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History of the Lobbying Disclosure Act

"The purpose of our lobbying laws is to tell the public who is being paid how much to lobby whom on what. That purpose is not being served under the status quo as we now see it."
-- Sen. Carl Levin, criticizing the prior
Federal Regulation of Lobbying Act (1992)[1]

The Lobbying Disclosure Act (LDA) of 1995 was passed after decades of effort to make the regulation and disclosure of lobbying the federal government more effective. Earlier lobbying laws, most notably the Federal Regulation of Lobbying Act of 1946, became virtually obsolete soon after passage.

Similarly, the rapid growth of lobbying in the nation's Capitol combined with many unfinished reforms from a decade ago requires Congress to institute a new round of lobbying reforms.

"Lobbying" is the process of petitioning government to influence public policy. This right is one of the most treasured rights in a democracy. Specifically recognized in the Magna Carta of 1215, the right to petition our government was repeatedly affirmed in colonial American treatises, the Declaration of Independence and post-revolutionary federal and state constitutions, including the Bill of Rights.[2] In colonial times, written petitions to local governments were usually simple and brief and almost always answered.[3]

The days of citizens effectively petitioning government for redress of grievances have long come to a close. Federal and state governments deal with vast numbers of complex economic and political issues, affording limited time for direct constituency contact, and spawning a legion of professional lobbying firms and associations. These groups leverage the right of petition with the power of economic resources or political networks to catch the attention of officeholders. For generations now, the traditional right of petition at the federal and state levels has become largely the domain of professional lobbyists.[4]

The rise of the professional lobbyist has meant an incredible – and potentially dangerous – concentration of power over government within a small, elite cadre of people. This concentration of power, in turn, means it is ever-so essential for legislators and the public to know who is paying the lobbyists how much to lobby whom on what. Legislators need this information to properly evaluate the political pressures to which they are being subjected. The public needs this information to evaluate the integrity of their legislators.

Early Efforts at Federal Regulation of Lobbying

The first efforts to regulate lobbying activity at the federal level came in 1876, when the House of Representatives approved a resolution only for that congressional session requiring lobbyists to register with the House Clerk.[5] Several states had gone a little further by the end of the 19th century and even criminalized lobbying.[6] But none of these efforts were systematically enforced.

In the 1930s, Senator Hugo Black of Alabama led the fight against corrupt lobbying practices in Washington. Black advocated that lobbyists register their names, salaries, monthly expenses and the intent of their lobbying activities. His concern fell on deaf ears until the spring of 1935, when lobbyists for an association of public utility holding companies attempted to block passage of a bill that would have broken up holding companies into smaller market shares. Lobbyists coordinated their efforts by firebombing Capitol Hill with hundreds of telegrams demanding that senators vote down the measure. Black held a congressional hearing on the source of these telegrams and discovered that lobbyists impersonated constituents by dictating hundreds of unique telegrams to Western Union associates.

As a result of the investigation, the Public Utilities Holding Company Act was amended to require registration of all company agents. Black also introduced a measure to require the registration of all lobbyists generally, but the bill failed to become law. Still, Congress showed signs of concern by adding special provisions for lobbyist registration in some industry-specific legislation, such as the Merchant Marine Act of 1936.

But it was not until World War II that Congress established comprehensive and systematic regulation of lobbying. This came in the form of two very different federal statutes: the Foreign Agents Registration Act of 1938 and the Federal Regulation of Lobbying Act of 1946.

1. Foreign Agents Registration Act of 1938

The Foreign Agents Registration Act (FARA) was the first attempt at comprehensive lobbying reform at the federal level. FARA's primary purpose was to limit the influence of foreign agents and propaganda on American public policy. It arose in response to a perceived propaganda drive by Adolph Hitler to fan the Nazi movement in the United States. Though there was no explicit evidence, President Franklin Roosevelt and many members of Congress believed that Hitler was helping finance the U.S. Nazi movement.

The enactment of FARA in the critical period preceding the outbreak of World War II was the result of recommendations by a special committee of Congress (known as the McCormack committee) investigating "un-American activities" in the United States. The law originally focused on the Nazi movement. In fact, the words "foreign propaganda" in the law, which was subject to regulation, originally read "Nazi propaganda."[7] But it was later expanded to include concerns about pro-communist propaganda.

FARA focused entirely on lobbying disclosure rather than regulation of lobbying conduct. It defined as a "foreign agent" any person acting as a lobbyist, public relations representative or attorney for a foreign principal or any domestic organization subsidized by a foreign principal. It

defines as a "foreign principal" a foreign government, political party, corporation, entity or individual organized under the laws of, or having a principal place of business in, a foreign nation.

