



Policy Briefing

‘DISCLOSE Act’: H.R. 5175 and S. 3628

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Introduction and Background

Citizens United is a conservative non-profit organization that produced a documentary movie critical of then-candidate Hillary Clinton in 2008. The group sought to distribute the movie via video-on-demand technology, and run ads promoting the movie. The Federal Election Commission ruled that they could not—under the “electioneering communications” sections of the Bipartisan Campaign Reform Act of 2002 (more commonly known as McCain-Feingold)—air commercials promoting the movie or distribute the movie via video-on-demand technology. Citizens United pressed its case all the way to the U.S. Supreme Court. On March 24, 2009, the Court heard oral arguments.

During that argument, the Deputy Solicitor General for the United States, Malcolm Stewart, claimed that the federal government had the authority, under existing campaign finance law and backed by the 1990 decision *Austin v. Michigan Chamber of Commerce*, to ban books if they were published or produced by incorporated entities or unions and contained any advocacy for or against a federal candidate. This assertion drew widespread attention, and in June 2009 the Supreme Court announced it would re-hear oral arguments in the case specifically on the issue of whether they should overturn *Austin*. Oral arguments were held on Sept. 9, 2009. On Jan. 21, 2010 the Supreme Court ruled 5-4 in favor of Citizens United, striking down *Austin* and related sections of McCain-Feingold.

In response, the current and past leaders of the Democratic campaign committees have authored legislation designed to address what they perceive as the perils of unfettered political speech. The Center for Competitive Politics has offered several specific critiques of this legislation, mostly based off of earlier outlines because actual legislation was not introduced until late April. As the Leadership of the U.S. House and Senate rush to enact legislation without taking the time to examine the actual impact of the *Citizens United* ruling or the unintended consequences likely to occur as a result of the proposed restrictions, the Center for Competitive Politics has prepared a comprehensive, section-by-section analysis of the “DISCLOSE Act” as passed by the House on June 24, 2010.

Both H.R. 5175 and S. 3295 propose sweeping and unnecessary restrictions on First Amendment political rights. Differences in the bills were initially relatively minor, but as amended the House bill contains a number of additional provisions. Initially, the key difference was that the Senate bill contained a provision that would extend preferential, deeply-discounted broadcast rates to candidates and parties—triggered by independent ads. This analysis will focus on the H.R. 5175, and flag for the reader the recently amended clauses that move H.R. 5175 further away from the original proposal.

This analysis is designed to inform Members of Congress and staff, as well as the general public, of the many constitutional and policy problems the DISCLOSE Act poses. Any questions regarding this information should be directed to Laura Renz, Research & Government Relations Director at the Center for Competitive Politics, at (703) 894-6822 or lrenz@campaignfreedom.org.

TITLE I—REGULATION OF CERTAIN POLITICAL SPENDING

SEC. 101. PROHIBITING INDEPENDENT EXPENDITURES AND ELECTIONEERING COMMUNICATIONS BY GOVERNMENT CONTRACTORS.

The legislation would impose the broadest possible burden on the political speech of business corporations that receive government contracts, enacting a **total** ban on independent expenditures and electioneering communications by any government contractor who receives a contract for \$10 million or more. It would also prohibit any recipient of TARP funds, or anyone who was negotiating for TARP relief, from making any contributions expenditures or electioneering communications until repayment. It would do the same for all holders of drilling leases in the Outer Continental shelf, or anyone negotiating for such a lease. The oil lease ban was recently added to the bill, and has no counterpart in the Senate legislation

The threshold of \$10 million is clearly designed to prevent many businesses receiving government contracts from exercising their First Amendment rights, including businesses that receive only a very small portion of their revenues from government contracts. One \$10 million construction, rehabilitation or IT contract could easily be a small part of a company's total portfolio. Literally thousands of businesses would be prohibited from speaking out on matters vital to their shareholders, employees and communities. The Supreme Court has rejected Congress's ability to use the receipt of federal funds to "suppress[] ideas thought inimical to the Government's own interest."¹

There is little serious risk that contracts that are competitively bid pose a risk of corruption or its appearance, or a greater risk than grants awarded to companies. How is there a difference between the corruption potential behind a \$20 million recovery grant as compared with a contract? Yet the DISCLOSE Act would restrict contractors but not grant recipients.

Similarly, the bill fails to recognize that some companies are legally required to accept all customers, including the government, forcing them to become government contractors and depriving them of their First Amendment rights. For example, the FEC ruled in 1999 that a power company on an Indian reservation was a government contractor because it provided power to two federal agencies with facilities on the reservation.²

There is no persuasive rationale for specially suppressing the political activity of TARP recipients and oil-lease holders. No one has come forward with an explanation for why these entities pose a particular danger to the political process. Because TARP closed at the end of 2009, as recipients repay the government this set of afflicted parties will shrink. Yet there is no explanation for the oil lease provision, other than to score political points at the expense of an entire industry, in light of the tragic Gulf of Mexico accident.

¹ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001).

² See Federal Election Commission Advisory Opinion 1999-32, [Tohono O'odham Nation](#).

Furthermore, the Supreme Court has rejected the notion that independent expenditures can be corrupting—a key point in the *Citizens United* decision—and, therefore, has ruled that they cannot be limited or banned.³ Section 101 of the bill directly contradicts the Supreme Court’s jurisprudence and is unlikely to survive a legal challenge.

The Section also abandons the government’s long-standing policy of subjecting unions and corporations to similar restrictions. DISCLOSE would impose no similar burden on unions that directly negotiate for salary and benefits with the government or receive government grants, or on nonprofit groups that receive grants or taxpayer funding. In addition, it would leave out unions that represent workers at government contractors, who obviously have a substantial economic interest in whether the firm receives government contracts.

