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Lobbying on Aluminum and Steel Tariffs May Raise FARA Issues for Companies

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Election and Political Law

President Trump's decision to impose tariffs on imported steel and aluminum has set off a "stampede" of lobbying, according to the *New York Times*. Countries are lobbying for broad exemptions, and U.S. companies can petition the Commerce Department for specific exclusions for individual products and industries. Companies that are engaging with Congress and the executive branch on trade issues may be surprised to find that their advocacy could have FARA implications.

FARA is a notoriously tricky statute, with broadly worded triggers, complicated statutory and regulatory exemptions, and a complex history of Department of Justice legal interpretations that are not publicly available. It may seem strange to suggest that lobbying on commercial tariffs could have FARA implications, but Congress and the Department of Justice considered a very similar situation nearly thirty years ago and reached surprising conclusions.

In the last days of the Reagan administration, the U.S. Customs Service announced a revised tariff classification on sports utility vehicles. The new classification moved SUVs from the tariff for cars to the tariff for trucks, resulting in a higher import tariff. The move prompted fierce lobbying. Lawyers and lobbyists representing "[f]oreign vehicle manufacturers and their domestic subsidiaries . . . made formal and informal contacts with Federal officials at all levels of both Customs and Treasury, and Members of Congress were enlisted to make the importers' case."[1]

When Congress held hearings on federal lobbying disclosure laws a few years later, the lobbying associated with the import tariffs received significant attention. Congress noted that "virtually none of the lobbying activity in this case was disclosed under the Foreign Agents Registration Act," and Congress wondered whether it should have been.[2]

The hearings resulted in several key observations that warrant reexamination today by lawyers assessing the FARA risks associated with lobbying on steel and aluminum tariffs, particularly lobbying on behalf of foreign corporations and their U.S. subsidiaries. Moreover, these observations from decades ago may take on greater significance in today's FARA climate, in

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[1] Federal Lobbying Disclosure Laws, Hearings Before the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, 102d Cong. 10, S. Hrg. 102-377 (1991).
[2] *Id.* at 11.

which the Justice Department has shifted to interpreting key exemptions to the statute more narrowly.

In testimony and written submissions before Congress examining the automobile tariff lobbying, Department of Justice officials stressed that lobbying directed at "enlarging the U.S. market for goods produced in [another] country" was predominantly advancing a foreign interest.[3] In a letter to Congress, Assistant Attorney General W. Lee Rawls noted that Congress had specifically amended FARA in 1966 to capture lobbying related to sugar import quotas, and he analogized lobbying on sugar quotas to lobbying on automobile tariffs.[4] In an exchange with Senator Carl Levin at the hearing, Deputy Assistant Attorney General Mark Richard stated that tariff lobbying that predominantly benefited foreign interests would require registration.[5] Senator Levin added that tariffs are "not just a business issue," and instead "it is a national economic issue which is involved here."[6]

These observations take on new significance in light of the Justice Department's recent interpretations of the Lobbying Disclosure Act exemption to FARA and the regulatory commercial exemption to FARA, particularly the limitations on the use of these key exemptions.[7]

First, if lobbying on broadly applicable market tariffs is considered to advance predominantly a foreign interest for the benefit of a country's national interest, that could call into question the applicability of the Lobbying Disclosure Act exemption to FARA registration. The Lobbying Disclosure Act exemption is available to any foreign agent of a private sector entity that registers and discloses its lobbying activities under the Lobbying Disclosure Act, but the exemption is not available if the "principal beneficiary" of the lobbying is a foreign government.[8]

Second, a regulatory exemption for commercial activity could be foreclosed. FARA's regulatory commercial exemption applies to activities in furtherance of "commercial, industrial, or financial operations of [a] foreign corporation," but it is not available if the activities "directly promote" the interests of a foreign government.[9] If trade lobbying is closely connected to a country's national interest, this exemption may not apply.

These interpretations highlight the challenges of applying FARA's broadly worded and lightly defined provisions. When companies engage in advocacy on issues that are intertwined with a foreign government's interests—such as import tariffs and exemptions—the risks of inadvertently triggering FARA increase substantially.

The 1991 hearings focused primarily on a FARA exemption for domestic subsidiaries of foreign corporations engaged in substantial commercial operations in the United States. Congress repealed that exemption in 1995 when it adopted the Lobbying Disclosure Act exemption, which made the domestic subsidiary exemption largely superfluous. Notably, however, there are now

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[3] *Id.* at 488.
[4] *Id.* at 487-88.
[5] *Id.* at 41.
[6] *Id.* at 26.
[7] Other exemptions may also apply. For example, the lawyer's exemption could apply to a legal representation before a court or agency, subject to certain limitations.
[8] 22 U.S.C. § 613(h); 28 C.F.R. § 5.307.
[9] 28 C.F.R. § 5.304(c).

serious proposals in Congress to repeal the Lobbying Disclosure Act exemption. If that were to occur, the Justice Department's assessment of automobile tariff lobbying will take on even greater significance.

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