FARA sought to lessen the influence of foreign propagandists by requiring that:

- All "agents of a foreign principal" register their names, addresses and foreign clients represented with the Secretary of State;
- Any literature or information disseminated by the foreign agent be conspicuously labeled as such; and
- Foreign agents maintain a comprehensive account of all lobbying contacts made, the date of those contacts, compensation received and funds disbursed, the subject matter discussed and with whom, and disclose this "diary" with the Secretary of State.

FARA was designed to counteract the influence of foreign propaganda, not by restricting the distribution of such information, but by identifying it as paid for and distributed by foreign agents. Communications by foreign agents intended to influence public policies were required to include a statement including the name and address of the foreign agent and the foreign interest promoting the political communications.

FARA was amended several times in the 1950s and 1960s. The most significant amendment came in 1966, when Congress changed the primary focus of FARA from an anti-propagandist tool into an instrument of regulation over grassroots lobbying as well as lobbying of Congress by foreign agents. The greatest threat perceived by Congress at that time was not so much from foreign subversives attempting to shape American foreign policies, but from foreign economic competitors attempting to influence American business and tax policies.[8]

FARA, including its anti-propagandistic elements, has repeatedly been upheld by the courts.[9]

2. Federal Regulation of Lobbying Act of 1946

Following immediately in the footsteps of World War II, Congress approved the nation's first comprehensive lobbying disclosure law for domestic lobbyists: the Federal Regulation of Lobbying Act (FRLA) of 1946. The primary objective of the law was to establish a system of lobbyist registration and disclosure of those attempting to influence Congress. Like FARA, the FRLA did not attempt to regulate the conduct of lobbying or the financial activity of lobbyists.

The Federal Regulation of Lobbying Act provided a system of registration and financial disclosure of those attempting to influence legislation in Congress.[10] FRLA's goal was to provide public information on the political pressures influencing legislation, and it recognized that "full realization of the American ideal of government by elected representatives depends to no small extent on [members of Congress] ability to properly evaluate" the political pressures to which they are regularly subjected. Without this public information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[11]

The FRLA required anyone whose "principal purpose" was to influence the passage or defeat of legislation in Congress to register with the Clerk of the House and the Secretary of the Senate and file quarterly financial reports. The financial reports required the name and address of the lobbyist and all paying clients; how much the lobbyist was paid; all contributors to the lobbying effort and the amount of the contributions; an itemized accounting of expenditures by the lobbyist; the identity of any publications that the lobbyist caused articles or editorials to be printed in; and the particular legislation the lobbyist was paid to influence. Violation of these reporting requirements could be punishable by a fine up to $5,000 or one year imprisonment and a three-year prohibition on lobbying.

The FRLA was widely perceived as poorly drafted and ineffective. Just two years after President Harry Truman signed the law, he called for several revisions to make it more effective. Some of its weaknesses are that it did not cover congressional staff or the executive branch nor a great deal of grass-roots lobbying. Importantly, while the FRLA did require itemized reporting of expenditures, it failed to require disclosure of what the public needs to know most about lobbying: *how much was spent overall and for what policy objective*. Furthermore, the law was very vague as to who actually had to register. It was not at all clear what constituted lobbying as a "principal purpose," which would trigger the reporting threshold.

Just as problematic was enforcement of the law. The Clerk of the House and Secretary of the Senate felt at the time that their role was to serve as a depository of information, not to audit for errors and enforce compliance. The Department of Justice also decided that it would focus on encouraging voluntary compliance with the law by bringing it to the attention of potential violators rather than prosecute for non-compliance.[12]

The FRLA was further weakened when the U.S. Supreme Court narrowed its already limited scope. Importantly, the court upheld the right of the federal government to regulate the disclosure and, to some extent, the conduct of lobbying in *United States v. Harriss*.[13] However, the court also narrowed the application of the law in order to avoid finding it unconstitutional due to poor drafting. Without ruling on the merits of regulating lobbying, the court determined that it only applied to "paid lobbyists" who "directly communicate" with Members of Congress on "pending legislation." Thus, the court interpreted the law to cover only efforts to influence the passage or defeat of a specific bill, and for only those paid efforts in which lobbyists directly contacted members of Congress, not their staff. Persons who spend less than half of their time contacting members of Congress on legislation were exempt from the reporting requirements.

A 1991 study by the U.S. Government Accountability Office (GAO) uncovered just how porous was the law.[14] The GAO found that about 10,000 of the 13,500 individuals and organizations listed as key influence peddlers on Capitol Hill in a book entitled, *Directory of Washington Representatives*, were not registered as lobbyists. The GAO study concluded that lobbyist disclosure reports were woefully incomplete. It found that: 60 percent of registered lobbyists reported no financial activity; 90 percent reported no expenditures for salaries, wages, fees or commissions; 95 percent reported no public relations or advertising expenditures; and only 32 percent of filers reported a specific title or bill number of legislation lobbied.

