

States and localities take on foreign-influenced political spending

By Ki Hong, Esq., and Sam Rothbloom, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

MAY 30, 2023

Since the 1974 amendments to the Federal Election Campaign Act ("FECA"), FECA has prohibited political spending by foreign nationals at the federal, state, and local levels. This prohibition had long been the sole ban on foreign political spending in the U.S., but some states and localities have recently adopted so-called "foreign-influence" bans that go well beyond FECA.

In particular, while FECA prohibits a foreign national from making, or participating in a decision to make, political contributions or expenditures, foreign-influence bans prohibit U.S. companies from making contributions or expenditures merely because they have foreign owners, in some cases with ownership interests as low as 1%. These new laws raise significant First Amendment and FECA preemption concerns.

Federal foreign national ban

FECA prohibits foreign nationals (i.e., foreign entities and individuals who are neither U.S. citizens nor permanent resident aliens) from making, or being solicited for, contributions or expenditures in connection with federal, state, or local elections. Foreign nationals also may not participate in decisions involving such contributions or expenditures. This ban, however, does not extend to 1) foreign-owned U.S. subsidiaries, unless they coordinate their political activities with their foreign parents, or 2) spending on ballot measures (i.e., measures that are initiated by voters who collect signatures via petitions or that are referred to the ballot by legislatures).

State and local laws and bills prohibiting foreign political spending

In the last few years, a number of states and localities have adopted their own bans on foreign political spending, with some going well beyond FECA.

Foreign national bans: Several states have enacted their own foreign national bans to establish their own cause of action. Some bans merely parallel the federal ban, while others, such as California's, also cover ballot measure elections (initiated by citizens by collecting signatures).

Foreign-influence bans on companies with foreign owners:

- **Colorado** prohibits contributions by U.S. LLCs with foreign owners. It also prohibits contributions, independent

expenditures ("IEs"), and ballot measure spending by U.S. corporations that are majority foreign-owned or in which a majority of directors are foreign nationals. IEs are expenditures made independently of a campaign that expressly advocate for or against the election or defeat of a candidate.

- **Seattle, Washington:** In 2020, Seattle adopted a law prohibiting a "foreign-influenced" company from making contributions to candidates and IE committees as well as their own IEs. A "foreign-influenced" company is defined as a company with a single foreign owner with at least 1% ownership or multiple foreign owners with at least 5% ownership combined ("1%-5% thresholds"). The definition, based on its plain language, also appears to cover a company in which a foreign-owned U.S. subsidiary holds any ownership and participates in the company's political spending decisions. The law also requires companies making contributions to IE committees and their own IEs to file with the city a certification of compliance with the ban.
- **San Jose, California:** In 2022, San Jose adopted a policy memorandum instructing city council staff to draft an ordinance prohibiting a foreign-influenced corporation, with the same definition as used under Seattle's law, from making contributions to candidates and IE committees and from making their own IEs. The city has yet to adopt a final ordinance.
- **Minnesota:** This month, Minnesota adopted a ban on contributions, IEs and ballot measure spending by foreign-influenced corporations and LLCs, also following the Seattle definition. The law also requires corporations and LLCs making contributions to IE and ballot measure committees and making their own IEs and ballot measure expenditures to file with the state a certification of compliance with the ban. This new law takes effect Jan. 1, 2024.
- **Alaska:** Alaska prohibits a foreign-influenced company from making contributions or IEs (including for or against ballot measures). A "foreign-influenced" company is similarly defined as under Seattle's law, except it covers a company with a single foreign owner with at least 5% ownership or multiple foreign owners with at least 20% ownership combined ("5%-20% thresholds"). However, the ban caveats that it goes

no further than federal law. This limiting clause only applies to state elections, but the state appears to read it to apply to local elections as well, meaning the ban merely parallels the federal foreign national ban.

Aurora, Colo., and St. Petersburg, Fla., also prohibited certain political spending by foreign-influenced corporations meeting the 5%-20% thresholds but have since repealed their bans (St. Petersburg's ban was repealed after it was preempted by state law).

In the last few years, a number of states and localities have adopted their own bans on foreign political spending, with some going well beyond the Federal Election Campaign Act.

This year, foreign-influence bills were introduced in several additional states. Please note: Some of these bills could be read to cover a foreign-influenced corporation's PAC.

