



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2016 SEP 28 PM 2:28

AGENDA ITEM
For Meeting of 9-29-16
SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Ellen L. Weintraub *ELW*
Commissioner

DATE: September 28, 2016

SUBJECT: Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence

At the last open meeting of the Federal Election Commission, I introduced a motion to open a rulemaking and direct our Office of General Counsel to begin drafting a Notice of Proposed Rulemaking that would allow the Commission to consider every option for reducing the potential for foreign spending in our elections, taking into account the views of all Commissioners. That motion failed on a 3-3 vote. My Republican colleagues objected that my proposal was too open-ended. But they stated a willingness to consider more specific proposals.

I now return to the table bearing more specific proposals. At the next open meeting of the Commission, on September 29, I am prepared to move that we address through rulemaking five discrete topics relating to foreign-national political spending and corporations: 1. Percentage of foreign ownership; 2. Board membership of corporation; 3. Foreign government ownership; 4. Type of corporation; and 5. Implementation measures.

I will not repeat all the arguments in favor of our taking action, but incorporate by reference my memorandum of September 9, 2016,¹ Vice Chair Walther's memorandum of September 15, 2016,² Commissioner Ravel's memorandum of August 9, 2016,³ the

¹ *Proposal to Launch Rulemaking to Ensure That U.S. Political Spending is Free From Foreign Influence*. Agenda Document No. 16-40-A (Sept. 9, 2016).
http://www.fec.gov/agenda/2016/documents/mtgdoc_16-40-a.pdf

² *Statement of Vice Chairman Steven T. Walther Regarding Proposal to Rescind Advisory Opinion 2006-15 (Transcanada) and to Open a Rulemaking to Ensure That U.S. Political Spending is Free From Foreign Influence*. Agenda Document No. 16-44-A (Sept. 15, 2016).
http://www.fec.gov/agenda/2016/documents/mtgdoc_16-44-a.pdf.

petition submitted by Commissioner Ravel and myself on June 8, 2015,⁴ the op-ed I wrote for *The New York Times* on March 30, 2016,⁵ and the comments presented at the forum I convened on *Corporate Political Spending and Foreign Influence* on June 23, 2016.⁶

In *Bluman v. FEC*,⁷ a decision affirmed by the Supreme Court, a special three-judge D.C. district court held 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.”⁸ The law prohibits foreign nationals from directly or indirectly making contributions or donations in connection with any Federal, state, or local election; from making contributions or donations to any political party; or from funding expenditures, independent expenditures, or electioneering communications.⁹

The policy statement proposed Sept. 15 by Chairman Petersen and Commissioners Hunter and Goodman acknowledged the need for clarification of how this foreign national ban applies, post-*Citizens United*, to “domestic corporations that are owned or controlled by foreign nationals.”¹⁰ Their proposal would afford a safe harbor for such corporations to engage in various kinds of political spending, providing certain certifications are made, regardless of the degree of foreign ownership of the subsidiary.

As I read Supreme Court precedent, ownership matters. When a U.S.-based company is owned by foreigners, the U.S. managers, even if U.S. citizens, would be breaching their fiduciary duties if they spent company resources other than in the best interests of their foreign owners. As the Supreme Court has said: “An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights,

³ *Proposal to Rescind Advisory Opinion 2006-15 (TransCanada)* (Aug. 9, 2016), http://www.fec.gov/agenda/2016/documents/mtgdoc_16-32-a.pdf.

⁴ *Petition for Rulemaking* (June 8, 2015), http://www.fec.gov/members/statements/Petition_for_Rulemaking.pdf.

⁵ *Taking On Citizens United*, NY TIMES (March 30, 2016), <http://nyti.ms/230BOgg>. The op-ed pointed out that *Citizens United* protected the First Amendment rights of corporations as “associations of citizens.” But the people behind corporate political spenders are not always U.S. citizens, and the resources they use may well be owned by foreigners. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁶ *Forum: Corporate Political Spending and Foreign Influence* (June 23, 2016), <http://www.fec.gov/members/weintraub/CorporatePoliticalSpendingandForeignInfluence.shtml>.

⁷ *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.).

⁸ *Id.*

⁹ 52 U.S.C. § 30121.

¹⁰ *Proposed Statement of Policy on The Application of the Foreign National Prohibition to Domestic Corporations Owned or Controlled by Foreign Nationals*, Memorandum from Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, Agenda Document No. 16-41-A (Sept. 14, 2016), http://www.fec.gov/agenda/2016/documents/mtgdoc_16-41-a.pdf.

whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”¹¹ It matters whose rights are being protected and whether the people who own or control corporations have rights to participate in our elections at all. Foreign nationals, particularly foreign governments, do not.

