction would have resulted in a loss to Toshiba of approximately ten billion dollars a year in lost sales to the United States. *Id.* at 31. Toshiba immediately launched "one of the costliest and most aggressive lobbying campaigns ever mounted by a foreign company. . ." through its wholly owned subsidiary, Toshiba America, Inc. *Id.* (quoting *Toshiba Corp. Paid Lobbyists Millions to Soften Sanctions*, L.A. TIMES, Oct. 13, 1988, § IV, at 1, *available in* LEXIS, News Library, Curnws File). Using a combination of three law firms and a public relations group, a Toshiba-funded damage control team issued a report finding Toshiba itself uninvolved in the sale by its subsidiary, Toshiba Machine, while subsequently organizing a letter writing campaign, running full-page advertisements in major newspapers, holding news conferences, and working the halls of Congress. *Id.* As a result of this intense lobbying, the only penalty imposed on Toshiba was a three-year restriction on U.S. government purchases of Toshiba products, with exemptions for national security as well as for other reasons. *Id.* at 31-32. The estimated costs of Toshiba's actions to the United States ranged from eight billion to over one-hundred billion dollars, a cost to be born by U.S. taxpayers. *Id.* at 32. Even more damaging, however, was the impact of the Toshiba scandal on U.S. national security. *Id.* Such an example reveals the precarious nature of U.S. policy in the face of organized, well-financed foreign lobbying efforts and the extent to which such efforts can succeed, even in a highly sensitive area such as national defense.

7. *See* Karim G. Lynn, Note, *Unconstitutional Inhibitions: Political Propaganda and the Foreign Agents Registration Act*, 33 N.Y.L. SCH. L. REV. 345, 353 (1988).

8. The most recent effort to enact a lobbying disclosure bill was defeated in 1994 due to controversial provisions contained in the bill. The bill would have mandated the creation of a completely new enforcement agency, civil fines of up to $200,000 for violations of FARA, and disclosure by lobbyists of the specific congressional committees contacted. T. R. Goldman, *Why Lobbyists Can Live With New Bill*, N.J. L.J., Dec. 11, 1995, at 13, *available in* LEXIS, Njlaws Library, NJ LAWS File.

9. *See infra* Part II.B.

10. The House originally considered adding four amendments to the Senate bill, but these amendments were defeated on November 28, 1995. Sponsors of the bill urged the defeat of all the amendments, regardless of merit,

of this bill, the Lobbying Disclosure Act of 1995 (LDA), on November 29, 1995.[11] On December 19, 1995, President Clinton signed the bill,[12] stating that he "ha[d] strongly supported the purposes and principles embodied in this legislation since the beginning of . . . [his] Administration."[13]

Section II of this Note first examines FARA, its history and its interpretation in the courts, and discusses commonly cited problems in FARA's administration. Section III describes past attempts to reform FARA, as well as reforms that were proposed prior to the new bill. Section IV examines the provisions of the Senate bill recently enacted into law and evaluates its efficacy in light of the perceived shortcomings of FARA and the reforms previously proposed. This Note concludes that despite the positive impact the reforms embodied in the LDA may have on increasing registration under FARA, the failure of the LDA to address the persistent problem of FARA administrators' inadequate staff levels, and the need for greater enforcement powers to ensure continuing compliance, will significantly undermine the efficacy of such reforms.

II. FARA—LEGISLATIVE HISTORY

A. *General Provisions*

Enacted in 1938, FARA[14] sought to deter the spread of propaganda by foreign propagandists,[15] particularly those

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lest the bill be sent back to the Senate and face an uncertain future. Because the House bill was then identical to the Senate bill, it could be sent immediately to the President for signing without a House-Senate conference. *Lobbying, House Passes Lobby Reform, Bill Headed for White House*, 1995 DAILY REP. FOR EXECUTIVES 230, Nov. 21, 1995, *available in* LEXIS, Exec Library, Drexec File.

11. *House Passes Lobby Reform Bill; Sponsors Expect White House Approval*, 48 INT'L T. REP. (BNA) 2017, 2017-18 (1995).

12. Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-12 (Supp. 1996).

13. *Text of Presidential Statement on Approval of Lobbying Disclosure Act of 1995*, U.S. NEWSWIRE, Dec. 19, 1995, 17:39 Eastern Time, *available in* LEXIS, News Library, Curnws File. As evidence of this support President Clinton stated:

> During my first days in office, I barred all top executive branch officials from lobbying their agencies for five years after leaving office and from ever lobbying for foreign governments. During the 103rd Congress, my Administration lent its strong support to congressional backers of legislation that served as the model for the Lobbying Disclosure Act of 1995.

Id.

14. FARA, 22 U.S.C. §§ 611-21 (1990).

promulgating pro-Nazi[16] and pro-Communist[17] literature.[18] The concern was that these persons were "representing foreign governments or foreign political groups . . . [and were] supplied by such foreign agencies with funds . . . [for the purpose of] influenc[ing] the external and internal policies of [the United States]."[19] FARA aimed to counteract the effects of subversive propaganda, not by limiting the information that could be disseminated, but by requiring that the disseminator of the foreign propaganda register with the Secretary of State and label its source.[20] It was felt that U.S. citizens could make an informed decision, as to the accuracy of the information, if they knew both the identity of the foreign agents spreading it and the source of the propaganda itself.[21]

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15. Lynn, *supra* note 7, at 346. The enactment of FARA in the critical period preceding the outbreak of World War II was the result of recommendations set forth by a special committee investigating "un-American" activities in the United States. *Id.* at 345 n.7 (citing H.R. REP. NO. 153, 74th Cong., 1st Sess. 25 (1935)). This committee was called the "McCormack Committee" and was established to investigate the infusion of Nazi and other propaganda. *Id.*

16. *Id.* at 345 n. 7. *See also* Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder*, 78 KY. L. J. 237, 242-43 (1990) (citing H.R. RES. 198, 73d Cong., 2d Sess., 78 CONG. REC. 4934, 4949 (1934) (illustrating that the words "foreign propaganda" in FARA originally read "Nazi Propaganda")).

An example of the pro-Nazi activity of that era was the publishing in the United States of a newspaper called the Silver Ranger which advocated the "reorganization of the United States government to further pro-Nazi goals." *Id.* at 243. Additionally, during World War II, U.S. residents routinely received literature on anti-semitism and the eventual German victory, material that was not labeled and which appeared to have been circulated as "'a bit of American comment.'" Robert G. Waters, Note, *The Foreign Agents Registration Act: How Open Should The Marketplace of Ideas Be?*, 53 MO. L. REV. 795, 799 (1988).

17. *See* Lynn, *supra* note 7, at 350 n.24 (reporting on amendments to the definitional section of FARA made in 1950 where the Committee on Un-American Activities articulated the purpose of the statute as aiding American people in their understanding of the true character, aims, and techniques of the communist conspiracy.) (citing H.R. REP. NO. 81-2980, at 1, *reprinted in* 1950 U.S. CODE CONG. SERV. 3891).

18. *Id. See also* Farrokh Jhabvala, Note, *The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?*, 41 U. MIAMI L. REV. 591, 591 (1987) ("Concern within the county had been mounting over the activities of foreign propagandists, particularly Nazi, fascist, and communist, and FARA sought to unmask these agents and provide for official and public surveillance of their activities.").

19. Spak, *supra* note 16, at 242.

20. *Id.* at 243.

21. *Id.* at 243-44. *See also* Pamela Sirkin, Comment, *The Evanescent Actus Reus Requirement: California Penal Code § 647 (d)- Criminal Liability for "Loitering With Intent . . . "Is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 189 n. 142 (1990) (noting that Justice Stevens, writing for the Court in Meese v. Keene, 481 U.S. 465, argued that FARA was not a mechanism designed to suppress the material, but rather was an

The ultimate purpose of FARA, as stated by Congress, was the "protect[ion] of [the] internal security, national defense, and foreign relations of the United States."[22] This purpose would be advanced, it was thought, if the government and people of the United States were informed of the "associations and activities" of those engaged in propagandist activity.[23] It was only through shining this "spotlight of pitiless publicity" that the people of the United States could identify those "engaged in . . . spread[ing] doctrines alien to our democratic form of government" and act in an informed manner to mitigate the "pernicious" nature of their actions.[24]

In its original enactment, FARA required an "agent of a foreign principal"[25] to register with the Secretary of State.[26] As the administrator of FARA, the Secretary of State was responsible for obtaining registration and supplemental statements of registrants.[27] The Secretary of State was also given the authority to bring criminal charges against those failing to comply with the

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instrument for putting the material into the proper perspective so the public could better evaluate its import.).

22. Lynn, *supra* note 7, at 346 (citing FARA, 22 U.S.C. § 611 (1982)). *See also* Waters, *supra* note 16, at 798-99 (noting that Congressional investigation into subversive activities in the United States "produced 'incontrovertible evidence' of persons operating in the United States on behalf of foreign principals for the purpose of fostering 'un-American activities' and 'inculcating' principles and teachings' aimed toward establishing in the United States a foreign system of government. . . .'") (quoting H.R. REP. NO. 75-1381, at 2 (1937)). These findings prompted Congress to act to address such activities and, to that end, FARA was introduced by Senator John McCormack. *Id.* at 799.