The exclusion of unions and grant recipients from the ban on independent expenditures, and the inclusion of TARP recipients and oil lease holders both indicate that the intent of this legislation is to **silence** the business community and score political points against an unpopular industry, while allowing labor unions to continue to spend to influence campaigns.

SEC. 102. APPLICATION OF BAN ON CONTRIBUTIONS AND EXPENDITURES BY FOREIGN NATIONALS TO FOREIGN-CONTROLLED DOMESTIC CORPORATIONS.

The legislation would duplicate existing FEC regulations while adding a troubling new standard. It threatens to strip First Amendment political rights from American citizens under the guise of keeping foreign influence out of U.S. elections.

By prohibiting U.S. headquartered and incorporated companies with as much as **80 percent ownership** by U.S. citizens of voting shares from speaking, the legislation would eliminate the free speech rights of those companies that have succeeded in attracting an overseas investor, even though that foreign national investor comes nowhere near having control of the corporation. American companies with as much as **95 percent U.S. ownership** would suffer the same fate, if the foreign owner is a foreign country, government official, or a private corporation owned or controlled by a foreign country or foreign official. Companies are also barred if two or more foreign investors each own at least five percent of shares and have direct or indirect control of 50 percent or more of voting shares, or a majority of the Board are foreign nationals, or foreign nationals direct or control the corporation or its political activities.

For example, Verizon Wireless, a Delaware corporation headquartered in New Jersey with 83,000 U.S. employees and 91 million U.S. customers, would be silenced because of Vodafone’s 45 percent stake. There is no “narrow tailoring” to this provision, such as exists in **current** law requiring, for example, that funds spent on elections by U.S. subsidiaries of foreign corporations be generated from the U.S., or that decisions over political spending be made by U.S. citizens.⁴

³ *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

⁴ See 11 CFR 110.20 (decisions must be made by citizens); see also e.g. Federal Election Commission MUR 4909, J&M International, Inc. (funds must be earned from U.S. operations).

As a practical matter, a publicly traded company can pass over (and under) the thresholds several times in a day. Foreign ownership would fluctuate between the time a decision is made to speak, the air time is purchased, the orders are made and the material is produced, and the speech is publicly disseminated. Nevertheless, before communicating about politics, the company's CEO must certify under penalty of perjury, that it meets these requirements. Therefore, the law will chill activity even when a company falls within the limits, because no executive will be willing to make a mistake when that error comes with criminal consequences.

Furthermore, though DISCLOSE backers claim to target this provision at eliminating foreign influence in elections, it targets only for-profit corporations, exempting unions and non-profit membership organizations with substantial foreign involvement. For example, only 250,000 of Greenpeace's 2.8 million members are from the United States. Similarly, the International Brotherhood of Electrical Workers represents workers in both the U.S. and Canada, and has a Canadian director. Yet they would be able to spend unlimited amounts.

Additionally, the Act would impose a near-impossible task on publicly traded companies: determining (guessing) how the FEC would interpret compliance with the various thresholds in the absence of regulations from the FEC clarifying this process, how "foreign government official" or "principally owned or controlled by a foreign country" is defined (especially when dealing with foreign investors from communist countries).

The House Bill does open some loopholes, but the effect of these is not to reduce the burden of the law, but to make it more complicated and less credible. First, the measure allows corporations that are not foreign nationals or controlled by foreign nationals to make contributions and expenditures consistent with state or local laws, as is the case now. Second, if a corporation can segregate treasury funds so that no funding for speech is traced to the foreign investor, it can proceed as under existing law. These exceptions would seem to demonstrate that existing law is adequate to address the real threats of foreign influence, and the new restrictions are intended to limit domestic corporate political speech -- contrary to *Citizens United*.

Rather than imposing discriminatory new burdens that favor core constituencies, Congress should simply allow the FEC to continue enforcing existing regulations that bar foreign nationals and entities from participating in U.S. elections.

SEC. 103. TREATMENT OF PAYMENTS FOR COORDINATED COMMUNICATIONS AS CONTRIBUTIONS.

Speakers wanting to comply with federal coordination restrictions must also consider what speech can be investigated by the FEC as "coordinated communications." Coordinated communications are regulated like direct contributions to candidates. Not all speech, even if coordinated with candidates or Capitol Hill staffers, should be subject to regulation by the FEC as the majority of such speech is unrelated to elections.

Any standard that would subject an ad that mentions a candidate to investigation is too broad. That would sweep up protected grassroots advocacy regarding legislation. Any standard that would subject groups running ads that “criticize” or “oppose” a candidate is too subjective, and therefore, too vague.

Yet this is exactly what DISCLOSE would do.

The bill sweeps too broadly, calling any “public communication” that *refers to* a candidate within a certain time period a “covered communication” subject to investigation. The time periods are also broad--years, not days. A communication that refers to a candidate for President or Vice President is covered from 120 days before the first primary election (New Hampshire) *through* the general election. For Senate and House races any reference to a candidate is covered beginning 90 days before the primary election or convention *through* the general election.

Congress has no basis to order the FEC to investigate “coordination” so broadly. Regulating grassroots lobbying ads as coordinated communications raises constitutional problems. For example, ads asking citizens to call and tell a Senator seeking reelection to oppose filibusters on the Senate floor would be a covered communication under DISCLOSE, yet this is the same content that gave the Supreme Court pause in its 2007 *Wisconsin Right to Life* opinion.⁵ Such ads are “genuine issue advocacy,” not election advertising. Congress may not treat them as election-related advertising under the First Amendment.

