

Minn. 'Foreign Influence' Law May Bar U.S. Cos. From Politics

By **Melissa Laurenza, Kenneth Gross and Kevin Paulsen** (June 13, 2023)

In May, Minnesota adopted the Democracy for the People Act, a sweeping new law that substantially changes the state's campaign finance and voting rules.

The DPA establishes a new automatic voter registration process, allows 16- and 17-year-olds to preregister to vote, and lets voters request permanent absentee voting.

It also drastically limits the ability of many businesses to participate in Minnesota elections if they are "foreign-influenced."

Under the new law, corporations and limited liability companies will be considered foreign-influenced, and thus prohibited from making independent expenditures in connection with state and local elections, if they have a single foreign investor with 1% or more ownership, or two or more foreign investors with 5% or greater ownership.

These businesses will also be prohibited from making contributions or expenditures in connection with state and local ballot measures, though the state already passed an amendment to narrow the scope of one of the DPA's broader prohibitions.

Even as amended, Minnesota's law is the strictest state legislation enacted to date to curb perceived foreign influence in state elections. It will have major impacts for businesses that engage in political activities in the state. A discussion of the law and its implications follows below.

Foreign-Influenced Corporations

The DPA applies to for-profit corporations — including LLCs — and nonprofit corporations that do business or conduct activities in Minnesota. It is not limited to corporations or LLCs organized under Minnesota law or with a principal place of business in the state.

A business will be deemed foreign-influenced if any of the following conditions are met:

1. A single foreign investor holds, owns, controls, or otherwise has direct or indirect ownership of 1% or more of the total equity or voting shares of the corporation.

A "foreign investor" is any person or entity who is (1) a foreign government or political party; (2) a business or organization organized under the laws of, or having its principal place of business in, a foreign county; or (3) an individual who is not a U.S. citizen or green card holder. A foreign investor also includes any corporation — including a domestic corporation — that is more than 50% held, owned or controlled by a person or entity described above;



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2. Two or more foreign investors in the aggregate hold, own, control, or otherwise have direct or indirect ownership of 5% or more of the total equity or voting shares of the corporation; or
3. A foreign investor participates directly or indirectly in the corporation's political activities in the United States. "Political activities" are not defined by the law.

Prohibited Activities

For-profit corporations were already prohibited from making contributions to Minnesota candidates, political parties and political committees under existing state law. Under the new law, any business that falls within the broad definitions above will be further restricted from engaging in the political process.

Beginning Jan. 1, 2024, any business that is deemed to be foreign-influenced will be prohibited from the following:

1. Making or offering to make an expenditure to promote or defeat any state or local candidate's election.

Notably, the law does not include an exception for independent expenditures, such as communications expressly advocating the election or defeat of a clearly identified candidate that are not coordinated with the candidate or candidate's campaign.

2. Making contributions or expenditures to promote or defeat a ballot question, or to qualify a question for placement on the ballot;
3. Making contributions to candidates or their committees; and
4. Making contributions to any political committee, political fund or political party unit.

To prevent circumvention of these restrictions, the DPA also prohibits foreign-influenced corporations from making any contribution or donation to any person or entity with the condition that the funds be used for a prohibited purpose.

This provision, however, was already amended to clarify that a foreign-influenced corporation will not be prohibited from making donations or paying dues or membership fees to any association — other than a political committee or state or local party committee — for its general purposes, even if those funds are ultimately used for campaign activity.

Implications and Compliance

On its face, the DPA might appear consistent with federal law prohibiting foreign nationals from intervening in federal, state and local elections. In reality, however, the DPA will likely prohibit many domestic businesses from engaging in the political process given the low thresholds for classifying a corporation as foreign-influenced.

Most publicly traded companies have at least some foreign ownership. Under the new law, an American corporation with 99% domestic ownership will be considered foreign-influenced if a single, individual investor who is not a U.S. citizen or green card holder retains a 1% ownership stake. Notably, a business will not be deemed foreign-influenced if its only foreign ownership is through a U.S.-based mutual fund.