3. The Byrd Amendment and Miscellaneous Disclosure Laws

In 1989, Sen. Robert Byrd (D-W.Va.) offered an amendment to an Interior appropriations bill prohibiting the use of government funds by any private entity to influence the award of a federal contract, grant or loan.[15] However, private recipients of government appropriations can use non-government funds to influence the award of contracts, grants or loans, but the private entity is required to disclose this lobbying activity. Federal regulations implementing the Byrd amendment require the disclosure of each contact made by the private entity with a federal official through "outside lobbyists" to influence an award decision. In-house lobbyists and the client's employees are exempt from the Byrd amendment.

At the time the contract, grant or loan is requested or received, the disclosure reports must be filed with the awarding agency. The agency compiles these reports and submits them to the Clerk of the House and Secretary of the Senate twice each year. Monitoring compliance is the responsibility of the awarding agency and enforcement against violations is the responsibility of the Department of Justice under the Program Fraud Civil Remedies Act.

Similarly, federal employees are also prohibited from lobbying with appropriated monies.[16] The restriction has been interpreted by the Justice Department to prohibit "grass roots lobbying" -- campaigns in which members of the public are encouraged to contact their senators or representatives. Slightly less restrictive rules apply to cabinet members and other Senate-confirmed officials acting within their areas of responsibility. The Justice Department guidance permits federal employees to do the following:

- Communicate with Members and their staffs in support of administration or departmental positions;
- Communicate with the public through public speeches and published writings;
- Communicate privately with individual members of the public, so long as those communications are not part of a grass roots lobbying campaign; and
- Lobby Congress or the public on non-legislative or appropriation matters, such as nominations and treaties.

Over the years, specific agencies adopted various agency-specific requirements on lobbying. For example, the Department of Housing and Urban Development imposed disclosure requirements on persons who make expenditures to influence decisions made by HUD employees, including decisions that affect the status of HUD assistance.[17] Similar reporting requirements were established for those lobbying the Farmers Home Administration and other agencies.

Lobbying Disclosure Act of 1995

After 50 years of failed attempts to close the many loopholes of the 1946 Act, Congress finally stepped up to the plate at the end of 1995 and approved the fairly sweeping Lobbying Disclosure Act (LDA).[18] The LDA represents a significant effort to create an effective system of lobbying disclosure, especially when compared to the earlier regulatory efforts.[19] However, as discussed below, the LDA has also fallen short in several respects.

For decades Congress had been reluctant to modify the 1946 lobbying law, despite the fact it was widely recognized as a failure in achieving the objectives of registering and disclosing to the public the swelling ranks and financial activity of federal lobbyists.

Several forces came into play in the mid-1990s to compel action. First and foremost, Congress had been enwrapped in a sensational case of corruption touching several of its members, known as the Wedtech scandal. In 1987, the Senate Subcommittee on Oversight of Government Management investigated "improper activities in the award of federal contracts to the Wedtech Corporation."[20] The Subcommittee noted that Wedtech had hired numerous lobbyists, including some former members of Congress, to help land lucrative government contracts. All the lobbying activity went unreported, and even involved bribing government officials. The investigation highlighted inadequacies of lobbying laws, prompting the Subcommittee to convene hearings in 1991 on lobbying registration and reporting problems.

This hearing was the genesis of the LDA, with Sen. Carl Levin (D-Mich.) introducing the first version of the Act in 1992. The bill was revised and reintroduced several times in subsequent congressional sessions. It gained substantial momentum when other scandals in Congress erupted, centering on a few Democratic leaders of the House. Republicans campaigned on the theme of cleaning up Congress and made lobbying disclosure a priority. The LDA was finally codified in 1995 with substantial bipartisan support.

The LDA replaced much of the earlier patchwork of lobbying disclosure laws with a single, uniform statute covering the activities of all professional lobbyists. It incorporated many of the key provisions of FARA, the Byrd Amendment and the Federal Regulation of Lobbying Act under one law and provided substantial improvements in their definitions, coverage and reporting requirements.

The LDA made some important improvements:

- It clarified key concepts subject to regulation. For example, the definitions of "lobbyist" and "lobbying activities" subject to regulation had previously been so ambiguous that even the courts were unclear as to whom the law applied.
- It provided a quantifiable threshold for when lobbying registration and reporting is required and required that lobbyists and organizations file bi-annual financial activity reports.
- Reporting requirements for lobbyists representing foreign interests were modified. Under the LDA, lobbyists representing foreign governments or foreign political parties must continue registering under the Foreign Agents Registration Act and need not register under LDA. Lobbyists representing private foreign interests may register under LDA and then need not register under the more stringent FARA.

