May 19, 2010

Committee on House Administration
1309 Longworth Building
Washington, DC 20515

Chairman Robert Brady, Ranking Member Dan Lungren and other Members of Congress:

We are former members of the Federal Election Commission. Collectively, we have nearly 75 years of service on the Commission, and at least one of us was on the Commission at all times from the Commission's inception in April of 1975 through July of 2008. We write to express our views on the so-called "DISCLOSE Act" ("Democracy is Strengthened by Casting Light on Speech in Elections"), recently introduced as H.R. 5175 and S. 3295. In summary, the DISCLOSE Act is unnecessary, largely duplicative of existing requirements, burdensome, and raises serious constitutional issues that will make enforcement difficult.

DISCLOSE has been variously described as an effort to "fix," "address," or "reduce the impact" of the Supreme Court's decision in *Citizens United v. Federal Election Commission*. We filed an *amicus* brief with the Supreme Court in *Citizens United* on the side of the petitioners. In that brief, which was cited twice in the majority opinion of the Court, we noted that over the years the law has become exceedingly complex, to the point where the FEC now has differing regulations for 33 types of contributions and speech and 71 different types of speakers. We noted that regardless of the abstract merit of the various arguments for and against limits on political contributions and spending, this very complexity raises serious concerns about whether the law can be enforced consistent with the First Amendment. We noted that the law's regulatory burdens often fall hardest not on large scale players in the political world, but on spontaneous grassroots movements; upstart, low-budget campaigns; and unwitting volunteers.

DISCLOSE exacerbates many of those same problems. Its disclosure provisions are unnecessary—duplicating information that is readily available to the public or providing information of extremely low informational value at a significant cost in terms of complexity and lack of clarity, especially for grassroots political speech. Its other provisions also significantly increase the complexity of the law for little or no gain. Additionally, we are concerned that DISCLOSE threatens to upend Congress's longstanding tradition of treating corporations and unions in parallel fashion, with similar burdens on each. One of the most significant issues in campaign finance, which the FEC must constantly fight to overcome, is the perception by many that the law is merely a partisan weapon wielded by the dominant political interests. Failure to maintain that even-handed approach towards unions and corporations threatens public confidence in the integrity of the electoral system. Each of these objections is intertwined with serious concerns about the effects of DISCLOSE on constitutionally-protected speech, effects which often cannot be appreciated without understanding the practical realities of enforcement.

The debate, as we have witnessed it since the introduction of DISCLOSE in late April, has revolved around whether "disclosure" is beneficial. We believe that that is not the issue: we

are part of the broad, bipartisan consensus that believes that disclosure requirements can benefit the political process. Rather, the question is whether the particular disclosure proposals included in DISCLOSE, as well as other provisions of the bill, are beneficial. We conclude, based on experience in enforcing federal campaign finance laws, that they are not. Unfortunately, the debate has gone on with relatively little attention paid to the actual, current state of the law or to the particular proposals included in the DISCLOSE legislation. We submit these comments in the hope that they will be useful to Congress in considering the actual impact of the law and how it would be enforced.

1) DISCLOSE Abandons Congress's Longstanding Policy of Equal Treatment for Corporations and Unions.

The first federal law specifically restricting corporate political participation was the Tillman Act of 1907, which prohibited some corporations from contributing directly to federal campaigns. Some version of the Tillman Act has been included in federal law ever since. At the time the Tillman Act was passed, the union movement was in its infancy and unions were not important political players. However, with the passage of the National Labor Relations Act in 1935 and the ensuing, rapid growth of unionism, Congress quickly concluded that the reasons for regulating and limiting corporate participation in politics also applied to unions. In 1943, Congress for the first time applied the ban on contributions to Federal campaigns to unions. In 1947, Congress extended the ban to include not only contributions, but also independent expenditures, and again included both corporations and unions in the expanded ban. Every federal campaign finance law since then —the Federal Election Campaign Act of 1971, the FECA Amendments of 1974, 1976, and 1979, and the Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold" or "Shays-Meehan") —maintained this even handed approach to unions and corporations. It is this prohibition on corporate and union independent expenditures (but not contributions) that was overturned by the Supreme Court in *Citizens United.* While *Citizens United* was itself a corporation, there is no dispute that the decision also freed unions to engage in independent expenditures (i.e. independent political speech and advocacy).

The even-handed approach to corporations and unions cuts across all areas of the law. Both types of entities may operate and pay operating expenses for a Political Action Committee ("PAC"), and such PACs are subject to identical contribution and donation limits and reporting. Corporate and union independent expenditures and electioneering communications are subject to identical disclaimer requirements. Under existing law governing reporting of independent expenditures, corporations and unions will now face identical reporting requirements if and when they make independent expenditures. Laws regarding PAC solicitations and operations are, to the extent possible given the natures of corporations and unions, based on mirror images of one another. DISCLOSE abandons this traditional approach in two very important areas.

