of 5 complaints about violations of the Act over the previous 15 years, all of which it declined to prosecute.[8]

In short, the Lobbying Regulation Act has been a failure: it is unclear and confusing, unenforced, and it has failed to ensure the public disclosure of meaningful information about lobbying activities. As Senator Levin concluded, at the Subcommittee hearings:

> That is a pretty dismal picture of a law that just isn't functioning as a law, and that has been festering on the books too long. We ought to either clean it up and make it relevant or get rid of it. That seems to me to be the inevitable conclusion.[9]

B. THE FOREIGN AGENTS REGISTRATION ACT

The Foreign Agents Registration Act was passed in 1938 to require public disclosure of the activities of Nazi propagandists. As the Supreme Court explained in 1943—

> [FARA] was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda and to require them to make public record of the nature of their employment.[10]

In 1966, in response to overly aggressive lobbying by foreign sugar companies, FARA was amended to cover a broader range of foreign activities and interests. Since that time, the focus of the Act has shifted from the regulation of subversive activities to the disclosure of lobbying on behalf of foreign business interests.

FARA requires any person who becomes an "agent of a foreign principal" to register with the Attorney General within 10 days thereafter. The term "agent of a foreign principal" includes—subject to certain exemptions—any person who engages in political activities on behalf of a foreign government, political party, individual, corporation, partnership, association or organization.

Each FARA registration statement must include, among other information, a comprehensive statement of the registrant's business; a complete list of employees and the nature of the work they perform; the name and address of every foreign principal for whom the registrant is acting; the nature of the business of each foreign principal and the ownership and control of each; and copies of each agreement with a foreign principal.

In addition, each registrant is required to file a supplemental disclosure statement every six months, updating its registration and detailing all past and proposed activity on behalf of foreign principals. Supplemental statements are required to include, among other information, a detailed accounting of income and expenses and a list of all meetings with federal officials on behalf of foreign principals.

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[8] Richard Cowan, "None Dare Call it Lobbying", Common Cause Magazine (March/April 1989), page 14; see also Christopher Anders, "Prospects for Strengthening the Disclosure Requirements of the Federal Regulation of Lobbying Act", reprinted at Hearing Record (July 16, 1991), page 600.

[9] Hearing Record (July 16, 1991), page 67.

[10] *Vierick* v. *United States*, 318 U.S. 236, 241 (1943).

1. The Coverage of the Act

FARA requires any person who acts "as an agent of a foreign principal" to register with the Attorney General and disclose his or her activities. However, broad exemptions to FARA's registration requirements appear to have resulted in spotty disclosure of foreign lobbying activities. The two most frequently cited exemptions apply to: (a) the practice of law in formal or informal proceedings before U.S. courts and agencies; and (b) activities on behalf of a foreign-owned company in the United States that are in furtherance of the bona fide commercial, industrial, or financial interests of the U.S. company.

a. The "Lawyers' Exemption"

The so-called "lawyers' exemption" to FARA exempts attorneys who provide "legal representation" to foreign principals in the course of "established agency proceedings, whether formal or informal." This exemption was adopted because the Congress determined that disclosure under FARA serves no useful purpose in legal proceedings where full disclosure of the agent's status and the identity of his or her client is required. Because terms such as "legal representation" and "established proceedings" are not defined in the statute or the implementing regulations, however, the applicability of this exemption has been left to case-by-case determinations by the Justice Department's Registration Unit and by prospective registrants themselves.

The Justice Department, in response to a letter from the Subcommittee on Oversight of Government Management, stated that the lawyers' exemption applies only to services that can only be performed by an attorney, and only in proceedings established pursuant either to statute or regulation. The Justice Department letter states:

> The proceeding must be one established by the agency in question pursuant either to statute of regulation * * *. The Department interprets "legal representation" to include those services which can only be performed by a person within the practice by law.

However, the Justice Department was not able to identify any written guidance or other public documents which reflect its "present interpretation of these issues."[11]

Perhaps for this reason, the Justice Department's interpretation of the lawyers' exemption does not appear to be widely known or followed by attorneys who represent foreign clients. Interviews by the Subcommittee staff revealed that some attorneys take the view that the lawyers' exemption applies only in cases where there is a docketed case with formal appearances entered, while others believe that virtually any services they provide fall within the exemption, even when they have extensive contacts with executive branch officials on a regulatory issue of broad impact. Experts on the statute generally agree that the scope of the exemption is not clear.[12]

[11] Hearing Record (June 20, 1991), page 486.