23. Lynn, *supra* note 7, at 346 (citing 88 CONG. REC. 802 (1942)). *See* Spak, *supra* note 16, at 244 ("FARA was designed to limit the effect of foreign propaganda by revealing both the identity of foreign agents and the source of the propaganda they were disseminating.").

24. *Id.* (quoting H.R. REP. NO. 75-1381, at 2 (1937)). *See also* United States v. Auhagen, 39 F. Supp. 590 (D.D.C. 1941) (noting that if U.S. citizens were informed as to the identity of foreign agents, they would be able to evaluate their statements accordingly.).

25. The term "agent of a foreign principal" included any person acting, engaging, or agreeing to act as a "public relations counsel, publicity agent, or as agent, servants, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal.". Spak, *supra* note 16, at 244 n.43.

26. *Id.* at 244. However, the registration requirements were so poorly enforced by the Department of State that Congress transferred these enforcement duties to the Department of Justice in 1943. Baker, *supra* note 2, at 36 (citing *Hearings on H.R. 1591 Before a Subcomm. of the Comm. on the Judiciary of the House of Representatives*, 75th Cong. 1st Sess. (1937) (unpublished), *reprinted in* INSTITUTE OF LIVING LAW, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107, 112 n.20 (1943).

27. Spak, *supra* note 16, at 244.

requirements of FARA, which carried penalties of a jail term, a fine, or both.[28]

In addition to registration, the original FARA also required that "political propaganda" be filed[29] and labeled[30] if the registered agent employed interstate or foreign commerce or used the mails to disseminate the material.[31] "Political propaganda" was defined under FARA as:

> any oral, visual, graphic, written, pictorial, or other communication or expression . . . which is reasonably adapted to, or 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, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions. . . .[32]

The label of "political propaganda" was applied in one of two ways.[33] First, the agent could determine that the material to be distributed fell within that definition. Second, an employee of the Justice Department could make such a determination. Once the material was identified as "political propaganda," a statement was to be attached to the material, providing the following information:

> (1) the relationship or connection between the person transmitting the "political propaganda" and the propaganda; (2) the status of the person transmitting the "political propaganda" as an agent of a foreign principal who is registered with the Justice Department; (3) the name and address of the foreign agent; and (4) a statement that the registration required by [FARA] does not indicate approval by the United States Government of the contents of the "political propaganda."[34]

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28. *Id.*

29. FARA, 22 U.S.C. § 614(a) (1990).

30. *Id.* at § 614(b). *See also* Waters, *supra* note 16, at 796 (noting that, under this section of FARA, political propaganda was not to be disseminated without being "'conspicuously marked at its beginning with . . . [an] accurate statement . . . setting forth the relationship or connection between the person transmitting the political propaganda . . . and such propaganda. . . . ' " (quoting 22 U.S.C. § 614(b) (1982)).

31. This section was added by amendment in 1942. Lynn, *supra* note 7, at 349 n.23.

32. *Id.* at 350 n.24 (quoting 22 U.S.C. § 611(j) (1982) and noting that the definitional section of the 1938 Act was amended as part of the Internal Security Act of 1950, 64 Stat. 987, 989-91 (1950)).

33. *Id.* at 350.

34. *Id.* at 351 (citing FARA, 22 U.S.C. § 614(b) (1982)).

Courts upheld FARA against First[35] and Fifth[36] Amendment challenges to the registration and disclosure requirements of FARA, as well as those to its original labeling requirement. The U.S. Supreme Court, in *Meese v. Keene*,[37] held that the use of the term "political propaganda,"[38] to identify the materials that must comply with the requirements of FARA, did not burden protected expression and thus did not violate the First Amendment. The Court defended FARA against the charge that the term resulted in the suppression of expression[39] due to its pejorative connotation. "The statutory term is a neutral one, and in any event, the Department of Justice makes no public announcement that the materials are 'political propaganda.'"[40] The Court also noted that

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35. It was argued that the registration requirements of FARA were an unconstitutional restraint on the dissemination of ideas. *See* U.S. v. Peace Information Center, 97 F. Supp. 255 (D.D.C. 1951). Peace Information Center was indicted on a charge of violating FARA, in failing to register as an agent of a foreign principal. Individual defendants were also charged, in their capacity as officers and directors of the Peace Information Center, with failure to cause the latter to register. The defendants moved to dismiss the indictment, contending that the statute was unconstitutional. In holding that FARA did not violate the First Amendment, the Court stated, "The statute under consideration neither limits nor interferes with freedom of speech. It does not regulate expression of ideas. Nor does it preclude the making of any utterances. It merely requires persons carrying on certain activities to identify themselves by filing a registration statement." *Id.* at 262. Regarding the Fifth Amendment argument, the Court noted that:

> [t]he privilege against self-incrimination is . . . personal to the individual and may be either asserted or waived by him. It does not constitute a basis for invalidating a statute . . . . Moreover, the statute does not require the disclosure of any information except on a voluntary basis as a condition of carrying on certain occupations or certain activities. [T]he information called for by the statute is not incriminating on its face.

Id. at 263.

36. FARA was stated to violate the privilege against self-incrimination conferred by the Fifth Amendment. *See id.* at 255; *see also supra* note 35 (indicating the Court's ruling on this issue); Atty. Gen. v. Irish Northern Aid Committee, 530 F. Supp. 241 (S.D.N.Y. 1981) (upholding the facial validity of FARA against a First Amendment challenge).

37. 481 U.S. 465 (1987).

38. FARA, 22 U.S.C. § 611(j) (1990).

39. *See* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J. L. & PUB. POL'Y 149, 153 n.34 (1993). The *Meese* Court recognized that, in fact, the statute provided for *more* speech rather than less. The Court noted that Congress was requiring "the disseminators of such [labeled] material to make *additional* disclosures that would better enable the public to evaluate the import of the propaganda." 481 U.S. at 480 (emphasis added).

40. 481 U.S. at 479 n.14. *See also* Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986) (rejecting a challenge to the constitutionality of the classification of certain films as "political propaganda." The Court declared that:

"[although] [t]here is a risk that a partially informed audience might believe that a film that must be registered with the Department of Justice is suspect . . ., there is no evidence that this suspicion—to the degree it exists—has had the effect of Government censorship."[41] The Court declared that its duty was simply to "construe legislation as it is written, not as it might be read by a layman." The Court continued, "we simply view this particular choice of language, statutorily defined in a neutral and evenhanded manner, as one that no constitutional provision prohibits the Congress from making."[42]

> [E]ven if classification as 'propaganda' constituted an expression of official government disapproval of the ideas in question, neither precedent nor reason would justify us in finding such an expression *in itself* unlawful. . . . If the first amendment considers speakers to be so timid, or important ideas to be so fragile, that they are overwhelmed by knowledge of governmental disagreement, then it is hard to understand why official governmental action, which speaks infinitely louder than words, does not constantly disrupt the first amendment 'marketplace.'

Id. at 1312-1313.

41. 481 U.S. at 484. *See also* Viereck v. United States, 318 U.S. 236, 251 (1943) (dissenting on separate and unrelated grounds), Justice Black noted that FARA was not only constitutionally sound, but also promoted First Amendment freedoms:

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

Id. Cf. Jhabvala, *supra* note 18, at 622-25 (noting that "[t]he true impact of the label on the plaintiff's first amendment right . . . must be assessed by its practical impact [which will be to] inhibit[] and deter[] both speakers and listeners from disseminating and receiving [the messages contained in the labeled material].").

42. 481 U.S. at 484. *See also* Stephen J. Kim, Comment, *"Viewer Discretion is Advised": A Structural Approach to the Issue of Television Violence*, 142 U. PA. L. REV. 1383 (1994). Kim notes that, in rejecting the argument that the public's likely negative reaction to the label "political propaganda" made such a labeling requirement unconstitutional, the *Meese* Court declared that the appropriate response by those required to label their materials would be to counter with more speech:

> Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the

B. *Amendments to the Foreign Agents Registration Act*

FARA has been amended eight times by Congress.[43] It was first amended in 1942[44] to "close up certain loopholes."[45] To that end, the terms "foreign principal" and "foreign agent" were expanded by these amendments.[46] The 1942 amendments required agents of a foreign principal (private or government) to:

> (1) report each dissemination of political material in the interest of a foreign principal to the Internal Security Division of the Justice Department; (2) label the disseminated material as foreign political propaganda; and (3) file with the Department of Justice the names

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best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.

Id. at 1410 (quoting Meese v. Keene, 481 U.S. at 480-481) (footnotes and citations omitted). *Cf.* Beth Orsoff, Note, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 241-42 (1993) (rejecting the notion that the term "political propaganda" is neutral and asserting that:

> The only way the Court could reach this conclusion was to limit its analysis to the statutory definition of "political propaganda" [in FARA, for example, "those expressive materials that must comply with the Act's registration, filing, and disclosure requirements," 481 U.S. at 467] . . . [while] ignor[ing] the reality that the public perceives "political propaganda" as negative or even un-American speech.)

