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Randall H. Johnson

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NOTES

THE FOREIGN AGENTS REGISTRATION ACT: WHEN IS REGISTRATION REQUIRED?

I. INTRODUCTION

The Foreign Agents Registration Act of 1938 [hereinafter referred to as FARA]¹ originally was enacted by Congress to curtail the subversive political activities of Nazi and Communist propagandists within the United States during World War II and the early Cold War. During this period, the enforcement machinery focused upon the political threat from radical propagandists who sought to influence the course of government action by influencing American public opinion. Congress did not attempt to restrict the distribution of political propaganda or to limit directly the activities of political subversives. Rather, the operative language of FARA required registration of foreign agents and disclosure of their agency relationships when the agents represented the interests of their foreign principals before government agencies and officers and before the general public.

As the Cold War subsided, the focus of FARA shifted to accommodate the more subtle operations and objectives of foreign principals. Foreign agents became more concerned with commercial matters and specific facets of American foreign and domestic policy that have economic ramifications.² The contemporary foreign agent is a lobbyist,³ seeking by persuasion to in-

1. 22 U.S.C. §§ 611 to 621 (1976 and Supp. IV 1980).

2. Agents acting on behalf of foreign commercial enterprises may be concerned with lobbying efforts for a number of reasons. Companies originating in highly industrialized nations require extensive advertising and public relations to create a strong product market. They often employ representatives to appear before government commissions and other official bodies. Companies engaged in industries that are the subject of controversy in the United States may wish to sway public opinion in their favor.

3. Because lobbying is a highly regulated activity, foreign agents may be subject to a

fluence American public opinion and government actions along lines that are in some way beneficial to the economic and political interest of his foreign principal. Although the purview of FARA includes agents of national governments and quasi-governmental entities,⁴ this study is concerned primarily with agents who act on behalf of foreign commercial enterprises or for state enterprises of a highly commercial nature.

II. AN OVERVIEW OF FARA

Under certain circumstances, agents of foreign principals operating within the United States are required to register with the Department of Justice pursuant to FARA. A foreign agent covered by FARA is generally any party acting on behalf of or under the direction or control of a foreign principal. A foreign principal can be a foreign government, foreign political party, foreign individual (unless a citizen of the United States or an organization created under United States law), or foreign corporation. News or press services or associations are not considered agents of a foreign principle.⁵

Agents must submit a "registration statement" to the Attorney General. It contains initial statements, supplemental statements, and any other documents or papers related thereto. Short-form registration statements are available in specific instances for officers, directors, and employees of registered agents.⁶

A number of exemptions are available to agents who otherwise would be required to register. Officials of foreign governments and their staffs are not required to register. Persons engaged in private and nonpolitical activities relating to the trade

number of other statutory regulations. *See, e.g.*, Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 to 270 (1976)(which may or may not apply to foreign agents); Subversive Activities Control (Smith) Act of 1950, 50 U.S.C. §§ 781 to 798 (1976 and Supp. IV 1980); Vorhees Act, 18 U.S.C. § 2386 (1976 and Supp. 1980); 2 U.S.C. § 441(e)(1976 and Supp. IV 1980) (prohibiting campaign contributions by foreign principals directly or through their agents); and 18 U.S.C. § 951 (1976)(requiring foreign agents to register with the Secretary of State).

4. Quasi-governmental entities include the Irish Northern Aid Committee and the Palestine Liberation Organization, for example.

5. 22 U.S.C. §§ 611, 612 (1976 and Supp. IV 1980).

6. For a more thorough discussion of the registration and disclosure provisions, *see infra* notes 26 through 70 and accompanying text.

or commerce of a foreign principal are exempt from registration. Persons engaged in activities not serving a predominantly foreign interest also are exempt from registration, as well as persons engaged in human relief efforts and persons collecting contributions in the United States for these efforts. Persons engaged in religious, scholastic, academic, or scientific pursuits are exempt as well. Persons qualified to practice law are exempt insofar as their activities relate to the legal representation of disclosed foreign principals. Persons seeking an exemption from registration have the burden of establishing its availability.⁷

Copies of all political propaganda, in any media form, disseminated by agents on behalf of their foreign principals must be filed in duplicate with the Attorney General within forty-eight hours of distribution. The agent also must provide the Attorney General with information regarding the extent of the distribution. The political propaganda so disseminated must conspicuously show the identity of the foreign principal, the fact that the agent is registered with the Department of Justice, and that copies of his registration statement are available from the Justice Department upon request. Whenever a foreign agent appears before a committee of Congress, he is required to submit a copy of his most recent registration statement on file with the Justice Department.⁸

III. THE PURPOSE OF FARA

FARA was intended "to ensure that the Government and the people of the United States would be informed of the identity of persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals."⁹ Congress aimed "to bring activities of persons engaged in disseminating foreign political propaganda out into the open and to make known the identity of any person engaged in such activities, the source of the propaganda and who is bearing the expense of its dissemination in the

7. 22 U.S.C. § 613.

8. *Id.* § 614.

9. Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended, for Calendar Year 1979 at 6 [hereinafter cited as 1979 Report on FARA].

United States.”¹⁰ The idea behind FARA was not to deprive the American public of political information, regardless of whether such information is propaganda of a foreign government or other foreign principal,¹¹ but rather to prevent the deception of the public though pronouncements made by ostensibly independent entities.¹² For example, the impact of pro-Arabic information provided by representatives of American industry would presumably differ significantly from the impact of the same information provided by professed agents of Arab interests.¹³

FARA is not limited to protection of the American public and the legislative process. Congress has voiced concern over the possibility that national credibility might be damaged by American agents convincing their foreign principals that they have influence when in fact they do not.¹⁴ Other possibilities of abuse, which FARA does not effectively regulate, include the acceptance of employment from two or more conflicting principals, contributions to political campaigns, and the dilution of funds intended for foreign aid.¹⁵

Because the methods used to influence American policies have become more subtle than the tactics used by propagandists of the past, Congress amended FARA to shift its focus from subversive activities to the influence of political and economic policies of the United States.¹⁶ “The Act is intended to protect the

10. *United States v. Auhagen*, 39 F. Supp. 590 (D.D.C. 1941). Disclosure was required so that Americans would be informed of the identity of agents and be able to evaluate their statements accordingly.

