

SB 87: WRITTEN TESTIMONY – SUPPORT

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Maryland State Senate
Education, Health, and Environmental Affairs Committee
Annapolis, MD 21401

Dear Chair Pinsky, Vice Chair Kagan, and Committee Members:

This testimony is submitted in support of SB 87, legislation regarding Campaign Finance—Contributions, Expenditures, or Donations by Foreign-Influenced Corporations or Foreign Principals, which is pending before your committee.

I am a senior fellow at the Center for American Progress (CAP). Based in Washington, D.C., CAP is an independent, nonpartisan policy institute dedicated to improving the lives of all Americans through bold, progressive ideas, as well as strong leadership and concerted action. CAP recently published a report and factsheet discussing the policy contained in the legislation under consideration, which may be of further assistance to the committee.¹

After reviewing this legislation, I conclude that it would provide a critically important tool to protect Maryland’s elections from foreign influence. This legislation would strengthen the right of Marylanders to determine the political and economic future of their state and help ensure that lawmakers are accountable to voters instead of foreign-influenced corporations, which are increasingly active politically. This legislative effort follows on the heels of Seattle, Washington, which two weeks ago passed virtually identical legislation to protect its elections after a deluge of corporate political spending by at least one foreign-influenced U.S. corporation.

SB 87 would reduce foreign influence in our elections by preventing political spending from corporations that meet one of the following criteria:

¹ Michael Sozan, Center for American Progress, Report: *Ending Foreign-Influenced Corporate Spending in U.S. Elections* (November 2019) (“CAP Report”), available at <https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/>; Factsheet available at <https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477468/ending-foreign-influenced-corporate-spending-u-s-elections-2/>.

- A single foreign shareholder owns or controls 1% or more of the corporation's equity,
- Multiple foreign shareholders own or control—in the aggregate—5% or more of the corporation's equity, or
- Any foreign entity participates directly or indirectly in the corporation's decision-making process about political activities in the United States.

These brightline thresholds would not bar political spending by *all* corporations but rather corporations that have levels of foreign ownership *appreciable enough* to influence the decision-making of corporate managers.

The Current Legal Framework

Current law and U.S. Supreme Court precedent are clear when it comes to foreign influence: it is illegal for foreign governments, corporations, or individuals to *directly* or *indirectly* spend money to influence U.S. elections.²

The statutory prohibition against foreign involvement is foundational to U.S. self-government and exists primarily because foreign entities are likely to have policy and political interests that do not align with America's best interests. This bedrock principle was discussed at length and developed by the nation's founders and enshrined in the U.S. Constitution. It was reaffirmed just eight years ago in the case of *Bluman v. Federal Election Commission*, written by now-U.S. Supreme Court Justice Brett Kavanaugh, who was part of a special panel deciding the case.³ In that case, the court stated 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." The Supreme Court affirmed the *Bluman* decision (without writing a decision).

Yet a loophole in current law makes the United States vulnerable to foreign influence because foreign entities can invest in a U.S.-based corporation—and then that corporation can spend unlimited amounts of money on elections, often secretly. This loophole was opened in the Supreme Court's misguided 2010 decision in *Citizens United v. Federal Election Commission*, which, for the first time, gave corporations the right to spend unlimited amounts of money from their corporate treasuries on advertising for the election or defeat of candidates.⁴ The Supreme Court indicated it was aware of this foreign-influence loophole and that its decision would not preclude a law to close it. Even with the existence of this loophole, the *Bluman* court concluded that nothing in *Citizens United* was inconsistent with the law that bans *foreign* contributions and expenditures in U.S. elections.

² 52 U.S.C. § 30121.

³ *Bluman and Steiman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (Mem.).

⁴ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Torrent of Spending by U.S. Corporations that Have Appreciable Foreign Ownership

In the ensuing decade since *Citizens United*, America's largest corporations—most of which appear to have appreciable levels of foreign ownership—have spent hundreds of millions of dollars directly from their corporate treasuries to influence elections and ballot measures.⁵ This does not even count their separate corporate political action committees (funded by money from U.S. managers and employees), contributions by a corporation's managers or employees in their personal capacities, or the hundreds of millions of dollars that corporations spend on lobbying and other advocacy.