First, DISCLOSE would prohibit any corporation with a federal contract of $50,000 or more from making independent expenditures or electioneering communications. No such prohibition is applied to unions. The $50,000 trigger is extremely low, and would literally exclude thousands of corporations from making expenditures that are, under *Citizens United,* constitutionally-protected political speech at the core of the First Amendment.

If the concern is the possibility of corruption, or its appearance, this exemption of unions makes little sense. Opinion polls have usually shown less public confidence in union leaders than in business leaders. Although in recent years more Americans have identified "big business" than "big labor" as a "threat" to the country in Gallup polls, from 1965 through 1985, "big labor" was consistently rated as a "threat" by more Americans than was "big business."[1] Polling in many states continues to show that spending in elections by unions is viewed with greater suspicion than is spending by corporations. A recent Pew survey found that 61 percent of Americans thought that organized labor was "too powerful."[2]

In particular, public employee unions negotiate directly with the government for contracts many, many times the value of corporate contracts that DISCLOSE would use to trigger a ban on corporate independent expenditures. Additionally, private sector unions have a substantial interest in steering government contracts to unionized firms, or in having government pass laws that require or give an advantage to unionized firms in the bidding process. Similarly, DISCLOSE bans expenditures by corporations that have received TARP money, but allows unions at those companies to continue to make expenditures—even when the unions have an equitable stake in the company, and even though the ability to steer TARP funds to a unionized company or industry can be a tremendous advantage for the union.

If the reason for this ban on government contractors is the possibility of corruption and the appearance of corruption when a contractor who receives government funding is also making political expenditures, then it is obvious that such corruption or appearance of corruption must exist with any other recipient of federal funds. Yet many advocacy organizations receive government grants and earmarks (as opposed to "contracts") but are not covered by the provision at all.[3] In fact, most of these grants and earmarks have a value to the recipient far in excess of the value of a $50,000 contract to a for-profit corporation, which would typically earn the contractor a profit of five to eight percent, or $2,500 to $4,000. Yet recipients of grants and earmarks will be free to make unlimited political expenditures. Thus DISCLOSE gives the appearance of being less concerned with preventing corruption or its appearance than with disadvantaging a certain category of speaker: for-profit corporations.

DISCLOSE also includes a new ban on expenditures by American corporations that have more than 20 percent foreign ownership. While we discuss the merits of this proposed ban below, here we note only that no parallel provision exists for unions. Many unions, such as the Service Employees International Union and the International Brotherhood of Electrical Workers, have substantial foreign membership. Many, such as IBEW, also have foreign nationals as directors.

DISCLOSE states in its legislative findings that, "[t]he public's confidence in government is undermined when corporations that make significant expenditures during Federal election campaigns later receive government funds," but offers no reason why that same logic

[1] Herbert Asher, American Labor Unions in the Electoral Arena, p. 17-18 (2001)

[2] *See* Pew Charitable Trust, *Independents Take Center Stage in Obama Era,* Part III, May 21, 2009 (available at http://people-press.org/report/?pageid=1518)

[3] Grants have not been considered "government contracts" for FECA purposes. *See* Federal Election Commission Advisory Opinion 1993-12 (Mississippi Band of Choctaw Indians, Sep. 17, 1993).

would not apply to unions.[4] Similarly, the bill would have Congress declare that it "has an interest in minimizing foreign intervention, and the perception of foreign intervention, in American elections," yet offers no reason why large scale "intervention" by international unions is less threatening than spending by corporations.

Our experience as administrators of federal campaign finance law is that a large percentage of Americans are suspicious of the law as little more than a tool for partisan interests. During periods of Republican congressional majorities, the suspicion grows among Democrats; during periods of Democratic majorities, among Republicans. Any perception of legitimacy of the law in this area is based on the assumption that the law is an even-handed attempt to control the allegedly improper or unsettling influence of money in politics. This is the reason, for example, that the FEC itself was designed so that a majority of Commission seats cannot be held by members of one political party. DISCLOSE's abandonment of the historic parallel treatment of unions and corporations is likely to increase public skepticism about government and the democratic legitimacy of laws governing money in politics. Little explanation has been offered as to why DISCLOSE abandons this long-standing, even-handed approach to the law.

2) Many of DISCLOSE'S Provisions Replicate Current Law, and So Play no Meaningful Role in Combating Corruption or its Appearance, Burden Constitutionally Protected Speech, and Increase the Complexity of the Law for Little or No Gain.