11. *Id.*

12. Note, *Attorneys, Propagandists, and International Business: A Comment on the FARA of 1938*, 3 GA. J. INT’L & COMP. L. 408 (1973) [hereinafter cited as Note, *Attorneys*].

13. See, Note, *Enforcement of FARA — A New Emphasis*, 9 LAW & POLICY IN INT’L BUS. 985, 998 (1977) [hereinafter cited as Note, *Enforcement*].

14. See, Note, *Regulating Nondiplomatic Activities of Representatives of Foreign Governments in the United States*, 31 GEO. WASH. L. REV. 977, 988 (1963) [hereinafter cited as Note, *Regulating*].

15. *Id.*

16. See Note, *Enforcement*, *supra* note 13, at 985-86.

This change in application from the “subversive” to the “lobbyist” is also readily seen in the shift in defendants in the cases brought under the Act — from the Nazi propagandist to the public relations or legal counsel for business or political-economic interests seeking to expand his principal’s U.S. operations and influence via manipulation of public opinion and influence upon legislation.

Note, *Attorneys*, *supra* note 12, at 413.

interests of the United States by requiring complete disclosure by persons acting for or in the interests of foreign principals where the activities are political in nature or border on the political.”¹⁷

In summary, FARA is a registration and disclosure statute, not an alien and sedition act. It does not directly restrict the activities of foreign agents. According to the 1979 report of the Attorney General on the status of FARA: “Registration under the Act does not imply recognition by the United States government either of the *de jure* existence or legality of the foreign principal, nor does registration indicate approval by the United States Government of the propaganda material disseminated.”¹⁸

IV. THE USE OF AGENTS IN INTERNATIONAL CORPORATE INTELLIGENCE SYSTEMS

Transnational business enterprises are in constant need of the services of agents to monitor the policies of foreign governments which affect their subsidiaries.¹⁹ Foreign commercial enterprises operating or hoping to operate within the United States utilize local personnel to track American monetary, political, and social developments in order to provide reliable warning mechanisms, establish communications channels for an ongoing examination of major governmental proposals, and to foster an effective intercorporate information system.²⁰ Many corporations employ a single-issue or task force committee—*e.g.*, a toxic substance task force, comprised of representatives from the general

17. 1979 Report on FARA, *supra* note 9, at 7. The amendments followed from hearings held by the Senate Foreign Relations Committee during an examination of the interrelationship of nondiplomatic agents with the executive and legislative branches of government and with the mass media. *Id.*

18. *Id.* at 7.

19. *Monitoring U.S. Developments: Foreign-Based Companies Face Special Needs, Problems*, BUSINESS INT'L, 13 October, 1978, at 325-27.

Although many non-U.S. firms cite the country's free enterprise system as one of its main attractions, they soon discover that the U.S. is a highly regulated economy in which government decisions have a vast impact on corporate operations. Moreover, domestic companies have for many years maintained staffs to track both the federal and the state scenes, and non-U.S. firms that fail to follow suit run a competitive risk

Id.

20. *How Subsidiaries of Two European Firms Track U.S. Developments*, BUSINESS INT'L, 27 October, 1978, at 342-43.

counsel's office and a rotating membership of senior managers, technical or product specialists, and outside experts or consultants.²¹ Each foreign company active in the United States, however, has its own peculiar approach to government relations efforts.

A 1978 study of twenty foreign firms operating in the United States—either through integrated manufacturing and marketing subsidiaries or through extensive import marketing organizations—revealed several basic characteristics of their lobbying organizations.²² First, the organizations emphasize a reactive rather than an anticipatory strategy. Governmental policies are disseminated and then analyzed. Second, lobbying organizations seek to maintain a low profile with respect to all governmental levels. Individual advocacy is avoided. Third, the primary focus is on regulatory actions directly impinging upon their American operations, resulting in a concentration of regulatory bureaucratic contacts. Fourth, although their ultimate objective often is to influence the course of legislation, the organizations prefer not to be seen in that role and avoid testifying before committees of Congress. Fifth, to blend into the United States business community, they rely heavily on trade associations. Sixth, trading and marketing companies place an even stronger reliance on importers' associations. Even in cases in which the importers' associations provide intelligence on regulatory matters, however, individual agents still are maintained. Seventh, foreign firms also use additional sources of information and expertise. Monitoring staffs are supplemented by consulting and law firms "which may provide the bulk of a company's daily flow of information."²³ Eighth, the government-tracking function frequently is meshed with other corporate support units, resulting in a high degree of interaction between economic, business

21. *Id.* The committees pull together relevant information, make specific recommendations to chief executive officers, or make final decisions on responses to be publicized by public affairs or divisional executives. Developments on the state level usually are monitored through the local plant manager, who has a heightened awareness of local situations. *Id.* at 343.

22. *Monitoring U.S. Developments: Foreign-Based Companies Face Special Needs, Problems*, BUSINESS INT'L, 13 October, 1978, at 325-27.

23. *Id.* These supplementary sources included information on general topics from consulting firms, periodic reports from United States law firms, and information on special issues gathered by lobbyists.

development, and legal departments (or services). Finally, the monitoring functions conducted by American subsidiaries and those carried on by the overseas parent often overlap—in part because of the heavy reliance on outside sources.²⁴

Foreign companies often solicit lawyers, consultants, and other types of business advisers to act on their behalf. Foreign principals prefer the use of American agents over direct actions in order to maintain low profiles. Just as American firms operating abroad have found the use of foreign agents preferable to direct contacts, foreign companies have likewise found it expeditious to use American agents.²⁵ The agents alert foreign commercial enterprises of important legislative and commercial developments. Agents then inform American politicians and businessmen of the interests of their foreign principals. This educational process often is focused upon key bureaucratic contacts and appearances by agents before Congressional committees and business groups. Agents often act independently of the trade associations to which their principals belong, supplementing information the principals receive from other sources. In addition, agents act as liaisons between different branches of the same foreign principal—e.g., between the foreign parent and the American subsidiary.