Minnesota's new law also sets it apart from other states by restricting businesses from engaging in activities that have been recognized as protected exercises of First Amendment rights.

Following the U.S. Supreme Court's landmark *Citizens United v. FEC* decision in 2010, corporations are permitted to make independent expenditures to influence federal, state and local elections, provided that such corporation is not organized under the laws of, or has its principal place of business in, a foreign country. Beginning next year, domestic businesses will be prohibited from making independent expenditures to influence state or local Minnesota elections if they qualify as foreign-influenced.

The DPA also expands the class of communications that may be regulated as independent expenditures by broadening the definition of "express advocacy" under state law. Moreover, foreign-influenced corporations will be prohibited from contributing to super PACs that make independent expenditures in the state as well.

The DPA should have more limited impacts on the activities of political committees that receive financial support from a connected corporate entity, such as separate segregated funds, as these committees were already prohibited from making contributions in connection with Minnesota elections under existing law.

However, it is unclear whether the state will interpret the DPA to prohibit an out-of-state separate segregated fund from making independent expenditures to influence state elections if its connected corporation qualifies as foreign-influenced under the law.

As noted above, membership dues, fees and donations paid by a foreign-influenced corporation to an association for its general purposes will still be permitted under the recently passed amendments to the DPA. Accordingly, a foreign-influenced corporation should not be prohibited from paying dues to a trade association that funds campaign activity in Minnesota provided that it does not earmark funds for this purpose.

Trends and Comparisons

It remains to be seen whether Minnesota's new law is an outlier or part of a growing trend to limit political activities by businesses with minimal foreign ownership.

Federal campaign finance law has long prohibited foreign nationals from making contributions or expenditures — including independent expenditures — in connection with federal, state or local elections. Under federal law, a foreign national includes an association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country.

By also prohibiting contributions and expenditures by companies incorporated domestically if they have a small percentage of foreign ownership, the DPA limits the political activities of a much broader class of businesses.

Additionally, the Federal Election Commission concluded in a 2021 enforcement matter that federal law does not prohibit foreign nationals from spending funds in connection with state or local ballot measures — activities that are prohibited for foreign-influenced corporations under the DPA. Several other states currently ban foreign nationals from intervening in ballot measure campaigns, but those states' definitions of a "foreign national" are generally consistent with the FEC's.

At least nine other state legislatures are currently considering bills that would limit the political activities of businesses with minimal foreign ownership. Pending bills Connecticut S.B. 1188, Maine L.D. 1610 and Pennsylvania S.B. 11 would apply to businesses with 5% or greater foreign ownership. California A.B. 83, which recently stalled on its way through the California State Assembly and seems unlikely to become law in the near future, would have established a 1% threshold for foreign ownership.

In recent years, municipal efforts to bar foreign-influenced corporations from making contributions or expenditures in local elections have been successful in a handful of U.S. cities. Seattle, for example, enacted a 2020 ordinance comparable to Minnesota's, which remains in effect today.

In any event, the DPA's strict restrictions on corporate political activity will almost certainly face a First Amendment challenge in court. Opponents of this and similar state-level foreign influence laws could also bring challenges on the grounds that they are preempted by the federal ban on campaign activities by foreign nationals. Until then, companies must carefully navigate the DPA if they intend to be politically active in Minnesota.

Unsurprisingly, the law presents a host of compliance challenges. Whether a publicly traded company is foreign-influenced within the meaning of the law may change from one day to the next.

In addition, any corporation that makes a permitted contribution or expenditure will be required to submit a certification to the state verifying that it is not foreign-influenced within seven days of the contribution or expenditure. This certification must be signed by the corporation's chief executive officer under penalty of perjury.

Corporations making contributions or expenditures will therefore need to implement compliance measures to ensure the accuracy of their certifications regarding foreign ownership.

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