

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: March 19, 2021
To: Veterans and Legal Affairs Committee
From: Janet Stocco, Legislative Analyst

LD 194 **An Act To Prohibit Contributions, Expenditures and Participation by Foreign Government-owned Entities To Influence Referenda** (emergency) (Sen. Bennett)
LD 479 **An Act To Ban Foreign Campaign Contributions and Expenditures in Maine Elections** (Rep. K. Bailey)
LD 641 **An Act To Prohibit Contributions, Expenditures and Participation by Foreign Nationals To Influence Referenda** (emergency) (Rep. Riseman)

SUMMARY - See Appendix I

LD 194, LD 479 and LD 641 prohibit various categories of foreign individuals, foreign governments, foreign entities and domestic but foreign-owned entities from making specific types of contributions or expenditures to influence state and local referendum elections or state and local candidate elections. The provisions of the three bills are summarized in Appendix I.

ADDITIONAL INFORMATION

A. Federal law - See Appendix I. The chart attached as Appendix I illustrates how the provisions of the bills compare to existing federal law, [52 U.S.C. §30121](#), that prohibits specific types of foreign nationals from making certain contributions or expenditures to influence federal, state or local candidate elections.

1. Types of elections covered by federal law

At the public hearing, a suggestion was made that federal law prohibits foreign nationals from making contributions and expenditures in connection with *all* elections not just *candidate* elections. As it is currently drafted, [52 U.S.C § 30121\(a\)](#) prohibits foreign national: contributions “in connection with a Federal, state or local election”; contributions to political parties; and expenditures for “electioneering communication[s].” The relevant definition of “election” appears in [52 U.S.C. §30101\(1\)](#) and includes only the following candidate elections:

- (A) a general, special, primary, or runoff election;
- (B) a convention or caucus of a political party which has authority to nominate a candidate;
- (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
- (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

See also [11 C.F.R. §100.2\(a\)](#) (“Election means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to ... office.”). The definition of “Electioneering communication” is similarly limited to communications involving *candidate* elections. [§30104\(f\)\(3\)](#). It may be worth nothing, however, that [H.R. 1](#), a bill passed by the U.S. House and pending in the U.S. Senate, would amend this federal law in several ways, including by applying its provisions to State and local referendum elections. See §4104 of H.R. 1.

2. Domestic subsidiaries of foreign corporations under federal law

The federal definition of “foreign national” includes only the following types of foreign business entity: “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.” [52 U.S.C. §30121\(b\)](#) (incorporating definition of “foreign principal” in [22 U.S.C. §611\(b\)](#)). See Appendix I

Federal law prohibits both direct *and indirect* contributions and expenditures by foreign nationals, however. [52 U.S.C. §30121\(a\)](#) In addition, Federal Elections Commission (FEC) regulations implementing this statute prohibit a foreign national from directing, controlling or directly or indirectly participating in the campaign contribution and expenditure decision-making process of any domestic business, PAC or other organization “in connection with elections for any Federal, State or local office.” [11 C.F.R. §110.20\(i\)](#). See Appendix I.

Accordingly, although the federal definition of “foreign national” does not expressly include domestic subsidiaries of foreign businesses, the FEC has explained that under current federal law domestic subsidiaries of foreign corporations may make contributions and expenditures in connection with state and local candidate elections **only if two conditions are met**: (1) the foreign parent or a foreign owner of the subsidiary may not finance the activities in any part—*i.e.*, the domestic subsidiary must be able to demonstrate it has sufficient funds other than funds given or loaned by the foreign parent/owner, to account for the donations or expenditures and (2) individuals who are neither U.S. Citizens nor permanent residents may not be involved in making the decisions regarding these political activities. See <https://www.fec.gov/updates/foreign-nationals/>

B. Laws in other states - See Appendix II. Of the [25 other states identified by NCSL](#) that permit citizens to propose legislation either through direct initiatives or popular referenda, 12 limit foreign interference in elections to some degree.

Type of election:

- **Three** states’ prohibitions apply only to candidate elections (Alaska, Mississippi and Montana)
- **Two** states’ prohibitions apply only to referendum elections (California and Maryland)
- **Seven** states’ prohibitions apply, at least to some extent, to both candidate and referendum elections (Colorado, Missouri, Nevada, North Dakota, Ohio, South Dakota and Washington)

Five additional states—that do not permit citizens to propose legislation through initiatives or referenda—also limit foreign interference in elections to some degree.