Much of this corporate election spending is done through dark money channels, which makes it untraceable.⁶ Whether traceable or not, multiple avenues now exist for foreign entities to exert influence on our nation's domestic political process via corporate political spending. This is an especially noteworthy point in light of the fact that foreign investors now own a whopping 35% of all U.S. stock, compared to just 5% in 1982.⁷

Many foreign-influenced U.S. corporations that spend political dollars are wholly-owned subsidiaries of foreign corporations, such as BP and Shell Oil. Other U.S. corporations are partially-foreign-owned. For example, approximately 10% of U.S.-based Uber is owned by Saudi Arabia, which controls one of Uber's board seats.⁸ Uber has spent tens of millions of dollars in recent years to influence elections and local ballot measures that would help the company's bottom line. Uber just pledged \$30 million for a 2020 ballot measure in California to fight a pro-worker law.⁹

This Legislation Is Rooted in Well-Accepted Principles of Corporate Governance Law and Practice

Ownership thresholds are not new or untested in U.S. law. Rather, they are common regulatory tools used in many contexts—such as telecommunications, defense, and financial services—to help prevent undue foreign influence over U.S. sovereignty or national security and the divergent policy interests that flow therefrom.¹⁰ Foreign ownership thresholds, in fact, were passed by the U.S. House of Representatives in the DISCLOSE Act of 2010, and garnered 59 votes in the U.S. Senate, one vote short of breaking a filibuster.¹¹

⁵ See *CAP Report* (discussing this issue in several sections).

⁶ See *CAP Report*, p. 9.

⁷ See Steven M. Rosenthal and Lydia S. Austin, "The Dwindling Taxable Share Of U.S. Corporate Stock" (Washington: Tax Policy Center, 2016), p. 929, available at <https://www.taxpolicycenter.org/publications/dwindling-taxable-share-us-corporate-stock/full>.

⁸ See Eric Newcomer, "The Inside Story of How Uber Got Into Business With the Saudi Arabian Government," Bloomberg, November 3, 2018, available at <https://www.bloomberg.com/news/articles/2018-11-03/the-inside-story-of-how-uber-got-into-business-with-the-saudi-arabian-government>.

⁹ See *CAP Report*, pp. 21-22.

¹⁰ See *CAP Report*, p. 37.

¹¹ See Michael Beckel, "Senate Republicans Again Block DISCLOSE Act, Designed to Reveal Special Interest Spending," Center for Study of Responsive Politics, September 23, 2010, available at <https://www.opensecrets.org/news/2010/09/senate-republicans-again-block/>; DISCLOSE Act, H.R. 5175, 111th Cong., 2nd sess. (April 29, 2010); S. 3628, 111th Cong., 2nd sess. (July 21, 2010).

The government's interest in regulating foreign influence need not rest on the idea that foreign investors may be linked to hostile entities that are actively trying to weaken U.S. democracy. Rather, because current federal law does not explicitly prevent U.S.-based corporations with foreign owners from spending money in elections, foreign interests are almost inevitably going to influence the political system. That's because, pursuant to longstanding corporate governance principles, corporate managers are obliged to spend resources in ways that serve all shareholders, including foreign shareholders. As the former CEO of U.S.-based ExxonMobil Corp. starkly stated, "I'm not a U.S. company and I don't make decisions based on what's good for the U.S."¹²

In the policy areas of tax, the environment, workers' rights, and commerce—just to name a few—there are many ways that foreign interests predictably diverge from Marylanders' interests. At the very least, this dynamic creates a harmful appearance of impropriety that can weaken Marylanders' trust in elections, in government officials, and ultimately, in the policies their lawmakers produce.