[12] See Hearing Record (June 20, 1991, pages 34–35 (Testimony of Mr. Barringer and Mr. Neill).

b. The "Domestic Subsidiaries" Exemption

The "domestic subsidiaries" exemption to FARA excludes from coverage any activities in the bona fide commercial, industrial or financial interests of a domestic company engaged in substantial operations in the United States, even if the company is foreign-owned and the activities also benefit the foreign parent corporation. Again, little formal guidance on the application of this exemption is available.

The Justice Department's letter to the Subcommittee states that the primary test for the applicability of the domestic subsidiaries exemption is "whether the presence of the domestic person is real or ephemeral, in short, whether the domestic person is a viable working entity or a so-called 'front' or 'shell'." However, the Justice Department letter also states that the domestic subsidiaries exemption does not apply when a local subsidiary is making efforts to expand the U.S. market for foreign goods. In particular, the letter cites as definitive a passage in the legislative history which states that—

> [w]here * * * the local subsidiary is concerned with U.S. legislation enlarging the U.S. market for goods produced in the country where the foreign parent is located * * * the predominant interest is foreign.[13]

The Justice Department interpretation has not been memorialized in published guidance and does not appear to be widely known or followed by representatives of foreign principals. Some take the position that this exemption applies to any lobbying activity on behalf of domestic subsidiaries of foreign corporations. Others believe that the issue is whether the parent corporation "controls" the subsidiary in such a way that it can be seen as controlling the lobbying. A third category of lobbyists argue that the exemption applies only to "commercial" matters such as contract awards and landing rights determinations.

The widespread confusion over the proper application of FARA exemptions and the lack of clear written guidance from the Justice Department has left broad latitude for individual representatives of foreign principals to reach their own conclusions as to whether registration is required. As one lobbyists who is registered under FARA explained:

> I can argue the commercial exemption for subsidiaries almost any way * * *. I think it is entirely up to the judgment of the registrant, or potential registrant.[14]

The result is spotty disclosure, and in some cases no disclosure at all, of significant lobbying activities.

For example, the Subcommittee on Oversight of Government Management reviewed a heavily lobbied 1989 effort to overturn a decision by the Customs Service regarding the tariff classification of imported jeeps and vans. Although this issue was of great importance to foreign manufacturers of sport utility vehicles and exclu-

[13] Hearing Record (June 20, 1991), pages 486–487. At a hearing of the Subcommittee on Oversight of Government Management, two Justice Department witnesses disagreed with each other as to the application of this language. See Hearing Record (June 20, 1991), pages 41–44 (Testimony of Mr. Richard and Mr. Clarkson).

[14] Hearing Record (June 20, 1991), page 34 (Testimony of Mr. Barringer).

sively involved the treatment of imports, almost none of the lobbying activity in this case was disclosed under the Foreign Agents Registration Act.

Of the 48 people identified as lobbying Customs and/or Treasury on behalf of those who opposed the Custom decision, only six were registered under FARA. Three of the six who were registered worked for a single firm and were covered by a single registration; almost all stated that they registered out of an abundance of caution and probably were not required to do so. The reason for this non-disclosure is that virtually all lobbying against the Customs decision was viewed as exempt from coverage under FARA pursuant to either the lawyers' exemption or the domestic subsidiaries' exemption. Consequently, only a small fraction of the lobbying activities conducted on behalf of foreign companies were disclosed under FARA.[15]

2. Disclosure Requirements

Each FARA registration statement must include, among other information, a comprehensive statement of the registrant's business, a complete list of employees and the nature of the work they perform; the name and address of every foreign principal for whom the registrant is acting; the nature of the business of each foreign principal and the ownership and control of each; and copies of each agreement with a foreign principal.

In addition, each registrant is required to file a supplement disclosure statement every six months, updating its registration and detailing all past and proposed activity on behalf of foreign principals. Like the Lobbying Regulation Act, FARA requires detailed accounting of expenses such as cab fares, copying, and telexing. In addition, and unlike the Lobbying Regulation Act, FARA requires a complete listing of each federal official with whom the registrant has met during the reporting period.

