LEGISLATIVE BRIEF

July 2012

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Congress shall make no law...

S. 3369 – The DISCLOSE Act

Senator Sheldon Whitehouse (D-RI) has introduced S. 3369, a modified version of the DISCLOSE Act (Democracy is Strengthened by Casting Light on Spending in Elections), formerly introduced as S. 2219.

The new bill makes two significant changes to the previous version of the DISCLOSE Act by removing an onerous and time consuming "Stand-by-Your-Ad" provision and also changing the legislation's effective date from July 1, 2012 to January 1, 2013. The legislation is still heavily flawed and severely infringes on First Amendment rights to free speech.

While the stated goal of S. 3369 is to increase disclosure of spending to elect or defeat candidates, this radical proposal will chill speech by forcing nonprofits to drastically alter their fundraising and public advocacy efforts, creating a vague new rule defining express advocacy, and introducing new and unnecessary disclosure requirements and definitions.

Not surprisingly, several provisions in this iteration of the DISCLOSE Act present significant First Amendment problems, which will generate litigation with a good chance of success.

The following is an analysis of four primary shortcomings of this speech-stifling legislation.

Key Flaw #1: The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.

Current law defines a so-called "electioneering communication" as a broadcast ad that mentions the name of a candidate within 60 days prior to a general election or 30 days before a primary. The bill would significantly expand that definition. The new time period would be from January 1 to Election Day of each election year for congressional candidates.

Therefore, if the bill became law the following ad would be considered an electioneering communication subject to burdensome restrictions, if aired on January 2 of an even numbered year in the district of a hypothetical congressman, John Doe, who is running for reelection and facing a September primary:

[Pelosi]: Hi. I'm Nancy Pelosi, lifelong Democrat and former Speaker of the House.

[Gingrich]: And, I'm Newt Gingrich, lifelong Republican, and I used to be Speaker too.
[Pelosi]: We don't always see eye-to-eye, do we, Newt?
[Gingrich]: No, but we do agree that our country must take action to address climate change.
[Pelosi]: We need cleaner forms of energy, and we need them fast.
[Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.
On screen: Call Congressman John Doe and urge him to vote for HR 10000. 202-224-3121
Paid for by American Action for the Environment.

There is scant justification for forcing any additional disclosure on such an ad by this hypothetical group. Yet, S. 3369 would do just that.

American Action for the Environment (AAFE) would face several bad choices in funding such an ad. It might have to disclose donors to the public, as required by the bill, several of whom might work for utilities or coal industries. Those donors might have supported the group's clean water efforts in response to an appeal for funds on that specific basis, but had not thought to earmark their checks.

Under this bill, AAFE would report these donors to the Federal Election Commission (FEC), where they would be publicly listed, and may find it difficult to keep their jobs. Worse yet, a donor may not even agree with the ad, but could be listed as a major donor on the ad itself.

Under the Act, AAFE could set up a special bank account and deposit into it only funds from donors who want to support ads that might run in even-numbered years. But that would massively complicate their fundraising efforts, which are already difficult in this economy.

On this issue, the Supreme Court has previously ruled in *Citizens United v. FEC* that the existence of an alternative way of engaging in speech—in that case PACs—did not save a prohibition on the use of general-treasury funds to pay for political advertisements.

A near certain result of this new mandate would be that AAFE and other organizations would witness a dramatic increase in their fundraising costs, their donations would decline, or some combination of the two would occur. Alternatively, many groups would avoid lobbying ads during even numbered years, when many important bills become law.

And what of their donors? The Act's segregated funds provisions require donors to choose between their rights under *NAACP v. Alabama*, the seminal case that allows advocacy groups to shield their membership lists, and their rights under *Citizens United*. Under this law, they cannot exercise both by keeping membership payments and donations private while still contributing to a group's general fund.

Similarly, donors—many of whom are unfamiliar with campaign finance laws—would have to affirmatively request that their funds not be used on campaign activity in order to remain anonymous. Current law mandating disclosure only when funds are given to further independent expenditures or electioneering communications is sufficient to provide transparency. As written, current law also avoids the misleading possibility that contributors to a group, whether the NRA or the Sierra Club, who do not specifically earmark their contributions, may be associated with advertisements they had no part in developing, and with which they may disagree.

Key Flaw #2: The new definition of the "functional equivalent of express advocacy" is vague.

There is a new definition for express advocacy in the bill that we believe is unconstitutional. Despite claiming to be a "pure disclosure" proposal, it adds a new and indecipherable definition to a core element of campaign finance law. The bill would expand the standard for express advocacy where the law defines independent expenditures if an ad:

> Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office.

