

UK ELECTION LAW: HOW ARE BUSINESSES RESTRICTED DURING THE 2017 GENERAL ELECTION CAMPAIGN?

The UK is holding a general election on 8 June 2017. UK election law regulates what individuals and companies can do and say during the period before the general election.

Many businesses will wish to discuss the potential impact of different general election outcomes with their clients and counterparties. Other businesses, such as investment managers and investment banks, may wish to circulate research papers to a wider audience. Some businesses may wish to actively participate in the political debate and/or make donations.

This briefing summarises the law, and asks what it means in practice for business in the run up to the election.

What activity is regulated by election law?

Election law is primarily designed to apply to political parties and other campaigning organisations. However in recent years the scope of election law has been widened, and large aspects of it now potentially apply to businesses and other "third parties".

In particular:

- rules in the Representation of the People Act 1983 (**RPA**) regulate activity that can be reasonably regarded as promoting the election of individual candidates;
- rules in the Political Parties, Referendums and Elections Act 2000 (**PPERA**) regulate more general activity which can reasonably be regarded as intended to influence voters to vote for or against particular parties or categories of candidates;
- rules in PERA regulate political donations; and
- Companies Act 2006 provisions regulate both campaigning expenditure and donations.

When do the restrictions start to apply?

The restrictions on donations apply at all times.

Spending and donations rules apply during the "regulated period." This period started on 9 June 2016 and will end on polling day, on 8 June 2017 at 10pm. Relevant spending on any elections, including the May 2017 local elections, by-elections, Northern Ireland Assembly elections, Council elections in Scotland, and combined authority mayoral elections in England would count. Spending towards the EU referendum does not count.

Considering only activity that relates to the UK general election in 2017, it is difficult to see how any activity prior to the Prime Minister's announcement on 18 April to hold a general election can be reasonably regarded as intended to promote or procure success in that election, as it would not have been possible to know it was happening.

What are the RPA rules relating to individual candidates?

For many decades, successive RPAs have controlled expenditure incurred with a view to promoting or procuring the election to Parliament of particular individual candidates.

The RPA caselaw is clear that it applies only to direct promotion of individual identified (or clearly identifiable) candidates, and not to generally promoting or opposing particular parties or policies.

Hence the RPA rules are only in rare cases relevant to businesses, as it is in our experience very unusual for a business to wish to promote (or oppose) a particular candidate. We therefore will not consider these sets of rules any further in this briefing - any business that does believe these rules are relevant should obtain specific advice.

It is relevant to note that there are local council elections in many parts of the UK (but not London) on 4 May 2017, and there are parallel rules in the RPA restricting expenditure incurred with a view to promoting or procuring the election of individual council candidates. However, again, it would be unusual for a business to wish to promote or oppose a local election candidate, and this briefing will therefore not consider this issue any further.

What are the more general PPERA rules?

These rules were significantly expanded in 2014.

The key principle is that any individual or entity other than a political party must register with the Electoral Commission if it intends to incur "controlled expenditure" during the "regulated period" which exceeds certain statutory limits.

The statutory limits

Separate statutory limits apply regionally and in each constituency:

- The regional limits are £20,000 for England and (separately) £10,000 for each of Scotland, Wales and Northern Ireland. These limits can be exceeded if a third party registers with the Electoral Commission.
- The constituency limit is £9,750 per constituency (with care having to be taken to correctly allocate spending to relevant constituencies). This is an absolute limit, applying to unregistered and registered third parties.

The regulated period

As noted above, the "regulated period" started on 9 June 2016 and will end on polling day, on 8 June 2017 at 10pm.

Controlled expenditure

Expenses will constitute "controlled expenditure" if they fall within certain statutory categories **and** if a "purpose test" is satisfied.

The statutory categories include:

- the production or publication of material which is made available to the public at large or any section of the public (in whatever form and by whatever means);
- canvassing, or market research seeking views or information from, members of the public;
- press conferences, or other media events;
- transport (by any means) of persons to any place or places with a view to obtaining publicity; and
- public rallies or other public events.