- California, Hawaii, Massachusetts, New York, Virginia, and Washington: Bills were introduced in these states prohibiting political spending by foreign-influenced corporations meeting the 1%-5% thresholds. Most of these bills cover contributions to candidates, PACs, and parties as well as independent spending (including for or against ballot measures), but some are more limited. The New York bill (S371) passed the State Senate and is pending in the State Assembly. The California bill (AB 83) passed the Assembly Elections Committee and has been referred to the Assembly Appropriations Committee. The Massachusetts bills (H 722 and S 430) are pending in committee. The bills in Hawaii (SB 1179), Virginia (HB 1648), and Washington (SB 5284) are all dead.
- **Connecticut:** SB 1188 would prohibit "foreign nationals" (including U.S. companies meeting the 5%-20% thresholds) from making contributions, IEs, or ballot measure expenditures. The bill passed the Joint Committee on Government Administration and Elections and the Joint Committee on Judiciary and has been referred to the Senate.
- **Oregon and Illinois** had more limited bills, but the Oregon bill (HB 2693) appears to be dead, and the Illinois bill (SB 290) died at the end of the regular session.

First Amendment Concerns

Restrictions on political spending implicate the First Amendment, as the Supreme Court has long recognized that political spending is a means of engaging in protected speech and association. In the landmark campaign finance case, *Buckley v. Valeo* (1976), the Supreme Court held that restrictions on political spending trigger heightened judicial scrutiny. While the specific standard of review

varies depending on whether the restriction covers contributions or covers IEs or ballot measure expenditures, a restriction on political spending must be sufficiently calibrated to advance a significant governmental interest to pass constitutional muster.

Foreign-influence bans raise serious concerns under this test. Supporters of foreign-influence bans cite *Bluman v. Federal Election Commission* ("FEC") (2012), in which the District of Columbia U.S. Circuit Court of Appeals upheld the foreign national ban on the grounds that it was sufficiently tailored to shield U.S. elections from foreign influence. Foreign-influence bans, however, are distinguishable, as they apply even where there is no involvement by a foreign national.

Rather, they apply merely based on foreign ownership of a U.S. corporation. This raises a significant question as to whether foreign-influence bans are sufficiently tailored to prevent foreign influence in U.S. elections. As recognized under FECA, foreign-owned U.S. subsidiaries should not either in law or fact be treated as alter egos of their parents. Yet foreign-influence bans do exactly that and go further by covering U.S. companies with foreign ownership as low as 1%.

This has far-reaching implications. According to the Tax Policy Center, in 2019, foreign investors held 40% of U.S. stock, a percentage that has steadily risen over the past few decades. Moreover, the Center for American Progress found that a large share of companies, including virtually all S&P 500 companies, would be covered under foreign-influence bans with 1%-5% thresholds. Thus, these bans could be viewed as unduly chilling the First Amendment rights of a large swath of U.S. publicly traded corporations.

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Also, to the extent foreign-influence bans cover IEs and ballot measure spending, they raise even greater First Amendment concerns, as they are subject to strict scrutiny, the highest form of judicial scrutiny. They also are in significant tension with a long line of the Supreme Court's campaign finance cases, such as *Citizens Against Rent Control v. Berkeley* (1981), which struck down limits on contributions to ballot measure committees, and *Citizens United v. FEC* (2010), which struck down the federal ban on IEs by corporations and labor unions.

FECA preemption concerns

Foreign-influence bans are also vulnerable to preemption by FECA's foreign national ban. Although FECA does not expressly preempt foreign-influence bans, as it does not expressly preempt laws

covering state and local elections, there are multiple grounds on which to find implied preemption. For example, it can be argued that foreign-influence bans impermissibly conflict with the aims of the foreign national ban.

Indeed, the FEC considered whether to extend the foreign national ban to cover foreign-owned U.S. subsidiaries but declined to do so based on a lack of evidence that Congress intended the ban to cover such entities, and for what it called “substantial policy reasons,” articulated in a series of FEC advisory opinions. Also, implied preemption could stem from the federal government’s plenary power over foreign affairs and immigration. As this power affords

the federal government the authority to determine who qualifies as a foreign national, it can be inferred that foreign-influence bans encroach on this authority by making their own foreign status classifications.

In sum, foreign-influence bans rest on an uncertain legal footing. While they may raise other legal concerns not addressed here, such as equal protection concerns, they are particularly vulnerable to challenge on First Amendment and federal preemption grounds.

Ki Hong is a regular contributing columnist on political law for Reuters Legal News and Westlaw Today.

About the authors



Ki Hong (L) is a partner at **Skadden, Arps, Slate, Meagher & Flom LLP** and head of the firm’s political law group. He advises major corporations on the unique political law issues they face when engaging in government affairs or government procurement activity. He can be reached at ki.hong@skadden.com. **Sam Rothbloom** (R) is an associate at the firm in the firm’s political law group. He can be reached at sam.rothbloom@skadden.com. The authors are based in Washington, D.C.

This article was first published on Reuters Legal News and Westlaw Today on May 30, 2023.