Type of foreign entity:

- **Six** states’ prohibitions expressly adopt the federal definition of “foreign national” (Maryland, Mississippi, Nevada, New Hampshire, Ohio and West Virginia)
- **Four** states’ prohibitions, although not expressly adopting the federal definition, apply to essentially the same foreign entities as federal law (Iowa, Montana, North Dakota and Washington)
- **Two** states’ statutes are written in a way that *theoretically* applies to more business entities than the strictly foreign-organized or foreign-located business entities covered under federal law:
 - Alaska’s definition of “foreign-influenced corporation” includes domestic entities where a single foreign owner holds $\geq 5\%$ of the equity or voting shares or where group of foreign owners hold

≥ 20% of the equity or voting shares. Yet, a provision of Alaska’s statute indicates that the law’s prohibitions against a foreign-influenced corporation’s contributions or expenditures apply only to the extent that federal law prohibits those contributions or expenditures. Given this provision, Alaska’s Attorney General has [suggested](#) that the state statute’s prohibitions against contributions by a “foreign-influenced corporation” may not be effective. *See* Appendix II.

- California’s prohibition applies to domestic subsidiaries of foreign corporations if the decision to make the contribution or expenditure is made by a non-U.S. citizen and non-permanent resident officer of the foreign parent corporation. (This prohibition is congruent to the Federal Election Commission’s interpretation of the scope of the federal prohibition, as is explained above.)
- **Three** states’ prohibitions are, with respect to foreign business entities, narrower than the federal law, because they prohibit contributions and expenditures only from foreign corporations not authorized to conduct business in the State (Louisiana, Missouri and Colorado).
- **One** state’s prohibition applies to the undefined term “foreign national” as well as to a foreign “government, instrumentality or agent” (New Jersey)
- **One** state’s prohibition applies only if the contributor is a foreign government (South Dakota)

ISSUES RAISED IN PUBLIC HEARING TESTIMONY

A. Types of business entities. Concerns were raised that, on the one hand, a publicly traded company may not have sufficient information at each point in time to ascertain, as is required by LDs 194 and 479, what percentage of its equity is held by a single “foreign owner” (defined as an entity with majority foreign ownership) or a combination of foreign owners. Nor may a publicly traded company prevent foreign individuals or entities from obtaining a specific percentage of their equity. On the other hand, concerns were raised that the definitions of foreign nationals in LDs 194, 479 and 641 are too narrow, because foreign individuals and entities who own or control as little as 1% of a company’s equity wield significant influence over corporate decision-making, including decisions regarding election spending.

B. Constitutional Issues. The bills’ opponents argue that each bill violates the First Amendment, especially to the extent that they propose to limit the election-related activities of domestic companies partially owned by foreign nationals. The bills’ proponents counter that foreign nationals do not enjoy a First Amendment right to participate in U.S. elections.

In *Bluman v. Federal Election Commission*, the U.S. District Court for the District of Columbia held that the federal law (currently codified at [52 U.S.C. §30121\(a\)](#) and summarized in Appendix I) does not violate the First Amendment rights of *individuals* present in the United States on temporary work visas. Then-judge Kavanaugh, writing a decision that was later summarily affirmed by the U.S. Supreme Court, concluded that “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D. D.C. 2001), *sum. aff’d*, 565 U.S. 1004 (2012) (mem.). The *Bluman* Court observed in a footnote that its holding would apply equally to foreign corporations, which it suggested may “likewise [be] barred from making contributions and expenditures” in connection with candidate elections. *Id.* at 292 n.4. The *Bluman* court explicitly did not decide several critical issues that bear on the question whether LDs 194, 479 and 641 can withstand similar First Amendment challenges, however:

- **Permanent residents.** First, the *Bluman* court did not decide “whether Congress could constitutionally extend the . . . statutory ban to lawful permanent residents who have a more significant attachment to the United States than the temporary resident plaintiffs in this case. Any such extension would raise substantial questions” that were not raised when the law was applied to noncitizens temporarily present within the country. *Id.* at 292.
- **Ballot measure campaigns.** Second, the *Bluman* decision did “not address” whether Congress had the authority to prohibit foreign nationals from engaging in issue advocacy—that is, “speech that does not expressly advocate the election or defeat of a candidate”—and thus its “holding should not be read to support such bans.” *Id.* at 284-85, 292.

The bills’ opponents note that in cases upholding limited restrictions on candidate-contributions against First Amendment challenges, the U.S. Supreme Court has recognized only a single compelling government interest in preventing *quid pro quo* corruption or the appearance of such corruption. *Citizens United v. FEC*, 558 U.S. 310, 356-60. By contrast, the bills’ opponents observe, the U.S. Supreme Court has concluded that “the risk of corruption perceived in cases involving candidate elections simply is not present” in referendum elections and therefore “there is no significant state or public interest in curtailing debate and discussion of a ballot measure.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). While this line of cases demonstrates that restrictions on campaign spending to influence the outcome of ballot questions are more constitutionally suspect—suggesting LDs 194, 479 and 641 may be more vulnerable to First Amendment challenges than the federal law, which focuses solely on candidate contributions—it is difficult to predict whether this reasoning applies to the bills in light of the *Bluman* court’s recognition of a second compelling governmental interest “in preventing foreign influence over U.S. elections.” *See* 800 F. Supp. 2d at 288 n.3. It is possible that a court examining the question will conclude that this second compelling interest in preventing foreign interference in elections is equally valid in the candidate-election and referendum-election context.

