

H.R. 1 Passes House; If Enacted, Would Significantly Change Campaign Finance and Lobbying Laws

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On March 3, the U.S. House of Representatives passed H.R. 1 by a 220-210 vote. As its designation indicates, the bill is a top priority for the Democratic majority in Congress and the Biden Administration. If enacted into law, the bill would make significant and broad changes to federal voting, campaign finance, and lobbying laws.

A companion version of the legislation designated as S. 1 is still pending in the U.S. Senate as of the time this article's publication. With Democrats holding 50 seats in the Senate and Senate Republicans opposed to the bill, the prospect of passage in both houses remains uncertain. The legislative filibuster requires at least 60 votes to pass most bills in the Senate. However, there is mounting pressure among Senate Democrats to invoke the "nuclear option" to do away with the filibuster, whether altogether or for certain types of legislation, such as bills like H.R. 1/S. 1 that address voting laws.

Regarding the campaign finance provisions, H.R. 1 would enact the most significant changes to federal law since the "Bipartisan Campaign Reform Act" of 2002 (a.k.a. "McCain-Feingold"). Similarly, with regard to the lobbying laws, H.R. 1 would enact the most significant changes since the "Honest Leadership and Open Government Act" of 2007.

The campaign finance and lobbying provisions would make the following changes:

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New FEC Reporting Requirements. H.R. 1 would require new reports to be filed with the Federal Election Commission (FEC) for so-called “campaign related disbursements” (CRDs). CRDs would include not only “independent expenditures” and “electioneering communications” under existing law, but also communications that “promote or support” or “attack or oppose” (PASO) the election of a federal candidate or the confirmation of a federal judicial nominee. In addition, under certain circumstances, CRDs would include making “covered transfers” to other organizations that make CRDs.

CRD reports would have to provide information not only about the expenditures, but also the donors to organizations that make CRDs.

Expansion of Electioneering Communications to Digital Ads. Under existing law, an “electioneering communication” (EC) only covers broadcast, cable, and satellite ads to refer to a federal candidate within certain pre-election time windows.

H.R. 1 would expand the EC definition to cover digital ads on certain online platforms. Notably, in contrast to how existing law treats ECs, in order for digital ads to be regulated, they would *not* have to be targeted to the relevant electorate or be capable of being received by at least 50,000 persons.

Expanded Disclaimer Requirements. H.R. 1 would expand the existing FEC disclaimer requirements to apply to the broader category of regulated communications known as “campaign-related disbursements” discussed above. In addition, certain organizations would have to identify their top five donors (or top two donors for audio ads) in ad disclaimers. An organization’s CEO or top-ranking official also would have to recite the so-called “stand by your ad” language (“I approve this message”) that is currently required for candidate ad disclaimers.

Coordination. H.R. 1 would expand the types of content under existing law that could trigger restrictions on coordination with candidates and political parties to include PASO communications (as discussed above). In addition, the bill would: (1) alter the pre-election time windows in which communications that refer to a candidate could be considered coordination; (2) eliminate the FEC’s existing allowance for using brief excerpts of video content produced by a candidate; (3) eliminate the FEC’s existing allowance for use of common vendors if they have an internal firewall; and (4) impose more stringent coordination restrictions on certain “coordinated spenders.”

Public File Requirements for Online Platforms. Certain online platforms would be required to maintain a public database on their websites with information about the political and issue ads purchased on the platform and the purchasers of such ads. These databases would be similar to, but more extensive than, the “public file” requirements currently applicable to broadcast, cable, and satellite operators under the federal communications law.

Liability for Policing Foreign National Ban. Certain online platforms, as well as broadcast, cable, and satellite operators, would be required to make “reasonable efforts” to ensure that foreign nationals are not purchasing political ads on their platforms in violation of the ban on such activity by foreign nationals. Relatedly, H.R. 1 would expand the scope of activities covered under the existing foreign national ban.

No Foreign National Certifications. Before a corporation engages in certain political spending, the corporation's CEO would have to certify under penalty of perjury to the FEC that the spending is not in violation of the ban on foreign national funding and involvement. Corporate PACs would have to file a similar annual certification.

The initial version of H.R. 1 that was introduced in 2019 also had included a broader provision that would expand the foreign national ban to apply to domestic subsidiaries of foreign corporations and even potentially to many publicly traded corporations with foreign shareholders. That controversial provision was dropped before final passage in the House in 2019 and was not included in the 2021 bill.

Additional PAC Information on FEC Filings. Although not in the bill as originally introduced, a provision added by the "manager's amendment" (incorporated into the bill as finally passed) 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).

Relatedly, the manager's amendment appears to require the FEC to implement a rulemaking to change the terminology the agency uses in referring to corporate PACs.

FEC Restructuring. H.R. 1 would cut the FEC from a bipartisan six-member agency to a five-member agency that essentially has two Republican commissioners, two Democratic commissioners, and one nominal independent. One of those commissioners would be appointed by the President to be the agency's chair. (The current chair is elected by the commissioners themselves.) The chair would have far greater powers than the position currently has.

The FEC's general counsel also would have authority to initiate enforcement investigations unless the commissioners vote to override. (Under existing law, the commissioners must affirmatively vote to authorize investigations.)

Expansion of Lobbyist Registration and Reporting. Under existing law, individuals are not required to register and report as lobbyists unless they spend at least 20% of their time during a quarter on lobbying activities for an employer or client. H.R. 1 would lower this threshold to 10%. The bill also would eliminate the so-called "Daschle exemption" under which behind-the-scenes consulting related to lobbying does not trigger registration.

Relatedly, FEC reports filed by candidate committees, political party committees, and PACs would have to flag contributions received from registered federal lobbyists.

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Wiley's Election Law practice will be carefully monitoring the progress of H.R. 1 and S. 1 as the legislative process unfolds in Congress. For more analysis of H.R. 1, check out our *Political Law Podcast* series.