Although DISCLOSE is presented as necessary to close "loopholes" in the law opened by *Citizens United*, in fact many of its provisions are merely duplicative of current provisions of law. They thus add a new layer of complexity and burden constitutionally-protected political speech for little or no gain.

a) Provisions Governing U.S. Subsidiaries of Foreign Companies
(Title I)

Existing law already prohibits foreign nationals from participating in U.S. elections. In fact, this prohibition is significantly broader than the ban on corporate expenditures struck down in *Citizens United*, as it applies not only to federal elections but to state and local elections as well (2 U.S.C. § 441e). The definition of "foreign national" includes any "partnership, association, corporation, organization, or other combination of persons" that is either organized or incorporated outside the United States or that has its principal place of business outside the United States. Thus, contrary to various statements made by the President and others, foreign corporations are already prohibited from spending general treasury funds in U.S. elections.

More precisely then, DISCLOSE seeks to prohibit expenditures not by "foreign corporations," which are already prohibited even after *Citizens United*, but rather by U.S. incorporated and headquartered companies with some element of foreign ownership. However, even here, current FEC regulations already require that if a U.S. subsidiary of a foreign

[4] We are not sure how Congress has been able to make this finding, given that prior to *Citizens United* corporate expenditures in elections were banned since 1947.

corporation engages in spending, either from its general treasury funds[5] or through a state or federal PAC, all decisions about political spending must be made by American citizens, with *no* foreign nationals eligible to participate in the decision making, either directly or indirectly [11 C.F.R. 110.20 (i)]. Finally, the FEC has long required U.S. subsidiaries of foreign companies to make expenditures from U.S. earnings— that is, it is already illegal for a foreign corporation or owner to simply place cash into a U.S. subsidiary and then have the subsidiary spend that money in U.S. elections.[6] It may be that Congress would wish to codify these FEC regulations in the statute, but no one should be deceived into thinking that *Citizens United* must be "fixed" to prevent foreign corporations from influencing U.S. elections.

What the sponsors of DISCLOSE are attempting is to prohibit American owners of American companies with as little as 20 percent foreign ownership from exercising their First Amendment rights otherwise guaranteed by *Citizens United.* There are a number of problems with this approach.

DISCLOSE bans any company with 20 percent or more foreign ownership, or on which a majority of the board consists of foreign nationals, or in which any one foreign national plays a role in the corporation's decisions on political spending, from spending money in elections. (The last of these requirements, of course, is merely duplicative of current FEC regulations.) The bill would require the CEO of every company that seeks to make expenditures to file a certificate of compliance, under the threat of criminal penalties, prior to making political expenditures.

Under one possible interpretation, this means that any time aggregate foreign ownership tops 20 percent, the corporation would be prohibited from making independent expenditures. This reading of the bill would yield an enforcement nightmare. First, it provides no guidance as to how or when the 20 percent ownership threshold would be determined. As a practical matter, a publicly traded company can pass back and forth over the 20 percent ownership threshold several times in a day, let alone in between the time a decision is made to speak out, the air time is purchased, orders made and the material produced, and the speech is publicly disseminated. Furthermore, it is often all but impossible to immediately determine, at the end of any given day, the total foreign ownership of a corporation. Thus for companies near the 20 percent threshold, the provision would either be meaningless (there will be a fixed date for the certification: the company could well have over twenty percent ownership at the time the speech airs, but not when the decision to speak is made, or vice versa), or there would essentially be an outright prohibition, as a CEO would face jail time for making the necessary certification only to have circumstances change in the interim. It will often not even be possible for the CEO of a publicly traded company to know the percentage of foreign ownership at the time the certification is signed and the disbursement is authorized.

An alternative interpretation of the bill, however, is that the restriction would apply only if a single foreign national held a 20 percent or greater stake in the company. If the goal is to limit foreign influence, this would lead to some odd results, indeed. For example, a U.S. corporation in which a German company holds a 25 percent stake would be prohibited from

[5] Prior to *Citizens United,* 28 states permitted corporations to make independent expenditures in state and local political races; in 26 states, these expenditures were unlimited.

[6] Federal Election Commission MUR 4909, J&M International, Inc. (2001), and 11 C.F.R. 110.6

making expenditures, even if, in turn, the minority stake German company is 50 percent owned by a U.S. corporation. Meanwhile, a U.S. corporation 100 percent owned by a consortium of 6 Japanese companies, each with an equal stake, would be free to make independent expenditures, as no one foreign national would control more than 20 percent. In short, in a modern global economy, the 20 percent standard is functionally meaningless for the purpose for which the bill seeks to put it to use.

Adding to the enforcement woes, the bill prohibits spending by a corporation in which the foreign ownership is "indirect" as well as direct. Imagine, for example, that a U.S. corporation purchases a 25 percent share in another U.S. corporation, but that the purchaser is itself 25 percent owned by a foreign national. Are both companies prohibited from making expenditures, or only the purchasing company? These types of cases will never be easy to enforce, but some coherent definition might be worked out in the rulemaking process. DISCLOSE, however, provides no opportunity for the rulemaking process to work, taking effect thirty days after passage.