V. THE REGISTRATION AND DISCLOSURE PROVISIONS

The agent's obligation to file a registration statement continues from day to day after the tenth day of his becoming an agent. Termination of the agency relationship will not relieve the agent of his obligation to file a registration statement cover-

24. Other characteristics include: a focus on Washington (from outside the capital), thereby accentuating the need for various listening-post organizations around the capital; lack of a central corporate receiving point as a clearinghouse for monitoring agents; and a direct reporting relationship to a line operation or individual — monitoring personnel reporting directly to the chief officer of the United States subsidiary, a senior executive of the foreign parent, or an operating division in the United States or abroad. *Id.*

25. For example, the British Aerospace Dynamics Group employed Georgia International Services, Inc. to advise them on matters relating to the Rapier Missile System, weapons capabilities and deployment postures for airfield defense, the Sky Flash missile system and the possibility of manufacturing communications equipment in the United States. 1979 Report on FARA, *supra* note 9, at 180.

ing the period of time during which he was an agent.²⁶

The registration statement requires disclosure of the agent's name, his business address, and all other relevant addresses. He is required to disclose his status, whether as an individual (nationality) or group of individuals (the nationality of each partner or director) provide copies of pertinent charters, articles of incorporation, bylaws, statements of oral agreements relating to organization, and a statement of membership and control. He must disclose the nature of his business. He must provide a list of employees and the nature of their work (this requirement can be waived), the names of foreign principals, the nature of their businesses, and a statement of their ownership and control, including the extent to which they are owned, controlled, directed, financed, or in some other way subsidized by a foreign government or foreign political party.²⁷

The agent also must provide a copy of any relevant agency agreement, a statement regarding money or other things of value received by the agent from the foreign principal, and a detailed statement of his proposed activities for the foreign principal. If the agent is acting ostensibly for a domestic concern which is in turn acting for a foreign concern, he must provide the same information for both the domestic and foreign concerns. He must also provide a detailed statement regarding money and other things of value spent by him in conducting his activities for the foreign principal (including expenditures in connection with election campaigns, most of which are prohibited by section 613 of FARA).²⁸

Agents are required to file supplemental statements updating the prior registration every six months. All materials registered with the Justice Department are open to public inspection.²⁹ Furthermore, current registration statements are no guarantee against prosecution. The Attorney General may at any time determine that information in the registration statement is misleading or that omissions were made rendering the registration incomplete.³⁰

26. 22 U.S.C. § 612.

27. *Id.*

28. *Id.*

29. *Id.* § 616.

30. *Id.* § 612.

Not only must agents register with the Department of Justice and provide the specific information discussed above, they also must maintain account books and other records relating to their activities as agents in accordance with standard accounting procedures and the needs of the Justice Department. These books and records must be maintained for three years following termination of the agency relationship and are subject to inspection by Justice Department officials. Concealment, destruction, falsification, or any other alteration of these records is unlawful.³¹

VI. WHO MUST REGISTER?

A. *Agent of a Foreign Principal*

According to section 611(c) of Title 22 of the United States Code, an "agent of a foreign principal" is defined as follows:

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

(i) engages within the U.S. in political activities^[32] for or in the interests of such foreign principal;

(ii) acts within the U.S. as a public relations counsel,^[33] publicity agent, information service employee^[34] or political consultant for or in the interests of such foreign principal;

(iii) within the U.S. solicits, collects, disburses, or dispenses contributions, loans, money, or other things of

31. *Id.* § 615.

32. Political activities include, *inter alia*, any attempt to influence an agency or official of the United States government regarding foreign or domestic policy. *Id.* § 611(o).

33. A "public relations counsel" is an individual engaged "in any public relations matter pertaining to political or public interests, policies, or relations." *Id.* § 611(g).

34. An "information service employee" includes:

any person who is engaged in furnishing . . . data with respect to the political, industrial, employment, economic, social, cultural, or other benefits . . . of a partnership, association, corporation . . . organized under the laws of, or having its principal place of business in, a foreign country.

Id. § 611(i).

value for in the interests of such foreign principal; or
(iv) within the U.S. represents the interests of such foreign principal before any agency or official of the government of the U.S.; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship,^[35] an agent of a foreign principal as defined in clause (1) of this subsection.

The statutory definition of an “agent of a foreign principal” makes the nature of the agent’s activities the criterion for establishing whether registration is required.³⁶ However, whether an agency relationship exists between the American consultant, businessman, attorney, or lobbyist and a “foreign principal” must first be determined. The applicability of FARA, in this respect, cannot be circumvented by the creation of an intermediate entity within the United States between the foreign principal and the domestic agent.³⁷ Furthermore, the establishment of an organization in the United States by the agents of a foreign principal sent here specifically for that purpose will not relieve that entity from the requirements of FARA.³⁸

B. Exemptions

1. Statutory Language

The Attorney General has broad discretion in granting agents exemptions from registration and from any or all of the record requirements of FARA.³⁹ Specific exemptions are listed in section 613 of FARA. Among those exempted are:

(a) diplomatic or consular officers;^[40]

35. See *United States v. German-American Vocational Language League, Inc.*, 153 F.2d 860, 864 (3d Cir. 1946), *cert. denied*, 329 U.S. 760 (1946).

36. Note, *Enforcement*, *supra* note 13, at 990 (citing 22 U.S.C. § 611 (1970)).

37. See *Attorney General v. United States-Japan Trade Council*, No. 76-1290 (D.D.C. Sept. 3, 1976) (settled by consent decree) (ostensibly a propaganda labeling issue, the ultimate question was the existence of an agency relationship between the trade association and the government of Japan).