The bill would regulate any republication of a candidate’s campaign materials, whether in whole or in part, as a contribution to that candidate’s campaign, *whether or not the group actually coordinated the ad with candidate’s campaign*. This means that a group that uses a photo, logo, image, or stretch of B-roll that a candidate happened to use could result in a *violation* under DISCLOSE’s new coordination provisions--not just an investigation into whether they, in fact, coordinated their advertising with the candidate.

DISCLOSE sweeps in protected issue advocacy and grassroots lobbying in a manner far broader than the Supreme Court has allowed as recently as 2007, places regulation of the Internet in question, and makes republication a violation absent *any* suggestion by a candidate. Furthermore, DISCLOSE would go into effect without giving the FEC any time to offer the public guidelines to comply with these byzantine regulations.

SEC. 104. TREATMENT OF POLITICAL PARTY COMMUNICATIONS MADE ON BEHALF OF CANDIDATES.

Because DISCLOSE ensures that even more political speech can be investigated for coordination, the bill makes the standard for *proving* coordination extremely difficult between candidates and their party committees while leaving in place a far easier standard for proving coordination between candidates and outside groups.

⁵ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*).

DISCLOSE leaves the existing standard for proving coordination in place for all organizations but political party committees—though the bill expands dramatically the kinds of speech that can be investigated. That is, the FEC will investigate whether the communication was made “in cooperation, consultation, or concert with, or at the request or suggestion of” a candidate, an authorized committee or a political party. This vague standard offers little guidance, and the mere allegation that such conduct happened is sufficient to open a matter with the FEC.

However, the bill then says that party-to-candidate coordination will not occur unless the candidate “directs or controls” the content of the ad. This standard is narrower and thus more lenient to political parties, though the bill never defines the terms, and gives the FEC no realistic opportunity to do before the 2010 elections.

This double standard has no basis in constitutional law and would have the effect of emboldening party committees to run advertising free of the restraints of coordination. At the same time, it creates a fear of speaking at all among the outside organizations the Supreme Court just said, in *Citizens United*, have a First Amendment right to run independent political ads.

If the intent of this provision is to make it easier for party committee lawyers to file coordination complaints against outside organizations, knowing the standard to a retaliatory complaint is much harder to prove, it is not a purpose the courts will approve. If it is an attempt to put the party committees on an equal footing with outside organizations it is the wrong way to do so.

While CCP believes the party committees lose out under the current campaign finance regime, this is because the McCain-Feingold restrictions on party committees have not (yet) been struck down by the courts while other provisions have been held unconstitutional. Congress should not wait for the courts to relieve the party committees; it should remove those McCain-Feingold restrictions now, and allow the party committees to compete with outside organizations for political support. Many of the organizations freed to engage in politics by the *Citizens United* opinion would rather work with the nation’s political party committees if current law permitted it.

Rather than create a double standard for proving coordination, Congress should strike the party coordinated limits⁶ altogether. There is no reason to believe that a party committee corrupts its own candidates. Indeed, it is difficult for a reviewing court to see why Congress would keep this restriction in place, thus conceding that a party committee can somehow corrupt its candidates, while making it harder to prove coordination for party committees than for outside organizations.

SEC 105: RESTRICTIONS ON INTERNET COMMUNICATIONS TREATED AS PUBLIC COMMUNICATIONS

DISCLOSE codifies an exemption for Internet communications, declaring that they will not be regulated as general public political advertising unless placed for a fee on another person’s Web site. The text of

⁶ 2 U.S.C. § 441a(d).

the “covered communication” definition applies only to “public communications” so we presume this amendment is to exclude from treatment as a coordinated communication most Internet activity. Again, without clarifying regulations, our interpretation, while reasonable, is open to argument.

TITLE II—PROMOTING EFFECTIVE DISCLOSURE OF CAMPAIGN-RELATED ACTIVITY

Subtitle A—Treatment of Independent Expenditures and Electioneering Communications Made by All Persons

SEC. 201. INDEPENDENT EXPENDITURES.

DISCLOSE defines independent expenditures subject to reporting as including any speech that is “the functional equivalent of express advocacy.”

By including “the functional equivalent of express advocacy,” DISCLOSE would regulate more “expenditures” (political advertising) than the Supreme Court allowed in *Buckley v. Valeo*,⁷ and even more advertising than the Court would allow in a 2007 case, *FEC v. Wisconsin Right to Life, Inc.*⁸

In *Buckley*, the Supreme Court interpreted the definition of “expenditure” under the Act to be limited to “express advocacy,” defined as speech using explicit words of support or opposition such as “vote for,” “support,” “defeat” and the like. This narrow definition, the Court ruled, was necessary to avoid questions of unconstitutional vagueness.

Twenty-six years later, in *McConnell v. Federal Election Commission* the Court ruled that Congress was not limited to regulating “express advocacy,” but could regulate other campaign speech that was “the functional equivalent of express advocacy.”⁹ However, in that case, the Court had before it a particular definition of covered speech: “electioneering communications,” clearly defined as certain broadcast ads run within 60 days of a general election or 30 days of a primary that mention a candidate. That shifted the constitutional inquiry from one of vagueness to one of overbreadth, and the Court ultimately held that the new statute was not overly broad.

However, the Court trimmed back that holding in *FEC v. Wisconsin Right to Life, Inc.* The Court ruled that in order for speech to be constitutionally limited, it had to meet both the definition of an electioneering communication (i.e., not be overly vague) *and* it had to be “susceptible of no reasonable interpretation other than a call to vote for or against a particular candidate” (i.e., it could not be overly broad).¹⁰

⁷ *Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976).

⁸ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*).

⁹ *McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁰ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*).