Beyond these issues, the provision raises serious constitutional concerns. First, it shuts off the speech of majority U.S. shareholders in a corporation. 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 minority ownership in the corporation. Competing telecommunications companies, however, would be able to spend money to influence elections. It is doubtful that Congress could justify such a distinction as necessary to prevent "corruption or its appearance," the constitutional touchstone for limitations on campaign spending and contributions.[7]

Second, discrimination on the basis of national origin is prohibited by the U.S. Constitution. Yet DISCLOSE not only limits the speech rights of persons on the basis of their national origin, it limits the speech rights of American citizens merely because they *associate* with foreign nationals. This is a remarkable assertion of government power that has little to do with preventing corruption of the political process, and raises constitutional concerns of equal protection as well as freedom of speech and association.

b) New Reporting Provisions
(Title II)

The bill imposes substantial new and unnecessary disclosure burdens. Disclosure requirements already present in the law are sufficient to inform the public about who is speaking about candidates in elections. The bill also significantly intrudes on the relationship between

[7] It is uncontested that foreign corporations have a right to lobby the U.S. government, and that U.S. subsidiaries of foreign corporations have long had the right—as with U.S. corporations—to organize PACs for the purpose of political spending and contributions (subject, of course, to the regulatory restriction that foreign nationals play no role in decision making of the PAC). Thus, Congress is on very thin ice in asserting that the new regulation is necessary to prevent some type of unique foreign corruption of the U.S. government. Indeed, 100 percent foreign owned U.S. subsidiaries have been able to make expenditures in state races in 28 states even before *Citizens United,* with no evidence of foreign corruption of the political process in those states.

organizations and donors, and requires each to be skilled at reading the mind of the other in order to determine intent.

2 U.S.C. § 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, a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate whom it promotes, and the identity of any person or entity contributing more than $200 for the expenditure.

Similarly, 2 U.S.C. § 434(f) requires spenders to report "electioneering communications" when they exceed $1,000. This mandates that 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 be disclosed. Contributions made by individuals that exceed $1,000 are disclosed, accompanied by the individual's name and address.

Furthermore, current law requires any 527 organization that is not registered with the FEC as a "political committee" to disclose all of its donors to the IRS. And any organization that receives contributions or makes expenditures in excess of $1,000, 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 or public interest in knowing the sources of funds. Instead, DISCLOSE would create new reporting obligations on non-profit advocacy groups in addition to those already in existing law. In particular, the bill would require disclosure of personal information for any person who donates in excess of $1,000 to the organization, for whatever purpose, unless the donor specifically certifies in writing at the time the donation is made (later is too late) that the funds may not be used for "campaign-related activity," *and* receives in return a written certification from the organization's Chief Financial Officer, under the threat of criminal sanctions, that the funds will not be so used. Note here, among other things, that the ability of the donor to shield his name is contingent on the compliance by the recipient organization, something over which the donor has no control.

In this, DISCLOSE infringes on the First Amendment rights of private association recognized by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), by threatening to disclose all donors to a group regardless of whether the donors intended to have their donation used for independent expenditures or for the group's other purposes. Any donors who do not know in advance that they must specifically and in writing request that their donations not be used for political purposes, and who give at least $1,000 or $10,000 (depending on the type of communication), will be disclosed under the requirements of this bill. Such information gives political parties and officeholders powerful information to bully advocacy groups and intimidate individuals into supporting their endangered candidates and agenda.

The bill imposes 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 as an independent expenditure, even if the donor or the recipient has no knowledge of whether the donation will be used to support independent expenditures. Here, rather than increase public knowledge, the added disclosure may merely serve to confuse the public —organizations will be required to report within 24 hours that their contributions were used for independent expenditures, when in fact they may never be so 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 recipient has simply made any independent expenditure in the current or previous election cycle. After *Citizens United,* however, donations from one organization to another are <u>always</u> available for use in "campaign-related activity." Thus, every single gift, loan, contribution, or other disbursement of funds made by a corporation, union, or nonprofit qualifies as money available for "campaign-related activity," except for gifts to 501(c)(3) organizations, which must refrain from political expenditures to retain their tax exempt status. This means nearly every donation above a certain threshold made to a non-501(c)(3) nonprofit is presumed to require disclosure if the group has recently engaged in any independent expenditures.

For example, if a state-based trade association made a single $15,000 independent expenditure in one congressional race in 2008, every donation above the threshold to the group in the 2010 election cycle would have to be disclosed, even if the group made no political expenditures at all in that cycle. Beyond the intrusion on privacy, the public using the disclosure database would be led to believe that more was spent on independent expenditures than actually was. Far from enlightening the public, this provision will merely feed the public misinformation.

