

S.371 (Gianaris)/A.2633 (Walker)

STAFF CONTACT : Ken Pokalsky | Vice President | 518.694.4460

BILL

S.371 (Gianaris)/A.2633
(Walker)

SUBJECT

Restrictions on Political
Advocacy by Business

DATE

January 30, 2023

OPPOSE

The Business Council strongly opposes this legislation. The bill's effect, if not its explicit intent, will be to prohibit many if not most publicly traded corporations from participating in any level of political advocacy in New York State, including but not limited to campaign contributions, contributions to housekeeping accounts, and independent expenditures.

Enforcement of a similar law, passed by the Minnesota state legislature in April 2023, is subject to a federal injunction prohibiting its enforcement as underlying litigation moves forward challenging its constitutionality. In issuing the injunction, a federal judge found, ““Because the Board [of Elections] has failed to identify evidence that minority foreign shareholders regularly (or ever) exercise influence or control over corporations’ political expenditures, the challenged provisions of [the law] sweep far too broadly.”

If the real concern being address in this bill is the issue of “foreign influences” in state elections, it is important to recognize the existing federal prohibition:

11 CFR § 110.20 - Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals (52 U.S.C. 30121, 36 U.S.C. 510). (i) Participation by foreign nationals in decisions involving election-related activities. **A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process** of any person, such as a corporation, labor organization, political committee, or political organization **with regard to such person's Federal or non-Federal election-related activities**, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.

An effective alternative to this bill would be to require a business entity making a regulated contribution or expenditure in New York to certify their compliance with 11 CFR § 110.20.

Instead, this bill goes much further to place unreasonable, unnecessary restrictions on political advocacy by businesses with significant capital investment and employment in New York State, due to fractional ownership by non-U.S. entities.

The main provisions of this bill would:

- Define “foreign-influenced business entity” as one that: a single foreign person or entity owns or controls 1 percent or more of stock or other form of ownership interest; two or more such owners own 5 percent or more of the business; or where a “foreign owner” participates in the business’ decision-making regarding political activity.
- Prohibit “foreign-influenced” business entities from making direct or indirect campaign contribution, contributions to political parties, direct political expenditures, or contributions to independent expenditures, with violations constituting class E felony. The bill also prohibits individuals or entities from receiving such banned contributions.
- Require every business entity that makes a political contribution or expenditure to, within seven days of making such payments, certify “under penalty of perjury, avowing that after due inquiry” that the business is not a foreign-influenced business entity, and provide such certification to the state Board of Elections and to the campaign or committee to which the payment was made.

In short, if aggregate foreign ownership of a business exceeds 5 percent, with the remaining 95 percent of ownership by domestic entities, that business will be prohibited from making direct or indirect political contributions or expenditures in New York State.

This bill is patterned on a proposal from the Center for American Progress, whose “fact sheet” on the issue clearly describes its impact:

Of 111 corporations studied among the S&P 500 stock index, 74 percent exceeded the 1 percent threshold for a single foreign owner and 98 percent exceeded the 5 percent aggregate foreign ownership threshold.

Under current New York State law, corporations and limited liability companies are already subject to strict direct political contribution limits of \$5,000 in aggregate contributions per year. Businesses in New York are subject to other unique restrictions as well, i.e., they cannot offer payroll deductions for contributions to employee political action committees (PACs) – a restriction that that is not found in federal law nor imposed by other major or neighboring states.

This bill would simply impose another significant restriction on private sector political advocacy in New York.

These low ownership thresholds will disqualify many businesses from engaging in advocacy, even though they continue to have a significant, even overwhelming, U.S. ownership, and even though they have significant capital and employment presence in New York State.

Further, it will be difficult for many businesses to make the required certification. Other than mandatory disclosure requirements on large shareholders, in most instances a publicly traded business will have no means to accurately determine the percentage of its shares owned by domestic versus foreign entities, so it is unclear how or whether they would be able to “avow” in good faith that they are below the very low 5 percent aggregate ownership threshold – especially given the bill’s proposed class E felony for violations.

The bill sponsor’s memo argues that “political spending by foreign-influenced business entities can weaken, interfere with, or disrupt New York’s democratic self-government and the faith that the electorate has in its elected officials.”

We strongly question and challenge the assertion that a 5 percent foreign business ownership represents a significant threat to New York’s self-government. Businesses engaged in political advocacy in New York are typically responding to proposals that have a direct – often detrimental – impact on the business’ bottom line. In that respect, they are acting in the same form of self interest as most “special interest” groups.

Further, we would point out that the sponsor’s argument could be made regarding significant political spending by **any** special interest group, however, we rarely if ever see legislation advance in New York State directed at limiting the political spending of non-business interests.

In summary, we are very concerned with this legislation that, under the banner of reform, imposes excessive, unjustified restrictions on political advocacy of just one category of entities with an interest in New York State.

For these reasons, The Business Council strongly opposes adoption of S.371 (Gianaris)/A.2633 (Walker).