38. *United States v. Kelly*, 52 F. Supp. 362 (D.D.C. 1943).

39. The Attorney General’s discretion is limited by considerations of national security and public interest. 22 U.S.C. § 612(f)(2) (1976).

40. The diplomatic exemption includes those agents not American citizens who act

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- (b) officials of a foreign government;⁴¹
 - (c) staff members of diplomatic or consular officers;
 - (d) private and nonpolitical activities; solicitation of funds; any person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest;
 - (e) religious, scholastic, or scientific pursuits;
 - (f) defense of a foreign government deemed vital to U.S. defense; and
 - (g) persons engaged in the practice of law.

For purposes of this discussion, in light of its concern for the activities of foreign companies acting in the U.S., subsections (d) and (g) are most relevant.

2. *The Commercial Exemption—Private and Nonpolitical Activities in Furtherance of the Trade or Commerce of a Foreign Principal*

Congress intended the commercial exemption of section 613(d)(1) to exclude routine commercial matters designed to reach commercial objectives, but not to exclude political activities designed to reach commercial objectives. The exemption clearly is available when the foreign principal's activities are restricted to purely commercial endeavors which have no effect on governmental interests and when there is no attempt to influence the American government or public.⁴² One who simply advises a foreign principal without engaging in political lobbying thus would not be required to register.⁴³ For example, a lawyer

as accredited and accepted representatives in or to an international organization in accordance with the provisions of the International Organization Immunities Act, 22 U.S.C. § 288 (1976). Note, *Attorneys*, *supra* note 12, at 412.

41. For a case involving belated recognition of the privileges and immunities by the State Department, see *Attorney General v. Arab Information Center*, No. 76-279 (1976) (discussed in 1976 Report on FARA, *supra* note 9, at 3).

42. Doubt arises when the government of the foreign principal is the owner of the enterprise or depends upon its success. See, Note, *Attorneys Under the Foreign Agents Registration Act of 1938* 78 HARV. L. REV. 619, 624 (1965) [hereinafter cited as Note, FARA]. See also, *infra* notes 51-54 and accompanying text.

43. However, Section 612(a) of FARA requires that all agents of foreign principals must register unless specifically exempted. One author suggests that a political consultant without an exemption would have to register. See, Note, *Attorneys*, *supra* note 12, at 423-24. See also Paul, *Foreign Agents Registration Act: The New Amendments*, 22 BUS.

arranging a loan for a private corporation, or arranging a contract for the sale of wool by a private foreign entity to an American textile mill, or arranging for the incorporation of a domestic subsidiary of a private foreign corporation would be exempt.⁴⁴

Furthermore, routine contacts by an agent before government officials and agencies would not require registration.⁴⁵ Uncertainty arises, however, when the routine contact itself involves a degree of policy formulation, as in the following hypothetical situations: negotiations over government contracts; communications regarding proposed agency regulations; and discussions with government officials concerning changes in informal practices and procedures.⁴⁶ The distinction is one between routine contacts and attempts to influence policy. A person otherwise excused from registration would sacrifice that status as soon as he undertook to influence government agencies or officials on matters of domestic or foreign policy.⁴⁷

Since the distinction between “policy administration” and “policy formulation” is difficult to delineate, problems naturally arise in the application of the commercial exemption.⁴⁸ In determining the availability of this exemption, the Department of Justice considers the following factors: (1) the functions and procedures of the particular agency approached; (2) the purposes of the representation; and (3) the particular character of the conduct engaged in by the agent.⁴⁹ When the contact is mechanical, for example filing articles of incorporation or tax returns, or requesting information on the proper procedure for filing an SEC registration, the exemption will apply. As the contact becomes more informal and the appeal to official discretion increases, the exemption is less likely to apply.⁵⁰

LAW. 601, 613 (1967) [hereinafter cited as Paul].

44. These examples can be found in Note, *FARA*, *supra* note 42, at 624.

45. Note, *Attorneys*, *supra* note 12, at 421.

46. Paul, *supra* note 43, at 605.

47. Note, *Attorneys*, *supra* note 12, at 421; Paul, *supra* note 43, at 613.

48. Note, *FARA*, *supra* note 42, at 626.

49. *Id.* at 625.

50. *Id.* at 626. For purposes of the commercial exemption: attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal, shall include only such attempts to influence or persuade with reference to formulating, adopting, or changing the domestic or foreign policies of the United States with reference to the political or public interests, policies, or relations of a gov-

3. *An Exception to the Commercial Exemption—Foreign Governmental Involvement*

The commercial exception is not available when the foreign principal engages in commercial activities designed to reach political objectives. When the foreign enterprise is owned in whole or in part, is subsidized, or is in some way sponsored by its government, political and economic objectives often become synonymous. For example, state shipping lines and airlines are still sufficiently "private" to characterize their operation as commercial. Coffee and sugar companies of countries such as Colombia and Haiti, on the other hand, are not sufficiently private because of their close association with the economic and political interests (and stability) of their governments.⁵¹ Exemptions for state-owned enterprises are determined on a case-by-case basis.⁵² According to the Justice Department, "activities of an agent of a foreign principal . . . in furtherance of the bona fide trade or commerce of such foreign principal, shall be considered 'private', even though the foreign principal is owned or controlled by a foreign government, so long as the activities do not directly promote the public or political interests of the foreign government."⁵³ When in doubt, the attorney or businessman is encouraged to ask the Internal Security Division of the Justice Department before assuming that there is an exemption.⁵⁴

4. *Activities Serving a Predominantly Domestic Interest*

The predominantly domestic interest exemption differs significantly from the general commercial exemption because it applies regardless of whether the agent's activities are political in nature.⁵⁵ Congress intended by this exemption to exclude from

ernment of a foreign country or a foreign political party

28 C.F.R. § 5.306 (1979).

51. See Paul, *supra* note 43, at 613; Note, *FARA*, *supra* note 42, at 625.

52. Note, *Enforcement*, *supra* note 13, at 991. For example, the Amtorg Trading Corporation was indicted in 1949 for failure to register as the agent of three Soviet governmental departments and eighteen trading combines. Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended, for calendar year 1950, at 20.