WRTL II did not do away with the requirement that the statute not be vague, and it did not hold that “the functional equivalent of express advocacy” was a term that sufficiently defined speech that could be regulated. Rather, it used the phrase merely to describe another very clearly defined term—“electioneering communications”—and explain why that type of speech could be regulated in the same way as “express advocacy.” However, the term, “the functional equivalent of express advocacy” is not, on its own, a clearly defined limit that avoids vagueness problems.

DISCLOSE would attempt to address this vagueness issue by suggesting that the “functional equivalent of express advocacy” can be defined by reference to “whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on the candidate’s character, qualifications, or fitness for office.” Such language, however, is not helpful. While the *WRTL II* Court found that the specific ads in question were not the functional equivalent of express advocacy because they lacked any of these indicia, it did not suggest that some general inquiry into these factors could, alone, make the speech subject to regulation.

Quite the contrary, the Court noted that, “this test is only triggered if the speech meets the bright line requirements of BCRA §203 in the first place.”¹¹ The criteria that DISCLOSE would use to regulate independent expenditures is remarkable similar to the FEC’s regulation at 11 C.F.R. 100.22(b), which has repeatedly been held to be unconstitutionally vague by federal courts, and is no longer enforced.¹²

SEC. 202. ELECTIONEERING COMMUNICATIONS.

DISCLOSE would dramatically expand the amount of political speech to be regulated by changing the definition of “electioneering communication.” Under BCRA, the definition of “electioneering communications” was limited to broadcast ads run 30 days before a primary or 60 days before a general election. DISCLOSE would significantly expand this limited window to cover ads mentioning a candidate from any time starting 120 days before the general election.

When the Supreme Court upheld the electioneering communications provisions of BCRA, it did so on the basis of several studies and record evidence produced by the government and intervenors claiming that most ads mentioning a candidate close to an election were in reality “election ads” rather than “issue ads.” The Supreme Court pruned that finding in its *WRTL II* opinion, saying that Congress could not regulate all ads that fell within those temporal windows¹³.

Congress has established no record for the proposition that ads run 120 days – four months! -- before the general election are not “true issue ads.” This broad reach would also affect the numbers of ads that

¹¹ *Id.* at 474, fn. 7

¹² See *Maine Right to Life Committee v. FEC*, 98 F. 3d 1 (1st Cir. 1996); *FEC v. Christian Action Network*, 110 F. 3d 1049 (4th Cir. 1997); *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d (S.D.N.Y. 1998); *Iowa Right to Life v Williams*, 187 F. #d 963 (8th Cir. 1999)(striking down identical state regulation); and *Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000). These rulings were in no way disturbed by *McConnell* and, if anything, given new force by *Citizens United*.

¹³ See *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

could be investigated for “coordination,” as existing law counts “electioneering communications” among the ads the FEC may investigate.

Citizens United held that Congress could not prohibit corporate expenditures in elections. In DISCLOSE, Congress would respond by prohibiting large numbers of companies and nonprofits from not only paying for direct candidate ads, but also from paying for many issue ads that were allowed before *Citizens United*. The Supreme Court, however, has routinely struck down statutes that attempt to do indirectly what the government is prohibited from doing directly. DISCLOSE’s new definition of “electioneering communication” almost certainly meets that criterion.

Subtitle B—Expanded Requirements for Corporations and Other Organizations

SEC. 211. ADDITIONAL INFORMATION REQUIRED TO BE INCLUDED IN REPORTS ON DISBURSEMENTS BY COVERED ORGANIZATIONS.

SEC. 212. RULES REGARDING USE OF GENERAL TREASURY FUNDS BY COVERED ORGANIZATIONS FOR CAMPAIGN-RELATED ACTIVITY.

SEC. 213. OPTIONAL USE OF SEPARATE ACCOUNT BY COVERED ORGANIZATIONS FOR CAMPAIGN-RELATED ACTIVITY.

DISCLOSE would impose substantial new disclosure burdens that are unnecessary because **current** disclosure requirements are sufficient to inform the public about who is speaking in elections. The bill would also significantly intrude on the relationship between organizations and donors and would require each to be skilled at reading the mind of the other in order to determine intent. This would prove unworkable and cause endless investigations into private communications between donors and grassroots groups, chilling political speech.

Most of the “disclosure” provisions of DISCLOSE simply duplicate reporting and disclosure provisions that already exist in the law.

Section 434(c) already requires that groups, individuals, businesses, and unions report independent expenditures greater than \$250. This includes the name of the spender, the date on which spending occurred, the amount spent, the candidate who benefits from the independent expenditure, the purpose of the expenditure, and a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate whom it promotes.

More importantly, Section 434(c) also requires that contributions in excess of \$200 for the purpose of funding independent expenditures be disclosed in reports to the Federal Election Commission.

Similarly, Section 434(f) requires spenders to report “electioneering communications” when they exceed \$1,000. The identity of the spender, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the spender, the principal place of

business of the spender (if not an individual), each amount exceeding \$200 that is disbursed, the person to whom the expenditure was made and the election to which the communication pertains all must be disclosed. Contributions made by individuals that exceed \$1,000 are also disclosed, accompanied by the individual's name and address.

Furthermore, current law requires any Section 527 organization that is not registered with the FEC as a "political committee" to disclose its donors to the IRS. And any organization that receives contributions or makes expenditures in excess of \$1000, and has as its major purpose influencing elections, must register with the Federal Election Commission as a "political committee," subjecting **all** of its activities to public disclosure and regulation.

Proponents of DISCLOSE have failed to explain why these existing disclosure provisions are insufficient to meet any state interest.