Id. at 241-242; Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: "Domesticating" the Restrictions on Citizen Participation*, 2 TEMP. POL. & CIV. RTS. L. REV. 255, 265 (1993) (asserting that FARA "has a chilling effect on political participation that potentially goes far beyond the stigmatization brought on by the Act's application.").

43. Lynn, *supra* note 7, at 352.

44. Spak, *supra* note 16, at 244. *See also* Castello, *supra* note 4, at 657 n.22 ("The 1942 amendments were intended to remedy inadequate and inconsistent enforcement of the original disclosure procedures." It was at this time that Congress expanded the definitions of foreign principals and created the "political propaganda" definition.) (citing Act of April 29, 1942, ch. 263, § 1, 1(b), (j), 56 Stat. 248, 249-51 (codified as amended at 22 U.S.C. § 611 (1982))) (first citation omitted).

45. Spak, *supra* note 16, at 244. *See also* Ronald C. Brown, *East-West Labor Union Cooperation; Falling Walls and Opening Doors: Communism, Cold War Era Barriers, and the Immigration Act of 1990*, 7 AM. U.J. INT'L L. & POL'Y 1, 16 (1991) (indicating that the goal of the 1942 amendments which mandated disclosure statements deeming the dissemination of alien ideologies 'political propaganda,' was to "counter propaganda sent to the United States by the Axis powers of Germany, Italy, and Japan.").

46. Spak, *supra* note 16, at 245. The term "foreign principal" was expanded to include a corporation or person controlled by a foreign principal. The term "foreign agent" was expanded to include foreign military personnel. Newspapers not controlled by a foreign interest were excluded. *Id.*

> of persons and organizations to whom the material was disseminated.[47]

FARA was amended both in 1950[48] and 1961.[49] The most significant amendments, however, were those made in 1966,[50] which had the primary goal of changing the focus of FARA[51] to protect the "the decision making process of our Government" from the efforts of foreign agents to influence U.S. policies, foreign and domestic. This was to be done through the use of "techniques outside the normal diplomatic channels."[52] With this shift in focus, FARA evolved from an anti-propagandist tool into an instrument of "modern regulatory control over the sophisticated lobbying activities of foreign agents."[53] In the articulate phrase of one observer regarding the modern purpose of FARA, "The world is teetering on the brink of peace, and the rise of global markets has forced a need for national economic security."[54]

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47. Burt Neuborne & Steven R. Shapiro, *National Security and the First Amendment; The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 735-36 (1985).

48. Pub. L. No. 81- 642, 64 Stat. 399 (1950).

49. Pub. L. No. 87-366, 75 Stat. 784 (1961).

50. Congress began its work to change FARA in 1963. Spak, *supra* note 16, at 246. Their efforts did not bear fruit, however, until 1966 when the proposed amendments passed both houses of Congress. *See* Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611 (1990)).

51. In 1962, foreign powers lobbied the U.S. Congress to take steps to safeguard their sugar quotas. In response, Congress amended FARA in 1966, changing the coverage of FARA by including "[the] lobbying [of] government officials and by adding commercial activities to the registration requirements." Baker, *supra* note 2, at 25 (citing FARA, 22 U.S.C. § 611(o) (1982)).

52. Lynn, *supra* note 7, at 352 (citing S. REP. NO. 89-143, at 4 (1965)). *See also* Roth, supra note 42, at 261-62 (noting that "the Act's 1966 amendment expanded FARA's initial purpose beyond exposure of foreign-sponsored subversion to exposure of lobbying by foreign entities eager to influence U.S. policies to suit their economic and political interests.").

53. Spak, *supra* note 16, at 242. *See also* Castello, *supra* note 4, at 657 (noting that FARA's current focus on "political lobbying and public relations directed at U.S. policymaking" has "expanded the burden on foreign principals by adding labeling and filing requirements for materials distributed in the U.S.").

54. Baker, *supra* note 2, at 24 (emphasis deleted). The threat to the United States is seen by Baker as no longer coming from subversives promulgating propaganda, but from formidable economic competitors such as Japan. *Id.*

C. *Shortcomings of FARA*

Despite numerous attempts to correct existing problems in the administration of FARA, weaknesses remain.[55] The deficiencies of FARA fall into three general areas.[56] First, there is a noncompliance problem related both to "practical difficult[ies],"[57] and to a "structural insensitivity" to the "extent of current violations and the number of potential violators."[58] Second, the structure of FARA produces "adverse incentives" for compliance with its requirements.[59] Third, FARA does not possess bright-line rules specifying who must register and who is exempt under its provisions.[60]

In addition to the aforementioned deficiencies, the disclosure requirement may lack the bite it was originally intended to possess due to FARA's current focus on lobbying activity, as opposed to its original target of subversive propaganda.[61] In fact, while disclosure was presumed to harm the purveyors of pernicious propaganda, it is the identity of the agent that is vital to lobbying success today, particularly in the case of former officials who work for foreign interests. In such instances, former officials "gain advantage not from anonymity [as did the previous propagandists,] but rather from familiarity."[62] Because FARA

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55. The words of one Congressional member regarding the 1966 amendments remain applicable today: "[The Foreign Agents Registration Act of 1938] has proved inadequate [in regulating] the various subtle forms of persuasion and missionary work on behalf of foreign principals to which we have been subjected in more recent years." 112 CONG. REC. 10,537 (1966) (Statement of Rep. Celler).

56. Perry, *supra* note 3, at 144-45.

57. Spak, *supra* note 16, at 275, 277 (acknowledging in particular the difficulty created by poor staffing levels available to ensure that FARA's reporting requirements are adequately enforced).

58. Perry, *supra* note 3, at 146 (noting a 1980 GAO report that "reflected the Justice Department's concern that [the number of agents actually registered] . . . represented only 'the tip of the iceberg' and that many non-exempt agents were functioning without detection.").

59. *Id.* at 144, 147.

60. *Id.* at 144-45.

61. *See* Spak, *supra* note 16, at 274:

> Foreign propagandists, before 1938, were able to gain an advantage due to the fact that they were often strangers to their audience. Thus, they could appear to be merely concerned ordinary citizens when making statements on behalf of foreign benefactors. FARA took away this advantage from foreign propagandists by making them known to their audience as foreign agents.

62. *Id.* "The familiarity that former officials have with ex-colleagues in the federal service is their greatest asset. Former officials can navigate through bureaucratic channels far easier than others who routinely deal with federal agencies." *Id.*

does not remove any advantage from such officials, it is unable to prevent former government officials from "exercising undue influence" upon their former agency colleagues on behalf of foreign interests.[63]

1. The Problem of Continuing Noncompliance

Noncompliance with FARA is reportedly due, in part, to the practical difficulties of enforcing an act that covers a potentially large number of parties. In 1989, the Justice Department had registered a mere 832 out of a countless number of agents who lobby for foreign governments and foreign private interests before the U.S. government.[64] Inadequate staffing of the Foreign Agents Registration Office comprises one reason for the incomplete monitoring of compliance that has become the norm under FARA.[65] One commentator has noted, "This understaffing begs the question of how seriously the federal government has considered the potential problems of foreign agents operating anonymously in this country."[66]

Noncompliance is also traceable to the FARA administrators' ignorance as to the identity and number of improperly registered agents, which stems principally from the "self-policing" nature of FARA's exemptions.[67] Because the exemption is self-determined,

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63. *Id.* at 275. To wit, "[f]ormer officials have a great deal of confidential information that is most valuable to their new employers. They have substantial contacts within the agency, understand its procedures, and know how to shape arguments for presentation based on the informal practices and standards of the agency." *Id.* at 274.

64. *Id.* at 275 (noting further that, with this low number of agents registering, "it does not take a vivid imagination to surmise that many foreign agents are not registering their activities as required under FARA.").

65. *Id.* The author noted that "[h]istorically, the FARA office has had between six and seventeen persons working for it, including attorneys, paralegals, and clerical personnel." He concluded that "[s]eventeen people [do] not seem to be enough to accomplish the mission of FARA." *Id.* at 275-276 (citations and footnotes omitted).

66. *Id.* at 276. In addition, Spak noted that for over twenty-five years, a congressional committee had criticized "the staffing of the FARA office as inadequate to handle the thorough processing of all registration statements." *Id.* FBI research into registration levels uncovered "discrepancies, omissions, and inconsistencies that the FARA staff had overlooked." *Id.* Nonetheless, "[t]oday, there are roughly the same number of attorneys in the FARA office." *Id.* (citations and footnotes omitted).