In short, DISCLOSE presumes that every donation above a modest threshold must be disclosed, with only those donors who are aware of the regulations able to shield themselves from disclosure if they explicitly designate their contribution for non-campaign activities. Under *NAACP v. Alabama* and *Buckley v. Valeo,* however, it is the government that has the obligation to demonstrate that it is necessary to disclose the names of members of an organization.

Alternatively, the bill offers organizations the opportunity to establish a "campaign-related activity account," which is essentially a new form of corporate political action committee that can accept unlimited contributions to be used solely for independent expenditures. Any organization using such an account would only have to disclose donors who give to that account, 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. Of course, 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 non-profit corporations to choose between two options that have each been found unconstitutional by the Supreme Court. It can either disclose all of its donors to the government, a requirement that the Court ruled was unconstitutional in *NAACP v. Alabama*, or it must restrict its political spending to a "campaign-related activity account," contrary to the explicit holding in *Citizens United* that a corporation (or union) may pay for independent expenditures from its general treasury funds.

DISCLOSE then imposes yet another burden, requiring that the CEO or highest official of any organization making expenditures certify that he has reviewed and approved every statement and report filed by the organization, again under the threat of criminal penalties. In other words, the corporate CEO may not delegate duties for political spending to the Vice President for Government Relations, to a contract firm specializing in political reporting, or to anyone else. He or she is required by law to certify that he has personally reviewed each statement and FEC filing, and that it contains no error of material fact, and that none of the funds used came from donors who had specified otherwise.

None of this provides any added information to the public that is necessary to prevent corruption or its appearance, nor is this information necessary for the FEC to properly enforce the law. Rather, it appears designed to coerce corporate spenders into silence by threatening their CEOs with jail time for reporting errors, and forcing them to devote their time to matters normally delegated to subordinates in accordance with sound corporate management. This is government intimidation in its worst form.

The rules are especially burdensome to small businesses and grassroots organizations, which typically lack the resources for complicated compliance. Thus, the end effect of all this "enhanced disclosure" will be to ensure that only large corporations, unions, and advocacy groups can make political expenditures—the exact opposite of what the sponsors of DISCLOSE claim to desire. As we noted in our brief in *Citizens United*, the vast majority of corporations cannot afford to operate and organize PACs. Thus these regulatory burdens will favor large entities at the expense of grassroots politics.

c) Disclosure to Shareholders, Contributors, and Members
(Title III, Sec. 301)

DISCLOSE requires organizations that produce regular reports to inform their shareholders, members, and donors of political spending, and to include in those reports not just an aggregate amount spent on political activity but a line-item of every expenditure. 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.

First, this information is redundant of what is already available to shareholders, members and donors on the independent expenditure reports required by 2 U.S.C. § 434 (c), which are typically available through the FEC's website within a day or two of filing. There is really no evidence that the public finds this information useful, and even less that reporting it twice will make a difference.

Second, the sheer size of the information will 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 hundreds or even thousands of pages of donor information that would need to be included in printed material offered by the spending organization. As this information would merely go back to the same members and donors who gave to support the organization, it serves no real purpose.

The bill also specifies that those entities with an Internet site provide a direct link from the home page to a listing of independent expenditures and donors, and must also include an aggregate break down by political party of amounts in support of and opposition to candidates of each party, the amounts in support of or opposition to incumbents, and the amounts contributed to open seat elections. How information on the entity's support or opposition to incumbents is supposed to create better informed voters is not exactly clear.

The bill further specifies that the information must be in a format that is "machine-readable, searchable, sortable, and downloadable." This would impose substantial web design and capability requirements that are likely to reduce the willingness of some organizations to even have a website due to the increased cost and maintenance burden. The groups perhaps most likely simply to avoid having a website will be 527 organizations that spring up during a particular campaign and that do not have another ongoing, non-political mission: groups such as Americans Coming Together or Freedom's Watch. This would ironically lead to less disclosure by those very groups most often denounced as "shadowy." Meanwhile, small businesses, grassroots organizations, and union locals that maintain only basic websites would be discouraged from making expenditures because doing so would require them to spend thousands of dollars to upgrade their websites and purchase necessary reporting software to report information that is already readily available to the public from the Federal Election Commission. Larger companies and unions, however would be able to meet the burden. Thus this provision of the bill also benefits large, institutional players over small businesses and small grassroots groups.

d) Extension and Expansion of "Stand By Your Ad" Requirements to Independent Speech

(Title II, Sec. 214)

The DISCLOSE Act imposes new "Stand By Your Ad" (SBYA) disclaimer requirements on broadcast ads that again merely duplicate information already available to voters, while placing substantial new burdens on political speech. The requirements effectively cut in half the amount of political speech an organization can engage in with a 30-second commercial, demonstrating again that DISCLOSE is an attempt to do indirectly what the Supreme Court has said Congress can not do directly – silence corporations.