The Justice Department interprets FARA's disclosure provisions to require that registrants detail even activities unrelated to their registrations—such as providing advice or legal representation on matters that would not otherwise require registration. This means that engaging in even a single "registrable" activity exposes the entire scope of a registrant's activities to public disclosure requirements.

As a Justice Department representative explained at the Subcommittee's hearing—

> Senator LEVIN. So if you have one contact with a Government official and have to register, you then have to disclose everything that you do for that principal even though all those other activities would not cause you to have to register * * *?
>
> Mr. CLARKSON. If you have one contact that is of a registrable nature, yes, you would have to register and then you would disclose your activities.

[15] Overall, there are only 825 active foreign agents registered under FARA. Of these registered foreign agents, roughly half represent foreign corporations, partnerships, and associations, and fewer than half are engaged in lobbying activities. August 14, 1991, letter from the Justice Department to the Subcommittee on Oversight of Government Management, Hearing Record (September 25, 1991), page 493.

> Senator LEVIN. [Then] you agree with the interpretation that you have to disclose all hundred [activities] even though only one of them required you to register?
>
> Mr. CLARKSON. We not only agree with it, that has been our practice. I have no problem with that.[16]

Perhaps because the FARA disclosure requirements are so extensive, the General Accounting Office has found that half of the registered foreign agents do not fully disclose their activities on behalf of foreign principals and more than half fail to meet statutory filing deadlines. The deficiencies identified by GAO included conflicting responses to questions, failures to list contacts with government officials, failures to disclose finances, and failures to include supplemental statements as required.[17]

3. The Administration of the Statute

The Department of Justice enforces FARA largely by sending letters and making phone calls to registrants and potential registrants. The chief of the Department's Registration Unit estimates that about seven or eight formal notices of deficiency were sent out from 1988 to 1991. This compares to 62 deficiency notices sent out by the Department over a similar three-year period in the early 1970's.

The Department has both criminal and civil injunctive enforcement authority under the statute. However, the statute does not authorize either civil monetary penalties or administrative fines. As a result, a few court cases, either civil or criminal, have ever been initiated under the Act. The Justice Department initiated about ten cases in the 1970's, but did not file any in the 1980's.[18]

The Registration Unit also conducts inspections to review the files of registrants and make sure that they have accurately disclosed their activities. Inspections are conducted on a non-confrontational basis: they are always announced in advance, and some registrants are given an opportunity to amend their filings prior to the inspection.

In 1989, the Registration Unit conducted 14 inspections; in 1990, only four inspections were conducted. These numbers are down substantially from the mid-seventies, when the Unit conducted 166 inspections in a period of a year and a half and announced its intention to inspect every registered foreign agent within a period of three years.

Six of the inspections conducted in 1989 and 1990 were of lawyer-lobbyists or other firms engaged in lobbying-type activities. Several of these inspections identified significant deficiencies in the lobbyists' registrations. For example, one inspection report indicates that the registrant had routinely filed disclosure statements which noted only that the firm provided "legal representation" for its numerous foreign principals. The registrant failed to indicate that it was involved in extensive lobbying activities, or to disclose

[16] Hearing Record (June 20, 1991), pages 49–50.
[17] GAO Report NSID 90/250 (July 1990), page 5.
[18] On July 7, 1992, a former U.S. Ambassador to Bahrain and two associates were reportedly indicted for their alleged failure to comply with FARA in connection with their representation of Kuwait. "Former U.S. Envoy, 2 Others Indicted for Pushing Gulf War in Pay of Kuwait," Wall Street Journal, July 8, 1992.

the numerous federal officials who were contacted in connection with these activities.

In a second case, a registrant failed to disclose meetings with dozens of federal officials, despite the fact that these meetings were listed in its client billing documents. The undisclosed contacts included meetings with the Secretary of Commerce, the Deputy Attorney General, the Deputy Secretary of Defense, the Deputy Secretary of Defense, the Deputy Secretary of State, the U.S. Trade Representative, and several Members of Congress. The registrant also failed to disclose almost $200,000 in income and expenses on behalf of its foreign principals.

In neither of these cases did the Department of Justice seek to sanction the registrant. In each case, the registrant was simply asked to amend its registration statement to provide the missing details.