67. Perry, *supra* note 3, at 146; *see also* William P. Fuller, S.J., *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 436 (1993) (concluding that "[s]ince 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,' it is hardly surprising that the Act is so often circumvented.") (footnote omitted).

unless the activities of the agent attract the attention of FARA administrators in some way, the legitimacy of this self-determined exemption is never challenged.[68] The successful application of FARA depends on knowledge of those who are violating its provisions. Hence, the lack of an affirmative duty on agents to notify FARA administrators that they are relying on an exemption[69] renders the effective enforcement of FARA's provisions nearly impossible.[70]

2. Disincentives for Compliance

The 1966 amendments to FARA were intended to broaden its reach, bringing under its mandates "the lawyer-lobbyist and public relations counsel whose object [was] not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of the particular client."[71] Although the persons to whom the amended FARA applies often engage in perfectly legal and non-subversive activities, the negative connotation of FARA's original focus remains.[72] This stigma, which continues to be associated with registration as a "foreign agent," acts as a "significant obstacle to voluntary compliance today."[73]

In addition, the exemptions[74] that exist under FARA are confusing, allowing many agents properly within its scope to

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68. Perry, *supra* note 3, at 147. "Successful implementation of FARA rests on knowledge of who is violating the Act. Without imposing an affirmative duty on agents to notify FARA's administrators of reliance on an exemption, the short-staffed registration unit cannot possibly enforce FARA's objectives." *Id.*

69. *See infra* Part II.C.2 (delineating the exceptions under FARA).

70. Perry, *supra* note 3, at 147.

71. Waters, *supra* note 16, at 800 (citing S. REP. NO. 89-143, at 4 (1965)); *see also* Baker, *supra* note 2, at 25 (noting that after World War II, FARA was primarily used to track Communist propaganda, but that in time, "a significant change occurred in the goals of foreign powers attempting to influence the United States political process."). Congress responded to this change by amending FARA in 1966 to "alte[r] the definition of 'political activities' to include lobbying government officials and by adding commercial activities to the registration requirements." *Id.*

72. Perry, *supra* note 3, at 147-48 & n.95; *see also* Baker, *supra* note 2, at 39 (noting that when Congress expanded FARA's coverage to include the "advocacy of a foreign nation's economic interests before government officials, the negative, traitorous connotation did not disappear. The image of traitorous foreign agents covertly promoting un-American activities remain[ed].").

73. Perry, *supra* note 3, at 148 (quoting CONG. RES. SERVICE, 95th Cong., 1st Sess., THE FOREIGN AGENTS REGISTRATION ACT 1 (Comm. Print 1977)); *see also* Fuller, *supra* note 67, at 438 (noting FARA'S ineffectiveness can be traced in part to the lingering stigma attached to registration: "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.").

74. FARA, 22 U.S.C. §§ 613 (a)-(g) (1990).

escape registration by exploiting the loose statutory language.[75] For example, FARA provides for eight exemptions which: (1) exclude foreign government officials, diplomatic and consular staff; (2) provide a commercial exemption;[76] (3) excuse agents engaged in pursuits of a religious, scholastic, or scientific nature; (4) focus on acts involving the defense of a foreign government considered vital to the U.S. defense; and (5) gives the Attorney General the discretion to exempt any agent from the requirements of FARA.[77]

3. Absence of Bright-Line Rules

The absence of clearly defined rules in portions of FARA's regulatory scheme may contribute to noncompliance. For example, enforcement of FARA is undermined by overbroad definitions contained in its provisions.[78] Such definitions lack sufficient clarity for successful application of FARA, and "[f]ailure of agents to register . . . 'is likely due simply to confusion about the provisions of FARA.'"[79]

Two areas of FARA have been criticized as failing to provide adequate bright-line rules. The first involves the treatment of controlled subsidiaries,[80] which is guided by FARA's definition of "foreign principal,"[81] whereby agents of the same must register. Before passage of the LDA, the criticism was leveled that some agents of entities controlled by foreign principals (that were "organized, incorporated, and created under the laws of the United States") were required to register and some were not, based entirely on advice from the Justice Department.[82] The

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75. Perry, *supra* note 3, at 148. In fact, an agent that balances both the probability that FARA administrators discover his[or] her foreign agency relationship and the probability that his [or] her reading of the exemption is erroneous against the burden of compliance with FARA may choose to risk nonregistration. By fostering such a calculus, FARA thus fails to effectively encourage registration. *Id.*

76. *See* Fuller, *supra* note 67, at 435 (explicating the relevant portions of the commercial exemption and concluding that the components of the exemption are subject to ambiguity in application, particularly in the exemption's "more nuanced applications.").

77. Perry, *supra* note 3, at 139.

78. *Id.* at 148. It has been suggested that much of the confusion regarding registration under FARA "stem[s] from the overly expansive and bewildering definitions in FARA itself." *Id.*

79. *Id.*; *see also* Fuller, *supra* note 67, at 436 (suggesting that "[b]ecause the law lacks 'clear guidance as to who is required to register,' many lobbyists interpret it narrowly and conclude that they need not comply.").

80. Perry, *supra* note 3, at 148.

81. FARA, 22 U.S.C. § 611(b) (1990).

82. Perry, *supra* note 3, at 149.

determination by the Justice Department as to which foreign principals were to register was criticized as unguided and lacking a "single firm set of criteria that are uniformly and universally applied."[83] Secondly, the broad definition of "political consultant"[84] has added to the confusion, possibly resulting in the under-enforcement of FARA.[85] The definition of the term is so broad that it may require many more parties to register than originally intended by Congress, which may lead to confusion regarding the scope of FARA's applicability.[86] Such confusion most likely contributes to noncompliance.

III. REFORM PROPOSALS

The arguments over the need to reform FARA have resulted in a laundry list of reform proposals. From academic critics[87] to the proposals of legislators,[88] the cries for change and pleas for closing the purported loopholes in FARA have been perennial. Until recently, however, such calls produced little legislative result, as time and again the U.S. legislature seemed to be poised on the precipice of reform, only to step hastily back from the brink.[89]

Suggested reform measures have generally fallen into three broad categories.[90] First, some reform proposals seek to simplify the process of compliance with FARA, thereby lessening the

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83. *Id.* (quoting 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988)). Agents are required to register where the "U.S. entity does no real business in the U.S., existing only to represent a foreign entity." *Id.* (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988) (statement of Sen. Heinz). The Senator concluded that such a "test does not appear in the law or in regulations." *Id.*.

84. "The term 'political consultant' means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party." 22 U.S.C. § 611(p).

85. Perry, *supra* note 3, at 149.

86. *Id.*

87. *See, e.g.*, Baker, *supra* note 2; Perry, *supra* note 3.

88. *See Overhauling the Lobbying Disclosure Laws: Hearings Before the House Comm. on the Judiciary* (September 7, 1995), *available in* 1995 WL 527076 (F.D.C.H.) [hereinafter *Overhauling Hearings*] (testimony of Senator Carl Levin, in which he noted that Congress had tried and failed to reform lobbying registration laws "[d]ecade after decade").

89. *See Lobbying Reform Proposals: Hearings Before the Subcomm. on the Constitution of the House Comm. of the Judiciary* (September 7, 1995), *available in* 1995 WL 534276 (F.D.C.H.) [hereinafter *Report Hearings*] (statement of Senator Carl Levin noting that since the 1940's attempts had been made to reform lobbying laws and that, as recently as 1994, such a reform bill was passed in the Senate only to die in the House).

90. *See infra* notes 91-132 and accompanying text.

incentives for noncompliance. Second, other proposals aim at removing the negative or stigmatic connotations associated with FARA, bringing FARA more in line with contemporary notions as to who should be subjected to its strictures, and lessening the perceived opprobrium attached to registration under it. Third, numerous proposals strive for general substantive changes in FARA to make its regulatory regime more effective.

A. *Simplifying Compliance with FARA*

It is often argued that the difficulty of complying with FARA has militated against compliance with its registration requirements. Reformers have thus turned their eyes to this particular weakness with hopes of stimulating a heightened degree of compliance through the simplification of the registration requirement process. The simplification proposals have tended to focus on either the actual mechanics of registration or the often bewildering terms of FARA itself.

1. Simplifying the Registration Process

Two principal reform proposals directed at simplifying the registration process under FARA included the consolidation of all registering and reporting requirements under a single office,[91] and the implementation of standardized filing dates.[92] The former change was proposed in a reform bill that passed the House of Representatives, but ultimately failed to become law.[93] The latter was recommended by Senator Heinz in the amendments to FARA that he proposed in 1988,[94] as a method of

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91. *See* Phil Kuntz, *Provisions: Lobbying and Gift Bills Compared*, 52 CONG. Q. WKLY. REP. 1016, 1016 (April 23, 1994).

92. Perry, *supra* note 3, at 151 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988)).

93. The House bill was S.349 and was only slightly different from a bill passed by the Senate on May 6, 1993. Both versions aimed at disclosing to the public "who is being paid how much and by whom to lobby on what issues." Kuntz, *supra* note 91, at 1016. The House Bill aimed to remedy the existing state of affairs that requires lobbyists to register and report at different locations. Though the bill covered more than foreign agents' obligations to register under FARA, its simplified reporting provisions would have resulted in a more straightforward registration process. This reform measure failed ultimately due to a controversial "grass roots" lobbying provision. Catherine O'Brien, *House Feels Pressure of Lobby Reform After Senate Passes Levin Bill*, A. P. POL. SERV., Sept. 9, 1995, *available in* 1995 WL 6740547.

