



Legislative memo on H.R. 5175, the “DISCLOSE Act”

The U.S. House may consider the “DISCLOSE Act,” better known as “Democratic Incumbents Seeking to Contain Losses by Outlawing Speech in Elections,” this week. The Committee on House Administration marked up the bill Thurs., May 20 on a party-line 5-3 vote. The bill purports to respond to the Supreme Court’s January decision in *Citizens United v. Federal Election Commission*. It was introduced by DCCC Chairman Chris Van Hollen and Sen. Chuck Schumer, the past DSCC Chairman, in late April.

At Thursday’s markup, the committee approved a manager’s amendment and seven additional measures. It would be a stretch to say any of these measures improved the bill—and in practice, many of them make the bill even more restrictive of free political speech.

The key provisions of the bill would:

(1) **Unfairly widen the gap in treatment between corporations and other similar organizations like labor unions.** Numerous measures advanced by Republicans to provide parallel rules for unions and companies consistently failed in committee. Although corporations are forced to certify that foreign investors hold less than 20 percent of the company’s voting shares, unions are not required to certify that 20 percent of their members are not foreign. In rejecting such similar treatment, Democrats cited the rationale that unions lack the luxury to choose their members. The fact that corporations also do not choose their shareholders is meaningless when the true purpose of this act is to protect the Democratic majority as opposed to promote similar treatment across various types of organizations. Democrats offered weak excuses to justify their opposition to this and other measures, citing the lack of an explicit mention of labor unions in the *Citizens United* decision or a worry for small unions—just not small groups like the Mom and Pop store owners who wish to speak out about a candidate threatening to raise taxes that would cripple their business. Ultimately, Democrats included an outright ban on the political speech of countless companies while leaving similarly situated union allies untouched.

(2) **Restrict government contractors over a certain threshold and companies with a foreign investor holding more than 20 percent voting shares from making political expenditures.** As noted earlier, Democrats rejected numerous parallel restrictions for unions in the markup session. An attempt to extend the ban on political expenditures by government contractors to labor unions that negotiate large employment contracts with the government failed. The majority argued that union contracting could not be corrupting because union members ratify the contracts. The following day, two unions announced plans to spend more than \$100 million helping Democrats in midterm races. The campaign will fund “a massive incumbent protection program,” Gerry McEntee, president of AFSCME, [told The Hill newspaper](#). “We have got to protect the incumbency in the House. We have got to protect the incumbency in the Senate. It is going to be hard. Those tea-baggers are out there.” DISCLOSE’s abandonment of the historic parallel treatment of unions and corporations is likely to increase public skepticism about government and the legitimacy of laws governing money in politics.

(3) **Mandate a much more burdensome disclosure regime than the Supreme Court said would be beneficial in *Citizens United*.** The bill would require nonprofits to either disclose their donors over a certain threshold or establish a separate, segregated fund for political spending. The Supreme Court has rejected both of these attempts in the past, the latter in *Citizens United*. The bill would also require CEOs to appear on screen in disclaimers as much as three-to-four times longer than the disclaimers candidates currently air. Proponents of DISCLOSE have failed to explain why existing disclosure provisions are insufficient to meet any state or public

interest in knowing the sources of funds, as donations to groups for independent expenditures and electioneering communications over \$250 are already required to be disclosed through the Federal Elections Commission (FEC).

(4) **Create onerous and vague “Stand by Your Ad” requirements for ads in various communications mediums.** At Thursday’s markup, numerous provisions were added to the bill, which mandated various disclaimer requirements for a variety of political communications. Rep. Michael Capuano (D-Mass.) succeeded in passing an amendment requiring that electioneering communications and independent expenditures in the forms of radio ads include a statement detailing the top two funders. Obviously, as with the bill in general, the burden this places on those wishing to speak out in radio ads is troubling. Furthermore, no such language format is given in the bill, creating further confusion and making more organizations vulnerable to criminal penalties for non-compliance.

(5) **Sow confusion and regulatory chaos during midterm elections, ensuring that independent speakers, especially those that might speak ill of Democratic incumbents, remain on the sidelines.** The bill would go into effect 30 days after passage, regardless of whether the FEC writes regulations to interpret the many vague provisions in the bill. The Republicans raised an amendment to change the effective date to Jan. 1, 2011, but the initiative was shot down by the Democrats, who wish to chill speech in the midterm elections as a strategy to protect their Democratic majority in Congress. The Democrats refusal to sign onto a measure that would ensure the FEC had the appropriate time to codify their regulations and craft the necessary disclosure forms in accordance with the provisions upheld as central to this bill’s purpose underscores the true partisan motivations behind this Act.

Making matters worse, the bill contains a provision different than the one in McCain-Feingold, slowing the standard for challenging the constitutionality of the provisions. Although Republicans offered amendments that would replace some instances of vague language with existing language from longstanding FEC’s regulations, the measures were shot down. Effectively, speakers would be left guessing at the precise meaning of certain parts of the bill during the midterm elections. If they guess wrong, they could potentially face criminal sanctions or heavy fines.

Campaign finance law is already extraordinarily complex—the FEC now has differing regulations for 33 types of contributions and speech and 71 different types of speakers—and this bill would exponentially worsen that problem. These provisions would ensure that, if the legislation passes, it would not be overturned or remedied until well after the 2010 elections. *Citizens United*’s challenge to a portion of the McCain-Feingold law, under a more expedited framework, still took about two years.

At the mark-up, Rep. Michael Capuano (D-Mass.) revealed the bill’s true intent, saying “**I hope it chills out all—not one side, all sides! I have no problem whatsoever keeping everybody out. If I could keep all outside entities out, I would.**”

For a more detailed analysis of the bill, or if you have any questions, please contact the Center for Competitive Politics Director of Research & Government Relations, Laura Renz, at (703) 894-6822 or lrenz@campaignfreedom.org.

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