Barring political spending by corporations with appreciable levels of foreign ownership does not mean that such companies necessarily lack sufficient ties to Maryland. Nor is this policy meant to signify that such companies are trying to deliberately influence American elections (although there are several recent examples of that),¹³ that these companies are bad actors, or that these companies should reject investments from foreign entities. Rather, this legislation is meant to close a loophole opened by *Citizens United* and prevent the possibility that a company with appreciable foreign ownership would allow such ownership to influence the company's political spending in Maryland.

This Legislation's Foreign Ownership Thresholds Are Carefully Crafted

At first glance, the recommended thresholds—1% for a single foreign shareholder and 5% for aggregate foreign ownership—may appear to be relatively low. However, both thresholds are solidly grounded in corporate governance and related law.

Corporate managers, capital investors, regulators, and governance experts recognize that a shareholder who owns at least 1% of stock in a corporation can influence corporate decision-making, including decisions about political spending.¹⁴ There are relatively few individual shareholders who ever own as much as 1% of a major publicly-traded corporation; and if they do, their stock likely is worth tens of millions of dollars, if not more. Shareholders who own 1% of corporate stock are rare and powerful; they are able to get their calls returned by executive suite managers and have sway over the strategic direction of a corporation.

The legislation's 1% threshold is rooted in regulations of the Securities and Exchange Commission governing thresholds for shareholder proposals. These regulations state that if a shareholder owns at least 1% of a corporation's shares, that shareholder has the unique right to submit shareholder

¹² Steve Coll, *Private Empire: ExxonMobil and American Power* (New York: Penguin Books, 2012), p. 71 (quoting Lee Raymond).

¹³ See *CAP Report*, pp. 16-17.

¹⁴ See *CAP Report*, pp. 32-34.

proposals to dictate a corporation's course of action.¹⁵ In November 2019, the SEC even proposed eliminating the 1% threshold, finding that the vast majority of investors that submit shareholder proposals do not even have that level of equity ownership and that institutional investors below the 1% single owner threshold can, in fact, exercise substantial influence on a corporation's decisions.¹⁶

The former Republican chairman of the U.S. House Committee on Financial Services recognized—in the area of proxy contests—that shareholders who own 1% of corporate stock are important players who have the very real opportunity to influence corporate decision-making.¹⁷ And the Business Roundtable, an association representing corporate CEOs, acknowledged this dynamic.¹⁸ In fact, the Business Roundtable suggested a sliding scale for shareholder proposals that would dip far below the 1% threshold for the largest U.S. corporations—to a 0.15% share of ownership.

A 5% aggregate foreign ownership threshold is also well-supported. When a significant number of smaller shareholders together have a commonality—such as foreign domicile—it can influence corporate managers' decisions, in the manner described above. Moreover, if several shareholders each own slightly less than 1% of a corporation, but together own at least 5% of a corporation, it makes little sense to ignore the possibility that they could join forces to do what a single 1% shareholder could do alone. One avenue for smaller shareholders to exert their collective influence is during “proxy season,” when they can threaten to band—or actually have banded—together to force votes on proposals that affect corporate decision-making.¹⁹ The Business Roundtable also stated that it supported the right of a group of shareholders to submit a proposal for consideration if those shareholders owned only 3% of a corporation's shares.²⁰

Finally, as Chair Weintraub has written, we are not working our way down from a 100% foreign ownership standard; we are working our way up from the zero foreign-influence standard that a strict legal interpretation of federal law suggests.

¹⁵ 17 C.F.R. § 240.14a-8(b).

¹⁶ Securities and Exchange Commission, Proposed Rule, “Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8,” Release number 34-87458, File number S7-23-19, November 5, 2019, pp. 22–23, 154, available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.

¹⁷ U.S. House of Representatives Committee on Financial Services, transcript of committee debate and markup of Financial CHOICE Act, H.R. 10, § 844(b), 115th Cong., 1st sess. (May 3, 2017), available at <https://plus.cq.com/doc/congressionaltranscripts-5096442?9>.