53. 28 C.F.R. § 5.304 (1976).

54. See Note, *Attorneys*, *supra* note 12, at 423.

55. See Paul, *supra* note 43, at 608-11.

FARA's purview situations involving American companies with their foreign subsidiaries and foreign companies with their American subsidiaries.⁵⁶ The definitional section of FARA provides a clarification of the scope of this exemption:

Activities in furtherance of the bona fide commercial, industrial or financial interests of a domestic person engaged in substantial commercial, industrial or financial operations in the U.S. shall not be deemed to serve predominantly a foreign interest because such activities also benefit the interest of a foreign person engaged in bona fide trade or commerce which is owned or controlled by, or which owns or controls, such domestic person; *provided*, that (i) such foreign person is not, and such activities are not directly or indirectly supervised, directed, controlled, financed or subsidized in whole or in substantial part by, a government of a foreign country or a foreign political party, (ii) the identity of such foreign person is disclosed to the agency or official of the U.S. with whom such activities are conducted, and (iii) whenever such foreign person owns or controls such domestic person, such activities are substantially in furtherance of the bona fide commercial, industrial or financial interests of such domestic person.⁵⁷

Thus, if an American subsidiary of a foreign parent is engaged in "substantial commercial, industrial or financial operations" in the United States, neither it nor any agent acting on its behalf would be required to register, for example, when appearing before government agencies regarding the sale of goods between it and its foreign affiliate or regarding a patent licensed by one to the other, provided the royalty is significant.⁵⁸ A significant royalty is substantive proof of an arms-length transaction. If, however, the transaction is for the benefit of the foreign affiliate, the "predominantly domestic interest" exception would no longer apply. Any political component in the committee hearing would, furthermore, destroy the availability of the commercial exemption as well. Although a marketing subsidiary in the United States could be viewed as having a predominantly domestic interest, it may not be exempt if its only interest in the

56. O'Hara, *The Foreign Agents Registration Act — "The Spotlight of Pitiless Publicity"*, 10 VILL. L. REV. 435, 452 (1965) [hereinafter cited as O'Hara].

57. 22 U.S.C. § 611(g) (1976).

58. Paul, *supra* note 43, at 608-11.

United States is the creation of a market for the goods of its foreign parent because it is not serving a domestic interest.⁵⁹

For purposes of FARA, a foreign sister corporation would be considered in the same manner as a foreign parent and the exemption would be unavailable if the American subsidiary operated to serve the interests of its sister corporation. The direction in which control runs is immaterial. A joint venture would be considered foreign pursuant to the definition of a foreign principal unless organized in the United States with its principal place of business in the United States. The American member of the joint venture acts for the foreign member unless the activities of the venture are substantially in furtherance of the interests of the domestic member.⁶⁰ The American member has the burden of establishing in a particular case that the interests being served are predominantly domestic.

5. *The Attorney Exemption*

Most legal activities are exempt from the registration requirements by virtue of section 613(g) of Title 22 of the United States Code.⁶¹ This section, however, does not establish a block exemption. "The 'attorneys exemption' . . . covers legal representation before courts of law or governmental agencies so long as the agent confines his attempts to influence to the course of formal and informal official proceedings."⁶²

Once an attorney's activities go beyond sanctioned proceedings, the exempt status ceases. Not only will there be no exemption for those activities which are clearly outside the realm of

59. The result might differ if the marketing subsidiary represented a substantial investment, employed a large number of personnel, and performed major operations in the United States. *Id.*

60. *Id.*

61. The Department of Justice has defined legal services narrowly to encompass only those activities which a non-lawyer could not perform. *Id.*

62. Note, *Attorneys*, *supra* note 12, at 413. *Contra* *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964). At the time *Rabinowitz* was decided the standard for the commercial exemption was "financial or mercantile" activity that was also "private and nonpolitical." The Supreme Court held that "[a]lthough the work of a lawyer in litigating for a government might be regarded as 'private and nonpolitical' activity, it cannot properly be characterized as only 'financial or mercantile' activity." *Id.* at 609. This implication that litigation of any sort might prevent an attorney from qualifying for exemption was eliminated by the new amendments. Paul, *supra* note 43, at 608.

sanctioned proceedings, but those previously or otherwise exempt activities will then be subject to the registration and disclosure provisions of FARA. All records relevant to both the exempt and nonexempt activities must be maintained and all are subject to inspection.⁶³ This result seems *non sequitur* because FARA ostensibly is concerned with the registration of political activities. Furthermore, the court's decision in *Attorney General v. Covington & Burling*^{63.1} runs contrary to Congressional intent. As things now stand, an attorney conducting the most innocent act of political persuasion could open his case files (regarding foreign principals) to review by the Justice Department. For this reason, the attorney-client privilege is an indispensable resource in protecting the confidences of foreign principals.⁶⁴

Attorneys, in representing foreign principals, should exercise caution when engaging in collateral efforts outside the committee or courtroom, such as attempting to persuade a committee member or judge in an informal setting. In such cases the attorney may be required to comply with the registration requirements of FARA.⁶⁵ If the attorney's activities go beyond formal and informal proceedings into the realm of political influence concerning official conduct or pending legislation, the likelihood of registration will increase.⁶⁶ Although an attorney in violation of FARA is subject to statutory penalties, a violation probably will not result in disbarment.⁶⁷

C. *Fish Through the Net*

The cursory review of the enforcement of FARA reveals that compliance has been lax. Even allowing for the numerous exemptions, innumerable business activities, legal representa-

63. *Attorney General v. Covington & Burling*, 411 F. Supp. 371 (D.C.C. 1976), *inj. denied*, 430 F. Supp. 1117 (D.D.C. 1977).

