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The Lobbying Disclosure Act (LDA) and Its Exemption for Non-Government Foreign Entities

The First Amendment protects the fundamental right “to petition the Government for a redress of grievances.”¹ This right applies as fairly to the people as it does to the professionals who habitually engage in lobbying on behalf organized interests, both small and large. Special interests seeking exclusive access to policymakers is a tale as old as time, as are concerns over their disproportionate influence on government, especially that of international entities on foreign policy. Alexander Hamilton’s warnings of the dangerous influence of foreign agents on republican governments,² James Madison’s theory that larger republics can better withstand special interests,³ and Patrick Henry’s remarks on Great Britain’s corruption are proof of this history⁴. Balancing the scales does not require curbing the First Amendment or upending the political system. The enforcement of transparency mandates on lobbyists would have been

¹ U.S. Constitution, amend. 1.

² Hamilton writes, “One of the weak sides of republics... is that they afford too easy an inlet to foreign corruption ... history furnishes us with so many mortifying examples of the prevalence of foreign corruption in republican governments.” Alexander Hamilton, “The Federalist Papers: No. 22,” *The Avalon Project*, December 14, 1787.

³ Madison writes, “The greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter.” James Madison, “The Federalist Papers: No. 10,” *The Avalon Project*, November 23, 1787.

⁴ Henry writes, “Look at Britain—see there the bolts and bars of power—see bribery and corruption defiling the fairest fabric that ever nature reared.” Zephyr Teachout, “Original Intent,” *Democracy: A Journal of Ideas*, no. 11 (January 2009): 44–53.

unthinkable within the framework of small government the founders designed. However, had they been policymakers today, they likely would have supported ramparts against corruption and foreign influence, especially given no lobbying statutes have limited the First Amendment yet.⁵

Impetus for the Lobbying Disclosure Act of 1995 and its Amendments to FARA:

The first federal statute to regulate the lobbying activities of interest groups was the Foreign Agents Registration Act (FARA), which was originally enacted to limit the influence of foreign agents on American politics, specifically that of Nazi propagandists on public opinion in the lead-up to World War II. FARA is the most rigorous federal lobbying statute, as evidenced by its high disclosure requirements and severe criminal sanctions, including deportation of aliens. It set the groundwork for every subsequent federal lobbying statute.⁶ In 1966, FARA was amended to shift focus from monitoring propaganda to regulating lobbying by foreign companies and governments.⁷ Between the passage of FARA in 1938 and the passage of the Lobbying Disclosure Act (LDA) in 1995, there were four legislative statutes mandating the registration of lobbyists and the disclosure of their efforts to influence government, as well as one executive order.⁸ The disclosure requirements and the interest groups to which they applied varied in each statute, often resulting in one lobbyist having to register under two to three statutes. Those same statutes excluded major segments of the lobbying community and left many lobbyists with no

⁵ Ronald G. Shaiko, "Lobby Reform: Curing the Mischiefs of Factions?," in *Remaking Congress: Change and Stability in the 1990s*, ed. James A. Thurber and Roger H. Davidson (Washington: Congressional Quarterly Inc., 1995), 158.

⁶ Mark Fagan, *Lobbying: Business, Law, and Public Policy* (Lake Mary, FL: Vandeplas Publishing, LLC, 2015), 148-149.

⁷ John Herschel Glenn Jr., "Lobbying Disclosure Act of 1993" (Washington: United States Senate Committee on Governmental Affairs, April 1, 1993), 8-9.

⁸ Shaiko, "Lobby Reform: Curing the Mischiefs of Factions?" 158-162.

registration requirements.⁹ In fact, Phil Kuntz, reporting for the *Wall Street Journal* at the time, wrote that the standing legislation, particularly the Federal Regulation of Lobbying Act of 1946, “has been interpreted so narrowly by the court and enforced so weakly by the Justice Department that critics say compliance is almost voluntary.”¹⁰ The unclear statutory language accompanied by its lack of enforcement encouraged an overall disrespect for the law.