Meanwhile, DISCLOSE infringes on the rights of private association recognized by the Supreme Court in *NAACP v. Alabama*¹⁴ by threatening to disclose all donors to a group regardless of whether the donor intended to have their donation used for independent expenditures. Any donors who do not know in advance that they must specifically request that their donations not be used for political purposes will be disclosed under the requirements of this bill. It doesn't take the brass-knuckled brilliance of Rahm Emanuel to understand that such information would give political parties and the White House powerful information to bully advocacy groups into supporting their endangered candidates and agenda.

DISCLOSE would impose similarly draconian disclosure burdens on donations made from one organization to another, including those not made with the intent of supporting independent expenditures. This provision is made worse by requirements that the donation be disclosed within 24 hours by the donor and deemed an independent expenditure *itself*, even if the donor or the recipient has no knowledge of how the donation will be used.

This provision applies not only if the donation was solicited to make independent expenditures, or if independent expenditures were discussed during the solicitation, but also if the donor or recipient has made independent expenditures of \$50,000 or more during the preceding two years. This standard presumes that organizations with a record of making expenditures will remain under that cloud regardless of the facts surrounding the specific transaction, while other groups without such a record are untouched by these requirements.

Even more unfair, the DISCLOSE Act as passed by the House then *exempts* many transfers that would occur among affiliates of membership organizations, such as labor unions. The amendments first exempt from immediate disclosure transfers among affiliated groups if under \$50,000 in a year. Second, it exempts from being "deemed" an independent expenditure transfers among affiliates if the money is made up from funds paid by individuals in amounts of under \$10,000. Third, if the transfer is made up of money collected as dues, fees, or assessments from individuals, the donating affiliate isn't even

¹⁴ *NAACP v. Alabama*, 357 U.S. 449 (1958),

considered to be the source of the money – the individual dues- or fee-payers are. Thus transfers between affiliated labor unions of funds from dues will typically not be disclosed in this new regime.

Tax-exempt charities, known as 501(c)(3) organizations, are excluded from the definition of “covered organization.” And, such groups can retain their exemption yet still engage in a modest amount of the same activities social welfare 501(c)(4) organizations do (such as lobbying and issue advocacy). It remains to be seen whether this modest gap in the law becomes yet another loophole.

Moreover, the House Bill exempts from these new requirements certain entities that are tax exempt under Section 501(c)(4) of the Internal Revenue Code, had at least 500,000 dues paying individuals during the previous year, have members in each state (including DC and Puerto Rico) take no more than 15% of its revenue from corporations or labor unions, and do not use corporate or union funding for campaign-related activity. This exemption, initially negotiated by the National Rifle Association, is without any evident legislative purpose. It shields large entrenched special interest groups, and instead imposes new and complicated disclosure requirements on small, more focused or regionally based groups. If the purpose is to prevent “fly-by-night” shell organizations from evading the new disclosure requirements, that goal is already met under existing law. Current law treats an entity formed to influence elections that raises or spends \$1,000 as a political committee (or PAC). If Congress is concerned about entities that do not qualify as PACs moving and spending funds, there is no rationale for the criteria set forth here, which show no means-ends fit between that goal and these requirements.

Alternatively, the bill allows organizations to establish a “campaign-related activity account,” which is essentially a form of PAC that it can use for campaign spending. An organization using such an account would only have to disclose donors who give specifically for political purposes, rather than all members, although any transfer of funds from the organization’s general treasury to the “campaign-related activity account” triggers the more complex disclosure regime outlined above. Moreover, if a group ever uses such a fund, it can only use that fund, and not its general treasury funds, for political spending, in *perpetuity*. Recall that the fundamental holding of *Citizens United* was that corporations have a right to make political expenditures from their general treasury funds, without using a separate fund, with its added expense and its reliance on funds donated solely for that purpose.

The end result of these provisions is to force corporations, including many tax-exempt organizations, to choose between two options that have each been found unconstitutional by the Supreme Court. These groups can either disclose all members and donors, a requirement that the Court ruled was unconstitutional in *NAACP v. Alabama*, or can restrict political spending to a “Campaign-Related Activity Account,” a type of PAC and thus an impediment the Supreme Court held in *Citizens United* could not be constitutionally imposed on a group making independent expenditures.

The rules would be especially burdensome to small businesses and grassroots organizations, which typically lack the resources for complicated compliance. Recall that the law exempts certain large, nationally prominent 501(c)(4) groups. Thus, the end effect of all this “enhanced disclosure” would be to ensure that only large corporations, unions, and large advocacy groups can make political

expenditures free from these unreasonable burdens—the exact opposite of what the sponsors claim to desire.

Also noteworthy is that the legislation would require disclosure not for the act of engaging in political speech, but the act of preparing to potentially enable another to engage in political speech. This turns yet another legitimate purpose of disclosure on its head: Instead of notifying the public of who is speaking, DISCLOSE would simply reveal to political opponents those who may, at some point in the future, wish to speak. There is no legitimate governmental interest in composing a list of targets.

These new intrusions combine to overturn long-standing assumptions of disclosure and campaign finance, namely, that it is the act of speech that triggers disclosure and not simply the consideration and preparation for speaking, and that donors to organizations that do not affirmatively intend their donations to be used to further campaign activity are presumed to not to face disclosure. The DISCLOSE Act instead would assume that the donations to groups should not be private, and it is up to donors to take the necessary steps to avoid disclosure.

SEC. 214. MODIFICATION OF RULES RELATING TO DISCLAIMER STATEMENTS REQUIRED FOR CERTAIN COMMUNICATIONS.