94. Perry, *supra* note 3, at 151 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988)).

making the receipt of registration data more orderly and efficient. This reform initiative, however, also failed.[95]

2. Explicating the Terms of FARA

It is generally considered that the terminology of FARA is unclear, and that noncompliance may be partly traced to the inability of those who may be under its mandate to comprehend their registration responsibilities.[96] FARA has been described as a "byzantine scheme of broad restrictions and numerous exemptions in which it is difficult to know whether one is obliged to register."[97] Clarity of the definitions is critical under FARA due to the "self-policing" nature of its exemptions.[98]

Enforcement problems arise because individual parties must decide for themselves (self-police), based on FARA's often confusing language, whether an exemption applies.[99] If they decide that one does not, they are able to avoid any scrutiny unless they somehow bring themselves to the attention of FARA's administrators.[100] Clarifying FARA's language is only one of a handful of solutions to resolve such problems. The reforms suggested include constricting the broad language of FARA, requiring potential registrants to apply for an exemption to FARA's reporting requirements (known as the "prior clearance" approach),[101] and permitting applicants to send a letter to FARA's administrators announcing their intent to rely on an exemption[102]

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95. Under reporting requirements in force at that time, an agent was required to file initially when a foreign client was accepted and the agent began performing "reportable actions." Perry, *supra* note 3, at 151 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988)). The agent then had to file at six-month intervals from their original filing date. Consequently, agents' filings poured in throughout the year because of the marass of original filing dates. The Heinz proposal would have maintained the initial filing requirement, but would have required agents to submit subsequent filings on January 15 and July 15. This would have retained the biannual reporting structure of FARA while allowing a more timely and orderly receipt of the data, "presumably making compilation of the data more efficient" and making possible a more "thorough review of the data." *Id.* at 151-52.

96. *See generally*, Spak, *supra* note 16.

97. *Id.* at 279.

98. Perry, *supra* note 3, at 147.

99. *See supra* Part II.C.1 (noting the "self-policing" aspect of FARA).

100. *See supra* Part II.C.1.

101. Perry, *supra* note 3, at 158.

102. Spak, *supra* note 16, at 279. Spak notes that it would be difficult to constrict the scope of FARA, since foreign agents lobby the U.S. government over countless issues. Limiting FARA to only specific issues does not seem a desirable reform. Requiring a mandatory application for exemption has an obvious downside—the creation of increased paperwork demands on an already over-taxed FARA administrative office—as well as a less obvious disadvantage—

(an approach labelled as "prior notification").[103] Among these proposals, the clarification approach has the most intuitive appeal and seems to address the problem directly. "Clarifying the exemptions would eliminate the need for either obtaining advance clearance or sending a letter of reliance on an exemption since individuals would usually be able to readily tell if their activity is within the scope of the exemption."[104]

Another measure aimed at elucidating FARA's definitional confusion was proposed by Senator Heinz.[105] Heinz proposed to add a section to FARA's definition of "foreign principal" that would provide a clear rule for determining when a foreign principal maintained control over a domestic entity.[106] Heinz asserted that such an addition would "eliminate the ambiguity of the current standard," while broadening the reach of FARA.[107]

B. *Removing the Stigma Associated with Registration*

Another element of the literature on reforming FARA recognizes that current potential registrants are dissuaded from registering for fear of the stigma still associated with FARA and its anti-subversive origins, as the original impetus for creating FARA was the identification of suspected subversive agencies.[108] To reduce the perceived stigma associated with FARA, some have suggested that its name be changed to remove its "subversive and

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businesses who are regarded as potential registrants would have to apply for an exemption and wait for a decision before conducting foreign dealings. Allowing a letter of intent to rely on an exemption is a better alternative from a business perspective, as it would allow the agent to conduct its activities unless a review of the agents' activities revealed that the exemption did not apply after all. However, the same difficulties remain with the increased paperwork generated by such an approach. *Id.* at 279-80.

103. Perry, *supra* note 3, at 158. Perry calls "prior notification" the better approach as it would increase the total number of foreign agents that were exposed under FARA while allowing FARA administrators to review the claimed exemptions as they saw fit—with no comprehensive review of the claimed exemptions. Perry further argues that such knowledge on the part of agents—that they must notify the Department of Justice of their intent to rely on an exemption—will make them less likely to make "conveniently erroneous judgments of exemption applicability." *Id.* at 159.

104. Spak, *supra* note 16, at 280.

105. Perry, *supra* note 23, at 150-51.

106. *Id.* The rule urged by Senator Heinz would define foreign control of a U.S. entity as over 50% ownership of that entity. Ownership of between 20% and 50% of the entity would establish a rebuttable presumption of control, while less than 20% ownership would be "presumptively not controlling." *Id.* at 151 (quoting 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988) (statement of Sen. Heinz).

107. *Id.*

108. *See, e.g.*, Spak, *supra* note 16, at 278.

criminal connotations . . . [and] to complement its modern focus on lobbyists as opposed to subversive propagandists."[109] The argument is that a removal of the stigma will lead to higher rates of compliance.[110]

Other reform proposals to eliminate the stigma of registration focus on the terms of FARA itself, particularly the terms "foreign agent," and "propaganda."[111] It has been suggested that these terms be changed to "representative" and "promotional material" respectively.[112] Changing the terminology in this way would allow an agent to register under FARA without being labeled as a "foreign agent," which could lead to higher rates of compliance.[113]

C. *Changing FARA Substantively to Heighten Efficacy*

In addition to the less-comprehensive reforms that would improve FARA through definitional, procedural, and labeling changes, reform ideas have been proposed that involve significant substantive changes in FARA and its administrative approach. These reforms fall into two main groups. One type of reform suggests substantive changes in FARA itself, while the other focuses on the enforcement side of the FARA regime and offers improvements in its ability to carry out its registration imperative.

1. Changing FARA's Substance

The most dramatic substantive change that has been proposed is that FARA ought to be repealed and its components divided into "those addressing political subversion and those addressing economic lobbying."[114] Such a division would purportedly recognize the changed role of the foreign agent from the time of FARA's enactment. The sections of FARA relating to political subversion would be incorporated into existing statutory schemes in this area, and a new statute would cover only those

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109. *Id.*

110. *Id.* Spak asserts that agents would not be as reluctant to register as "'international information aide[s]' as opposed to 'foreign agent[s].'" *Id.* (citing Congressional Research Service, The Foreign Agents Registration Act, prepared for the Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (1977)).

111. *See, e.g.*, Perry *supra* note 3, at 159.

112. *Id.*

113. *Id.* at 159-60.

114. Baker, *supra* note 2, at 40. Such a reform was suggested as early as 1973 in Claude-Leonard Davis, Note, *Attorneys, Propagandists, and International Business: A Comment on the Foreign Agents Registration Act of 1938*, 3 GA. J. INT'L & COMP. L. 408, 429 n.109 (1973).

FARA components requiring those who lobby government officials to register.[115]

Another proposed change that was less sweeping than the repeal of FARA (but which nonetheless generated a significant level of reaction) was the elimination of the "lawyer" exemption[116] contained in FARA.[117] This statutory exemption was added in the 1966 amendments to FARA and was intended by Congress to be limited to attorneys representing foreign clients in proceedings before a court or a government agency. It did not, for example, envision embracing those who "attempt[ed] to influence or persuade agency personnel or officials other than in the course of established agency proceedings."[118] The expansive interpretation given by attorneys to the meaning of legal representation, however, made FARA of little practical effect in this area.[119] The "significan[t] abuse" of this exemption was evident in the apparent disregard attorneys had for the registration requirements under FARA, only adequately reporting thirty percent of the time.[120]

The proposal to eliminate the "lawyer" exemption was received less than enthusiastically in some quarters. One such reaction was evident in the testimony of Thomas M. Susmand, chair of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice, before a Senate subcommittee. Susmand asserted that such a step would "needlessly burden the practice of law and undermine fulfillment of lawyers' professional responsibilities."[121] Despite the opposition of the ABA,[122] however, such a reform was officially

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115. Baker, *supra* note 2, at 40.

116. FARA, 22 U.S.C. § 613(g) (1990).

117. *See* Rhonda McMillion, *Push Is on in Congress to Revamp Lobbying Disclosure Laws*, 78 A.B.A. J. 110, 110 (June 1992) (discussing a bill proposed by Michigan Democratic Senator Carl Levin (S.2279) to consolidate four existing disclosure laws so as to make possible the registration of all "professional lobbyists").

118. Baker, *supra* note 2, at 27.

119. *Id.* (asserting that "this exception has swallowed the rule").

120. *Id.* at 35 (citing 134 CONG. REC. S14,933 (daily ed. Oct. 6, 1988)).

