

Brexit: Corporate Communications And UK Election Laws

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Later this year, British and Northern Irish voters will go to the polls to decide whether or not to remain in the European Union. This important decision could have significant consequences for the British economy and firms that do business in the U.K., so it is not surprising that U.K. firms and multinational companies are increasingly voicing their opinion on what has been dubbed “Brexit.” Communicating about the referendum, however, can implicate U.K. campaign finance laws, and the campaign finance rules that apply to the Brexit referendum differ from both equivalent U.S. regimes and from the rules that apply during other U.K. elections.

More specifically, under U.K. law a company that makes communications campaigning for a particular outcome in the Brexit referendum — potentially including communications with the company’s own employees — can trigger the obligation to register with the U.K. Electoral Commission and file campaign reports.

Below, we provide some background on the Brexit referendum, give a brief overview of the relevant campaign finance rules and describe how companies can get involved in the referendum debate while staying on the right side of the relevant legal requirements.

The Brexit Referendum

Last December, the European Union Referendum Act 2015 received royal assent, fulfilling a manifesto promise of the governing Conservative party. The act provides for holding a referendum on the U.K.’s membership in the EU no later than the end of 2017. While the date of the referendum has yet to be decided on, there are indications that it could occur as soon as this June. In anticipation of the vote, Prime Minister David Cameron has opened negotiations with other EU member states, in the hope of securing concessions to support his case for remaining within the union. Even if these negotiations

succeed, however, the outcome of the referendum remains uncertain. In a recent poll, Britons favor leaving the EU by a margin of 45 percent to 36 percent, with the remainder undecided.

The outcome of the referendum is viewed as an important issue for companies that do business in the U.K. Many commentators have suggested that an exit could have significant business and economic consequences. These include International Monetary Fund managing director Christine Lagarde, who recently warned that the potential for Brexit is exacerbating turmoil in the financial markets. Credit Suisse also issued a recent report — “Brexit: Breaking up is never easy, or cheap” — which estimates that exiting the EU could result in a “financial shock” for the U.K. economy, triggering a recession and weakening the pound. Other reports have suggested that a British withdrawal could result in significant administrative burdens for global businesses, such as the need to rewrite contracts, review trade arrangements, and reconsider logistics arrangements.

Accordingly, many multinational companies have taken public positions on EU membership, and a number of companies have become actively involved in the referendum campaign. For example, Goldman Sachs Group Inc. recently contributed £500,000 to the “Britain Stronger in Europe” campaign — the lead campaign group for remaining in the EU, and it has been reported that JPMorgan, Morgan Stanley, and Bank of America Corp. will make similar donations. Multinational firms that have directly or through a corporate executive taken a position on the Brexit question include Lloyds of London, Deutsche Lufthansa AG, WPP PLC and GlaxoSmithKline PLC.

Limits Under U.K. Campaign Finance Laws

While companies are permitted to take a position or engage in public communications on the Brexit referendum, doing so can implicate complex laws that regulate expenditure during the referendum campaign. And because the rules that apply in the context of the referendum differ from those that apply in U.K. general elections and from equivalent U.S. laws, even companies with a longstanding presence in Britain may not be familiar with the referendum-specific rules.

Broadly speaking, corporations have two options for participating in the referendum campaign. First, they can donate money to a campaign organization registered with the U.K. Electoral Commission to campaign for or against withdrawal from the EU. Under the referendum rules, a single lead campaign group will be designated for both the “leave” and “remain” sides of the debate, and companies may want to make a donation to one of those groups. Lead campaign groups have several advantages over other campaigners, including much higher spending limits, access to a government grant, and the ability make campaign broadcasts advocating their position. Like other registered campaign organizations, lead campaign groups must register with the U.K. Electoral Commission and make reports in which they disclose donations they receive from third parties. The lead campaign group advocating to stay in the EU is quite likely to be Britain Stronger In Europe, the entity that received a donation from Goldman Sachs. The situation is less clear with respect to the campaign to leave the EU, where Vote Leave and Grassroots Out are both vying to be designated as the lead campaign group.

U.K. campaign finance law limits who can make a donation to a registered campaign organization (including the lead campaign groups), though generally speaking a U.K.-registered company that carries on business in the EU would be permitted to contribute. The entity that receives a donation is required to keep a record of the donation, and to file publicly available reports with information about persons who donated over £7,500, whether in one donation or as an aggregate of multiple donations.

Second, companies can individually advocate for a particular outcome in the referendum. Doing so,

however, potentially implicates complex rules regulating such direct campaigning. In particular, U.K. campaign finance laws treat as “referendum activity” any activity that: (1) falls within a list of specifically designated activities set forth in Part I of Schedule 13 of the Political Parties, Elections and Referendums Act 2000 (“schedule activities”); and (2) is undertaken for the purpose of influencing the outcome of the referendum (“referendum purposes”). Companies that incur more than £10,000 in expenses in connection with such referendum activities are required to register as a campaigning organization for the purposes of the referendum, and to file reports with the U.K. Electoral Commission. A company that incurs more than £10,000 of referendum expenses without registering potential commits a criminal offense under U.K. law.

