

Recent FARA Development: Skadden Pays \$4.6 Million in Settlement

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The Department of Justice recently [announced](#) a landmark settlement agreement with the prominent law firm Skadden, Arps, Slate, Meagher & Flom LLP. Skadden acknowledges in the agreement that it should have registered under the Foreign Agents Registration Act (“FARA”) for its work on behalf of the Government of Ukraine. The agreement also, among other things, requires Skadden to [file a late FARA registration, disgorge \\$4.6 million to the U.S. Treasury, and implement “formal, robust procedures” to ensure FARA compliance](#).

This Skadden settlement is the first of its kind in at least several decades and could have far-reaching consequences particularly for lobbying, public relations, and law firms that represent foreign governments and foreign entities.

Skadden's Representation of the Ukrainian Government

According to a U.S. Department of Justice [appendix](#) attached to the settlement agreement, the Ukrainian Ministry of Justice hired Skadden in 2012 to write a Report on the “evidence and procedures used during the 2011 prosecution and trial of former Prime Minister Yulia Tymoshenko” and advise the Ministry “about rule of law issues in connection with a second criminal case against Tymoshenko.” The engagement was led by a Skadden attorney referred to in the appendix as “Partner-1,” who is [reportedly](#) former White House Counsel and then-Skadden partner Greg Craig.

Under the engagement, a \$4 million advance retainer was paid to Skadden by a third party “business person.” The retention agreement, which was never countersigned by the Ministry, included a provision that Skadden was “not being retained to engage – and will not engage – in political activities as defined by the Foreign Agents Registration Act (FARA).” Notably, the retention agreement also incorporated by reference a separate contract between the Ministry of Justice and Skadden that set the maximum amount to be paid by the Ukrainian Government at just \$12,000.

Skadden is described in the appendix as exercising independence in preparing the Report, taking such measures as disregarding the Ministry’s comments and repeatedly engaging Ms. Tymoshenko’s attorney to obtain her opposing viewpoint. The Report did not include, however, certain pro-Tymoshenko observations about the 2011 criminal trial that were separately memorialized by Mr. Craig in a personal memo. Skadden delivered the Report officially on November 30, 2012 and the Ukrainian Government released the Report to the public on December 13, 2012.

The U.S. Department of Justice appendix indicates that Skadden’s in-house FARA experts provided advice about the statute’s application to the Ukraine representation “on multiple occasions” to the Skadden attorneys writing the Report, including Mr. Craig. This advice apparently included a note saying that “if we were to perform public relations work aimed at the US then we would be obligated to register under FARA.” The appendix also

indicates that Mr. Craig sent an email to an executive at a public relations firm stating that “we cannot run close to the FARA line and if we were seen as hiring and directing [PR Firm] we would be doing much more than just lawyering.”

Later, though, the appendix indicates that Mr. Craig was enlisted in the public-relations efforts by offering input into the proposed media plans and by interacting with a specific journalist with whom Mr. Craig had a prior relationship, which apparently included delivery of the Report to that journalist. (Attorneys for Mr. Craig have said previously that he did not disseminate the Report.) Mr. Craig was ultimately interviewed by the journalist and quoted in a [news story](#) about the Report.

Skadden's Interactions with the Department of Justice

After reading Mr. Craig's quotes in the media about the Report, the Department of Justice's FARA Unit sent to Skadden a Letter of Inquiry in December 2012 asking the law firm for additional information and documents about the Ukrainian Ministry of Justice representation. Skadden responded that its work “was conditioned on the understanding with the client that the Firm would not provide any services that would be covered by” FARA. The response did not indicate how much Skadden had been paid in total or identify the source of its compensation.

The FARA Unit followed up in April 2013 with a subsequent request for “additional information to determine whether your firm is obligated to register,” including whether any Skadden personnel released or distributed the Report to any journalists, whether any Skadden personnel gave any media interviews, and the amount and source of Skadden's compensation for the engagement. Skadden responded to this request in June 2013, but the appendix indicates that some facts “were not fully reflected” in Skadden's response.

In September 2013, the FARA Unit sent a letter indicating it had determined that Skadden must register under FARA as an agent of the Ukrainian Government, “as a result of the dissemination of the Report to the media and communications with the media regarding the Report.” Skadden requested and held an in-person meeting in October 2013 with the FARA Unit to address the government's conclusions. The firm subsequently sent a letter to the FARA Unit signed by Mr. Craig indicating, among other things, that the Report was provided to U.S. media outlets only “in response to requests from the media.”

The FARA Unit then changed its position and concluded in a January 2014 letter to Skadden that the firm had “no present obligation to register under FARA.”

Resolution for Skadden

The Department of Justice has since received information that now leads it to conclude that the FARA Unit's 2014 conclusion about Skadden's registration status was incorrect:

The FARA Unit made a determination that Skadden did not have a registration obligation in connection with its work for Ukraine, and it based that conclusion on the false and misleading information Skadden had provided. Before making its representations to the FARA Unit,

Skadden had conducted no investigation to confirm the information the lead partner was providing to the FARA Unit and to other partners at the firm.