121. Levin's bill addressed such concerns by excluding from the definition of "lobbying contact" any "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, provided that such communications are limited to matters that are subject to the proceedings." *Id.*

122. *See* McMillion, *supra* note 117, at 110 (indicating the ABA's concern that elimination of the exclusion would burden lawyers representing foreign interests, raise problems about the right to counsel and the attorney-client privilege for foreign persons violate existing U.S. treaty obligations, and invite retaliatory legislation by other nations against U.S. interests abroad).

proposed by Senator Heinz.[123] Senator Heinz introduced the reform in 1988 and reintroduced it in 1989, but his proposal never became law.[124]

2. Improving the Enforcement Capabilities Under FARA

Some commentators blame a significant portion of the noncompliance with FARA on the poor enforcement capabilities of the FARA administrators.[125] Various reforms have been suggested to remedy this situation. It has been suggested, for example, that one way to deal with FARA's inadequate enforcement powers is to grant new administrative powers to FARA.

Two such administrative powers include the implementation of a schedule of civil fines[126] and the power to subpoena individuals to "appear, testify or produce records."[127] One observer contended that stiffening the penalties of noncompliance is essential to improving the administration of FARA. FARA's maximum fines were stated to "[in]sufficiently deter individuals who regularly receive several times that amount for routine lobbying services," and that either significantly raising the maximum fines or leaving the fines to a court's discretion was necessary to create a "genuine deterrent effect upon high-powered Washington lobbyists."[128]

In addition to increasing the penalties under FARA, the administrators must be given more enforcement powers. Under FARA's current embodiment, the FARA office must seek a grand

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123. Perry, *supra* note 3, at 151. Senator Heinz argued for such a reform noting that:

> [i]n the trade area, much of the work of representation is carried on in the context of formal proceedings such as anti-dumping or countervailing duty investigations . . . and other procedures which are formalized in the trade laws. To exclude this type of activity from reporting is a loophole of some significance, and in some cases is so broad as to swallow the rule.

Id.

124. Baker, *supra* note 2, at 37 n.90.

125. *See, e.g.*, Spak, *supra* note 16, at 275-78; *see also* Fuller, *supra* note 67, at 438. "The [Justice] Department's influence [over FARA] is limited 'to powers of inspection [as to documents of those already registered] and injunction.'").

126. Perry, *supra* note 3, at 152. "Civil fines would provide FARA's administrators with a reasonable way to encourage compliance by fining violators in proportion to their violations rather than relying on severe criminal sanctions (or injunctive relief.)" *Id. See also* Spak, *supra* note 16, at 277 (urging an increase in the maximum fine under FARA).

127. Perry, *supra* note 3, at 152.

128. Spak, *supra* note 16, at 277-78.

jury investigation to procure compliance. However, "granting the FARA office the power to summon individuals to appear before it . . . would do much to expedite the process."[129] In fact, without such an enlargement of enforcement powers, "any other amendments to the law will be nugatory."[130] While granting these additional enforcement powers would necessitate an increase in the staff of the Foreign Agents Registration Office,[131] any additional cost for such an increase would arguably be offset by the increased amount of fines that could be collected with a larger staff.[132]

IV. THE CURRENT ACT—THE LOBBYING DISCLOSURE ACT OF 1995: AN EVALUATION OF THE EFFICACY OF ITS REFORM PROPOSALS

After years of struggle and numerous failed attempts at reform,[133] the LDA represents a legislative victory of sorts. While not seen as a complete success by all who labored for its passage (as it does not contain everything that its sponsors wanted even though it includes all that they believed could be successfully included),[134] nearly all concede it is a good bill.[135] On December 19, 1995, President Clinton signed the reform bill into law. In a statement made on the same date, President Clinton stated:

> [The LDA] replaces the existing patchwork of lobbying disclosure laws with a single, uniform statute that covers the activities of all professional lobbyists. Among other things, the bill streamlines lobbyist disclosure requirements and requires that professional lobbyists register and file regular reports identifying their clients,

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129. *Id.* at 278.

130. Fuller, *supra* note 67, at 442 (noting that "[t]he Department of Justice cannot effectively administer FARA without greater authority to investigate possible violations").

131. Spak, *supra* note 16, at 275. "[Under present staffing levels, the office] is not adequately staffed to monitor compliance and seek corrective action against those who either fail to register or fail to give accurate disclosure on their registration statements." *Id. See also supra* Part II.C.1.

132. Spak, *supra* note 16, at 278.

133. Senator Carl Levin, one of the prime movers in the drafting of S 1060, stated in testimony before the House Committee on the Judiciary that "[d]ecade after decade, Congress has tried to close the loopholes in the lobbying registration laws, and decade after decade, those efforts have failed. This Congress has a chance to be different." *Overhauling Hearings, supra* note 88 (testimony of Sen. Levin).

134. During hearings on the reform proposal, Representative Christopher Shays stated, "[While i]t is possible to write a better bill. . . I'm not sure it's possible that we would pass it. . . ." *Reform Hearings, supra* note 89.

135. Representative Michael Castle noted that the new law "passed unanimously in the Senate with the support of major watch dog groups and more importantly the American public." *Id.*

> the issues on which they lobby, and the amount of their compensation.[136]

The LDA took effect on January 1, 1996.[137]

In the context of the regulation of lobbying activities in general, the new law makes several significant changes, recognizing the shortcomings of the patchwork of lobbying disclosure laws that has been the sole mechanism for keeping track of lobbyists in the United States.[138] The LDA states that "existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose."[139] The law further notes that "effective public disclosure of the identity and efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government."[140]

Under the new law, all lobbyists coming within its scope must register within forty-five days[141] of the first making of a lobbying contact,[142] the accepting of a client, or the carrying over of a client from the previous year.[143] In registering, a general statement regarding the content of the registrant's lobbying efforts is required, and the specific issues already addressed or likely to be addressed during the lobbying efforts must also be disclosed.[144]

In addition to the initial registration requirements, lobbyists must also make fiscal reports on their activities.[145] However, the required disclosure forms are filed much more uniformly under the new law. Section 5(a) provides:

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136. *Presidential Statement, supra* note 13.

137. *New Lobby Disclosure Law is Better Suited For 'History' Than for 'Current Events,'* POL. FIN. & LOBBY REP., Dec. 13, 1995 *available in* LEXIS, Legis Library, Pflrpt File.

138. Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. 1996).

139. *Id.* § 1601(2).

140. *Id.* § 1601(3). Senator Levin stated, regarding S 1060 [the Senate bill precursor to the LDA]'s effect on public confidence in government: "The people want us to change the way we do business in Washington. . . They want to feel, and are entitled to feel, that this government is *our* government." Adam Clymer, *Senate Bill on Lobbying Close to Final Approval: But Limits on Gifts Remain Uncertain*, S. F. CHRON., July 25, 1995, at A3 (emphasis added).

141. 2 U.S.C. § 1603 (Supp. 1996)

142. *Clinton Signs Lobby Reform Bill Setting New Disclosure Procedures*, 13 INT'L TRADE REP. (BNA) 14 (January 3, 1996).

143. *Lobbying, Lobbyists, Hill Officials Prepare For Demands of Lobbying Disclosure Law*, 1995 DAILY REP. FOR EXECUTIVES 237 (Dec. 11, 1995), *available in* LEXIS, Exec Library, Drexec File.

144. *Id.*

145. 2 U.S.C. § 1604(a) (Supp. 1996).

> [N]o later than 45 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 a registrant is registered under section 4, each registrant shall file a report with the Secretary of the Senate and the Clerk of the House of Representatives on its lobbying activities during such semiannual period.[146]

This provision should prove beneficial as it changes the previous filing requirement, which had resulted in semiannual filings that flowed in throughout the entire year, depending on when the initial filing was made.[147] With the uniformity this requirement brings to the registration process, the processing of the reporting data will be facilitated and performed in a more orderly fashion.

In a further attempt to simplify registration, the LDA aims to make the actual filing process of the required registration forms simpler, thereby enhancing the likelihood of compliance. To that end, the LDA "significantly streamline[s] lobbying disclosure requirements by consolidating filing in a single form and a single location . . . instead of the multiple filings required [under the previous regulatory regime]."[148] By further simplifying the reporting requirements, the new law allows the use of "estimates of total, bottom-line lobbying income" in place of the more-complex information previously required.[149] A major proponent of the LDA, Senator Levin, called the detailed information previously required "most[ly] . . . meaningless."[150]

The LDA also clarifies who must register, reducing the ambiguity of previous broad definitions. For example, the LDA contains *de minimis* rules that exempt small organizations from registration even if occasional contacts are made by their employees. Individuals spending less than twenty percent of their time lobbying, and organizations with lobbying expenditures not exceeding $20,000 a semiannual period, are exempt.[151] Lobbyists who receive at least $5,000 during a semiannual period from a single client must register.[152]

In addition to the foregoing improvements, the LDA specifically amends FARA with the goal of strengthening its administration. For example, in accordance with a central goal of

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146. *Id.*

147. *See* Perry, *supra* note 3, at 151-52; *see also supra* Part III.A.1.

148. *Overhauling Hearings*, *supra* note 88 (testimony of Carl Levin).