U.K. law takes a broad approach to defining both prongs of the test. Thus, schedule activities include a broad range of communications — including some communications with a company’s employees — as well as posting materials to a website, holding press conferences, hosting events and advertising, among others. And the term “referendum purposes” is similarly broad — as a result, referendum activities can include not only communications that expressly advocate a particular result in the referendum, but also those that could be understood as favoring one side over the other, or as part of a campaign to do so. Unlike the rules that apply during U.K. general elections, there is no need for a communication to be made to the general public to be caught by the test. Thus, a company that posts a white paper on the benefits of EU membership to its internal website could be deemed to be engaged in referendum activities for purposes of the law.

In order to qualify as a referendum activity, an activity must occur, at least in part, during a special campaign window of a minimum of 10 weeks before the date of the election, which is known as the “referendum period.” Activities that occur wholly outside of the referendum period are not subject to the law. However, where even a part of an activity takes place within the period, then costs associated with the activity may count against the £10,000 threshold, even if those costs were incurred long before the referendum period began. If a company engages in any referendum activities during the referendum period, moreover, the U.K. Electoral Commission may inquire whether the threshold has been exceeded, and may require the company to provide an accounting of referendum-related expenses. At this time, it is not clear when the referendum period will commence, although it is possible it will begin at some point over the next two months.

U.K. law also takes a broad approach to regulating the activities of two or more parties who work together on Referendum Activities as part of a coordinated plan or arrangement. In particular, where two parties are deemed to be “working together” on a particular schedule activity or activities, all of the expenses incurred in doing so by both parties are attributed to both parties (unless one of them is a lead campaign group registered with the U.K. Electoral Commission). As a result, companies need to be particularly careful not to engage in coordinated activity around the referendum, as doing so can result in an aggregation of expenses that can result in the £10,000 threshold being exceeded.

Corporate Communications and the Referendum Rules

Companies active in the U.K. should take steps now — before the referendum period begins — to consider whether they have any potential exposure under U.K. campaign finance laws and, if so, to establish a compliance framework for referendum-related activities. The first step is to evaluate the extent of legal risk — this can involve a consideration of each company’s specific facts and circumstances, including the size of U.K. operations, the company’s public profile, the structure of its corporate communications, and the degree to which senior executives involve themselves in issues of public policy.

If this initial review suggests that there is a risk of engaging in referendum activities, companies may want to consider developing a basic compliance structure to deal with referendum-related communications. Such a compliance structure may involve the following:

- ***Adopt a policy on referendum-related communications:*** Such a policy may involve a brief description of the company's approach to compliance with the law and the designation of individuals with primary responsibility for carrying it out. Having a formal policy is also useful in the event of an inquiry by the U.K. Electoral Commission.
- ***Consider prohibiting or pre-clearing referendum-related communications:*** The principal way that companies may engage in referendum activities is by making corporate communications on the referendum. Whether made by a company's public relations department or by senior executives, such communications may count against the threshold for registration. It is important to note whether a communication qualifies as a referendum activity does not turn on whether it includes words that expressly advocate a particular result in the referendum; so long as the two-part test described above is satisfied, discussing the benefits of EU membership or the merits of the prime minister's EU reform agenda during the referendum period is likely to be treated as campaign activity. Accordingly, corporations may wish to either entirely prohibit communications during the referendum period, or establish a preapproval scheme for referendum-related communications. Under a preapproval approach, a company can either tailor communications to ensure that they will not be covered by the law or track related expenses (including overhead) to ensure the relevant threshold is not breached. To avoid a potential "working together" issues, companies will also want to ensure that any referendum activities they engage in are not coordinated with third parties.
- ***Hold trainings for staff:*** Staff can only follow a policy if they are familiar with its requirements. As a result, providing staff with trainings is a key element of a compliance framework. Such trainings can take many forms, from meetings or seminars to the distribution of a slideshow presentation or similar training tool. It may also make sense to focus training efforts on those employees at highest risk of engaging in referendum activity, such as the public relations department or senior executives.
- ***Develop records and an audit trail:*** A set of clear records and supporting material can be a powerful resource in the event of an inquiry by the U.K. Electoral Commission. Recordkeeping is particularly important where a company engages in some referendum-related communications during the referendum period but plans to stay below the threshold for registration.
- ***Beware of acting jointly with others:*** To avoid potentially being deemed to be "working together" with another party, companies should be careful when staging joint events or otherwise coordinating activities with a party that may be engaged in referendum activities.

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