The DISCLOSE Act would impose disclaimer requirements on broadcast ads that would be comical were it not for the extreme burden on free speech imposed. The requirements could effectively cut in half the amount an organization can say in a 30-second commercial, demonstrating the extreme hostility to independent speech embodied in the bill. Meanwhile, again, the large, nationally prominent 501(c)(4) groups described above would be exempt.

First, there is no additional informational interest satisfied by requiring a group's leader to make a "Stand By Your Ad" (SBYA) statement. Under current law, all independent expenditures appearing on television or radio already must contain a verbal disclaimer of who is paying for the ad, stating "_____ is responsible for the content of this advertising," as well as written disclaimers, including notice that the ad was not authorized by a candidate or party. Thus, the public knows who is paying for the ad without the SBYA statement. Now, this existing requirement will only be applicable to political committees.

DISCLOSE would require two new disclaimers for independent expenditures and electioneering communications--one from the head of the organization and another from funders of the ad or organization. The disclaimer from the organization requires the person to state his or her name, title, and town and state of residence, the company or organization name, and then to add that he or she approves of the message. An individual identified as the "significant funder" must also personally state name, town and state of residence, the fact that he or she is helping to pay for the ad, and approves the message. If the "significant funder" is an organization, then the CEO must state his or her name, title, the name and location of the organization, that the organization is helping to pay for the ad, and that it approves the message. If a number of funders provided \$10,000 or more to the entity making the

communication, the top five funders (if television) or top 2 (if radio) must be listed with the information required above.

No valid purpose is served by imposing these additional disclaimers. The statements simply restate that the organization and largest donor do, in fact, approve the ad that they are running and helping to fund. Voters understand that the “Chamber of Commerce” represents business; the National Restaurant Association represents restaurant owners, and the Sierra Club represents environmentalists. The effort here—as in *NAACP v. Alabama*—is simply to harass dissenting voices and discourage speech by piling disclaimer upon disclaimer that provide no meaningful information to the public.

More importantly, the additional disclaimers would dramatically reduce the time available for political speech by the speaker. The Center for Competitive Politics found that making these two disclaimers would consume nine to 16 seconds of every 30-second ad, substantially reducing the amount of substantive political speech. Unfortunately, that appears to be exactly the purpose of this provision.

The Committee on House Administration amended the DISCLOSE Act to allow for “hardship” exemptions from the expanded disclaimer requirement, but this exemption is wholly insufficient. The bill specifies that the FEC can establish regulations to determine when hardship exemptions should be granted, but the effective date of the bill does not allow reasonable time for the FEC to draft such regulations. Because there is not time for the FEC to craft regulations, speakers in the 2010 elections will be chilled because they cannot know whether the FEC might retroactively grant hardship exemptions, or where the lines will be drawn as to how much time of a specific ad constitutes a hardship.

Beyond the fact that it provides little or no useful information to voters, the SBYA requirement may be unconstitutional. The Supreme Court did not reach the question or decide the constitutionality of the SBYA provisions for candidate ads in *McConnell*, but those disclaimers are not mandatory—they are only required if a candidate wishes to preserve a statutory right to receive the “lowest unit charge” (LUC) on ad purchases. This incentive would not be available to organizations engaging in independent expenditures. Unlike the candidate provision, which is voluntary and offers an incentive for compliance, the SBYA provision of DISCLOSE is a mandate. It is doubtful the courts would approve of the government effectively hijacking as much as 50 percent of a speaker’s message for no legitimate purpose. The First Amendment generally prohibits the government from dictating the content of a speaker’s message.¹⁵

The “significant funder” and “top five funder” statement requirements also imposes a burden on one type of speaker, nonprofit advocacy groups not entitled to the exemption, that is not shared by those entities that don’t take donations from “funders” -- giving nonprofits less time to engage in political speech compared to others. This would also make DISCLOSE more vulnerable to challenge in court.

¹⁵ See *Hurley v. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Because “significant funder” and “top five funder” are defined in such a way that a donor who gave to a general fund with no intent of funding political activity could be identified as the “significant funder,” the requirement that such a person provide a disclaimer statement indicating that he approves the message raises serious issues of compelled speech.¹⁶ Additionally, “significant funder” and “top five funder” are determined by looking back over the reportable donations from the past year. Long after a donor’s funds have been given (and spent, whether on campaign-related activity or not), they may still be required to appear in advertisements stating that they helped to pay for the ad and that they “approve it.” Ironically, this disclaimer requirement will mandate that spenders provide *inaccurate* information.

The “top two funder” disclosure requirement forced on radio ads would impose a significant additional burden, because it must be made audibly while the “top five” requirement for television ads feature the statement in writing on the screen. Announcing the two largest donors as defined by the DISCLOSE Act and the amount they contributed consumes additional time beyond the already significant disclaimer requirements imposed, reducing even further the time available for political speech.

Furthermore, the Act does not prescribe a specific format or script for adding the “top two funder” list to a radio ad. Either the information will be presented completely devoid of context (i.e. at the end of the ad it would simply state “...John Smith, \$125,000, Jane Jones, \$110,000”) or organizations running ads would have no guidance on what language must accompany the names and donation amounts in order to comply with this provision. The first option would lead to confusion among the listener, especially if it is included in an ad that includes other people’s names and dollar amounts as part of the communication (“Fat cat Wall Streeters like Scrooge McDuck earned a \$1 million bonus while Congressman Smith stood by...”). The second option would create a significant chill on speakers who may not know how to comply or avoid complaints and investigations based on undefined requirements. Moreover, by using “radio” and “television” as key criteria, the bill creates confusion over how to treat cable and satellite broadcasting, Internet radio and video, and likely a host of new technologies that do not fit the conventional categories of “radio” and “television.”