149. *Id.*

150. *Id.*

151. *Id.* The goal of the drafters of the LDA was to "avoi[d] imposing any burden at all on citizens who are not professional lobbyists, but [to] merely contact the federal government to express their own personal views." *Id.*

152. *Congress, House GOP Leaders to Bring Gift Ban, Lobbying Reform to Vote*, 1995 DAILY REP. FOR EXECUTIVES 181 (Sept. 19, 1995), *available in* LEXIS, Exec. Library, Drexec File.

the LDA—broadening the reach of lobbying disclosure requirements[153]—the new law eliminates the exemption for lawyers who lobby for foreign companies or their subsidiaries.[154] Senator Carl Levin, who has fought for lobbying reform for years, stated that the existing legislation regarding lobbyists was a "sham and a shamble" and nothing but a "bad joke for everyone involved,"[155] leaving "more professional lobbyists unregistered than registered."[156] In order to correct this situation, Levin stated that "[w]e have eliminated every loophole we [could] get our hands on," adding that for the first time, lobbyists will be required to disclose "'who is paying, how much, on what issues.'"[157] The elimination of the lawyer exemption was a response to repeated calls for this reform during past years[158] and is a welcome change. Lawyers frequently able to avoid registration by characterizing their work as "legal representation"[159] will now have to register, permitting a more thorough tracking of the total amount of lobbying activities that occur on behalf of foreign interests.[160]

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153. "The public benefits of more disclosure are undeniable . . . [and] the new law casts a much wider net [with the result that] . . . [t]housands of previously unregistered lobbyists . . . will now have to go public." Goldman, *supra*, note 8.

154. Adam Clymer, *Senators Agree to Increase Lobbyist Reporting: Battle Remains On Gifts Issue*, COM. APPEAL (Memphis), July 25, 1995, at A1, *available in* LEXIS, News Library, Curnws File. *See infra* note 160.

155. *Id.*

156. O'Brien, *supra* note 93.

157. Clymer, *supra* note 154. Senator William Cohen (who along with Senator Levin was a primary crafter of S 1060 (O'Brien, *supra* note 93)) warned that lobbying restrictions should not be too strict: "'There's nothing wrong with lobbying. It's not an evil thing . . . We want lobbyists to register, but let's not chill protected constitutional rights [such as the right to petition the government] in the process.'" *Id.*

158. *See supra* notes 129-36 and accompanying text.

159. FARA, 22 U.S.C. § 613(g) (1990) provided:

> Any person qualified to practice law, insofar as he 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 purposes 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 (emphasis deleted and added).

See Baker, *supra* note 2, at 27 (regarding the expansive use made of this exemption by lawyers).

160. Under the LDA, the phrase "establishing agency proceedings, whether formal or informal" in 22 U.S.C. § 613(g) is struck and is replaced by "judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record." 2 U.S.C. § 1609(2) (Supp. 1996).

Another change made by the LDA that has been heralded by the lobbying community consists of the removal of foreign companies from the jurisdiction of FARA.[161] At present, corporate filings make up nearly half of all FARA registrations, which take hours to complete due to the detailed information required by the Justice Department.[162] Critics of this change, however, such as Justice Department officials, claim that it "undercuts critical scrutiny of foreign influence on domestic affairs."[163] In response, lobbyists argue that overseas companies that are not "trying to subvert American government policy" in the global marketplace, and who often have U.S. subsidiaries, should be treated no differently than domestic firms.[164]

Indeed, in this era of global competition, it is not realistic to expect foreign companies doing business with the United States to avoid attempting to influence U.S. policy in their favor. As a system with many potential points of entry for those seeking to influence its policy apparatus, the U.S. political structure must recognize that it is uniquely vulnerable to such efforts. However, instead of unduly burdening foreign corporations, a sensible and workable plan of registration should be nurtured and maintained.[165] This will provide the United States with both the security it seeks and the prosperity born of increased competition that it deserves.[166]

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161. Goldman, *supra* note 8.

162. The Justice Department requires color-coded pages of information on principals who have left or joined the firm in the preceding six months, accountings of campaign contributions, and copies of lobbying contracts. These demands have been said to represent "taking bureaucracy to new heights." *Id.* (quoting Thomas Susman, editor of a how-to lobbying manual).

163. *Id.*

164. *Id.* It is clear that there are limits to what disclosure may reveal regarding the true influence of private money upon the public. Ellen Miller, of the Center for Responsive Politics, asserts that disclosure alone is not enough to change business as usual. According to Miller, what is needed is a cross-referencing of the disclosure information with campaign contributions in order to determine which legislator is receiving donations from whom "to draw a closer link with whose interests are really being represented." *Id.*

165. Even though foreign companies and trade associations are exempt from the highly detailed reporting requirements under FARA, they still must file under the same guidelines as everyone else. *Id.* This makes such foreign firms subject to potential civil fines of up to $50,000 for a violation of registration requirements, as provided for in the LDA. *Id.*

166. There is some concern remains that FARA registrants will seek to make use of a provision in the new law which waives FARA's more stringent disclosure requirements for those becoming LDA registrants. *Loopholes for Lobbyists: Some Provisions of New Registration Law Have 'Unintended Consequences,'* POL. FIN. LOBBY REP., Feb. 14, 1996, *available in* LEXIS, Legis Library, Pflrpt File. However, Frederick J. Close, Jr., acting chief of the registration unit in the Justice Department's Internal Security Division, noted that "[t]he new law says you must be *required* to register under [the] LDA in order

The removal of foreign companies from FARA's jurisdiction is likely to have an efficacious impact on the administration of FARA. The LDA's positive impact in this regard will derive from the added guidance as to which agents of foreign entities must register.[167] Now, only lobbyists for foreign *governments* must file FARA reports.[168]

Further, compliance with FARA's registration imperative is likely to improve due to new provisions that focus on simplifying the registration process. For example, the LDA waives FARA's disclosure requirement for foreign agents who register as lobbyists on Capitol Hill.[169] This waiver has the effect of allowing foreign agents to avoid a FARA requirement that registrants disclose any formal contracts with their clients.[170] This change is likely to lessen any disincentive to register by reducing the registration requirements that existed under FARA's prior regulatory regime. Though falling short of actually consolidating all registration requirements under a single office,[171] the change is nonetheless a needed simplification.

In response to one of the most vociferous criticisms of FARA in recent years,[172] the new law also makes a significant definitional change to FARA. Regarding the section of FARA defining "political activities,"[173] the new law strikes the confusing language that prohibited "the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon,

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to get the FARA exemption." *Id.* (emphasis added) (internal quotations omitted). Further, the new law does not change the Justice Department rule requiring FARA registrants to obtain permission before terminating a FARA reporting obligation. Close explained, "Foreign agents who want to register under the Lobbying Disclosure Act will be required to terminate their FARA registrations. We will determine from their [termination] applications if their LDA registration is valid[.]" *Id.* (internal quotations omitted). Thus, oversight of FARA registrants will continue and fears of foreign agents escaping scrutiny by electing LDA registration seem unwarranted.

167. *See supra* Part II.C.3.

168. Goldman, *supra* note 8.

169. *New Lobby Disclosure Law*, *supra* note 137.

170. *Id.* Regarding this provision in the new law, Edward Zuckerman stated that the law represents the "'replace[ment of] a bad disclosure law with a law that fails to deliver on a promise of full disclosure' . . . [and in fact] discourages disclosure." Frank Greve, *Critics Find Loopholes In Senate Lobby Reform, Disclosure Measure*, THE CHARLESTON GAZETTE, August 22, 1995, at 5A, *available in* LEXIS, News Library, Curnws File. Ann McBride, president of Common Cause, a group that lobbied for the reform law, disagrees asserting that "'the current disclosure law is a joke. . . [a]nd to say that this is a step backward from it is baloney'." *Id.*

171. *See supra* Part III.A.1 (noting such a proposed consolidation).

172. *See supra* notes 112-17 and accompanying text.

173. FARA, 22 U.S.C. § 611(o) (1990 & Supp. 1996).

indoctrinate, convert, induce, persuade, or in any other way influence [the U.S. government in its policies toward a foreign country or political party]."[174] In place of this language is inserted the following phrase: "Any activity that the person engaging in believes will, or that the person intends to, in any way influence [those policies]."[175] Additionally, the term "political propaganda" has been replaced by the term "informational materials" in several different sections of FARA.[176] In other sections, references to "political propaganda" have simply been eliminated.[177]

These definitional changes represent a good start at addressing the stigma associated with registration under FARA.[178] Eliminating the "political propaganda" language brings FARA more in line with contemporary notions of the sources and intentions of foreign influence. Such language, reminiscent of a time when the United States feared the influence of the subversive elements of hostile foreign governments dedicated to harming U.S. interests, is out of step with modern lobbying efforts which seek to influence the outcome of the legislative processes of the United States.

Nonetheless, some of the stigma associated with FARA remains. FARA is still titled in such a way as to suggest its focus has not changed as much as the current amendment. In addition to the laudable definitional changes to FARA, its title should also be changed to reflect its new focus. For example, "The Foreign *Lobbyists* Registration Act" would be a simple change, reflective of its purpose, while less stigmatizing than the current reference to "foreign *agents.*"[179] Such changes aimed at reducing the stigma associated with FARA are crucial. Not only are such changes necessary to reflect the current environment in which FARA

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174. *Id.*

175. 2 U.S.C. § 1609(1)(B) (1990 & Supp. 1996).

