



U.S. Department of Justice

National Security Division

Counterintelligence and Export Control Section

Washington, DC 20530

March 31, 2017

By FedEx

Kenneth A. Gross, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Re: Mercury Public Affairs

Dear Mr. Gross:

This is in reference to your letter of October 5, 2016, in response to our letter of September 1, 2016, regarding your client, Mercury Public Affairs ("Mercury") and its possible obligation to register pursuant to the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.* ("FARA" or the "Act") in connection with its representation of the European Centre for a Modern Ukraine ("ECFMU"). We further reference our meeting of September 7, 2016, in which we discussed Mercury's possible obligation to register under FARA, as well as its prior registration from April 2012 to May 2014 under the Lobbying Disclosure Act, 2 U.S.C. § 1601 *et seq.* ("LDA"). Based upon the information you have provided, we have determined that Mercury has an obligation to register under FARA, which arises from political activities it undertook within the United States pursuant to its relationship with the ECFMU, a foreign principal under the Act.

The purpose of FARA is to inform the American public of the activities of foreign agents working for foreign principals to influence U.S. government officials and/or the American public with reference to the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a foreign country or foreign political party. An "agent of a foreign principal" is defined, in pertinent part, as "any person who acts . . . at the order, request, or under the direction or control of a foreign principal . . . and who directly or through another person . . . engages within the United States in political activities for or in the interests of such foreign principal." 22 U.S.C. § 611(c)(1)(i). The term "political activities" is defined in 22 U.S.C. § 611(o) as "any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or foreign political party." The term "foreign principal" includes "a government of a foreign country and a foreign political party, any person outside the United States . . . and a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." *Id.* at § 611(b).

According to an Engagement Agreement you provided, on or about April 18, 2012, Mercury entered into a contractual relationship with the ECFMU for the purpose of "strengthening its ties to various organizations in the United States."¹ The materials you provided indicate that ECFMU sought to conduct an "influencer outreach campaign" to promote "Ukraine's west-ward focus and goal of EU membership."² According to the information provided, Mercury acted as "the public face and organizing entity" of the ECFMU campaign.³

The numerous memoranda and other documents you provided demonstrate that Mercury engaged within the United States in a public relations campaign on behalf of the ECFMU, entitled the "US Allies Project," the purpose of which was "to facilitate opportunities for engagement on Ukrainian political developments and reforms for American elected officials, opinion leaders, the media and civil society organizations."⁴ In carrying out this project, as well as its second phase entitled the "Engage US" initiative, Mercury arranged meetings with members of Congress and their staffs, U.S. think tanks and other non-governmental organizations, as well as the media, to mobilize support for strengthening Ukraine's ties with Western democracies.⁵ The materials provided reference specific political activities within the scope of FARA, including, but not limited to, developing social media platforms; securing press interviews;⁶ and arranging meetings between Ukrainian government officials and experts with members of Congress and their staff.⁷ We believe, taken together, that these actions were intended to influence United States officials and the American public "with reference to the political or public interest, policies, or relations of a government of a foreign country or a foreign political party." 22 U.S.C. § 611(o).

Although you pointed out that Mercury did not perform any work for the Ukrainian government or any Ukrainian political party, you also acknowledge that "[s]ome employees at Mercury were aware that members of the ECFMU leadership were also active in the Party of Regions."⁸ In any event, however, the term "foreign principal" also includes "a partnership, association, corporation, organization, or other combination of persons organized under the laws

¹ Engagement Agreement Between European Centre for Modern Ukraine and Mercury Public Affairs, LLC at 1 (Apr. 18, 2012) ("Engagement Agreement") (attached to Letter from Kenneth Gross and Tyler Rosen to Heather Hunt ("Letter from Gross")).

² Memorandum from Mercury/Clark & Weinstock to Rick Gates, "Government Relations Strategy-ECFMU," at 2 (Dec. 14, 2012) (hereinafter "ECFMU Strategy Memorandum").

³ *Id.* at 1.

⁴ Letter from Gross at 2.

⁵ *Id.*

⁶ See Memorandum from Mercury/Clark & Weinstock to Rick Gates, "Recommendations for (b) (6) Meetings," at 1 (Oct. 11, 2012). (b) (6)

(b) (7) ⁷ See "Draft agenda of Minister of Foreign Affairs (b) (6), (b) (7) visit to Washington (May 7-9, 2013)" (Apr. 24, 2013).

⁸ Letter from Gross at 3-4.

of or having its principal place of business in a foreign country," which includes ECFMU.⁹ 22 U.S.C. § 611(b)(3).

Although Mercury filed certain reports pursuant to a registration under the LDA, registration under FARA for the foregoing political activities was nevertheless required, because its activities promoted the political or public interests of a foreign government or foreign political party.

Section 613(h) of FARA provides an exemption to Section 612's registration requirement for any agent of an entity described in Section 611(b)(3), "if the agent has engaged in lobbying activities and has registered under the Lobbying Disclosure Act of 1995 [2 U.S.C. § 1601 *et seq.*] in connection with the agent's representation of such person or entity." However, that exemption applies to lobbying activities conducted to benefit the bona fide *commercial* interests of "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its *principal place of business* in a foreign country." 22 U.S.C. § 611(b)(3) (emphasis added). It is not available to an entity or individual that engages in the United States in political activities promoting the political or public interests of a foreign government or foreign political party. *See* 22 U.S.C. § 613(h) (excluding § 611(b)(1), foreign countries, and political parties, from its scope). Indeed, the pertinent Department of Justice regulation expressly states that "in no case where a foreign government or foreign political party is the *principal beneficiary* will the exemption under [22 U.S.C. § 613](h) be recognized." 28 C.F.R. § 5.307 (emphasis added); *see also* 28 C.F.R. § 5.300 ("The burden of establishing the availability of an exemption from registration under the Act shall rest upon the person for whose benefit the exemption is claimed."). As demonstrated in the information provided, Mercury undertook to promote Ukraine's public and political interests, making the Ukrainian government and/or the Party of Regions the principal beneficiaries of its activities.

In conclusion, we have determined that Mercury must register under FARA, because the firm's activities on behalf of the ECFMU constitute "political activities" as defined under the Act and were conducted at the order, request, or under the direction or control of a foreign principal (the ECFMU) in furtherance of, and for the purpose of influencing, U.S. government officials, and sections of the public within the United States, with reference to the political or public interests, policies or relations of a foreign government or foreign political party. Mercury therefore cannot rely on the exemption set forth in Section 613(h) of FARA in these circumstances, because the principal beneficiaries of the political activities conducted within the United States were the Ukrainian government and/or the Party of Regions.

⁹ *See* Agreement (Apr. 30, 2012) (representing that ECFMU is "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country") (attached to Letter from Gross); Engagement Agreement at 1 (providing ECFMU's "principal office" address in Belgium).

Useful information and forms needed for registration may be found on our website at <https://www.fara.gov>. Please effect Mercury's registration, filing any necessary short form registration statements within thirty (30) days of the date of this letter. If you have any questions or wish to meet with us regarding our determination, please contact me by telephone at (202) 233-0776 or by email to FARA.public@usdoj.gov.

Sincerely,

b(6)

Heather H. Hunt
Chief, FARA Registration Unit