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 as to whether the ad was authorized by a candidate or party. Thus, the public has ample information as to who is behind political broadcast ads.

Nevertheless, DISCLOSE would impose two new SBYA disclaimers on independent expenditures—one from the head of the organization or corporation and another from the "significant funder" of the ad or organization. The disclaimer from the organization requires the person to state his name, title, and the company or organization name *twice*, and then to add that he or she approves of the message.

An individual identified as the "significant funder" must also personally state his name, the fact that he is helping to pay for the ad, and that he approves the message. If the "significant funder" is an organization, then the CEO must state her name, title, the name of the organization *three* times, that the organization is helping to pay for the ad, and that she approves the message.[8]

No valid purpose is served by imposing these additional disclaimers, as additional statements simply verify that the organization does, in fact, approve the ad that it is already identified as paying for, and for which both the spender and significant donor are already identified in FEC reports. Voters understand that an ad paid for by the "Chamber of Commerce" represents business; that the trial lawyers association represents trial lawyers; and that Microsoft represents Microsoft. The effort here appears to be simply to harass speakers and discourage speech by piling disclaimer upon disclaimer, while providing no new meaningful information to the public.

In fact, the SBYA requirements dramatically reduce the time available for political speech by the speaker. Depending on the length of the CEO's name and the organization's name, making these three disclaimers could easily consume half 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 bill provides a vague exemption only for the written "top five" funder disclaimer, yet this carve out depends on an FEC rulemaking deemed unnecessary by another provision in the legislation.

Beyond the fact that it provides little or no useful information to voters, the "Stand By Your Ad" requirement may well be unconstitutional. The Supreme Court upheld SBYA provisions for candidate ads in *McConnell v. FEC*, but those disclaimers are not mandatory—they are only required if the candidate wishes to preserve a statutory right to receive the "Lowest Unit Charge" on ad purchases. This incentive would not be available to organizations engaging in independent expenditures. Thus, unlike the candidate provision previously upheld by the Court, which is voluntary and offers an incentive for compliance, the SBYA provision of DISCLOSE relies on involuntary mandates. It is doubtful the courts will approve of the government effectively hijacking as much as 50 percent of the speaker's message.[9] The First

[8] Note that the definition of "significant funder" is determined by the size of other donations to the effort. Thus, a person often will not know if he or she will become a "significant funder" until others have contributed.

[9] Additionally, the "significant funder" statement requirement imposes a burden on one type of speaker—nonprofit advocacy groups—that is not shared by businesses (who have no "contributors"), candidates, political parties, individuals, and unions, giving them less time to engage in political speech compared to others. This also makes DISCLOSE more vulnerable to challenge in court.

Amendment generally prohibits the government from dictating the content of a speaker's message.[10]

3) <u>DISCLOSE's Definitions of Independent Expenditures and Electioneering Communications are Unenforceable</u>
(Title II, Sections 201 and 202)

While adding layer upon layer of duplicative "disclosure" and "disclaimer" requirements on speakers, DISCLOSE also attempts to vastly expand the scope of regulated speech. It does this in two primary ways.

First, DISCLOSE defines independent expenditures subject to reporting as including any speech that is "the functional equivalent of express advocacy." In *Buckley v. Valeo*, the Supreme Court interpreted the definition of "expenditure" under the Act to be limited to "express advocacy," speech using explicit words of election or defeat such as "vote for," "support," "defeat" and the like. This narrowing definition, the Court ruled, was necessary to avoid questions of unconstitutional vagueness. Twenty-seven years later, in *McConnell v. FEC* the Supreme 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." 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, and mentioning a candidate —a standard that all sides admitted was not vague. 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.

In *Wisconsin Right to Life v. FEC ("WRTL")*, 551 U.S. 449 (2007), however, the Court clarified 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). Neither *McConnell* nor *WRTL* did away with the requirement that the statute not be vague, nor did either hold that "the functional equivalent of express advocacy" was itself a term that sufficiently defined speech that could be regulated. Rather, they used the phrase merely to explain why another very clearly defined type of speech—"electioneering communications"—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 term that avoids vagueness problems.

The bill attempts to address this problem 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* Court, evaluating for overbreadth, found that the specific ads in question lacked any of these indicia, 551 U.S. 470, it did not suggest that some general inquiry into these factors could, alone, make the speech subject to regulation. Quite the contrary, the

[10] *Hurley v. Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995)

Court noted that, "this test is only triggered if the speech meets the bright line requirements of BCRA §203 [defining "electioneering communications"] in the first place. *Id*. at 474, fn. 7.

