



The EU Referendum: Comply with the Campaigning Rules

What's the issue?

Statutory restrictions on referendum campaign spending **come into effect on Friday, 15 April 2016**. Whether or not your business has taken, or intends to take, a public stance on Brexit, you will need to manage the risk of inadvertently falling foul of the rules, even when operating on a business as usual basis.

The basics

- There is **no prohibition on businesses** engaging in the EU Referendum debate and/or campaigning for either side.
- During the official campaign period (Friday 15 April - 23 June 2016), spending on campaigning activities is subject to **strict limits**, regulated by the Electoral Commission.
- It will be a **criminal offence** for anyone who has not first registered as a campaigner to spend **more than £10,000 on “referendum expenses”** if the person authorising it knew, or ought to have known, that the expenses would exceed the statutory limit.
- A referendum expense is an expense that is incurred:
 - in connection with a specified activity, which includes market research or polling, holding events, and publishing informational materials; and
 - for a **“referendum purpose”** – i.e. the expense was intended to or otherwise in connection with promoting or bringing about a particular outcome in the EU Referendum (the “purpose test”).
- The test applies on an **activity-by-activity basis**. As a result, a business that has taken a public stance and has promoted a particular outcome may still undertake activities that do not count as referendum expenses.
- The Electoral Commission has published **guidance** to help individuals and businesses comply with the rules ([available here](#) and [here](#)).

Specified activities

The list of activities in Part 1 of Schedule 13 of the **Political Parties, Elections and Referendums Act 2000** (“PPERA”), as amended ([available here](#)) is broad. It includes:

- **any material** that provides general information about the referendum, deals with any of the issues raised by the referendum, puts any arguments for or against any particular outcome or is designed to encourage voting at the referendum;
- **market research** or canvassing conducted for the purpose of ascertaining polling intentions; and
- **events organised** so as to obtain publicity in connection with a referendum campaign or for other purposes connected with a referendum campaign.

The rules do not expressly exclude activities, such as events or publications, that are directed only at employees and/or clients (i.e. not directed at the public at large). However, Electoral Commission guidance suggests that the intended audience of referendum-related activities will be relevant to the consideration of whether the activity is done for a “referendum purpose”.

The purpose test

The definition of referendum purpose contains two elements: **“intention to promote or bring about a particular outcome”** or **“connection with promoting or bringing about a particular outcome”**. While the second element suggests that the test may be met even where there was no relevant intention, the Electoral Commission guidance appears focused on the question of intention.

However, it also appears that the Commission will primarily look at objective evidence of the apparent intention.

As a consequence, businesses will need to **take care to avoid inadvertently undertaking referendum-related activities** during the referendum period that could be construed as promoting one side of the debate, even where this was not the intention. The mere fact that you intended the activity to be neutral as to the referendum outcome and/or have stated that your business is neutral will not suffice if the content and nature of the activity objectively indicates a referendum purpose.

Cost of activity

The types of specific expenditure counted as a referendum expense is the same for registered campaigners and non-campaigners. Possible expenses include:

- relevant overheads and administrative costs, such as increased telephone or utility bills;
- in respect of the holding of events, the hiring costs of premises, costs of the provision of goods, services and/or facilities at the event and the costs of any reimbursed travel, food or accommodation expenses in connection with the event; and
- the design, production and distribution costs of printed materials.



Any items, services or facilities bought before the referendum period, but used during the period in circumstances where, if they were bought during the period, they would otherwise be counted as a referendum expense, will be counted. Items, services or facilities bought during the referendum period but paid for after the period will also be counted.

Criminal offence

The criminal offence applies only where the person authorising the expense knew, or ought reasonably to have known, that incurring the expense would exceed the spending limit during the period. This could provide a defence to businesses where they have taken a reasonable view about whether a referendum-related activity is for a “referendum purpose” based on legal advice.

Register as a campaigner

Businesses that have taken a public position on the EU Referendum debate may choose to register as a campaigner. Registering as a campaigner means that a business would have a higher spending limit during the referendum period of £700,000. However, registered campaigners are required to declare which side of the debate they support in their registration form and are also subject to disclosure rules on campaign funding and spending.

An activity is less likely to be caught if...

- your analysis and the marketing and promotion of the activity is objective and neutral;
- it is intended to inform the debate, rather than persuade or otherwise influence voters;
- it is conducted as part of a professional service to clients or not otherwise widely publicised in the media or to the public at large;
- in the case of an event, speakers from both sides of the debate are invited and those attending are given equal opportunity to contribute;
- the analysis concerns what organisations will do in the event of a particular outcome or how to prepare for that outcome, rather than making a value judgment as to which outcome is preferred.

An activity is more likely to be caught if...

- your analysis uses positive and negative language when considering the respective outcomes of the referendum;
- you use the activity as part of a wider campaign to promote one side of the debate;
- in the case of an event, only speakers representing one side of the debate were invited or representation is unequal;
- it is marketed in such a way that could be construed as making a value judgment as to the preferred outcome;
- it is marketed widely to the public, rather than on a narrow, client-focused basis.

 Join the conversation #BrexitEffect

www.hoganlovells.com/constitutionalchange

“Hogan Lovells” or the “firm” is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word “partner” is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2016. All rights reserved. 10839_C0_0416