THE STATE of ALASKA
GOVERNOR BILL WALKER

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June 22, 2018

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 44 – Legislative ethics: voting and conflicts (SCS CSSSHB 44(STA))
Our file: 2018200426

Dear Governor Walker:

At the request of your legislative director, we have reviewed HB 44, relating to campaign expenditures and contributions; the per diem for members of the legislature; gifts by lobbyists to legislators and legislative employees; requiring a legislator to abstain from taking or withholding official action or exerting official influence that could benefit or harm an immediate family member or certain employers; and requiring a legislator to request to be excused from voting in an instance where the legislator may have a financial conflict of interest.

1. Contributions and expenditures by foreign nationals and foreign-influenced corporations.

The bill would amend AS 15.13.068, related to campaign contributions and expenditures by foreign nationals. Under current law, a foreign national may not, directly or indirectly, make contributions and expenditures in Alaska elections. Section 1 of the bill would add that "foreign-influenced corporations" are also prohibited from making or promising to make campaign contributions and expenditures, but only to the extent that federal law prohibits or permits the foreign-influenced corporation from making a contribution or expenditure.

It would also add new definitions for terms used in AS 15.13.068. A "foreign-influenced corporation" would mean a corporation for which a foreign national or foreign owner holds, owns, or controls five percent or more equity or voting shares in the corporation; two or more foreign nationals or foreign owners combined hold, own, or

control 20 percent or more of a corporation's equity or voting shares; or a foreign national or foreign owner participates directly or indirectly in decisions relating to covered expenditures or contributions.[1]

Section 2 of the bill would add an exception to the prohibition on foreign-influenced corporation contributions. Under proposed AS 15.13.068(d), a foreign-influenced corporation could make a contribution to a person who makes covered expenditures or contributions if the person segregates those funds into a separate bank account that will not be used, directly or indirectly, to finance covered expenditures or contributions.[2] Thus, a foreign-influenced corporation would be permitted to make a contribution to a person that expends funds in a candidate election or to a person that makes contributions to influence a candidate, ballot, or initiative proposal election so long as the person keeps the corporation's contribution separate from its own political activity funds. The bill would provide guidance on how and when to determine the percentage of a corporation's foreign ownership.

A. "Foreign-influenced corporations" are not specifically regulated by federal campaign finance law.

Under the bill, a "foreign-influenced corporation" would be prohibited from making contributions and expenditures in connection with an election "only to the extent" prohibited by federal law. Federal law broadly prohibits "foreign nationals" from (1) making or promising to make contributions, donations, or expenditures in any federal, state, or local elections;[3] (2) participating directly or indirectly in any decisions by any person (including a corporation, labor organization, political party, or political committee) in connection with federal, state, or local election-related activities; and (3) directly or indirectly financing or making any disbursement of money whatsoever in

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[1] "Foreign owner" would mean "a person for whom a foreign national holds, owns, or controls, or otherwise has directly or indirectly acquired beneficial ownership of equity or voting shares in a corporation in an amount equal to or greater than 50 percent of all corporate voting shares outstanding or all corporate equity." It would include a corporation that is at least 50 percent owned by a foreign national.

[2] "Covered expenditure" means an independent or electioneering expenditure or communication, but does not include media communication, membership communication, or shareholder communication or expenditure as defined in AS 15.13.400 (general definitions for AS 15.13).

[3] Likewise, a person may not "solicit or accept" a contribution or donation from a foreign national in connection with an election. 52 U.S.C. 30121(a)(2).

connection with contributions or expenditures.[4] Under federal law and current AS 15.13.068(c), foreign corporations, associations, or partnerships, as well as any other foreign organization or combination of persons organized under the laws of or having its principal place of business in a foreign country, are considered "foreign nationals."[5] To the extent a "foreign-influenced corporation" under state law would fall within the definition of "foreign national," such corporations' activity would be prohibited by federal campaign finance law.

But neither the Federal Election Campaigns Act nor Federal Election Commission regulations use the term "foreign-influenced corporation," and there is no other federal law addressing "foreign-influenced corporations" and campaign finance. While federal law currently prohibits a foreign corporation's involvement in federal, state, or local elections, it allows a domestic corporation with foreign ownership limited participation in election-related activity. First, a domestic corporation with foreign ownership may make independent expenditures[6] as long as no foreign national directly or indirectly finances such expenditures and as long as no foreign national is involved in directing, controlling, or participating in any election-related activities or decisions.[7] Second, a domestic corporation with foreign ownership may contribute to independent expenditure groups or ballot proposition groups for use in those groups' expenditures with the same restrictions on funds from and participation in decision making by foreign nationals.