The criteria that DISCLOSE would use to regulate independent expenditures are remarkably 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, though still on the books, no longer enforced. *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. 3d 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 not overturned by *McConnell* and were given new force by *Citizens United.*

Leaving aside the merits of these First Amendment concerns, the criteria proposed by DISCLOSE are simply unworkable from an enforcement standpoint. If Congress passes DISCLOSE, it would place the FEC in the same untenable position it was in during much of the 1990s, when it was forced to make decisions regarding core First Amendment rights based on a "totality of the circumstances" emerging from vague criteria with no clear guidelines. Decisions to find violations on such grounds would routinely be subject to legal attack (as they were in the 1990s), while decisions not to find violations would be trumpeted as "proof" that the Commission is "dysfunctional." And all of the decisions would be open to charges of partisan bias. This is not a recipe to build public confidence in government or the electoral system, and not a position any of us would wish on our successors at the FEC.

The second way in which DISCLOSE expands regulation is by changing the definition of "electioneering communication." Under BCRA, the definition of "electioneering communications" was limited to broadcast ads run in the 30 days before a primary or in the 60 days before a general election. The Senate version of DISCLOSE dramatically expands this limited window to cover ads mentioning a candidate from any time starting 90 days before the primary all the way through the general election. Thus, for example, in 2010 the definition would have covered all independent ads in Indiana from the beginning of February through Election Day in November, a period of nine months, during much of which Congress will be in session. For Illinois, whose 2010 primary was held on February 2, it would cover an entire year, beginning in November 2009. Coupled with the extremely low threshold for triggering a ban on corporate (but not union) government contractors, this provision effectively prohibits thousands of small corporations from funding issue ads during long periods of time—time when Congress is in session and debating or voting on public policy issues.

When the Supreme Court upheld the electioneering communications provisions of BCRA in *McConnell*, it did so on the basis of several studies and record evidence produced by the government and interveners that allegedly demonstrated that most ads mentioning a candidate during the short time close to an election were in reality "election ads" rather than "issue ads." There is no congressional record established for the proposition that ads run after the primary but more than five months before the general election, as could have been the case in Illinois, Indiana, and Ohio in 2010, are not "true issue ads."

Citizens United held that Congress could not prohibit corporate expenditures in elections. DISCLOSE responds by effectively prohibiting large numbers of corporations not only from paying for direct candidate ads, but from paying for many issue ads that they were allowed to fund even prior to *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.

4) <u>While Duplicating the Functions of Existing Law, DISCLOSE Adds Substantially to the Complexity of the Law</u>

As we noted in our amicus brief in *Citizens United*, the FEC currently has regulations in place governing speech by 71 different types of speakers governing 33 distinct types of speech. This type of complexity means that the law is now far beyond the point at which its distinctions can be easily grasped even by the best paid professionals, let alone laymen. Many of these distinctions flow directly from the complex statutes governing federal campaign finance, which now exceed 150 pages. Others are dictated by Court decisions based on the Constitution. Still others are the result of FEC regulatory choices that are an attempt to faithfully enforce the statute in a manner conforming to the First Amendment.

We believe that when a statute governing something as basic as political activity is beyond the understanding of the average citizen seeking to engage in political activity, it tends to increase, rather than decrease, skepticism of government. The complexity of the law leads to large numbers of technical violations (indeed, most violations reported to the FEC are technical reporting violations or revolve around unwitting errors by inexperienced or volunteer campaign staff), and these technical violations become fodder for "scandal reporting" journalists. The end result is to create the appearance of corruption where none actually exists.[11]

Further, the complexity and uncertainty around the law creates opportunities for partisans, both in and outside of the campaigns themselves, to file complaints alleging "serious" violations of the law on the flimsiest of legal grounds. Because most journalists—like most other citizens—will be unable to evaluate the true seriousness of the charges, this is an effective tactic to create the appearance of scandal where none really exists. And because investigating and analyzing a complaint takes time, complaints can rarely be resolved before an election.[12] Thus filing complaints and creating the appearance of corruption where it otherwise would not exist is a common side effect of the complexity of the FECA.

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[11] *See* Jeffrey Milyo, "Do State Campaign Finance Reforms Increase Trust and Confidence in Government," Paper presented at Annual Meeting of the Public Choice Society, Monterrey, California, March 2010; Stephen Ansolabehere, Erik Snowberg and James Snyder. "Unrepresentative Information: The Case of Newspaper Reporting on Campaign Finance," 69 *Public Opinion Quarterly* 213-231 (2005); David Primo, "Campaign Contributions, the Appearance of Corruption, and Trust in Government," in *Inside the Campaign Finance Battle: Court Testimony on the New Reforms* (Corrado, Mann, and Potter, eds. 2003).