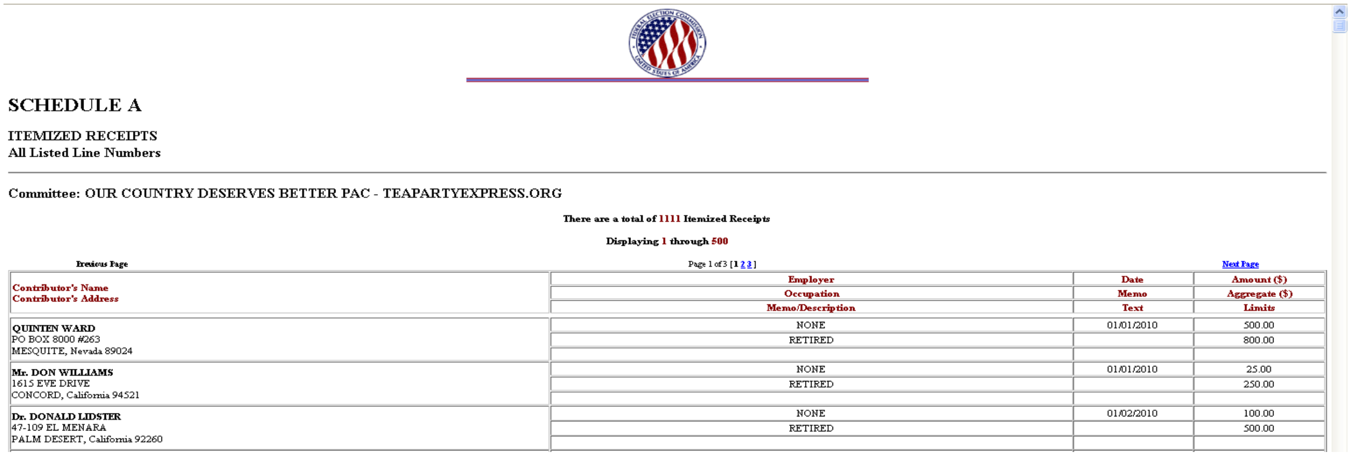
Similar definitions for regulating speech have repeatedly been struck down by federal courts as unconstitutionally vague. Doubtless, one could show 50 ad scripts to a randomly-selected group of U.S. Senators and Representatives, and its members would disagree as to which are issue advocacy and which are "the functional equivalent of express advocacy." If individuals who have gone through federal elections cannot agree, how can grassroots organizers, many of whom may be new to politics? How is a group to know, in advance, that it has not run afoul of this vague provision? Ultimately, this definition is nothing more than an invitation to burdensome and costly investigations and litigation by federal officials.

The provision is also harmful because the Federal Election Campaign Act uses "expenditures" to define which organizations become forced to register with the FEC as Political Action Committees. Were such a broad definition upheld by a court and actually applied, it would instantly convert large numbers of nonprofit organizations into PACs. This would include numerous organizations that never specifically advocated for the election or defeat of candidates for office.

Key Flaw #3: The Act is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.

2 U.S.C. 434(c) requires that groups report independent expenditures greater than $250.

Current law already provides for disclosure of independent expenditures. This includes the name of the group, individual, or other entity that is doing the spending, the date on which it 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 to whom it promotes. This existing regulation requires that the expenditure reporting follow the money—both who gives and who receives. For example, in the 2010 Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands of dollars on independent expenditures. However, their political action committee, called Our Country Deserves Better PAC, was the source of the funds. A simple search of the FEC website shows that both of these names are listed on the filing papers, along with the names of any person who donated money that furthered the production of the communication. An example is shown below:



SCHEDULE A

ITEMIZED RECEIPTS
All Listed Line Numbers

Committee: OUR COUNTRY DESERVES BETTER PAC - TEAPARTYEXPRESS.ORG

There are a total of 1111 Itemized Receipts

Displaying 1 through 500

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Contributor's Name / Contributor's Address	Employer / Occupation / Memo/Description	Date / Memo / Text	Amount ($) / Aggregate ($) / Limits
QUINTEN WARD PO BOX 8000 #263 MESQUITE, Nevada 89024	NONE RETIRED	01/01/2010	500.00 800.00
Mr. DON WILLIAMS 1615 EVE DRIVE CONCORD, California 94521	NONE RETIRED	01/01/2010	25.00 250.00
Dr. DONALD LIDSTER 47-109 EL MENARA PALM DESERT, California 92260	NONE RETIRED	01/02/2010	100.00 500.00

Reporting also follows where the money in independent spending goes. A separate tab on the FEC report shows the disbursements by the group—to whom each payment was made and for what purpose. Consider the example below:

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Email Newsletter Costs
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/06/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = $11027.73
Calendar YTD Per Election for Office Sought = $348671.17

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

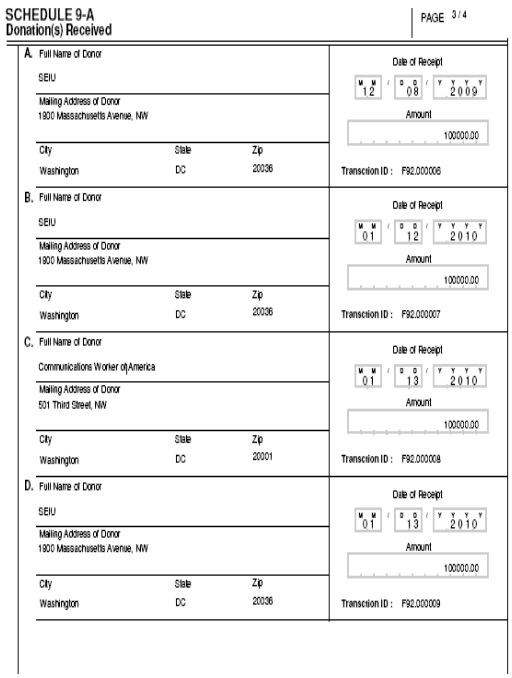
Purpose of Expenditure: Internet Newsletter Costs - Candidate Specific
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/09/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = $10500.00
Calendar YTD Per Election for Office Sought = $348671.17