- **Domestic corporations with foreign ownership.** Finally, when it observed that foreign corporations lack a First Amendment right to participate in candidate elections, the *Bluman* court cautioned that it had “no occasion to analyze the circumstances under which a corporation may be considered a *foreign* corporation for purposes of First Amendment analysis.” *Id.* at 292 n.4 (emphasis in original). The bills’ proponents argue, on the one hand, that the First Amendment does not mandate that foreign individuals and businesses be permitted to use the shield of a domestic corporate form to engage indirectly in the types of political activity that they may constitutionally be prohibited from engaging in directly. On the other hand, the bills’ opponents appear to be arguing that, as domestic corporations, partially foreign-owned corporations are protected by the First Amendment. As a consequence, they appear to argue, the bills may be vulnerable to attack as not narrowly tailored because, rather than broadly restricting the speech of entities with a certain percentage of foreign ownership, the bills could instead (like federal law) prevent foreign interference in state and local elections by more narrowly prohibiting foreign-funding of and participation in a domestic entity’s campaign-related financial activities.

In the 129th Legislature, the VLA Committee considered a bill ([LD 2136](#)) that would have prohibited foreign nationals—including domestic entities with respect to which a foreign individual, foreign government or foreign entity owned or controlled 50% or more of the total equity—from making contributions or expenditures to influence a referendum election. In a letter dated August 6, 2020, the Maine Attorney General opined that “the law in the area of campaign finance regulation . . . is unsettled.

This uncertainty makes it difficult to predict the outcome of a legal challenge to LD 2136.” A copy of that letter has been posted to the Electronic LD File for each of these bills. See <http://www.legislature.maine.gov/ctl/VLA/03-15-2021?panel=0&time=0&sortdir=0&sortby=2>.

AMENDMENTS PROPOSED AT PUBLIC HEARING

A. Sponsor’s Proposed Amendments to LD 479. Rep. Bailey and the Campaign Legal Center proposed two amendments to LD 479:

1. Add language to §1006(2)(F) on page 3 to specify that, in addition to the prohibition on making expenditures to influence ballot campaigns, foreign nationals are also prohibited from making “contributions” to ballot question campaigns. *Analyst note: The definition of “contribution” cross-referenced in the bill, in §1012(2), includes only contributions made to candidate campaigns. If the committee wishes to prohibit “contributions” related to ballot questions, it may want to cross-reference the definition in §1052(3) for that purpose.*
2. Clarify in §1006(3) on page 3 that foreign nationals may disseminate or republish candidates’ authorized campaign materials, as long as they do not expend money when engaging in these activities.

B. Foreign ownership of domestic entities. John Brautigam (MCCE) and Ron Fein (Free Speech for People.org) proposed amending the definition of “foreign national” in LD 479 to include domestic entities where a single foreign owner holds 1% or a combination of foreign owners holds 5% of the equity or voting shares in the entity.

C. Corporate certificates of compliance. Ron Fein (Free Speech for People.org) proposed adding the following provision to LD 479:

Any firm, partnership, corporation, association, or other organization that engages in covered activity shall prepare a statement of certification, signed by the chief executive officer under penalty of perjury, avowing that, after due inquiry, the firm, partnership, corporation, association, or other organization was not a foreign national on the date such contribution, expenditure or other covered activity occurred. The firm, partnership, corporation, association, or other organization shall, within 7 business days after making such expenditure or contribution, file the certification with the commission, and shall provide a copy of this certification to the recipient of such contribution or expenditure, who shall be entitled to rely upon it in good faith.

Analyst note: Perjury is a Class C crime under [17-A M.R.S. §451](#), which is punishable by a maximum of 5 years’ imprisonment and a fine of up to \$5,000. See [17-A M.R.S. §1604](#); [§1704](#).

Analyst questions: Do all of these types of entities have CEOs? Is there penalty be for failure to make such a certification? Does failure to receive such a certificate automatically subject a person who receives a corporate contribution or expenditure to penalties under sub-§§4 & 5 of LD 479?

D. Trade associations. Ron Fein (Free Speech for People.org) suggests the committee consider whether to clarify/expand the types of trade associations considered “foreign nationals” in LD 479.