[12] Under the statute a minimum of 60 days is required before the FEC may file an enforcement suit, assuming that the FEC literally had zero turnaround time needed to process and read complaints and responses, to do research and investigation, to prepare its case, or even for required mail service of documents.

Additionally, this complexity tends to ensnare the most authentic grassroots political activity in its grasp. The all-too-true aphorism about the Bipartisan Campaign Reform Act was that the initials "BCRA" really stood for "Before Campaigning, Retain Attorney." But average Americans—say the owner of a small corporation, or leaders of a local grassroots organization—should not have to retain an attorney before engaging in political activity and political speech.

The inability to understand the law breeds cynicism in many Americans. The FECA, as a result of statutory language and judicial decisions, already includes separate definitions for "Federal Election Activity," activity "for the purpose of influencing a Federal election," "generic campaign activity," "public communications," "electioneering communications," speech "expressly advocating the election or defeat of a candidate," and many more. The law establishes a bewildering array of types of speakers and accounts, with differing rules for groups organized under different sections of the tax code, among many other distinctions. There are "contributions," "disbursements," "expenditures," "independent expenditures" and "Levin Funds," among others, each with their own definitions.

To this, DISCLOSE would add several more fine distinctions, new categories of speech and regulated entities, and new forms and reporting requirements. The bill would create newly defined terms of "campaign-related activity" (in addition, of course, to the many categories named above); "applicable election period;" "covered communication," "communications referring to candidates," "communications made on behalf of candidates," "covered organization," "public independent expenditure" (separate from "independent expenditure"), "unrestricted donor payment," "significant funder," and more. It creates a new type of PAC, a "campaign-related activity account," that a corporation might maintain in addition to its traditional PAC now allowed under FECA.[13]

In numerous ways DISCLOSE is merely complex and burdensome more than it is enlightening. For example, as noted above, under current law, any organization paying for an ad must state that it is doing so in the ad, and must file reports with the FEC that include the names of donors who have contributed for the ad. DISCLOSE now adds to that a requirement that not only the CEO of the organization make a "Stand By Your Ad" statement, but that a "significant funder" make a SBYA statement. However, the statement required by the "significant funder" will vary depending on the organizational form of the significant funder.

Similarly, one of the few beneficial features of DISCLOSE is that it loosens the restraints on "coordination" between candidates and political parties, a reform endorsed by scholars at such divergent organizations as the Brookings Institute, the Campaign Finance Institute, and the Center for Competitive Politics. Yet rather than do so in a straightforward fashion, by raising the cap on party coordinated expenditures or eliminating it altogether, DISCLOSE approaches the issue by creating two new definitions of "coordination," one to be used for parties, one to be used for everybody else. This is typical of the approach taken by DISCLOSE throughout.

The merits of restrictions on campaign contributions and expenditures can be, and in fact have been, debated ad nauseam. But whatever the merits of particular reforms, at some point the

[13] We suspect that for the casual user, seeing two different corporate accounts, a "political action committee" and a "campaign-related activity account" will make harder to make sense of published disclosure data.

sheer weight and complexity of regulation must raise concerns under a First Amendment that reads, "Congress shall make no law…" Excessive regulation, and excessively complex regulation, chills political speech, not only by threatening citizens with jail time (as DISCLOSE does) or fines for ordinary political activity, but also by raising the costs of speaking in both time and money. A system that seems incomprehensible to all but a handful of experts in the field leaves citizens feeling distanced from their democracy, not more confident in it. The perception that campaign results are determined by who can hire the best lawyers, consultants and accountants is no more likely to inspire trust or confidence than the perception that money determines results. Our present system, unfortunately, has given us both, and DISCLOSE would take us further down that path.

Conclusion

While recognizing the policy and constitutional controversies that form the backdrop to campaign finance reform, we have tried to avoid being drawn into those discussions, except to note that the constitutional arguments are serious and will greatly affect enforcement of the statute. What we wish to convey, however, is that DISCLOSE is unnecessary, largely replicating existing law in its essentials, and providing little information of value to the electorate. This it does, we believe, at significant practical costs: it makes the law more complex, more incomprehensible to ordinary voters, more open to subjective enforcement, and more open to manipulation by political partisans seeking to file charges for partisan gain.

Additionally, it would put the FEC repeatedly in the position of having to challenge Supreme Court precedent, and of having its regulations and decisions subject to constant judicial challenge. The Act's abandonment of the historical matching treatment of unions and corporations will, in itself, cause a substantial portion of the public to doubt the law's fairness and impartiality. For all of these reasons, it is unlikely that democracy will be strengthened by DISCLOSE. Instead, it is a law likely to breed more cynicism and contempt for the government. As the legislative debate proceeds, we are hopeful that Congress will conclude that the DISCLOSE Act is misguided and should not be enacted.

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