63.1 *Id.*

64. See, Note, *Foreign Agents Registration Act Attorney-Client Privilege Exception to Disclosure Requirements*, 19 HARV. INT'L L.J. 329, 335-39 (1978) [hereinafter cited as Note, *Privilege*].

65. Note, *Attorneys*, *supra* note 12, at 422-23.

66. Paul, *supra* note 43, at 606-08.

67. See, *In re Burch*, 73 Ohio App. 97, 54 N.E.2d 803 (1943) (a disbarment proceeding involving an attorney's violation of FARA). The Ohio court held that FARA was political and not moral, and that its violation did not involve moral turpitude, a requisite to disbarment in Ohio.

tion, and lobbying efforts (not to mention foreign government activities) are being conducted through agency relationships that should be, but in fact are not, registered with the Justice Department.⁶⁸ One reason suggested for the apparent reluctance of businessmen and attorneys to register is the psychosocial stigma associated with being labeled a foreign agent.⁶⁹ The degree of noncompliance becomes apparent whenever Congress closely scrutinizes legislative lobbying efforts. For example, when the Senate Foreign Relations Committee began its investigation of agents' efforts to influence the allocation of quotas under the Sugar Act, agents materialized in droves to register under FARA.⁷⁰ How many other businesses and interest groups would be affected by closer scrutiny?

VII. WHAT RECORDS MUST BE KEPT?

A. *Statutory Language*

Section 615 of FARA provides that an agent required to register must "keep and preserve . . . such books of account and other records with respect to all his activities, the disclosure of which is required . . . , in accordance with such business and accounting practices, as the Attorney General, having due regard for the national security and the public interest, may by regulation prescribe"⁷¹ The books and records which must be kept include:

- (1) all correspondence,^[72] memoranda, cables, telegrams, teletype messages, and other written communications to and from all foreign principals and all other persons, relating to the reg-

68. See Note, *Attorneys*, *supra* note 12, at 421.

69. *Id.* at 427. The author suggests that a new name be devised with less stigma, such as "U.S. relations counselor." *Id.* at 429. The New York Bar has proposed that attorneys and other professionals be granted an absolute exemption. Note, *FARA supra* note 42, at 663.

70. Note, *Attorneys*, *supra* note 12, at 422. For a discussion of the activities of lobbyists during consideration of the 1962 sugar bill, see Berman and Heineman, *Lobbying by Foreign Governments on the Sugar Act Amendments of 1962*, 28 LAW & CONTEMP. PROB. 416 (1963).

71. 22 U.S.C. § 615 (1976). Political propaganda must be filed with the Department of Justice and labeled when distributed. *Id.* § 614 (1976).

72. For an early case on point, see *Viereck v. United States*, 130 F.2d 945 (D.C. Cir. 1942), *rev'd*, 318 U.S. 236 (1943).

istrant's activities on behalf of, or in the interest of any of his foreign principals.

(2) relating to the registrant's political activity, or relating to political activity on the part of any of the registrant's foreign principals.

(3) All bookkeeping and other financial records relating to the registrant's activities on behalf of any of his foreign principals, . . .⁷³

If the registrant is a corporation, partnership, association, or other combination of individuals, all minute books and a list of employees and agents must also be maintained.⁷⁴

B. The Implications of Disclosure

The degree of record maintenance and the possibility of disclosure are perhaps the most important aspects of FARA, especially from the point of view of an attorney requested by a potential client to represent him or his principal before courts and governmental agencies and hearings. If the attorney suspects that registration may be necessary, he should stress to his client the possibility of government access to relevant documents.⁷⁵ When the negotiations or litigation will take place abroad, the attorney is encouraged to discuss the matter of registration and record maintenance with the Department of Justice. Should these discussions prove unsatisfactory, he may resolve not to keep the relevant documents in his custody, but rather at an embassy or some point outside the United States.⁷⁶ The Department of Justice is given broad discretion in the enforcement of FARA. Achieving a workable rapport with Justice Department officials, although not a guarantee, can provide a reasonable basis for deciding how to handle the disclosure problem.

Another question arises when counsel has already registered

73. 28 C.F.R. § 5.500(a)(1), (2) and (5) (1976). This includes: cancelled checks, bank statements, and records of income and disbursements, showing names and addresses of all persons who paid money to, or received moneys from, the registrant, the specific amounts so paid or received, and the date on which each item was paid or received.

28 C.F.R. § 5.500(a)(5) (1976).

74. 28 C.F.R. § 5.500(a)(6) and (7) (1976).

75. Hyde, *Foreign Agents Registration: A Practitioner's Note*, 5 N.C. J. INT'L L. & COMM. REG. 377, 379 (1980) [hereinafter cited as Hyde].

76. *Id.* at 380-81.

as the agent of a foreign principal and subsequently undertakes to represent the principal in matters outside the United States. Would the documents relevant to the extraterritorial representation fall outside the recordkeeping requirements and escape possible inspection?⁷⁷

Activities undertaken outside the United States, unrelated to a decision of the federal government or an agency or official thereof, and unrelated to influencing American public opinion on the respective merits of the parties' contentions are outside the Act; and this is not altered by the fact that research and writing and the work of counsel's assistant or expert take place within the United States.⁷⁸

C. Attorney-Client Privilege

Although one author suggests that administrative practice limits the restraining effect of FARA,⁷⁹ the best safeguard against undesirable disclosures by an attorney is assertion of the attorney-client privilege. An analysis of the privilege in relation to FARA disclosure requirements involves two considerations: (1) whether the attorney is exempt under section 613(g), and (2) the scope of the privilege should exemption not be available. If an attorney can show that he is entitled to exemption, then he need not maintain any records at all, and no ancillary threat of a required disclosure will exist. However, as will often be the case when representing foreign principals, not all of the attorney's activities will fall within the exemption, and the attorney will be required to register. Because of the broad language of FARA, the attorney is required to keep records of all correspondence.