Expenditure for an event includes costs incurred in connection with the attendance of persons, premises hire, and the provision of goods, services or facilities at the event.

There are specific exclusions, most importantly for expenses incurred in respect of broadcasts by the BBC or licensed broadcasters, or publication by "newspapers and periodicals" (which will include some websites, but certainly not all).

The **purpose test** is therefore of paramount importance. Expenditure will satisfy the purpose test if it can reasonably be regarded as intended to promote or procure electoral success at any relevant election for:

- a particular political party or parties;
- one or more political parties who advocate (or do not advocate) particular policies, or who fall within a particular category; or
- candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies or who otherwise fall within a particular category.

Is this effectively the same rules as applied during the EU referendum campaign?

There are several important differences.

First, the PPERA rules regulating referendums apply the traditional election law test of subjective intent. Expenditure was controlled only if incurred "with a view to" promoting or procuring a particular referendum result.

The rules for general elections are objective – they apply if expenditure can "reasonably be regarded" as intended to promote a particular result.

Second, the categories of controlled expenditure for general elections are wider – in particular, they include staff costs.

For both reasons, businesses may wish to be somewhat more cautious in relation to the PPERA general election rules than they were for the, very similar, PPERA referendum rules.

What are the consequences of breaching PPERA?

Breach of PPERA is a criminal offence. Where a company breaches PPERA, criminal liability applies to the entity itself and any director, manager, secretary or other similar officer who authorised the act in question (or who, by neglect, permitted the act to occur).

A person found guilty of an offence is liable to fines and/or imprisonment of up to one year.

What approach should businesses adopt in practice?

In most cases we would advise that businesses aim to incur no expenditure at all that could be reasonably regarded as having the "wrong" purpose.

In principle a business could undertake some campaigning activity, but aim to keep the expenditure below £20,000 in England and £10,000 in Scotland, Wales and Northern Ireland. One might think that the low marginal cost of modern campaigning tools (e.g. websites and emails) means that this would be straightforward.

In practice that may not be the case.

The rules in PPERA are designed for small campaigning groups, where their expenditure consists of direct expenditure (e.g. printing leaflets and buying advertising space), and overheads (e.g. premises and facilities costs, limited staff costs) that they simply pro rate over the election campaign period and declare as PPERA expenditure.

Matters are more awkward for a complex business. The staff, premises and facilities costs would likely be significant, and complicated by cross-charging between entities. The overhead would then need to be pro-rated across the activities that are considered to potentially give rise to "controlled expenditure" (and everything that supported those activities).

Further complication is created if a business engages in activity jointly with others. Special rules for joint campaigns then apply which, very broadly, mean that the combined total spend of the joint campaign is separately allocated to each member (and not split). So, for example, two companies work together jointly in one constituency, the total they spend must not exceed £9,750.

The calculation of "controlled expenditure" would therefore be subject to multiple uncertainties, with a real risk of inadvertently breaching the thresholds.

For most businesses we would therefore suggest that the prudent approach is to set out to do nothing that could be reasonably regarded as intended to promote or procure a particular election result, and therefore have no controlled expenditure at all.

Why not simply register with the Electoral Commission?

Registering with the Electoral Commission as a "recognised third party" permits the £20,000/£10,000 expenditure limit to be breached (but not the £9,750 constituency limit).

However it also triggers a complex compliance regime that is intended for political campaigning groups and is ill-suited for complex businesses. Compliance would be an arduous task, with potential criminal sanctions for individuals in the event of non-compliance.

For these reasons, as far as we are aware, only one (small) business has ever registered under these rules.

It is important to note that registration must be in advance of controlled expenditure being incurred – it cannot be used as a "fix" if limits are breached.

Election law on polling day

Broadcasters (and maybe others) will be conducting exit polling from the moment polling opens at 7am on 8 June. The exit poll results are then generally published by the media as soon as polls close at 10pm.

Given the potential political and market impact of the result, there may well be rumours throughout the day (online and offline) as to the initial exit polls findings. It will likely be unclear whether the rumours are founded on actual leaks or merely speculation. Regardless, this is something people need to be extremely careful about.