176. *Id.* § 1609(4)-(6).

177. *Id.* § 1609(7)-(8).

178. Some observers, however, question why references to "political propaganda" were removed from FARA given the Justice Department's successful defense of the use of the term before the U.S. Supreme Court. *Loopholes For Lobbyists, supra* note 166.

179. U.S. Representative James A. Traficant, Jr., has proposed a measure aimed at toughening registration requirements for foreign lobbyists. A central part of this measure is the substitution of the term "representative of a foreign interest" for "foreign agent." Press Release, March 22, 1996, *James Traficant, Congressman, House, Traficant Urges House Judiciary Panel To Toughen Rules On Foreign Lobbyists*, Congressional Press Releases [hereinafter Traficant Press Release] *available in* 1996 WL 8784791. This alteration will broaden the definition, presumably closing a loophole. *Id.* It will have the additional effect of lessening the stigma associated with registration under FARA, thereby making potential registrants less averse to such registration. See *supra* Part III.B.

operates, the reduction of the negative associations is essential to maximize compliance with its registration imperatives, particularly due to the self-policing nature of its provisions.[180]

Another positive change made by the new law requires former U.S. trade representatives or deputies to be banned for life from lobbying.[181] This makes former government officials unable to peddle their influence upon their one-time co-workers in the U.S. government on behalf of foreign interests.[182] This change reflects the different world in which FARA must operate today. Lobbyists are not capitalizing on anonymity, as did the past propagandists, but are instead shopping themselves as a desired commodity to foreign interests because they *are* well known.[183]

Although the LDA represents an important step forward in lobbying reform, much more remains to be done. The law did not, for example, address one of the most serious problems with the administration of FARA—that of understaffing. The new law neglected to provide for new personnel, a failing that is likely to become problematic if the law accomplishes its goal of increasing the number of registrants. Such an increase would severely tax an already overworked staff. Although registration levels may rise initially, as FARA's resources are spread increasingly thin, potential registrants are likely to evade the scrutiny that could be provided by more robust staffing levels.

Similarly, while the new law aims to increase the level of registration under FARA, the LDA failed to adequately address the need for increased enforcement powers in the office of the Department of Justice. If there is to be any realistic hope of a true increase in the number of foreign agents registering as required, the administrators of FARA must be given the power necessary to compel compliance. As long as the administrators lack the ability to even properly *assess* compliance,[184] such as by subpoenaing individuals to determine if the requisite registration

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180. *See supra* Part II.C.1 (regarding the "self-policing nature" of FARA) and III.A.2 (noting reforms aimed at strengthening this aspect of FARA).

181. Warren P. Strobel, *Clinton Says Lobby-Reform Bill Will 'Pull Back the Curtains': Measure Reflects Bipartisan Consensus, Has Major Curbs*, WASH. TIMES, Dec. 20, 1995, at A8, *available in* LEXIS, News Library, Curnws File.

182. Senate Majority Leader Robert Dole stated that the "appearance of a revolving door between government service and private sector enrichment" was a problem, one that was "exacerbated when former government officials work on behalf of foreign interests." *Senate Lobbying Reform Bill Bars Foreign Lobbying by USTR, Deputies*, 12 Int'l Trade Rep. (BNA) No. 34, at 1423 (Aug. 23, 1995).

183. *See supra* Part II.C. (noting the problem with such officials working for foreign interests).

184. *See* Fuller, *supra* note 67 (recommending increased authority for FARA administrators to "investigate possible violations").

procedures have been followed, [185] the enforcement arm of FARA will remain largely impotent.

Another significant gap in the administration of FARA that was not addressed by the LDA is that of the self-policing nature of FARA and its exemptions. Though the LDA eliminates the lawyer exemption, other exemptions[186] remain which continue to be self-applied.[187] This oversight allows those potentially subject to FARA's registration requirements to avoid registration by determining that one of the exemptions applies to them. A further step is thus needed to ensure that the exemptions are validly applied. For instance, potential registrants should be required to notify FARA administrators in advance of their intention to rely on one of the exemptions, allowing the Justice Department to decide if a review is necessary. Without such a notification requirement, FARA administrators cannot reasonably be expected to monitor compliance as those parties, who determine on their own initiative whether they come within an exemption, simply avoid detection.

A further shortcoming in the effort to reform FARA consists of the LDA's failure to address the punitive aspects of FARA. While the LDA provides for civil fines of up to $50,000 for a violation of its registration requirements, these civil fines are not applicable to those who violate the registration imperatives of FARA.[188] This was a costly oversight because one of the perennial problems with enforcement derives from the reluctance of administrators to impose the criminal penalties available under FARA upon violators.[189] Unless FARA's enforcement mechanism is modified

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185. *See supra* notes 129-32 and accompanying text.

186. One example is the "commercial exemption" provided for in FARA. *See* Fuller, *supra* note 67, at 434 (noting that the relevant section of that exemption applies "to agents making only routine contacts with government officials on matters not concerning policy formulation." It excuses "[a]ny 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.'") (citing 22 U.S.C. § 613(d) (1988)) (footnotes and first citation omitted). A bill by U.S. Representative. Traficant would eliminate this exemption by requiring "any person who engages in political activities for the purpose of furthering the commercial or financial operation of a foreign interest" to register. Traficant Press Release, *supra* note 180.

187. *See supra* notes 98-104 and accompanying text (describing the "self-policing" nature of the exemptions).

188. FARA, 22 U.S.C. § 618(a)(2) (1990) provides that violators may be "punished by a fine of not more than $10,000" while LDA, 2 U.S.C. § 1060(2) (Supp. 1996) provides that noncompliance may be punished by a "civil fine of not more than $50,000."

189. *See* Press Release, May 10, 1996, *Charles Canady, Congressman House, Canady Introduces Bill To Restrict Revolving Door Lobbying*, Congressional Press Releases [hereinafter Canady Press Release], *available in* 1996 WL 8786700 ("Currently, only criminal penalties are provided for in FARA, and the Justice

to provide a schedule of civil fines for violations of its registration mandate, in addition to the criminal sanctions already provided,[190] it is unlikely that those who scorn their registration duty will be punished. Only punishment will deter future disregard of FARA's registration requirements. So long as FARA administrators are reluctant to impose the severe criminal penalties available under FARA, the continuing absence of civil fines for such violations seems to send potential registrants the message that they can ignore FARA's guidelines with impunity.[191]

V. CONCLUSION

The LDA represents the first successful attempt in decades to reform the regulatory apparatus of FARA. It was the product of a bipartisan effort that recognized the practical limitations of the legislative process itself on any reform process of this nature. The passage of the LDA is a testament to the diligent efforts of its sponsors and to the cumulative impact of the calls for reforms made by scholars and legislators alike for many years.

The changes made to FARA by the LDA are consistent with the reforms supported by both academics and political reformers. The elimination of the references to "foreign propaganda," while not entirely sufficient to eliminate the stigma associated with registration, constitutes a commendable step. Such a change brings FARA into the new era of global competition, where the impact of foreign interests is felt, not in subversive propaganda, but in the efforts of well-heeled lobbyists who bring their influence to bear on the U.S. government. The effort to increase the simplicity and uniformity of filing under FARA is likewise laudable. The elimination of the lawyer exemption and the

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Department has been unwilling to enforce the statute due to the strict criminal penal sanctions involved.").

190. *See* Fuller, *supra* note 67, at 438 (noting that FARA's "criminal provisions for noncompliance are not an effective threat. Such a charge is hard to substantiate because intent to violate [FARA] must be established, so administrators rely on civil [or] injunctive remedies instead.").

191. This shortcoming of FARA has been duly recognized and bills seeking to correct this deficiency in FARA's enforcement machinery have already been drafted. For example, Representative Canady has proposed the addition of civil fines to FARA which mirror those in the LDA. For each knowing violation of the registration requirements of FARA, a civil penalty of not more than $50,000 may be imposed. Canady Press Release, *supra* note 189. A bill proposed by Representative Traficant. provides for much stiffer civil penalties: "[A]ny person who has failed to file, omitted facts, or made a false statement regarding the facts, [may be subject] to a minimum fine of $2,000, and a maximum fine of $1,000,000." Traficant Press Release, *supra* note 179.

closing of the revolving-door regarding former U.S. trade representatives also constitute necessary reform.

Though several key aspects of FARA were unfortunately left unaddressed, the positive changes the LDA made to FARA should increase foreign agent registration. Such changes will allow FARA administrators to track down a large number of previously unregistered lobbyists. The success of the LDA in bringing more lobbyists under FARA's registration imperative, however, also points to its greatest shortcomings. While registration is expected to rise, FARA administration staff levels and enforcement powers remain insufficient under the LDA. Therefore, it is unclear whether the already strained staff will be able to maintain an adequate level of supervision of increased numbers of registered foreign lobbyists. Only when the additional step of bolstering the ranks and powers of the administration staff is taken may one truthfully assert that the light of public scrutiny will shine on those who seek to influence U.S. governmental processes.

Charles Lawson[*]

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