Unfortunately, federal lobbying laws have some important limitations. These are:

- *Inadequate disclosure*. Though the LDA requires the Secretary of the Senate and the Clerk of the House to develop "computerized systems designed to minimize the burden of filing and maximize public access to materials," lobbyist financial reports are filed in

paper format, and public accessibility of these reports is far from adequate. The disclosure system can be easily, and vastly, improved by implementing a fully searchable, sortable and downloadable electronic reporting system of lobbying financial records, similar to what the Federal Election Commission does for campaign finance records.

- *Inadequate enforcement*. Another shortcoming of the LDA is the lack of monitoring for compliance and enforcement for violations. No single agency is vested with enforcement authority of the LDA. The Clerk of the House and the Secretary of the Senate are separately responsible for collecting lobbying financial reports. But neither office has a particular interest in ensuring that the filings are complete or accurate. Nor do the congressional offices have enforcement authority. If they determine that a lobbyist is in repeated non-compliance, the offices may refer the case to the Department of Justice for legal action. But that is rarely, if ever, done.

- *Inadequate regulation of conduct*. Many lobbying practices today raise serious concerns of undue influence—the "revolving door" of former public officials becoming lobbyists for special interests, family members of legislators serving as lobbyists, gifts and campaign contributions given by lobbyists to federal officeholders. Several legislative reforms are needed for regulating the conduct of lobbying.

For a detailed analysis of the requirements and limitations of the Lobbying Disclosure Act click

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Endnotes

[1] Sen. Carl Levin, Hearing on S. 2279, Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, Washington, D.C. (Mar. 26, 1992).

[2] The first American colonial treatise that codified the right to petition was the Body of Liberties by the Massachusetts Bay Colony Assembly in 1641. It was repeated in several pre-revolutionary declarations, including the Stamp Act. In the Declaration of Independence, Thomas Jefferson wrote: "In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury." Declaration of Independence, para. 30 (1776). Eight of the 12 states following Independence specifically adopted the right to petition in their state constitutions. The "right to petition Government for redress of grievances" concludes the First Amendment of the Bill of Rights. Stacie Fatka and Jason Miles Levien, "Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution," 35 *Harvard Journal on Legislation* (1998) at 563.

[3] Raymond Bailey, Popular Influence Upon Public Policy: Petitioning in 18th Century Virginia (1979) at 29-31.

[4] The term "lobbyist" owes its origin to President Ulysses S. Grant. During Grant's first term as President, his wife disapproved of his drinking, so Grant would regularly slip out of the White House and visit the lounge at the nearby Willard Hotel in downtown Washington, D.C. Grant's visits to the Willard Hotel soon became common knowledge. Those wishing to catch a minute or two with the President to petition their causes would collect in the hotel lobby to corner Grant as he went to and from the lounge. Frustrated by the ever-growing crowd of petitioners, Grant

frequently complained of the "lobbyists" who would get in his way. Ron Smith, "Compelled Cost Disclosure of Grassroots Lobbying Expenses," 6 Kansas Journal of Law and Public Policy (1997) at 115.

[5] Fatka and Levien, op.cit. at 569.

[6] Id.

[7] Michael Spak, "America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder," 78 *Kentucky Law Journal* (1990) at 242-243.

[8] Mark Baker, "Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security," 25 *Texas International Law Journal* (1990) at 24.

[9] See, for example, *Meese v. Keane*, 481 U.S. 465 (1987).

[10] Section 308 of the Act provides: "(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included . . . ."

[11] *United States v. Harriss*, 347 U.S. 612 (1954) at 625.

[12] S. Rep. No. 99-161 (1986) at 51-52.

[13] United States v. Harriss, 347 U.S. 612 (1954). In subsequent rulings, the U.S. Supreme Court more clearly determined that lobbying is an important means of petitioning government and thus is given some constitutional protection. See, for example, Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) [defending the right of a group of railroads to wage a grassroots lobbying campaign].

[14] General Accounting Office, "Federal Lobbying: Federal Regulation of Lobbying Act of 1946 is Ineffective," (July 1991). In the study, GAO interviewed a sample of those identified in *Washington Representatives* and found that 75 percent had contacted both members of Congress and their staffs, dealt with federal legislation, and sought to influence Congress or the Executive Branch.

[15] 31 U.S.C. 1352.

[16] 18 U.S.C. 1913.

[17] 42 U.S.C. 3537b.

[18] 2 U.S.C. 1601.

[19] One of the lead sponsors of the Lobbying Disclosure Act of 1995, Sen. Carl Levin (D-Mich.), testified before the House Committee on the Judiciary that "decade after decade, Congress has tried to close the loopholes in the lobbying registration laws, and decade after decade, those efforts have failed. This Congress has a chance to be different." Hearing before the House Committee on the Judiciary, Overhauling the Lobbying Disclosure Law, Testimony of Sen. Carl Levin, September 7, 1995.

[20] Senate Committee on Governmental Affairs, Lobbying Disclosure Act of 1993, S. Rep. No. 37 (1993).