There were numerous problems with the aforementioned legislative corpus of lobbying statutes that the LDA sought to resolve. When considering amendments to make to FARA through the LDA, the House and Senate’s committee reports highlighted some issues FARA faces in practice. For one, the loopholes in FARA incentivized noncompliance in order to avoid its more burdensome disclosure requirements. Namely, foreign agents registered under FARA were subject to investigation of their books and records by the Justice Department; however, those who do not register are not subject to any investigative reviews short of a criminal investigation.¹¹ Given this dynamic, it should not be surprising that a 1990 General Accounting Office report on FARA compliance found that, on average, half of foreign agents registered with the Justice Department did not fully disclose their activities and more than half registered their initial forms late and filed their semiannual reports late.¹²

Furthermore, disclosure by businesses lobbying for commercial purposes is undermined by the considerable “gray area” in which it is unclear when the beneficiary of one’s business

⁹ Charles T. Canady, “Lobbying Disclosure Act of 1995” (Washington: United States House Committee on the Judiciary, November 14, 1995), 1-2.

¹⁰ Phil Kuntz, “House Clears Bill to Require Lobbyists to Disclose Employers, Pay and Issues,” *Wall Street Journal*, November 30, 1995, Eastern edition.

¹¹ Canady, “Lobbying Disclosure Act of 1995,” 7-8.

¹² Frank C. Conahan, “Foreign Agent Registration: Justice Needs to Improve Program Administration” (Washington: United States General Accounting Office, July 1990), 4-6.

would be classified as “domestic” or “foreign.” Aspects of this “gray area” to consider include U.S. corporations with a majority of foreign shareholders or a foreign firm with U.S. based facilities and thousands of American employees. These cases serve to highlight the outdatedness of FARA, one lobbyist registered as a foreign agent commented, “With the increasing internationalization of world commerce, it is simply impractical and unhelpful to try to distinguish between foreign and domestic interests which are essentially commercial.”¹³ Globalization has made it more difficult to understand the difference between foreign and domestic interests; nonetheless, the argument that any attempt to distinguish between the two is impractical and unhelpful might be overblown.

Streamlining the LDA and Incentivizing FARA Compliance:

A major objective of the LDA was simply consolidating all lobbying disclosure requirements into a single set of regulations. An optimal outcome in this regard would be streamlining the disclosure of meaningful information while minimizing needless paperwork which impedes on the government’s ability to relay accurate disclosures to the public in a timely manner. This is especially important as it is part of an effort to restore respect for the law, which became neglected due to frustrations with the registration process under multiple lobbying statutes which were rarely enforced.¹⁴ Another key goal was to foster “responsible representative

¹³ As a lobbyist for Willkie Farr & Gallagher and a registered foreign agent, Mr. Barringer was asked to give testimony to the Subcommittee on Oversight of Government Management’s hearing focused on the enforcement and administration of FARA. Glenn, “Lobbying Disclosure Act of 1993,” 38-39.

¹⁴ Canady, “Lobbying Disclosure Act of 1995,” 1-2.

government” by increasing public awareness of lobbyists’ efforts to influence the policymaking process in the legislative and executive branches.¹⁵ Senator Carl Levin of Michigan commented,

[The people] want to feel, and are entitled to feel, that this Government is our Government. When public opinion shows that a majority of Americans feel that lobbyists are the real power in Washington, only 22 percent believe it's Congress, and only 7 percent the President, we must act to restore confidence that in fact their elected representatives control the power in Washington.¹⁶

The overall goals of the LDA were not revolutionary, but they were likely essential for the restoration of public integrity and transparency in governance.

The goal the LDA exemption to FARA was to eliminate the gray area in which it is unclear when commercial interests are considered foreign and when they are considered domestic. By making it easier for foreign entities to register as lobbyists, the goal is to avoid evasion and ensure the complete disclosure of foreign lobbying. Furthermore, foreign companies being required to register under FARA and disclose massive amounts of private business information to the public, while their domestic competitors do not, puts them at a severe competitive disadvantage and encourages them to find ways of avoiding complete FARA disclosure.¹⁷ Although these goals appear simple, they might be able to change many lobbyists’ attitudes toward disclosure, if they come to fruition.

Facilitating Compliance with Federal Lobbying Statutes:

In order to streamline the lobbying disclosure statutes, the policymakers had to compile the strongest and most effective aspects of the standing legislation. Under the Lobbying

¹⁵ This marks a key shift in focus between the LDA and the Federal Regulation of Lobbying Act of 1946, which was aimed at informing legislators on who was influencing policy, as opposed to public. Fagan, *Lobbying: Business, Law, and Public Policy*, 60.