E. Qui Tam provision and findings. John M. Fitzgerald suggests amending LD 479 to include a *qui tam* provision that would authorize individuals file a complaint with the Ethics Commission or an action in court to enforce the provisions of the bill and, if the complaint or court action is successful, to receive 50% of any fine awarded to the State. He also suggests including legislative findings and purposes clauses in LD 194 and LD 479.

F. Out of state businesses and individuals. Theodore Sirois suggests amending any one of the three bills to prohibit out-of-state businesses from making contributions or expenditures to influence Maine referendum elections.

ANALYST-IDENTIFIED ISSUES FOR CONSIDERATION

LD 194

1. **Undefined terms:** Because of the location of LD 179 within Title 21-A, the following terms are undefined in the bill. The Committee may want to consider adding definitions for these terms.
 - a. Contribution—should the definition in [§1052\(3\)](#) apply, but be expanded to include BQCs?
 - b. Expenditure—should the definition in [§1052\(4\)](#) apply, with sub-¶(3) expanded to include BQCs?
 - c. Influence—should the definition in [§1052\(4-A\)](#) apply?
 - Referendum—to which types of referendum do the bill’s prohibitions apply? Options: a people's veto referendum; a direct initiative of legislation; an amendment to the Constitution of Maine; a referendum vote on a measure enacted by the Legislature; the ratification of the issue of bonds by the State or any agency thereof; a county or municipal referendum; other?

LD 479

1. **Penalty.** What is the penalty for violating each of the prohibitions and requirements of LD 479? Under [21-A M.R.S. §1004\(1\)](#), it is a class E crime for “a person, candidate, treasurer, political committee or political action committee” to “*knowingly make or accept any contribution or make any expenditure* in violation of [Title 21-A, Chapter 13].” Not all of the prohibitions in LD 479 fall within the ambit of §1004(1), however. For example, LD 479 prohibits: *solicitation* and not just acceptance of prohibited contributions; *reckless* and not just knowing acceptance of prohibited contributions and expenditures; knowing and reckless *substantial assistance* in the making, solicitation or acceptance of prohibited contributions and expenditures; as well as the dissemination of candidate campaign materials by foreign nationals. LD 479 also imposes certain duties on broadcasters and Internet platforms regarding communications funded by foreign nationals and on foreign nationals to disclose their sponsorship of certain other political communications. There do not appear to be any penalties in current law applicable to violations of these provisions of LD 479.
2. **Internet Platform.** Should “Internet platform” be defined? Is it limited to websites that produce their own content or does it include websites that serve as host forums for public of others’ speech? Under the federal Communications Decency Act (CDA) “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” [47 U.S.C. §230\(c\)\(1\)](#). In addition, “no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent” with this principle. [§230\(e\)\(3\)](#). An “interactive computer service” includes any “access software provider that

provides or enables computer access by multiple users to a computer server.” [§230\(f\)\(2\)](#). Courts have interpreted the definition to include “a website [that] . . . merely provides a neutral means by which third parties can post information of their own independent choosing online.” *See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014). By contrast, a website that creates or develops its own content is not an “interactive computer service” protected by [§230\(c\)\(1\) & \(e\)\(3\)](#) of the CDA.

3. **Design, produce or disseminate.** The bill defines “design, produce or disseminate,” a phrase that is also used (without a definition) in [21-A M.R.S. §1019-B](#), the independent expenditure statute. Should the definition apply to both statutes?

LD 641

1. **Ambiguous definition of “foreign national.”** Are U.S. entities that are majority owned by foreign governments or foreign entities intended to be included? If so, can this definition be clarified?
2. **Definition of “contribution.”** The definition of “contribution” in [§1052\(3\)](#) applies to LD 641, but that definition only involves contributions to PACs, not to BQCs. Is that intended?
3. **“Referendum” undefined.** To which types of referendum should the bill’s prohibitions apply? (See the list above for LD 194.)

REQUESTS FOR INFORMATION

3. *To John Brautigam (Maine Citizens for Clean Elections):*
 - List of initiative campaigns in Maine, comparing the fundraising spent for and against the initiative as compared to the outcome of the initiative election.
 - Information on other states’ and cities’ laws prohibiting foreign influence in elections.
 - Information on the number of other states that allow citizens to propose legislation via initiative.
4. *To Gerald Petruccelli (Maine Chamber of Commerce).* Approximate list of corporations registered with the Maine Chamber of Commerce that would be affected by the proposal to amend LD 479 to prohibit contributions and expenditures from domestic businesses with 1% foreign ownership.
5. *To Sophie Brochu (Hydro Québec).* Offered to provide information on Quebec’s laws prohibiting foreign influence in referendum elections.
6. *To Tim Woodcock (Hydro Québec).* Provide a copy of your written testimony and legal arguments.

FISCAL IMPACT

Not yet determined.