It's an offence under the RPA to publish exit polls (or other estimates or forecasts derived from interviews after people have voted) before the close of polling. The term "publish" has a wide meaning and potentially covers any communication in any form.

Breaching this rule is punishable by fines and/or imprisonment of up to six months.

We would therefore suggest that any business whose staff is likely to have a particular interest in the election outcome should warn those staff not to discuss any exit poll rumours before 10pm.

Does PPERA apply to people outside the UK?

PPERA is in principle extra-territorial, and applies to any activity throughout the world intended to influence the election result.

It follows that a company's personnel and entities outside the UK are potentially subject to PPERA if they are working on material or planning events which will reach the UK – either directly, because the material will be hosted on the internet, or because it will reach English language media (and hence may be picked up by media in the UK).

It is therefore prudent to ensure that no such activities/events can be reasonably regarded as intended to promote or procure the election of a particular candidate.

Regulation of donations

PPERA restricts donations to political parties.

Very broadly, donations over £500 may only be made by UK resident individuals, companies incorporated in the UK, and companies incorporated elsewhere in the EU but carrying on business in the UK. It is an offence for any other person to make a donation.

It should be noted that, as well as simple cash donations, the term "donation" includes any loan or provision of goods or services for less than market value.

A full explanation of the donation rules is outside the scope of this briefing, but particular care should be taken when employees are actively involved in campaigning for a political party.

Company law implications

As well as PPERA, companies incorporated in the UK are subject to the "political donation" and "political expenditure" rules in the Companies Act 2006.

In short:

- The Companies Act concepts are wider than those in PPERA. PPERA is focussed on the question of whether there is an intention to promote or procure the election of a particular candidate in an election. The Companies Act has a wider scope, looking at whether there is an intention to affect public support for a political party or an independent election candidate. Therefore, if a company incurs political expenditure which could be reasonably regarded as intended to persuade people to vote for a particular party, that would be caught by the provisions of the Companies Act.
- The "expenditure" concept in the Companies Act is narrower than that found in PPERA, and likely does not cover indirect costs such as overheads.
- The Companies Act rules operate across a UK corporate group, whereas PPERA generally applies to individual people or entities.
- The Companies Act thresholds are different from PPERA: £5,000 for political donations (aggregated across the corporate group) and no threshold at all for expenditure (i.e. any expenditure at all will trigger the Companies Act rules).

Donations (over the £5,000 threshold) and any expenditure are required to be authorised by a shareholders' resolution and, subsequently, reported. Many companies (particularly public companies) have general authorisations in place.

Provided appropriate authorisation and reporting is in place, the Companies Act does not prohibit political donations or expenditure or place any limits upon them.

Any breach of the Companies Act rules can result in personal liability for directors. Hence any company anticipating making a donation, or which has a material risk of incurring election expenditure, should ensure it has an appropriate authorisation in place and seek specific advice.

Is there any official guidance?

The Electoral Commission issues guidance in relation to all the matters covered in this briefing. As the Electoral Commission is the body that enforces election law, businesses should be comfortable that, provided they act within the spirit and letter of this guidance, the Electoral Commission will take no action against them.

Further information

If you would like further details on any aspect of election law, or how it applies to your institution, please speak to your usual Clifford Chance contact or any of those listed below.

CONTACTS

Dan Neidle

Partner, London
+44 20 7006 8811
dan.neidle
@cliffordchance.com

Phillip Souta

Head of UK Public
Policy, London
+44 20 7006 1097
phillip.souta
@cliffordchance.com

Malcolm Sweeting

Senior Partner, London
+44 20 7006 2028
malcolm.sweeting
@cliffordchance.com

Chris Bates

Partner, London
+44 20 7006 1041
chris.bates
@cliffordchance.com

Simon James

Partner, London
+44 207 006 8405
simon.james
@cliffordchance.com

Patricia Barratt

Director of Anti-Bribery
Compliance, London
+44 20 7006 8853
patricia.barratt
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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