¹⁶ Adam Clymer, “Lobbyist Disclosure Is Backed in Senate; Gift Issue Is Put Off,” *The New York Times*, July 25, 1995, A1.

¹⁷ Glenn, “Lobbying Disclosure Act of 1993,” 39.

Disclosure Act of 1995, Lobbyists must register within 45 days of making their first contact or being retained to make a contact and are required to file semiannual reports that detail the issue area the registrant is addressing and a good faith estimate of the total expense incurred. The statute further outlines the thresholds at which one would be required to register under the LDA, as well as specific civil fines which can amount to as much as \$50,000.¹⁸ A significant portion of the improvements made by the LDA can be entirely attributed to the clarification of ambiguities and removal of loopholes generated by the previous agglomeration of lobbying statutes that rendered lobbyists ambivalent about compliance with unclear and unenforceable laws.¹⁹

The Foreign Agents Registration Act was one of the many statutes for which the LDA enacted reforms to address. Specifically, the LDA made four amendments to FARA, two of which addressed important exemptions to the legislation.²⁰ Most importantly, the first amendment limited FARA's scope to solely include lobbyists representing foreign governments or political parties, shifting coverage of all other foreign entities to the LDA, which has considerably less comprehensive registration and disclosure guidelines (this is commonly referred to as the LDA exemption).²¹ Another relevant amendment to FARA was refining the "lawyers' exemption" that had exempted the attorney of a foreign principal from disclosure

¹⁸ Fagan, *Lobbying: Business, Law, and Public Policy*, 61-62.

¹⁹ For more information on the specific reforms instituted by the LDA, one can refer to the [full text of the LDA here](#) or the [House Committee report](#) which provides a basis for the need for reform, as well as a section-by-section analysis of the bill's text.

²⁰ The other two amendments are detailed in the House Committee report on the Lobbying Disclosure act of 1995, Sec. 9, p. 21-22. (2) eliminates a FARA exemption that is made irrelevant by (1), and (4) eliminates FARA's references to political propaganda, which only serves as a remnant of FARA's original purpose in 1938.

²¹ These other foreign entities are specified to include corporations, partnerships, associations, and individuals. Canady, "Lobbying Disclosure Act of 1995," 21-22.

requirements, so that it would now only apply to an attorney in their capacity as the foreign client's legal representation in judicial proceeding.²²

Evaluating the Successes, Failures, and Oversights of the LDA's Statutory Overhaul:

Before discussing the oversights made in the drafting of the LDA, it is important to evaluate whether or not it was successful in terms of its original goals. The LDA did clarify much of the ambiguity of the federal lobbying statutes that were on the books prior to its passage by consolidating the legislation, and therefore facilitating compliance. In fact, a recent Government Accountability Office (GAO) report found that approximately 88% of the lobbying firms they interviewed reported that it was "very easy" or "somewhat easy" to comply with LDA reporting requirements, which demonstrates a significant improvement from the status quo 25 years ago and the success of the LDA in meeting at least one of its key goals.²³ However, the same GAO report also highlights that facilitating compliance may not be all that is necessary to foster compliance: 20% of the quarterly lobbying disclosure reports examined by the GAO did not properly round their reported incomes to the nearest \$10,000.²⁴ This is not a coincidence. In fact, many firms attempt to artificially increase their numbers so that they can round up their incomes, because publications use those numbers to rank D.C.'s biggest lobbying firms every

²² This allows for attorney-client privilege without creating a loophole; thus, a substantial amount of communication unrelated to the attorney's legal representation remain subject to § 615 of FARA. Cynthia Brown, "The Foreign Agents Registration Act (FARA): A Legal Overview" (Washington: Congressional Research Service, December 4, 2017), 8-9.

²³ Yvonne D. Jones, "2018 Lobbying Disclosure: Observations on Lobbyists' Compliance with Disclosure Requirements" (Washington: United States Government Accountability Office, March 29, 2019), 12.

²⁴ Jones, "2018 Lobbying Disclosure," 19.

year.²⁵ The LDA has definitely been an improvement to the status quo of 25 years ago, but it would be difficult to argue that it has fully accomplished all of its goals.