¹⁸ See Business Roundtable, “Responsible Shareholder Engagement & Long-Term Value Creation,” available at <https://www.businessroundtable.org/archive/resources/responsible-shareholder-engagement-long-term-value-creation>; Ning Chiu, “Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes,” Briefing: Governance, November 16, 2016, available at <https://www.briefinggovernance.com/2016/11/business-roundtable-urges-improvements-to-rule-14a-8-and-related-processes/>; Business Roundtable Comments in Securities and Exchange Commission Roundtable on the Proxy Process, November 9, 2018, p. 5, available at <https://s3.amazonaws.com/brt.org/2018.11.09-BRT.SECProxyRoundtableCommentLetter.pdf>.

¹⁹ See John C. Coates IV, Statement submitted to Massachusetts House of Representatives regarding an act to limit spending by foreign-influenced corporations, Harvard Law School, May 14, 2019, pp. 6–7, available at <https://freespeechforpeople.org/wp-content/uploads/2019/05/2019-Coates-MA-FIC-20190514-PDF-final.pdf>.

²⁰ See footnote 16, above.

This Legislation is Constitutional

The foreign ownership thresholds in this legislation would survive constitutional challenge, a conclusion supported by several noted experts in constitutional, election, and corporate law.²¹ At root, this legislation is consistent with the *Bluman* decision—which the Supreme Court affirmed—declaring that foreign entities have no constitutional right to participate in U.S. elections.

Moreover, this legislation is consistent with the approach laid out by the Chair of the Federal Election Commission, Ellen L. Weintraub, in 2016, which provided a new, cogent way to read *Citizens United* in conjunction with the ban on foreign spending in U.S. elections. Weintraub pointed out that *Citizens United* allows corporations to spend freely in politics, calling them “associations of citizens,” and that corporations’ rights to spend in politics flows from the collective First Amendment rights of their individual shareholders. Weintraub stated that it “follows logically that the restrictions on the rights of shareholders must also apply to the corporation, as you cannot have a right collectively that you do not have individually.”²² Therefore, she concluded that “[s]tates can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens—and enforce the ban on foreign political spending against those that are not.”²³

It is worth noting that foreign-influenced U.S. corporations—and their managers and employees—would have multiple other avenues to exercise their legitimate First Amendment rights to spend money to influence elections, as discussed above.

How the Foreign Ownership Thresholds Practically would Affect Corporations

The vast majority of U.S. businesses have no foreign owners. But in the *CAP Report* referenced above, I analyzed data on foreign ownership of 111 U.S.-based publicly traded corporations in the S&P 500 stock index. The results include the following:

- When applying the 1% single foreign shareholder threshold, 74% of the corporations studied exceeded the threshold; and
- When applying the 5% aggregate foreign threshold, 98% of the corporations studied exceeded the threshold.

These 111 corporations voluntarily disclosed \$443 million spent in federal and state elections from their corporate treasuries in the years 2015, 2016, and 2017.

Among smaller publicly-traded corporations, 28% of the corporations that I randomly sampled exceeded the 5% aggregate foreign-ownership threshold. From this limited analysis, it appears that smaller

²¹ See *CAP Report*, p. 38.

²² Ellen L. Weintraub, “Seattle Takes On Citizens United,” *New York Times*, January 23, 2020, available at <https://www.nytimes.com/2020/01/14/opinion/seattle-citizens-united.html>.

²³ Ellen L. Weintraub, “Taking On Citizens United,” *New York Times*, March 30, 2016, available at <https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.

publicly traded corporations may be less likely to have as much aggregate foreign ownership as their larger counterparts, and therefore would likely be less affected by this legislation's thresholds.

Conclusion

At a time of historic interference in U.S. elections, Maryland is positioning itself at the forefront of legislative efforts across the nation to take proactive, common-sense steps to stop political spending by foreign-influenced U.S. companies. This is a people-powered proposal that would go a long way in reassuring Marylanders that their democratic right to self-government is being protected.

For the reasons stated above, I urge a favorable report on SB 87. Please let me know if I can be of further assistance.

Sincerely,

/s/ Michael L. Sozan

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