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MEMORANDUM

TO: NABPAC members

FROM: Carol A. Laham
D. Mark Renaud
Eric Wang

DATE: March 19, 2021

RE: H.R. 1 provisions affecting corporate political activities

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On March 3, 2021, the U.S. House of Representatives voted 220-210 to pass H.R. 1, the "For the People Act." The bill would enact a number of significant changes in federal election, campaign finance, lobbying, and government ethics laws.

On March 17, 2021, a companion version of the bill designated as S. 1 was introduced in the U.S. Senate. A Senate Rules and Administration Committee hearing on the bill is scheduled for March 24.

In regard to the campaign finance provisions, S. 1 is substantially the same as H.R. 1, although S. 1 has shareholder-vote provisions for political activity that are much more intrusive than H.R. 1. For convenience, the rest of this memo will refer only to H.R. 1, but all references to H.R. 1 generally should be understood as referring to both bills except as noted below.

The 2021 version of H.R. 1 also is substantially similar to the 2019 version of the bill as passed by the House. However, it notably omits certain provisions purporting to address political activity by foreign nationals that were in the original version of the 2019 bill as introduced. Those provisions would have greatly threatened the voice of NABPAC members in the political arena. NABPAC and its members played an instrumental role in educating and convincing House members and leadership to omit those provisions in the final bill in 2019.

This memo summarizes the provisions in the 2021 version of the bill, as passed in the House (with relevant differences in S. 1 specifically noted below), that would have greatest impact on NABPAC members if the legislation is enacted. Please note that the bill is subject to further amendment in the Senate.

A) Foreign National Prohibitions in 2019 Bill (Omitted in 2021 Bill)

Under existing law and Federal Election Commission ("FEC") precedents, foreign nationals are prohibited from making, directing, controlling, or participating in decisions over the making of political contributions, expenditures, and disbursements. The 2019 version of H.R. 1, as originally introduced, would have expanded the "foreign national" definition to include U.S. subsidiaries of foreign corporations and companies with certain levels of relatively low and vaguely defined foreign ownership. This would have effectively threatened or ended the

permissibility of maintaining corporate PACs (among other corporate political activities) for many NABPAC members and similarly situated companies.

Although H.R. 1 did not have a realistic chance of enactment in 2019 due to Republican control in the U.S. Senate and the White House, NABPAC recognized that if these provisions were allowed to pass in the House, they would serve as a baseline for future legislation. Conversely, if those provisions were defeated in the legislative process prior to final passage in the House, they were less likely to be reintroduced again. To that end, NABPAC and its members worked to educate and convince House members and leadership of the harmful and drastic consequences of those provisions. NABPAC's efforts were successful and its long-term strategy has proven to be correct thus far; the 2021 version of the bill, as introduced, omits the foreign national provisions that NABPAC and its members worked to defeat in 2019.

B) Foreign National Prohibitions and Certifications in 2021 Bill

1. Foreign National Prohibitions

The 2021 version of H.R. 1, as introduced, generally would codify into the statute the FEC's existing precedents concerning foreign nationals. Specifically, for NABPAC members, this means that:

> a foreign national [may not] direct, dictate, control, or directly or indirectly participate in the decision making process of [the corporation] with regard to [the corporation's] Federal or non-Federal election-related activity, including any decision concerning the making of contributions, donations, expenditures, or disbursements in connection with an election for any Federal, State, or local office or any decision concerning the administration of a political committee.

H.R. 1 (2021, engrossed), § 4101.

In addition, H.R. 1 would codify or expand the existing ban on foreign national spending under the federal law to include specifically:

- Contributions to super PACs;
- Contributions in connection with state and local ballot measures;
- Disbursements for various types of political and issue ads; and
- "Campaign-related disbursements," including "covered transfers" to organizations (e.g., Section 501(c)(4) advocacy groups and Section 501(c)(6) chambers of commerce/trade associations) that make "campaign-related disbursements."

  "Campaign-related disbursements" and "covered transfers" are newly defined terms that are discussed more below in Section (C) (Campaign Finance Reporting and Disclaimers).

Id. §§ 4102, 4104, 4105, and 4112.

2. Corporate and PAC No-Foreign National Certifications

Corporate Certifications. "Prior to the making in connection with an election for Federal office of any contribution, donation, expenditure, independent expenditure, or disbursement for an electioneering communication" in any given year, H.R. 1 would require an organization's CEO or highest-ranking official to certify to the FEC "under penalty of perjury" that "a foreign national did not direct, dictate, control, or directly or indirectly participate in the decision making process relating to such activity." Corporations, trade associations, and other non-profit organizations would be covered by this requirement. *Id.* § 4101.