The notion that ownership can indicate control is not a novel idea in the law. The Commission need not reinvent the wheel. Other areas of law specify various ownership levels that may be deemed a controlling interest. For example, federal securities law considers the purchase of a 5% share of a corporation to be significant and worthy of disclosure.¹² Communications law limits foreign ownership of entities seeking broadcast licenses to a 20% share.¹³ The inversion trend, in which U.S. corporations re-incorporate abroad and avoid paying U.S. taxes, is also a topic worth considering.

Where commissioners have different views on issues such as whether foreign ownership of domestic corporations should be a factor in interpreting the foreign national ban, it is particularly appropriate and important to engage with the public and seek expert advice. Our democracy belongs to all of its citizens. The input and advice we would receive from public comment would illuminate our discussions and could provide a path to avoid gridlock.

In hopes of alleviating the concerns expressed at the last meeting about imposing limits on separate segregated funds (“SSFs”) funded by the contributions of U.S. citizens, this rulemaking proposal focuses on the use of corporate treasury funds for political spending and excludes issues related to SSFs maintained by domestic subsidiaries with foreign owners.

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I will move that the Commission open a rulemaking and direct the Office of General Counsel to draft a Notice of Proposed Rulemaking (including any appropriate proposed rule text) that (a) puts out for public comment as proposed rule text the proposal described in the Sept. 15 proposed policy statement of Chairman Petersen and Commissioners Hunter and Goodman;¹⁴ (b) puts out for public comment the three alternatives referenced in Vice Chair Walther’s memorandum of September 15, 2016¹⁵ and first considered by the Commission at its meeting of January 20, 2011; and (c) seeks to answer the questions set forth below, which I have grouped by topic.

Topic 1: Percentage of foreign ownership.

¹¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014) (emphasis in original).

¹² *See Schedule 13D*. U.S. Securities and Exchange Commission.
<https://www.sec.gov/answers/sched13.htm>.

¹³ 47 U.S.C. § 310(b).

¹⁴ *Supra*, n. 10.

¹⁵ *Supra*, n. 2.

1. Given the ban on direct or indirect foreign national spending in U.S. elections, should any limits be imposed on corporate spending based on the percentage of the corporation's foreign ownership?

2. Are there levels of foreign ownership that may be deemed indicia of control, and if so, what are they? Should any limits be imposed on spending in U.S. elections by corporations with 5% foreign ownership? 20% foreign ownership? More than 50% foreign ownership?

3. Is it appropriate or necessary to consider any limits on the U.S. election spending of corporations that are 100% owned by foreign nationals? Should such corporations be deemed both owned and controlled by foreign nationals?

4. When U.S. corporations reincorporate in other countries, do they retain the right to spend in U.S. elections? May the domestic subsidiaries of corporations that undergo corporate inversions spend in U.S. elections?

Topic 2. Board membership of corporation.

5. What limits, if any, should be considered on the U.S. election spending of corporations that have foreign nationals on their boards of directors? Are limits appropriate if a significant percentage of the board is comprised of foreign nationals, and if so, what should that percentage be? One-third? More than half?

6. What limits, if any, should be considered, on the U.S. election spending of corporations whose board of directors is 100% comprised of foreign nationals? What arguments militate in favor of and against spending in U.S. elections by such corporations?

Topic 3. Foreign government ownership.

7. What limits, if any, should be considered on the U.S. election spending of corporations owned in part by foreign governments or State actors? Are there permissible levels of ownership by foreign governments or State actors for corporations that spend in U.S. elections?

8. What limits, if any, should be considered on the U.S. election spending of corporations wholly owned by foreign governments or State actors? What arguments militate in favor of spending in U.S. elections by corporations wholly owned by foreign governments or State actors?

Topic 4. Type of corporation.

9. Publicly held corporations, privately held corporations, limited-liability corporations (LLCs), and nonprofit corporations have differing ownership and governance structures. Should these different types of corporations be treated identically for the purposes of the foreign-national ban? Why or why not?

Topic 5. Implementation measures.

10. How are rules against foreign national spending in U.S. elections best implemented? Should the Commission adopt safe harbors? Should political spenders be required to verify and certify that they are not spending foreign money?

11. Should additional measures be required to verify the identity of those making contributions by credit card (such as requiring CVV codes)?

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I invite my colleagues to work together to find some collection of proposals that we can agree to put out for public comment to begin the process of strengthening our rules. I am open to adding to or subtracting from the list of topics and questions listed above.

However, failing to act, or assuming the answers without posing any of the questions, is not an option. The FEC needs to address the real threat that foreign individuals, corporations, or governments may seek to manipulate our elections through domestic corporations they own or control.

Given everything we have learned this year, it blinks reality to suggest that there is no risk of foreign nationals taking advantage of current loopholes to intercede invisibly in American elections. This is a risk no member of the Federal Election Commission should be willing to tolerate.