By contrast, other inspection reports identify dozens of so-called deficiencies that are of questionable significance at best. For example, one report indicates that the registrant accurately identified dozens of meetings with federal officials, but failed to report such activities as suggesting themes for a visiting foreign leader to address in a speech to the U.N. and sending a thank-you note to a federal official after a meeting (the meeting itself was disclosed). The remedy in this case was the same as in the case of the firm that failed to disclose meetings with the Deputy Secretaries of State and Defense: the registrant was required to amend its registration statements.

While those who register under the Act are subject to routine Justice Department inspection of their books and records, those who do not register are not subject to any review of their records short of a criminal investigation. In one instance reviewed by the staff, an attorney for leaders of the Cali (Colombian) drug cartel was reported to have lobbied the Senate Foreign Relations Committee staff and State Department officials, proposing amendments to international treaties that would make it easier to extradite foreign drug kingpins to the United States—without registering under FARA.

When the Justice Department's Registration Unit inquired as to why the attorney had not registered, the attorney told them that he had engaged in lobbying activities in his personal capacity, out of general interest in the treaties, and not in his capacity as an attorney for cartel members. Because the Justice Department did not have the authority to investigate further without initiating a criminal case, it did not inquire further into the matter.

In short, the inventive for representatives of foreign interests to avoid the burdens of registration under FARA is exacerbated by the Justice Department's apparent inability to investigate those who are not registered. While those who register under the Act are required to make extensive disclosure of all registrable and unregistrable activity and are subject to Justice Department inspection of their books and records to verify the information disclosed, those who do not register are not subject to any review of their records short of a criminal investigation.

As Senator Cohen concluded at the Subcommittee hearings on FARA, the statute is plagued with problems:

> The broad exemptions contained in the Act appear to permit significant lobbying efforts on behalf of foreign companies to go undisclosed * * *. There appears to be genuine wide-spread confusion and disagreement concerning the breadth of these exemptions * * *. There is also considerable confusion and an absence of specific guidance as to what information is required to be disclosed by those agents who do in fact register * * *. There may also have been instances where the Department of Justice has failed to impose sanctions in cases of serious violations, while at the same time devoting significant department resources to require agents to amend their statements to include minor and irrelevant facts.[19]

C. THE BYRD AMENDMENT AND THE HUD DISCLOSURE LAWS

The Byrd Amendment, which was enacted in October 1989 as a part of an Interior Appropriations bill, is codified at 31 U.S.C. 1352. No hearings were held on the Byrd Amendment before it was passed, and it was not the subject of extensive public discussion or debate.

The Byrd Amendment prohibits the expenditure of appropriated funds to influence the award of a contract, grant, or loan. Subject to certain exceptions, any payment for such lobbying out of non-appropriated funds must be disclosed by the recipient of the contract, grant, or loan. The recipient is required to disclose the name and address of each person paid to influence the award, the amount of the payment, and the activity for which the person was paid. Regulations implementing the Byrd Amendment require the disclosure of each contact made with a federal official to influence the award of the contract, grant, or loan.

This disclosure must be filed with the awarding agency at the time the contract, grant, or loan is requested or received. Each agency head is required to compile the information collected and submit it to the Secretary of the Senate and the Clerk of the House twice a year, on May 31 and November 30, Failure to file a disclosure form is subject to a civil penalty of $10,000 to $100,000, to be levied under the procedures of the Program Fraud Civil Remedies Act. (A knowingly incorrect disclosure may also be subject to prosecution as a criminal false statement.)

Section 112, of the HUD Reform Act, which was enacted in December 1989, two months after the Byrd Amendment, is codified at 42 U.S.C. 3537b. This provision, like the Byrd Amendment, imposes disclosure requirements on people who make expenditures to influence the decisions of HUD employees with respect to the award of contracts, grants, or loans. Section 112 goes beyond the Byrd Amendment by covering any other HUD management actions that affect the conditions or status of HUD assistance, and by requiring disclosure by lobbyists as well as clients.

Section 112 required disclosure of the income and expenses of lobbyists, to whom the money was paid, and for what purposes. Section 112, unlike the Byrd Amendment, does not require the disclosure of specific contacts with federal officials. Knowing failures

[19] Hearing Record (June 20, 1991), pages 3–4.