The bill does not specify any particular penalty for violations of the corporate certification requirement. However, under existing federal law, "perjury" means "willfully subscrib[ing] as true any material matter which [one] does not believe to be true." 18 U.S.C. § 1621. Perjury is a felony punishable by imprisonment of up to five years and/or a fine of up to $250,000 for individuals, and a fine of up to $500,000 for organizations. *Id.; id.* § 3571.[1]

PAC Certifications. H.R. 1 would require all corporate PACs – including those of trade associations and other nonprofit membership organizations – to certify on an annual basis to the FEC that:

(1) All individuals who manage and exercise decision-making authority for the PAC are U.S. citizens or permanent residents;

(2) No foreign national "participates in any way in the decisionmaking processes" of the PAC with respect to its contributions and expenditures;

(3) The PAC does not solicit or accept recommendations from any foreign nationals with respect to its contributions or expenditures; and

(4) Any member of the board of directors of the PAC's corporate sponsor who is a foreign national abstains from voting on "matters concerning the [PAC] or its activities."

H.R. 1 (2021, as introduced), § 4102.

The bill does not specify which corporate or PAC officer must make this annual certification, nor does it explicitly state a penalty of perjury. There is, however, always the risk of filing a false statement with the FEC, punishable under the FEC's general enforcement process (52 U.S.C. § 30109) or, if done knowingly and willfully, under the criminal code (18 U.S.C. § 1001).

C) Campaign Finance Reporting and Disclaimers

H.R. 1 would impose new reporting and disclaimer requirements (including donor exposure) for corporations and organizations that make "campaign-related disbursements" ("CRDs"), including "covered transfers" to other organizations that make CRDs. This could result in: (1) corporations being identified on FEC reports as donors to a Section 501(c)(4) group or Section 501(c)(6) chamber of commerce/trade association, for example, if the organization

[1] While the perjury statute itself does not specify whether violations are felonies or misdemeanors, a separate statute provides that unclassified violations are considered Class D felonies if the statute provides for imprisonment of five years, as the perjury statute does. *See* 18 U.S.C. § 3559(a)(4).

makes CRDs; (2) corporations having to file their own additional FEC reports for their payments to such organizations; and (3) corporations being identified by name in an organization's ad disclaimers as a top donor to the organization.

CRD Definition. H.R. 1 defines the CRDs that would trigger these reporting and disclaimer requirements as:

(1) "Independent expenditures" ("IEs") that expressly advocate the election or defeat of federal candidates. These are already regulated under existing law, but would be subject to additional reporting and disclaimer requirements under H.R. 1.

(2) "Electioneering communications" ("ECs") that refer to federal candidates within 30/60 days before the primary/general election. These are already regulated under existing law, but would be subject to additional reporting and disclaimer requirements under H.R. 1. In addition, H.R. 1 would expand the EC definition to include certain digital ads (which are not covered under the existing EC law) that refer to federal candidates within the regulated pre-election time windows.

(3) Public communications that "promote[] or support[]" or "attack[] or oppose[] the election" of federal candidates. This is often known as the "PASO" standard.

(4) Certain public communications that PASO the nomination or confirmation of a federal judicial nominee.

(5) "Covered transfers."

Id. §§ 4111, 4206.

Covered Transfer Definition. H.R. 1 defines "covered transfers" as payments made by a corporation or organization (excluding Section 501(c)(3) organizations) to any recipient if:

(1) The payment was earmarked for CRDs or making a transfer to another organization for the purpose of making CRDs;

(2) The payer "engaged in discussions with the recipient" regarding the making of CRDs or transfers to another organization for the purpose of making CRDs;

(3) If the payer itself has made CRDs other than in the form of a "covered transfer" in a total amount of $50,000 or more during the prior two-year period;[2]

(4) If the payer "knew or had reason to know" that the recipient has made CRDs in a total amount of $50,000 or more during the prior two-year period; or

(5) The payer "knew or had reason to know" that the recipient would make CRDs in a total amount of $50,000 or more during the next two years.

Id. § 4111.

[2] It is unclear exactly what types of payments would trigger reporting under this condition.

CRD/Covered Transfer Reporting Requirements. Organizations that make CRDs (including covered transfers) totaling more than $10,000 during a two-year election cycle would be required to file public reports of such spending with the FEC. *Id.*

In addition to reporting their spending on CRDs, donor-funded organizations generally would be required to report their donors who have given a total of $10,000 or more to the organization during the election cycle or during the one-year period before the date of the report (whichever is earlier). *Id.* Therefore, corporations that make payments (including membership dues) to Section 501(c)(4) groups or Section 501(c)(6) chambers of commerce/trade associations, for example, may have to be reported as donors if the recipient organization makes reportable CRDs.

