

An Update on Brexit: Legal and Compliance Considerations

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Brexit – Compliance Challenge & Advocacy Opportunity

- Compliance and advocacy – two sides of the same coin
- Huge amount of legal uncertainty because of lack of clarity about future legal and regulatory environment
 - Particularly true in any Brexit scenario as UK departure from the EU creates significant gaps in UK regulation
- That is a compliance challenge – not clear what law will apply in the future to UK business activities
- But it is also an advocacy opportunity – post-Brexit, there will be a significant opening to shape future UK regulations and trade deals

Potential Brexit Scenarios – Legal & Compliance

- So what are the options?
- Three general Brexit scenarios:
 - Revoke Article 50
 - No-Deal Brexit
 - Orderly Brexit
- Revoking Article 50 is straightforward from legal and compliance – no change in governing law
 - Legal and compliance challenges come from other two scenarios

Current Relationship Between EU & UK Law

Present relationship between EU law and UK law is a mix of direct and indirect regulation

- Direct regulation in the form of EU Regulations
 - Promulgated by the EU and apply directly to EU member states
 - Some provisions of EU Treaties also have similar direct application
- Indirect regulation in the form of EU Directives
 - Promulgated by the EU but implemented by EU member states
 - EU regulatory obligations that arise out of Directives have already been codified in UK law and would still be in place post-Brexit
- Direct regulation means that there would be significant gaps in many areas of UK regulation if Brexit occurred without mechanism for incorporating or replacing existing EU law

Current Relationship Between EU & UK Law (con.)

- Withdrawal Act of 2018 addresses this problem by converting EU law at the moment of Brexit into UK law
- Withdrawal Act recognizes that this is an imprecise solution and straight conversion without modification or tailoring will lead to laws not operating as intended
 - Many areas of EU law are premised on the assumption that they are regulating activities of member states interacting with other member states and the EU
- Withdrawal Act gives UK government temporary powers (“Henry VIII powers”) to issue laws and regulations to address such deficiencies
 - Still subject to Parliamentary review but on an expedited basis

Developing a Brexit Compliance Strategy

Developing a Brexit compliance strategy for your UK business requires both risk assessment and regulatory engagement

- Step One – Determine the extent to which Brexit will create a potential regulatory gap or change for your business
 - Some areas literally will be a gap, even with Withdrawal Act
 - Other areas will be shift to new default (e.g., WTO rules)
 - Review business lines, supply chains, contracts, distribution channels to identify and prioritize Brexit-related legal risk
- Step Two – Create a game plan for each scenario
 - Review Brexit plans for relevant UK and EU agencies, particularly with respect to a No-Deal Brexit
 - Identify key contacts and open lines of communication to make engagement easier if your business has Brexit-related disruptions

Developing a Brexit Compliance Strategy – Orderly Brexit

Compliance Strategy for Orderly Brexit Scenarios should be relatively straightforward

- Any Brexit pursuant to a withdrawal agreement should provide businesses with a certain amount of time to make arrangements
 - There will be a transition period (at least to the end 2020)
 - During that period, existing relationship between EU and UK law should remain in place
 - Still need to do assessment of extent to which contracts, licenses, etc. may be affected by fact that UK will no longer be EU member
- Key during transition will be to understand how negotiations over permanent arrangement will affect areas of interest
 - Scope of those negotiations may be affected by nature of withdrawal agreement (e.g., inclusion of customs union)

Developing a Brexit Compliance Strategy – No-Deal Brexit

Compliance Strategy for a No-Deal Brexit will require addressing the potential for much greater business disruption

- There is no transition period so all of the regulatory gaps and inconsistencies manifest as soon as Brexit occurs
 - Although Withdrawal Act converts all existing EU law at date of Brexit into UK law, you will still have the various deficiencies and the ability to fix those deficiencies quickly through "Henry VIII" powers will be under strain
- Government agencies are drawing up no-deal contingency plans in both UK and EU
 - Still likely to have uncertainty in terms of governing law and some inconsistency in application in post-No-Deal Brexit environment

Developing a Brexit Compliance Strategy – No-Deal Brexit (con.)

- Best legal and compliance approach in the immediate aftermath of a no-deal Brexit scenario is to focus on continuity
 - Operate as if the rules that applied pre-Brexit apply post-Brexit, as Withdrawal Act provides
 - Obviously you should modify if you get formal guidance from UK governmental entities indicating change in controlling law
- Stay close to key regulatory agencies for your business
 - May be hard to get complete information, but try to get a full understanding of no-deal contingency plans for those agencies and where there may be breakdowns/challenges that could affect your business
 - Maintaining a dialogue with regulators both before and after a no-deal Brexit should help limit any potential exposure to your business if problems arise because of post-Brexit disruptions

Brexit – Opportunities for Advocacy

- Focus is on compliance at present, but it is important not to lose sight of advocacy opportunities relating to Brexit
- Post-Brexit, there will be numerous areas of UK law and regulation that will be subject to potential revision
 - Could have some fairly significant changes from current baseline or could have maintenance of status quo
 - Ultimate outcome will play out in various forums, but most important is likely the shape and scope of the UK-EU final arrangement
 - Requires engagement in London, Brussels, and potentially EU member states

Brexit – Opportunities for Advocacy (con.)

- Post-Brexit US engagement also may be valuable
 - Negotiations over US-UK free trade agreement may be happening during post-Brexit period
 - Outcome of those negotiations likely to have substantial effect on UK regulatory environment and UK-EU negotiations
- Public sector engagement and advocacy on your issues during this post-Brexit period can have a big impact on the rules that ultimately will apply to your business

Brexit – Political Law Compliance

- Public sector engagement is regulated in London, Brussels, and member state-level
 - Lobbying rules, post-employment restrictions for former government officials, transparency & public records
 - Political law regulation is even more robust in the US to the extent that US engagement is part of your strategy
- Bottom line – Brexit provides significant advocacy opportunities, but need to make sure you are complying with applicable political law regimes
 - You do not want to have your advocacy strategy undermined by a political law compliance failure

Charles Borden



Mr. Borden advises clients on the political and reputational consequences, of political activity relating to campaign finance law, the Lobbying Disclosure Act (LDA), state and local lobbying law, the Foreign Agents Registration Act (FARA) and U.S. Securities and Exchange Commission (SEC) regulation of municipal advisors. He has extensive experience in federal pay-to-play rules for municipal dealers (Municipal Securities Rulemaking Board, or MSRB, Rule G-37), investment advisers (SEC Rule 206(4)-5), and swap dealers (CFTC Rule 23.451).

In addition, Mr. Borden counsels individuals appointed to senior positions in the Executive Branch of the federal government, including senior White House and State Department officials. He also advises such individuals' private sector employers on federal conflict-of-interest, security clearance and financial disclosure requirements.

Mr. Borden co-teaches a course on government ethics at Harvard Law School, where he is a visiting lecturer, and also serves as a visiting Fellow at the Centre for Analysis of Risk and Regulation (CARR) at the London School of Economics and Political Science.

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Education

- The London School of Economics and Political Science, M.S., Regulation, *with distinction*
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