1. *Attorney General v. Covington & Burling*^{79.1}

According to the decision in *Covington & Burling*, confidential communications between an attorney and his foreign princi-

77. *Id.* at 382. The Department of Justice has the power to inspect the records required by FARA.

78. *Id.* at 381-82 (based upon an opinion drafted by officials at the Justice Department).

79. *Id.* at 384-85.

79.1. 411 F. Supp. 371 (D.D.C. 1976), *inj. denied*, 430 F. Supp. 1117 (D.D.C. 1977).

pal must be recorded. The attorney-agent, however, may assert the attorney-client privilege to prevent disclosure, with the question of privilege to be decided by the court in an *in camera* inspection.⁸⁰ In *Covington & Burling*, several attorneys undertook to represent the Republic of Guinea regarding the negotiation of contracts for the exportation of Guinean bauxite. Although most of the attorneys' activities would have been exempt, "in the course of negotiations, members of the firm met with lawyers and staff of the AID and of the Export-Import Bank and with the Guinea desk officer of the State Department and the United States Ambassador to Guinea." Those activities, non-exempt in nature, brought the firm within the purview of FARA.⁸¹

2. *Scope of the Privilege*

With respect to FARA, the attorney-client privilege is narrowly construed and is determined on a case-by-case basis.⁸² The disclosure requirements involve records which may reveal confidential communications between a foreign principal and its agent-attorney concerning both legal and non-legal matters. The privilege is narrowly limited within its traditional confines and does not include matters which are only tangentially related to legal matters. Historically, the privilege protects only "those disclosures—necessary to obtain informal legal advice—which might not have been made absent the privilege."⁸³ An attorney's ministerial and clerical services are not covered.⁸⁴ The attorney-client privilege will not apply to information that is of a kind likely to be disclosed to third parties in the future, or that clearly could have been obtained by the agent elsewhere.⁸⁵ Basi-

80. See Note, *Privilege*, *supra* note 64, at 335-39.

81. Attorney General v. *Covington & Burling*, 411 F. Supp. 371, 372 (D.D.C. 1976), *inj. den.*, 430 F. Supp. 1117 (D.D.C. 1977).

82. Note, *Enforcement*, *supra* note 13, at 1004.

83. Note *Attorney-Client Privilege—Confidentiality of Particular Documents*, 3 BROOKLYN J. OF INT'L L. 308, 310 (1977). The general rule today is that the privilege applies to communications made during any consultation for legal advice, regardless of whether litigation is pending or an actual controversy exists. *Id.*

84. *Id.* at 311. The privilege does not extend to business advice or communications concerning company policy. *Id.*

85. One author argues:

Since FARA requires the attorney to file a public registration statement indicating the nature of his activities on behalf of a foreign principal, and since

cally, claiming the attorney-client privilege requires the assertion of three elements: (1) specification of which communications are covered by the privilege; (2) that the confidence actually came from the client; and (3) that the particular documents reveal communications made to obtain legal assistance.⁸⁶

3. *Upjohn Co. v. United States*⁸⁷

The United States Supreme Court clarified the scope of the attorney-client privilege with respect to corporations in the case of *Upjohn Co. v. United States*. The Upjohn Company is a pharmaceutical manufacturing corporation with a number of foreign subsidiaries. When general counsel for the company discovered that questionable payments had been made to foreign government officials to secure foreign government contracts, he initiated an internal investigation. Questionnaires were sent to all foreign managers asking for detailed information on similar payments. These were returned to general counsel, who also interviewed the foreign managers and other officers and employees involved.

The Internal Revenue Service demanded production of the questionnaires as well as the memoranda and notes made at the interviews. Upjohn refused on the grounds that the documents were protected by the attorney-client privilege and the work product doctrine. The Court found that:

[m]iddle-level — and indeed lower-level — employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.⁸⁸

the foreign principal has statutory notice that communications to the attorney regarding those activities are subject to scrutiny by a third non-privileged party, e.g., a Justice Department official, and to possibly wider dissemination within the government, such communications may realistically be considered not to be confidential and thus, not protected by the attorney-client privilege.

Note, *Privilege*, *supra* note 64, at 343.

86. See *Attorney General v. Covington & Burling*, 430 F. Supp. 1117, 1120-21 (D.D.C. 1977).

87. 449 U.S. 383 (1981).

88. *Id.* at 391.

For this reason, the Court held the attorney-client privilege applicable to communications between the attorney and the lower-level employees if: (1) the information was not available from upper echelon management; (2) the information was needed to supply a basis for legal advice; (3) the communications concerned matters within the scope of the employees' corporate duties; and (4) the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.⁸⁹

The notes and memoranda sought by the Government differed from the questionnaires. To the extent the notes and memoranda revealed oral communications, they were protected by the attorney-client privilege. To the extent that they did not reveal oral communications, they revealed the lawyers' "mental processes in evaluating the communications [S]uch work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."⁹⁰

What would the Government necessarily have to show in the way of necessity and unavailability by other means to compel disclosure of work product? The Court was unwilling to say.⁹¹ The Court did not indicate that any exception might exist regarding communications protected by the attorney-client privilege. In *Covington & Burling*, the court said that "in all or nearly all instances an impartial judicial officer would be able to disclose portions of a confidential document, or the substance of it, relevant to the Attorney General's needs under the Act, without compromising the attorney-client relationship."⁹² The court seems to suggest a balancing of interests between the agency relationship and the needs of the Justice Department officials in administering FARA.

Because many if not most foreign principals are corporate entities, the holding in *Upjohn* is important in trying to second guess the courts in their future *in camera* inspections of attorney records. As long as the attorney's communications with corporate personnel (whether lower, middle, or top management)

89. *Id.* at 394.

90. *Id.* at 401.

91. *Id.* at 402.