Federal law thus allows domestic corporations with foreign ownership — which would fall within the bill's definition of "foreign-influenced corporations" — to make independent expenditures or contributions to independent expenditure groups and ballot groups, as long as no foreign national finances or participates in any decision making whatsoever in connection with such activity. Therefore, even if this bill becomes law, it appears that "foreign-influenced corporations" would still be permitted to engage in the limited independent expenditure and contribution activity currently allowed under federal law, as discussed above.

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4 *See* 11 C.F.R. 110.20.

5 *See* 52 U.S.C. 30121(b) (definition of "foreign national"); 22 U.S.C. 611(b) (definition of "foreign principal" used in definition of "foreign national" in 52 U.S.C. 30121(b)); AS 15.13.068(c) (definition of "foreign national").

6 *See Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that corporations may use treasury funds to engage in express advocacy for a candidate through independent expenditures).

7 *See* 11 C.F.R. 110.20.

B. Freedom of speech and association and equal protection issues

Sections 1 and 2 of the bill would limit the political expression of foreign-influenced corporations — even if those corporations are organized under the laws of and have a primary place of business in the United States — and thus implicate First Amendment and equal protection concerns.[8] The United States Supreme Court has held that under the First Amendment, the government cannot limit corporate funding of independent expenditures.[9] But it has also held that the government may exclude foreign citizens from activities "intimately related to the process of democratic self-government," as reflected in the ban on foreign national contributions and expenditures in federal law.[10] Limitations on campaign finance expenditures are subject to strict scrutiny, and are constitutional only if "a provision burdening the exercise of political speech [is] 'narrowly tailored to serve a compelling state interest.'"[11]

A domestic corporation with foreign ownership conceivably could argue that the prohibition on expenditures by foreign influenced corporations are not narrowly tailored and impermissibly prohibit the corporation's political speech solely because the corporation has a relatively small amount — i.e., five-percent — of foreign ownership. The prohibition may, however, be justified given the government's compelling interest in preventing foreign influence over democratic self-government.[12] But we cannot predict with certainty whether a court would view the bill's prohibition on a domestic corporation with as little as five-percent foreign ownership as narrowly tailored, particularly when there may be no actual "foreign influence" or involvement in Alaska elections.

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8 U.S. Const., am. 1. The First Amendment protects freedom of speech and association.

9 *Citizens United v. FEC*, 558 U.S. 310 (2010).

10 *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *see also Bluman v. FEC*, 800 F.Supp.2d 281, 287 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

11 *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 603 (Alaska 1999).

12 *Bluman v. FEC*, 800 F. Supp. 2d at 287-288.

For similar reasons, the bill raises equal protection concerns because it would treat domestic corporations with foreign ownership different than similarly situated corporations without any foreign ownership.[13] "The common question in addressing equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."[14] In order for a classification to be valid under Alaska's equal protection test, it must be reasonable, not arbitrary, and bear a fair and substantial relation to a legitimate governmental objective.[15] A domestic corporation with foreign ownership could argue that the bill's prohibition on its political activity violates equal protection because the classification of as little as five-percent foreign ownership is arbitrary and does not bear a substantial relationship to the government's interest of protecting state elections from foreign influence if no foreign national finances or participates in election-related contributions and expenditures.

Despite these constitutional concerns, the bill would restrict foreign-influenced corporations "only to the extent" prohibited or permitted by federal law. Because federal law allows foreign-influenced corporations, as defined by the bill, some participation in elections through independent expenditures and contributions to independent expenditure groups and ballot groups, to the extent the federal limitations are constitutional, the limitations proposed in the bill may also withstand legal challenge.

2. Compensation and gifts to legislators.

Sections 3, 4, 5, 6, 10, and 12 of the bill would amend provisions in Title 24 (Legislature and Lobbying) and Title 39 (Public Officers and Employees) relating to compensation and gifts to legislators.

Section 3 of the bill would amend AS 24.10.120(a) to address payment for foreign travel by legislators. The amendment would require legislators who wish to travel outside of the United States to submit a report to the legislative fiscal officer proving that the travel has a legislative purpose before payment for the travel may be approved.

Section 4 of the bill would amend AS 24.10.130(b) to provide that legislators may not collect a per diem allowance if the legislature fails to pass a fully funded operating budget within the first 121 days of a regular legislative session. If the legislature passes a fully funded operating budget after the 121st day of a regular session, the bill would allow legislators to collect per diem starting on the first day after the operating budget is passed, or the first day of the next regular session, whichever occurs first.

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13 U.S. Const., am 14; Alaska Const., art. I, sec. 1.