More importantly, the relevance of FARA in the public discourse has increased significantly since 1995, and the LDA exemption it made has come under fire. Although it is true that the disproportionate disclosure requirements under FARA as compared to the LDA could have put foreign companies at a competitive disadvantage and was likely a cause for their noncompliance with FARA, it is not clear that making these foreign entities exempt from FARA was the best response. In fact, the LDA exemption has created gaping loopholes for foreign governments hoping to influence public policy without being subject to the intensive disclosure requirements of FARA. The House Committee Report on the LDA of 1995 clarified at the time that “a lobbyist for a foreign corporation that is owned by a foreign government will register under the Lobbying Disclosure Act, rather than under FARA,” so long as the lobbyist’s political activities are for the benefit of the company’s interests.²⁶ This is an unenforceable standard due to the overlap of what is beneficial to a business’s individual commercial interests and what would be beneficial to the state’s overall economy, and it is exactly the kind of loophole the LDA was trying to avoid. FARA and its later amendments were instituted to protect the public against undue foreign influence in their government. The LDA exemption was seen as acceptable, however, because the authors understood lobbying by foreign governments and political parties as fundamentally different from lobbying on behalf of commercial interests.²⁷ Although this is true, it fails to take into account the organization of several foreign political and

²⁵ Joshua Rosenstein, partner at Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., attested to this phenomenon in his lecture at the Workshop on Ethics and Lobbying on February 15, 2020.

²⁶ Canady, “Lobbying Disclosure Act of 1995,” 21.

²⁷ Canady, “Lobbying Disclosure Act of 1995,” 38.

economic systems wherein politics and business do not operate in separate spheres; rather, business is subject to the whims of the government.

One prime example of a state where the line between business and government is blurred can be observed in China. Although companies like Huawei have ultimate control over business decisions, Chinese laws and administrative guidelines make it difficult to determine whether a company is technically private or state-owned. One example of a law that blurs the lines and confounds what it means for a company to have agency over its decisions is China's Cybersecurity Law that requires Chinese companies to furnish the Chinese government access to its data. Similarly, Article 28 of the Cybersecurity Law requires network operators and telecommunications companies to provide "technical support and assistance" to all government offices involved in the maintaining of national security. Even more concerning, however, is the National Intelligence Law of 2017, which instructs every organization and citizen to support, assist, and cooperate with the national intelligence network.²⁸ It would not be beyond the pale to assume these statutes might require private companies to mobilize their lobbying teams on behalf of China's national security interests. It is worth pondering at what point can companies operating in communist countries be considered organs of the state? In fact, this hypothetical becoming a reality is not too far away. Some joint-venture executives have faced political pressure from their state-owned partners to give the Chinese Communist Party final say in business operations and investments opportunities.²⁹ The economic and political conditions in countries like China calls into question the ability of the U.S. government to treat all commercial

²⁸ Ashley Feng, "We Can't Tell If Chinese Firms Work for the Party," *Foreign Policy*, February 7, 2019, <https://foreignpolicy.com/2019/02/07/we-cant-tell-if-chinese-firms-work-for-the-party/>.

²⁹ Michael Martina, "Exclusive: In China, the Party's Push for Influence inside Foreign Firms Stirs Fears," *Reuters*, August 24, 2017, <https://www.reuters.com/article/us-china-congress-companies-idUSKCN1B40JU>.

interests equally, when some may be operating much more like a government agency than a private company.

Prospects for Change and Restoring Security:

Although the LDA was unarguably a necessary reform measure, and the evidence has shown that it was effective in streamlining and facilitating compliance with federal lobbying statutes, the potential ramifications of its amendments to FARA were not well thought out. The LDA is a lobbying bill, and it probably would have been best for it to leave matters of foreign interference and national security to foreign policy experts. A superior reform would have been to leave FARA regulations as they were, while providing the Justice Department with better tools for enforcement, as well as additional staff.

Senator Chuck Grassley's bill, the Disclosing Foreign Influence Act (S. 2039), would develop the comprehensive enforcement strategy that should have been implemented in 1995. At the crux of this strategy would be granting the Justice Department the civil investigative demand authority. The bill would also repeal the LDA exemption, so that all foreign entities are subject to FARA.³⁰ Unfortunately, not all nations have free markets and independent business like the United States. This condition requires that the government and the people have access to comprehensive information on the lobbying activities of foreign entities, whether or not they are technically political institutions. These transparency and disclosure measures will serve as buttresses against the foreign corruption that Hamilton warned could be republican government's downfall in *the Federalist Papers*.

³⁰ Brown, "The Foreign Agents Registration Act (FARA): A Legal Overview," 12.

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