92. 411 F. Supp. at 376-77.

are limited to legal matters, a strong argument for protection under the attorney-client privilege can be made. When, however, communications extend to noncorporate entities or involve non-legal matters (or matters only tangentially so) the possibility of required disclosure arises. In an indirect way, the attorney-client privilege protects those communications made pursuant to what would otherwise be exempt—i.e. purely legal, activities—but which were rendered nonexempt because the attorney engaged in political activities.

VIII. ADMINISTRATION AND ENFORCEMENT

FARA presently is administered by the Assistant Attorney General of the Registration Unit of the Internal Security Section of the Department of Justice.⁹³ The unit has been criticized for three reasons: (1) the information developed is inadequate; (2) the staff is too small; and (3) the degree of publicity given disclosures is inadequate.⁹⁴ The Department of Justice utilizes normal administrative procedures in carrying out FARA. Necessary investigations are conducted by the Federal Bureau of Investigation.⁹⁵ The department also distributes copies of registration statements and supplements to relevant government departments and agencies.⁹⁶ A liaison has been established with the staffs of the various Congressional committees and with the executive branch to acquaint them with the reporting and disclosure requirements and the availability of registration statements filed with the Justice Department. Congressmen, their staff members, and executive officials in turn provide information regarding possible violations of FARA by agents they encounter.⁹⁷

There are three basic categories of violations: (1) inadequate disclosure of source of payment or of detailed expenditures; (2) inadequate labeling of propaganda; and (3) failure to report the nature and extent of activities.⁹⁸ The Registration

93. Note, *Attorneys*, *supra* note 12, at 413.

94. Note, *Regulating*, *supra* note 14, at 986-88.

95. See Note, *Attorneys*, *supra* note 12, at 414.

96. Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended, for calendar year 1975, at 4.

97. *Id.*

98. Note, *Regulating*, *supra* note 14, at 989.

Unit periodically conducts in-depth inspections of books and records of registered agents pursuant to the inspection powers granted by section 615 of FARA.⁹⁹ Enforcement, however, has resulted in few actual indictments.¹⁰⁰ Currently, enforcement is less than harsh. Once a suit is brought by the Attorney General against an agent for alleged FARA violations (usually for failure to register), the defendant registers before or soon after the indictment is handed down and then enters a plea of *nolo contendere*. Fines are relatively light, with suspended confinement and possible probation.¹⁰¹ Due process and other constitutional issues have rarely arisen.¹⁰²

IX. AN EXAMPLE OF SURREPTITIOUS POLICY MANIPULATION THROUGH THE USE OF FOREIGN AGENTS—THE ARAB CONNECTION

During the recent intense debate on Capitol Hill over approval of the AWACs sale to Saudi Arabia, American businesses exerted a strong force in favor of the sale.¹⁰³ Among the most vocal American companies were Boeing and United Technologies, both of which had large contracts with Saudi interests.¹⁰⁴ One commentator suggests that, during the course of the debate, violations of FARA may have occurred in several areas. First, corporate officials contacted United States Senators and Representatives at the request of Saudi officials and members of the royal family. Second, corporate officers contacted members of Congress under threat or inducement of losing or gaining lucrative Saudi contracts. Third, other corporate officials contacted Congressmen at the request of registered Saudi agents. Last, many companies distributed Saudi propaganda or espoused the interests of Saudi Arabia as their own before government officials.¹⁰⁵

99. 1979 Report on FARA at 3.

100. Note, *Enforcement*, *supra* note 13, at 1003.

101. Note, *Attorneys*, *supra* note 12, at 427.

102. For a detailed discussion of the constitutional issues involved in FARA, see generally, Note, *Disclosure Under the Foreign Agents Registration Act of 1938, As Amended*, 14 CASE W. RES. L. REV. 579 (1963).

103. Emerson, *The American House of Saud: I. An Investigative Report. The Petrodollar Connection*, 186 THE NEW REPUBLIC 7 (1982).

104. *Id.* at 20.

105. *Id.* at 24.

Were Congress and the American public deceived? Certainly, Congressmen were persuaded by what was ostensibly a grass roots corporate endorsement of the AWACs sale. The effect of these lobbying activities may have differed significantly had the true nature of their pseudo-agency relationships been disclosed.¹⁰⁶ What is even more compelling is the potential impact of section 618(h), which prohibits agency fee arrangements based upon the contingent success of a lobbying effort. Hard evidence exists indicating the Saudis held up final contract negotiations with American firms during the period of the AWACs debate.¹⁰⁷ The question remains whether the Justice Department will undertake the possible prosecution of major corporate executives involved in this controversy.

X. CONCLUSION

FARA originally was intended as a limited registration statute designed to neutralize the deceptive power of foreign agents, acting under many guises, for undisclosed principals. A propaganda agent who is forced to disclose his principal suffers a loss of credibility in many instances. The policies behind FARA are noble; the means are not. What started out as a regulation against subversives has now become a trap for the unwary attorney or corporate executive trying to maintain a competitive edge.

Administrative lethargy in enforcing FARA does not compensate for the potential risk of an unintentional violation or for the inconvenience caused to foreign clients who must consider the implications of possible disclosure of confidential information. Perhaps litigation will develop out of the sale of AWAC's to Saudi Arabia which will test the fundamental effectiveness and worthiness of FARA.

Attorneys may continue to rely on the protection afforded by the attorney-client privilege and the work-product doctrine. When in doubt about the obligation to register or the potential for a Justice Department investigation of books and records, an

106. *Id.* at 25.

107. *Id.* at 19. For a further discussion of contingent fees, see Attorney General v. Int'l Pub. Relations Co., Ltd., No. 75-2042 (D.D.C. Dec. 29, 1975); Attorney General v. P.G.A. International, Inc., No. 75-2040 (D.D.C. Dec. 29, 1975).

attorney would be well advised to consult with the Internal Security Division of the Department of Justice.

Randall H. Johnson