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NEWSLETTER

New Bill Seeks to Expand the Foreign National Political Activity Ban in Many Directions

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On December 14, 2021, nearly two dozen congressional Democrats joined with lead sponsor Rep. Jamie Raskin (D-MD) to introduce the "Get Foreign Money Out of U.S. Elections Act" (the "Act"). Ostensibly targeting political contributions or expenditures by multinational corporations, the bill would vastly expand Federal Election Campaign Act's ("FECA's") definition of a foreign national to include corporate entities owned in whole or in part by foreign nationals while simultaneously expanding FECA's prohibition against contributions or independent expenditures by foreign nationals to cover contributions made in connection with "state or local ballot initiatives." If enacted into law, the bill would go far beyond its stated goal of removing "foreign money" from American elections, and would effectively prohibit any political contributions, or independent expenditures on electioneering communications by many if not most large American business entities.

Specifically, the Act would make the following changes:

Vastly expand FECA's definition of a "foreign national" to include many business entities headquartered in the United States and organized under the laws of the United States. Under existing federal campaign finance law, a "foreign national" is defined as any individual who is neither a citizen of the United States nor a lawful permanent resident of the United States; any governments of a foreign country; any foreign political party; and any partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country. Foreign nationals, so defined, are

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prohibited from directly or indirectly making contributions in connection with federal, state, or local elections, making contributions to political party committees, or making independent expenditures on electioneering communications. The Act would expand the definition of a foreign national to include "any business entity": (1) in which "a foreign national … directly or indirectly owns or controls … 1 percent or more of the voting shares, total equity, membership units, or other applicable ownership units of the entity;" (2) in which "two or more foreign nationals … in the aggregate, directly or indirectly own or control … 5 percent or more of the voting shares, total equity, membership units, or other applicable ownership interests of the entity;" (3) "over which one or more foreign nationals … has the power to direct, dictate, or control the decisionmaking process of the entity with respect to its interests in the United States; or" (4) "over which one or more foreign nationals … has the power to direct, dictate, or control the decisionmaking process of the entity with respect to activities in connection with a Federal, State, or local election, including—(i) the making of a contribution, donation, expenditure, independent expenditure, or disbursement for an electioneering communication …; or (ii) the administration of a political committee established or maintained by the entity." This expanded definition would not only encompass wholly owned American subsidiaries of foreign corporations, but also joint ventures between American business entities and foreign business entities, any business entities registered in America in which a single foreign national happens to control more than 1% of the ownership shares or any combination of foreign nationals hold at least a cumulative total of 5% of the ownership shares, including any publicly traded companies that happen meet these very modest foreign ownership requirements. In practical effect, this proposed expansion would reclassify tremendous amounts of business entities headquartered in America, owned and controlled predominantly by American citizens or entities, and organized under the laws of America as foreign nationals and bar them from directly or indirectly participating in the political process. Because any such entity would be considered a foreign national upon enactment of the Act into law, all business entities described above would not only be prohibited from making contributions to PACs and/or superPACs, they would be prohibited from making any "expenditure[s], independent expenditure[s], or disbursement[s] for an electioneering communication." Moreover, the unintended consequence of this bill is that once a U.S. Subsidiary of a foreign corporation becomes a foreign national under this bill, the U.S. Subsidiary would also be prevented from establishing a separate segregated fund or PAC thereby eliminating the ability of many U.S. subsidiaries of foreign companies to have PACs.

Impose Burdensome Self-Certification Requirements on Business Entities. The Act would require all business entities making contributions or independent expenditures to file a self-certification with the FEC "[n]ot later than 7 days" after the contribution or expenditure declaring that "after due inquiry, the entity was not a foreign national on the date the entity made the contribution, donation, expenditure, independent expenditure, or disbursement."

Expand the Ban on Foreign Contributions to State or Local Ballot Initiatives. Finally, the Act would expand FECA's prohibition against political contributions and expenditures by foreign nationals to include spending on "a state or local ballot initiative or referendum" and "any disbursement to a political committee which accepts donations or contributions that do not comply with the limitations, prohibitions, or reporting requirements of this Act (or any disbursement to or on behalf of any account of a political committee which is established for the purpose of accepting such donations or contributions)."

The House has yet to take action on the bill, but Democrat leadership in both the House and the Senate have indicated that election law reform will be a major priority moving forward. Republicans in the Senate have not yet addressed Rep. Raskin's bill, but few if any Senate Republicans are likely to support such a sweeping reimagining of the limits on corporate political speech. However, with Democrat leadership in the Senate indicating that they will consider overhauling the filibuster if necessary to pass voting rights legislation, there remains a narrow, if unlikely, potential pathway to passage for the Act, or some portion thereof.