Donors are exempt from having to be reported if: (a) the organization making the CRDs exclusively used funds in a segregated account to pay for the CRD and the donor did not give to that segregated account; or (b) the donor prohibited in writing its funds from being used for CRDs, and the recipient deposited the funds in a separate segregated account that was not used for making CRDs. *Id.*

Lastly, and importantly, because the CRD reporting requirement also applies to organizations making "covered transfers," if a corporation makes a payment to an organization (e.g., a Section 501(c)(4) or (c)(6) organization) that qualifies as a covered transfer, then the corporation itself also would have to separately file an FEC report for the payment if the $10,000 threshold is triggered. This separate reporting requirement for donors is different from the current federal campaign finance reporting regime, which only requires recipients to report donors.

CRD Disclaimer Requirements. H.R. 1 generally would require donor-funded organizations that sponsor ads that qualify as CRDs to identify in the ad disclaimer their top five donors of $10,000 or more during the prior 12-month period, or, for audio-only ads, their top two such donors. *Id.* § 4302. Therefore, corporations that make payments of $10,000 or more to organizations (e.g., Section 501(c)(4) or (c)(6) organizations) that sponsor CRD ads may have to be identified in ad disclaimers as top donors to the organization.

Donors that prohibited in writing their funds from being used to make CRDs (as described above) would be exempt from being identified in disclaimers. *Id.*

D) Expansion of Coordination Rules

While corporations may coordinate with federal candidates on communications with the corporation's "restricted class" (PAC-eligible employees, stockholders, and their family members), corporations may not coordinate on communications with individuals outside of the restricted class.

H.R. 1 would alter or expand the existing coordination restrictions to include coordination on the following additional types of content:

- PASO communications;

- Content that refers to any federal candidate within 120 days before a general election or 60 days before a primary;[3] and

- Any republication of a candidate's campaign materials, "including *any excerpt* or use of *any* video from any video . . . or written, graphic, or other form of campaign material."[4]

Id. § 6102 (emphasis added).

E) Broadened Coverage of Lobbying Disclosure Act

H.R. 1 would expand the federal lobbying law by:

- Treating "counseling in support of" lobbying contacts as lobbying activities. This would eliminate the so-called "Daschle exemption" under which consultants or employees may avoid registering as lobbyists if much of their work is in the form of providing behind-the-scenes strategic advice on lobbying;

- Lowering the current threshold for lobbyist registration from spending at least 20 percent of an individual's time during a quarter on lobbying activities for a client or employer to 10 percent; and

- Requiring registered lobbyists during any lobbying contact to affirmatively identify themselves as such and further identify: (a) their client; (b) whether their client is a foreign entity; and (c) certain other foreign entities that have contributed more than $5,000 for the client's lobbying activities. (Under the existing law, this information is only required to be provided upon request by a covered official).

Id. §§ 7201, 7203.

F) Public Funding for Congressional Candidates

H.R. 1 would implement a public matching fund program for House candidates under which only "small dollar" campaign contributions of no more than $200 from individuals would be eligible for public matching funds. *Id.* § 5111. Participating candidates would still be permitted to separately accept PAC contributions that would not be matched with public funds. *See id*. Nonetheless, the public matching fund program may make accepting PAC contributions less appealing for congressional candidates.

S. 1 would implement a similar public matching fund program for Senate candidates under which only contributions from individuals would be eligible for public matching funds. S. 1 (as introduced) § 5111. Unlike H.R. 1, under S. 1, participating Senate candidates would be permitted to separately accept PAC contributions only if such contributions come from a PAC's "qualified account" that is comprised of funds from contributors who give no more than $200 per election to the PAC. *Id*.

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[3] Under the FEC's existing coordination rules, the pre-election time window is 90 days before a general or primary election for content that refers to a congressional candidate, and 120 days before a primary election through the date of the general election for content that refers to a presidential candidate.

[4] Under the FEC's existing coordination rules and precedents, there are exceptions for brief or incidental use of certain materials.

G) Repeal of Prohibition Against SEC Rulemaking on Political Spending Disclosure

H.R. 1 would repeal a prohibition in recent omnibus spending bills passed by Congress that prohibits the Securities and Exchange Commission from implementing a rulemaking to require publicly traded corporations to report to their shareholders certain information about the corporations' political spending. H.R. 1 § 4601.

H) Requirement to Assess "Shareholder Preferences" for "Political Disbursements" (H.R. 1)/Shareholder and Board Approval and Reporting for "Expenditures for Political Activities" (S. 1)

Prior to making any disbursement "for a political purpose," H.R. 1 would require a publicly traded company to have made an assessment within the prior one-year period of its shareholders' preferences with respect to such disbursements.