Skadden agrees with this conclusion, pursuant to a settlement agreement with the Department of Justice. This settlement agreement also requires Skadden to

- Make payment to the U.S. Treasury of \$4,657,568, representing all monies from all sources that the Law Firm was paid for its work and incurred expenses;
- Register within 10 days of the settlement as required by FARA in connection with work for the Government of Ukraine;
- Undertake continuing cooperation with all inquiries relating to the law firm's work for the Ukrainian Government; and
- Submit a report to the Department of Justice within 180 days certifying the implementation of processes related to "responding to inquiries concerning the Law Firm's conduct from any federal government entity" and "ensuring FARA compliance as to the Law Firm's engagements," which is a measure that calls specifically for "intake procedures to identify the direct or indirect involvement of a foreign principal and/or activities that may trigger potential FARA registration obligations" and "firm-wide awareness of FARA compliance, including FARA-compliance training and messaging to appropriate personnel."

The settlement agreement did not subject Skadden to any ongoing government monitoring or reporting regime.

Skadden did, in fact, register under FARA for its prior Ukraine work on January 18, 2019. The firm disclosed that 12 individuals associated with Skadden assisted in the representation and declared that it "understood that its work was to be largely funded by Victor Pinchuk."

Important "Takeaways" from the Skadden Settlement

Skadden's situation and settlement agreement offer important insights into FARA compliance to the regulated community, including:

- **Make sure that representations to the FARA Unit are accurate and the result of independent due diligence.** The Department of Justice concluded that the FARA Unit was misled by initial statements from Skadden, which it criticized for failing to conduct an "investigation to confirm the information the lead partner was providing to the FARA Unit." The Department also noted that it "expects that any organization, including a law firm or other professional service organization, that provides information in response to a government inquiry shall utilize formal policies and procedures to assess when independent diligence should be undertaken in responding to such inquiries to ensure that the information provided is reliable, accurate, and complete." Before a law firm, lobbying firm, public relations consultancy, or other entity responds to an inquiry from the FARA Unit, then, independent and robust due diligence should be conducted to verify that all representations made to the government are correct and comprehensive.

- **Lawyers are not categorically exempt from FARA registration.** FARA contains an exemption at 22 U.S.C. § 613(g) that is specific to lawyers engaged in a “legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States.” This has led to a misconception that lawyers are categorically exempt from FARA. But as the Skadden settlement shows, that is not the case. Lawyers providing legal advice to a foreign client must exercise due care that their advice does not wander into the provision of public-relations services or other FARA-registrable activities, since even a single contact with a journalist or simple involvement in media strategy planning can potentially trigger FARA registration.
- **Even a single act can trigger FARA registration.** While the Department of Justice did not articulate when exactly Skadden “crossed the line” into triggering FARA registration, it is possible that Mr. Craig’s alleged outreach to a journalist was sufficient to make the firm an “agent” under FARA. Unlike many other disclosure regimes, FARA does not contain any registration thresholds that permit a *de minimis* amount of activity to occur without giving rise to a legal obligation to register. The first registrable act triggers FARA registration, as evidenced here.
- **Cooperation with the FARA Unit can be beneficial.** The Department of Justice heavily criticized Skadden’s initial responses to its inquiries, but later expressed appreciation for “Skadden’s more recent extensive cooperation in the investigation of this matter, which facilitated its resolution.” Skadden’s cooperation, in this circumstance, seems to have resulted in an expedited end to the investigation under terms that are relatively favorable, given the current enforcement environment. Full cooperation with the FARA Unit can be beneficial to those under investigation or in receipt of a Letter of Inquiry.
- **Contractual language, while helpful, is not always dispositive.** Skadden folded into its engagement agreement with the Ukrainian Government language that it would not engage in FARA-registrable activities as part of the representation. Contractual language to this effect can be helpful, as it establishes the intent of the parties with regard to a representation. However, a lobbying firm, law firm, or public relations consultancy should make an effort to continually monitor its compliance with FARA and other applicable laws even after a contract including this type of language is executed.
- **The Skadden settlement could be a framework for settling future FARA issues.** Although the Department of Justice tried twice unsuccessfully in the 1990s to impose involuntary civil fines, it has focused in more recent year on a “two-track” enforcement approach: (1) criminal prosecutions for a limited number of cases involving especially large sums of money, serious misconduct, espionage, or other “bad facts”; and (2) penalty-free voluntary late filings for less serious or self-reported violations. The Skadden settlement may open up a “third track” in the enforcement process, where the FARA Unit could resolve potential violations by securing an agreement that includes a payment to the U.S. Treasury and the implementation of a robust internal compliance program, among other things.

For more information, please contact a member of [Caplin & Drysdale’s Political Law](#) team or visit our blogsite www.FARA.us.

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