An amendment adding “Stand by Your Phone Call” disclaimer requirements for automated phone calls would present additional problems. Again, the disclaimers would consume time on a phone call that would otherwise be devoted to political speech, either driving up costs for speakers or reducing the quantity of speech.

In addition, the statute defines these calls in part as one “in which a person is not available to speak with the person answering the call, and the call instead plays a recorded message,” without defining the term “available.” For example, does the option at the end of a recorded message to be connected with a representative by pressing the “#” key qualify as one that has an “available” person to speak with the person answering the call?

¹⁶ See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

The other part of the automated phone call definition is a call “which promotes, supports, attacks, or opposes a candidate,” which is vague as well. For example, do automated calls conducting a poll that raises issues that may be unflattering to a candidate qualify as attacking or opposing the candidate?

More generally, by requiring that the largest single largest donor to a group be identified in an independent expenditure or electioneering communication, DISCLOSE would undermine the entire thrust of the communication. These messages express a particular group’s opinion of a particular candidate. By definition, the general treasury funds of an organization represent funds from *all* members and donors, and a communication funded by the general treasury of the group represents the collective voice of the organization as determined by the leadership, not just the largest members or donors. When established groups like NARAL Pro-Choice America, Natural Resources Defense Council, the National Rifle Association, or the Chamber of Commerce speak using general treasury funds, everybody understands exactly who is speaking--the citizens who have come together to create these groups. Disclosure of the type envisioned in the DISCLOSE Act would actually undermine the speech of these groups by suggesting that it is not, in fact, the general membership of the group that is speaking, but instead the largest donor to the group.

Subtitle C—Reporting Requirements for Registered Lobbyists

SEC. 221. REQUIRING REGISTERED LOBBYISTS TO REPORT INFORMATION ON INDEPENDENT EXPENDITURES AND ELECTIONEERING COMMUNICATIONS.

This requirement would simply add a duplicative and unnecessary burden on those citizen groups that chose to exercise their First Amendment rights not only through making independent expenditures and electioneering communications, but also by petitioning their government.

Under current law, any individual or organization making an independent expenditure must file a report with the FEC that includes the name of the spender, the date on which spending occurred, the amount spent, the candidate who benefits from the independent expenditure, and other information.¹⁷ Electioneering communications require similar disclosure statements to be filed.¹⁸ As noted before (see commentary on DISCLOSE Sec. 201 and 202) DISCLOSE broadens the definition of independent expenditures and electioneering communications to capture expression that should not be considered campaign related, so the objected made before to those new definitions also apply here.

Requiring this information to be duplicated in reports filed in accordance with the Lobbying Disclosure Act of 1995 simply creates additional paperwork and potential for error, a burden that will be primarily felt by smaller organizations that lack significant compliance resources. This is just one more aspect of the DISCLOSE Act that tilts in favor of large, well-established, and sophisticated political actors at the expense of smaller groups.

¹⁷ 2 U.S.C. § 434(c)

¹⁸ 2 U.S.C. § 434(f)

TITLE III—DISCLOSURE BY COVERED ORGANIZATIONS OF INFORMATION ON CAMPAIGN RELATED ACTIVITY

SEC. 301. REQUIRING DISCLOSURE BY COVERED ORGANIZATIONS OF INFORMATION ON CAMPAIGN RELATED ACTIVITY.

DISCLOSE would require organizations that produce regular reports to provide their shareholders, members, and donors with not just an aggregate amount spent on political activity, but a list of every independent expenditure or electioneering communication. This entry must include the date and amount of each expenditure, the name of the candidate and office sought, whether the expenditure was for or against the candidate, and the source of funds. Transfers deemed expenditures would be included here as well.

First, this information would be largely redundant of what is already available to shareholders, members and donors on the independent expenditure reports required by 2 U.S.C. § 434 (c). There is really evidence that the public finds this existing information useful.

Second, the sheer size of the information would be a problem in many situations. For example, a non-profit organization that solicits contributions by direct mail to fund an independent expenditure campaign could have pages of donor information that would need to be included. As this information would merely go back to the same members and donors who had supported the organization, it serves no meaningful purpose.

The bill would also specify that those entities with an Internet site provide a direct link from the home page to a page on the FEC's website containing independent expenditure and electioneering disbursement reports for the organization. Candidates, of course, are not required to provide a similar link on their websites to FEC reports, making this another provision that would provide disproportionate restrictions and mandates on independent groups.

Finally, the large, nationally prominent organizations that enjoy exemptions from the other provisions of DISCLOSE are exempted here as well.

TITLE IV—TELEVISION MEDIA RATES (Senate bill only)

SEC. 401. TELEVISION MEDIA RATES.

This provision would trigger low broadcast charges for political parties and candidates when independent groups air ads. This is a classic example of legislative self-dealing and entrenchment: a candidate or party could use reduced rate advertising to attack a group, but that group or industry would be required to pay the usual market rate if it sought to respond.

According to background information provided by the National Association of Broadcasters, in the 45-day period prior to a primary, or the 60-day period before a general election, Congress has mandated that broadcast stations provide political candidates a discounted rate for advertising time. Candidates are already entitled to this “lowest unit charge” (LUC), also known as “lowest unit rate” (LUR), during that time frame. This forced subsidy provides candidates the lowest advertising rate “of the station for the same class and amount of time for the same period.” No matter the frequency of a candidate’s advertising, she receives this cut-rate price, while other groups must pay full-freight. In practice, this amounts to about a 30 percent discount for preemptible ads. Candidates generally must pay the market-rate for non-preemptible ads.