The assessment must address:

- Which types of disbursements "for a political purpose" the shareholder believes the company should make;
- Whether such disbursements should support or oppose Republicans, Democrats, Independents, or candidates of other parties;
- Whether such disbursements should be made in connection with federal, state, or local elections; and
- Any other information the Securities and Exchange Commission may specify by rulemaking.

"For a political purpose" is defined to include independent expenditures (including both express advocacy and the functional equivalent of express advocacy), electioneering communications, PASO communications, any communication that is otherwise "for the purpose of influencing the outcome of an election for a public office," and any transfer of funds to another person or entity for the purpose of paying for any of these types of communication. *Id.* § 4602.

While it appears that the shareholder "assessments" under H.R. 1 would not be binding, S. 1 takes a decidedly different approach to corporate political spending. Under S. 1, publicly traded companies would have to obtain a vote from the holders of a majority of their outstanding shares before making any "expenditure for political activities." S. 1 § 4602. There does not appear to be any de minimis threshold for this shareholder vote requirement. Moreover, the company's board of directors must additionally vote to approve any (1) "expenditure for political activities" of more than $50,000; or (2) series of "expenditures for political activities" in an aggregate amount of more than $50,000 in connection with any particular election for a federal office. *Id.*

An "expenditure for political activities" includes "independent expenditures" ("IEs") and "electioneering communications" ("ECs") (as those terms are defined under the existing federal campaign finance law, and subject to amendments by H.R. 1/S. 1), as well as dues and other

payments to trade associations and Section 501(c) entities where the payments are used, or "could reasonably be anticipated to be [] used" or transferred to another organization to be used for making IEs or ECs. An "expenditure for political activities" specifically does *not* include corporate PAC activities or a corporation's support for its PAC. *Id.*

In addition, publicly traded corporations would be subject to the following reporting requirements for their "expenditures for political activities":

- They would have to make every required vote of their board on covered political expenditures publicly available "in a clear and conspicuous location" on their website within 48 hours after the vote;
- They would have to provide certain information about each covered political expenditure in their quarterly SEC/shareholder reports; and
- They would have to provide certain information about (1) each covered political expenditure of more than $10,000; or (2) series of covered political expenditures in an aggregate amount of more than $10,000 in connection with any particular election for a federal office, in their annual SEC/shareholder reports.

Id.

I) FEC Restructuring

H.R. 1 would restructure the FEC from a bipartisan six-member commission to an agency with five commissioners. Two would effectively be Democrats, two would effectively be Republicans, and one would be nominally independent. The agency's chair, who would be appointed by the president, would have unilateral authority to issue subpoenas and compel testimony. The agency's general counsel's office also would have the authority to unilaterally initiate enforcement investigations unless a majority of the commissioners vote to override. H.R. 1, § 6001 *et seq.*

These measures are in contrast to the existing FEC structure, which requires a majority of the commissioners to affirmatively vote to initiate investigations, issue subpoenas, and compel testimony.

J) Additional PAC Information on FEC Filings and Redesignation of Corporate PACs (H.R. 1 Only)

H.R. 1 would require the FEC to conduct ongoing assessments of the extent to which corporate PACs have bylaws and boards of directors, as well as the characteristics of board members and their relation to the corporation. These assessments are supposed to be based on a PAC's statement of organization (FEC Form 1). However, because the existing FEC forms do not require this information, this provision may essentially require the FEC to amend its forms to require PACs to provide this information. The bill does not appear to require PACs necessarily to have bylaws or boards (although these are both good practices). H.R. 1 § 4603.

Relatedly, H.R. 1 would require the FEC to implement a rulemaking to change the terminology the agency uses in referring to corporate PACs. *Id.*

Note that S.1 omits both of these provisions.

K) Identifying Federally Registered Lobbyists on Campaign Finance Reports

H.R. 1 would require campaign finance reports filed by all federal PACs, political party committees, and candidates to flag any contributions that are made by federally registered lobbyists. *Id.* § 9202.

L) Additional Expedited Reports for PACs Receiving More than $5,000 From a Contributor (H.R. 1 Only; Effectively Does Not Apply to Corporate PACs)

H.R. 1 would require any federal PAC to file expedited reports when it receives contributions of *more than $5,000* from a single contributor between 20 days and 48 hours before an election. *Id.* § 4131. Since the annual limit for individual contributions to corporate PACs is $5,000, this expedited reporting requirement effectively would apply only to Super PACs.

Note that S.1 omits this provision.