14 *Anderson v. State*, 78 P.3d 710,718 (Alaska 2003).

15 *See Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).

Section 5 of the bill would amend AS 24.10.130(c) to require the Alaska Legislative Council, a joint standing committee, to adopt a policy on per diem allowances reflecting the changes made to per diem in sec. 4 of the bill. Similarly, sec. 12 of the bill would amend AS 39.23.540(d), relating to the State Officers Compensation Commission's annual report, to include the changes to per diem.

Sections 6 and 10 of the bill would amend AS 24.45.121(a)(9) and AS 24.60.080(a) to prohibit lobbyists from providing alcoholic drinks to legislators and legislative employees and to prohibit legislators and their staff from accepting food and drinks costing more than $15 from a lobbyist unless the food and drinks are provided as part of an event open to all legislators or legislative employees.

3. Legislative voting and conflicts of interest.

Sections 7, 8, 9, and 11 of the bill would amend provisions in Chapter 24.60 relating to legislative branch standards of conduct, voting, and conflicts of interest.

Currently, AS 24.60.030(e) recognizes a conflict of interest only when a legislator takes or withholds official action or exerts official influence that "could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment." Section 7 of the bill would amend this provision to broaden the circumstances under which a legislator may have a conflict of interest. A legislator would not be able to take official action or exert official influence that could "substantially benefit or harm" the financial interest of a person (1) who is a member of the legislator's immediate family; (2) who employs the legislator or their immediate family member; (3) with whom the legislator is negotiating employment; or (4) who has paid the legislator or their immediate family member over $10,000 of income in the last 12 months.

Section 8 of the bill would amend AS 24.60.030(g) to require a legislator to declare a conflict of interest on the record before voting on a measure in a committee and request to be excused from voting on the floor if the legislator or an immediate family member has a substantial financial interest in a business or other enterprise and the effect of the measure on that interest is greater than the effect on the general public.

Sections 7 and 8 of the bill would provide exceptions to allow a legislator to participate in public discussion or debate and to vote on appropriation bills—even when a legislator has a conflict of interest.

Sections 9 and 11 of the bill would define terms used in secs. 7 and 8. Section 9 of the bill would define "substantially benefit or harm" to mean "the effect on the person's financial interest is greater than the effect on the financial interest of the general public of the state." Section 11 of the bill would amend AS 24.60.990(a) to add a new definition of "financial interest" to mean "ownership of an interest or an involvement in business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit." The term "financial interest" is used in the proposed changes to AS 24.60.030(e) in sec. 7 of the bill and in the definition of "close economic association" in current AS 24.60.070, which requires a legislator or legislative employee to disclose close economic associations.

4. Miscellaneous provisions.

Section 13 of the bill repeals subsection (b) of AS 24.45.051, which currently requires lobbyists to report to the Alaska Public Offices Commission (APOC) all gifts of food and drink worth more than $15 given to legislators, their staff, or their spouses or domestic partners. This reflects the proposed changes in sec. 10 of the bill prohibiting gifts of food and drink worth more than $15.

Section 14 of the bill would amend the uncodified law of the state to require the APOC to adopt regulations necessary to implement secs. 1 and 2 concerning campaign contributions and expenditures by foreign-influenced corporations. The bill provides that such regulations may not take effect before the effective date of the bill.

Section 15 of the bill is a severability clause. It would amend the uncodified law of the State to provide that any provision in the bill found to be invalid by a court, either facially or as-applied, is severable, and that the remainder of the bill or the bill's applicability to other persons or circumstances is unaffected.

Section 16 of the bill provides that sec. 14 of the bill, authorizing APOC to adopt regulations, will take effect immediately under AS 01.10.070(c).

Finally, sec. 17 of the bill sets an effective date of July 1, 2018, for the remainder of the bill. If the bill does not become law on or before July 1, 2018, it will become effective at 12:01 a.m., Alaska Standard Time, on the day after the bill is signed or otherwise becomes law.

5. HB 44 and initiative proposition 17AKGA – substantial similarity analysis.

Our office has issued an opinion that this bill is substantially the same as a pending initiative proposition, 17AKGA (a governmental accountability measure).[16] The lieutenant governor has determined that SCS CSSSHB 44(STA) is substantially the same as 17AKGA. If HB 44 becomes law, the initiative measure will become void and will not appear on the November 6, 2018, general election ballot.[17]

Other than as noted, the bill does not present constitutional or legal issues.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

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Legislation and Regulations Section

JL/SRP/jkc

16 *See* 2018 Op. Alaska Att'y Gen. (May 25).

17 *See* Alaska Const. art. XI, sec. 4; AS 15.45.210.