Since this provision was included in the Federal Election Campaign Act of 1971 (FECA), it has been amended, most recently by McCain-Feingold. DISCLOSE would radically alter this provision to provide an even greater windfall in discounted advertising. For the first time, LUC would be expanded to include political parties. It would greatly reduce the time period to calculate the advertising rate discount by up to 180 days—effectively forcing broadcast stations to offer rates from August, when ratings traditionally are at their lowest annual point. Television stations would be forced to provide priority placement for candidate and party ads by making them non-preemptible. Furthermore, stations would have to open their books to random audits, on pain of loss of their broadcast license, to ensure compliance with this heavy-handed mandate. This provision would obliterate the bottom line at thousands of small television stations because it would force these outlets to accept ads at as much as a 90 percent discount during the fall campaign season. As local stations are coming off the worst advertising recession in the last 50 years, this proposal would penalize small commercial advertisers in local communities as well as state and local candidates, who would not be entitled to this deep discount.

TITLE IV: OTHER PROVISIONS (TITLE V IN SENATE VERSION)

SEC. 401 JUDICIAL REVIEW.

The judicial review rules proposed in the Act would fail to follow the precedent set in McCain-Feingold, which allowed for expedited review and shortened the time between the filing of a suit alleging that enforcement of the act was in violation of constitutional rights and a final judgment on the issue by the courts.

Even with the expedited schedule for challenges to BCRA, many groups were forced to wait years before having their right to speak vindicated by the courts. Citizens United, of course, wished to speak during the early part of 2008, but did not get a final ruling until January of 2010, well after the opportunity to speak had expired.

The implications are clear—legal challenges to this Act would be handled slowly, forcing those who wish to speak in the 2010, and potentially the 2012 elections, to remain silent while they await the judgment of the courts.

In addition, the Act would provide that any action seeking declaratory or injunctive relief based on constitutional claims can only be filed in the U.S. District Court for the District of Columbia. This provision imposes a significant burden on businesses, unions, and organizations who do not have either an attorney based in the District or the resources and connections to rapidly retain such an attorney. It also could effectively require such entities to not use the services of their local or long-standing counsel. Local lawyers often have built relationships with clients, understand their issues, and may even supply legal services on a *pro bono* basis.

The jurisdictional requirement thus advantages those entities with significant resources and a substantial inside-the-Beltway presence, at the expense of smaller businesses and groups across the country.

The lack of expedited appeal, combined with jurisdictional requirements that make it difficult for smaller groups to challenge the Act, seem tailor-made for those seeking partisan advantage and facing potentially difficult election cycles in 2010 and 2012.

SEC. 402/502. SEVERABILITY.

Allowing elements of the bill to survive should other provisions be struck down by the courts as unconstitutional is often included in legislation. Because the DISCLOSE Act amounts to a direct challenge and effort to substantially limit a recent Supreme Court decision, and several of the provisions in the legislation are in conflict with existing precedent, it is likely that several parts of the DISCLOSE Act would be struck down in court if Congress passes the legislation.

Because of this, Members considering supporting this bill because it has some elements that they approve of while others they oppose should be extremely cautious, as the elements they support may very well be the ones struck down while other, more objectionable elements remain.

This is what, in fact, has happened in many regards with the McCain-Feingold. The two most significant provisions of McCain-Feingold were restrictions on electioneering communications and the ban on “soft money.” The electioneering communications restrictions have been all but completely eliminated by the rulings in *WRTL II* and *Citizens United*. In addition, the so-called “Millionaires Amendment” of McCain-Feingold was struck down in *Davis v. Federal Election Commission*. It is entirely possible that within a few short years, the only remaining significant provision of McCain-Feingold that will not have been struck down or drastically limited will be increased contribution limits (and indexing these limits for inflation).

SEC. 403/503. EFFECTIVE DATE.

Among the many significant problems with the DISCLOSE Act, an effective date of 30 days after enactment would pose significant problems. Providing only 30 days between enactment and the effective date would prevent the FEC from drafting the regulations necessary to implement the law. These regulations would be necessary in order to give guidance to candidates, parties, citizens, and organizations wishing to exercise their First Amendment political rights.

Without the guidance of regulations, speakers would be chilled, because they would be unable to determine the scope of legal activity in which they might engage. Such a burden on First Amendment rights is intolerable and unlikely to be upheld in court.

Conclusion

The DISCLOSE Act would impose new prohibitions on political speech, place substantial burdens on speech that is not directly prohibited, and create significant uncertainty and confusion among those who wish to speak—detering the political voices of Americans who cannot be sure whether their political speech would lead to investigation and possibly even fines and imprisonment.

The effect of these proposed burdens on political speech as well as uncertainty by potential speakers appears to be by design. Sen. Chuck Schumer (D-N.Y.), the lead author of the Senate version of the DISCLOSE Act, summed up the intent of the bill at its introduction, saying that “the deterrent effect should not be underestimated.” At the House mark-up for DISCLOSE, a key sponsor, Rep. Michael Capuano (D-Mass.), said, “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.” Any possible proper legislative purpose the bill might have reflected was abandoned when, to attract sufficient votes, the authors negotiated with the NRA a massive loophole applicable only to a narrow classification of large, nationally prominent advocacy groups.

Congress should reject this effort to directly, indirectly, and through uncertainty prohibit, limit, and chill the political speech of Americans who chose to speak in association with their fellow citizens, whether that association is an incorporated business, a labor union, a trade or professional association, or a nonprofit advocacy group. The DISCLOSE Act is a politically-driven effort to silence and dissuade certain voices in the political process that some find troubling or damaging. As such, the bill represents nothing less than a violation of the fundamental tenets of the First Amendment, and a rejection of the constitutional framework that citizens, rather than Congress, are the best judges and interpreters of the varied political voices in our Republic.