2 U.S.C. 434(f) requires groups to report "electioneering communications" when they exceed $1,000.

Current law also requires reporting of "electioneering communications." This mandates the disclosure of the identity of the person making the disbursement, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the person making the disbursement, the principal place of business of the person making the disbursement (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. Contributions made by individuals that exceed $1,000 are disclosed and accompanied by the individual's name and address.

As with independent expenditures, the reporting of electioneering communications also tracks the money. Looking again at the Massachusetts Senate election in January 2010, a quick search of the FEC database shows that the ambiguous-sounding group "Citizens for Strength and Security" spent $265,876.96 for a communication on January 13, 2010. While the name of the group may not reveal much, the list of donors who funded the electioneering communication do; the eight donations listed came from two labor unions: the Service Employees International Union and Communications Workers of America. Such concerns that corporations like Exxon Mobil could set up "shadow groups" to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by "Citizens for Strength and Security" were.



SCHEDULE 9-A
Donation(s) Received

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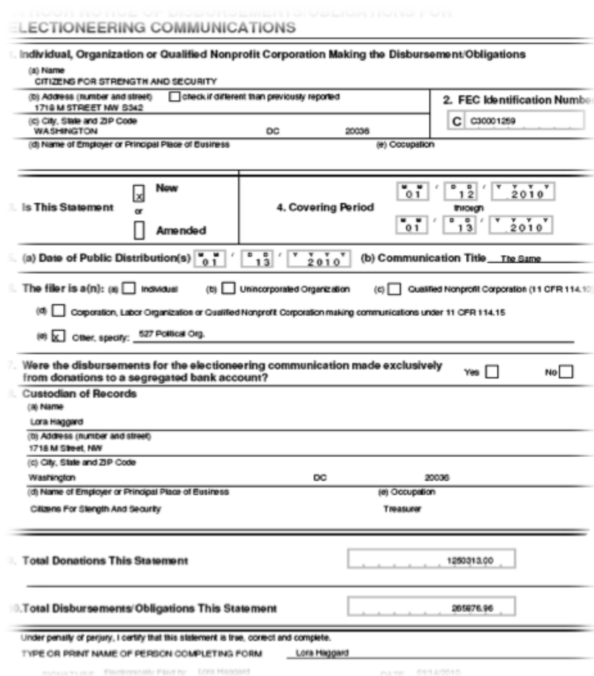
A. Full Name of Donor: SEIU
Mailing Address of Donor: 1800 Massachusetts Avenue, NW
City: Washington State: DC Zip: 20036
Date of Receipt: 12 / 08 / 2009
Amount: 100000.00
Transaction ID: F92.000006

B. Full Name of Donor: SEIU
Mailing Address of Donor: 1800 Massachusetts Avenue, NW
City: Washington State: DC Zip: 20036
Date of Receipt: 01 / 12 / 2010
Amount: 100000.00
Transaction ID: F92.000007

C. Full Name of Donor: Communications Worker of America
Mailing Address of Donor: 501 Third Street, NW
City: Washington State: DC Zip: 20001
Date of Receipt: 01 / 13 / 2010
Amount: 100000.00
Transaction ID: F92.000008

D. Full Name of Donor: SEIU
Mailing Address of Donor: 1800 Massachusetts Avenue, NW
City: Washington State: DC Zip: 20036
Date of Receipt: 01 / 13 / 2010
Amount: 100000.00
Transaction ID: F92.000009



ELECTIONEERING COMMUNICATIONS

Individual, Organization or Qualified Nonprofit Corporation Making the Disbursement/Obligations
(a) Name: CITIZENS FOR STRENGTH AND SECURITY
(b) Address (number and street): 1718 M STREET NW S342
(c) City, State and ZIP Code: WASHINGTON DC 20036
(d) Name of Employer or Principal Place of Business (e) Occupation
2. FEC Identification Number: C C00001259

Is This Statement: [x] New or [ ] Amended
4. Covering Period 01 / 12 / 2010 through 01 / 13 / 2010
(a) Date of Public Distribution(s) 01 / 13 / 2010 (b) Communication Title: The Same
The filer is a(n): (a) Individual (b) Unincorporated Organization (c) Qualified Nonprofit Corporation (11 CFR 114.10)
(d) Corporation, Labor Organization or Qualified Nonprofit Corporation making communications under 11 CFR 114.15
(e) [x] Other, specify: 527 Political Org.

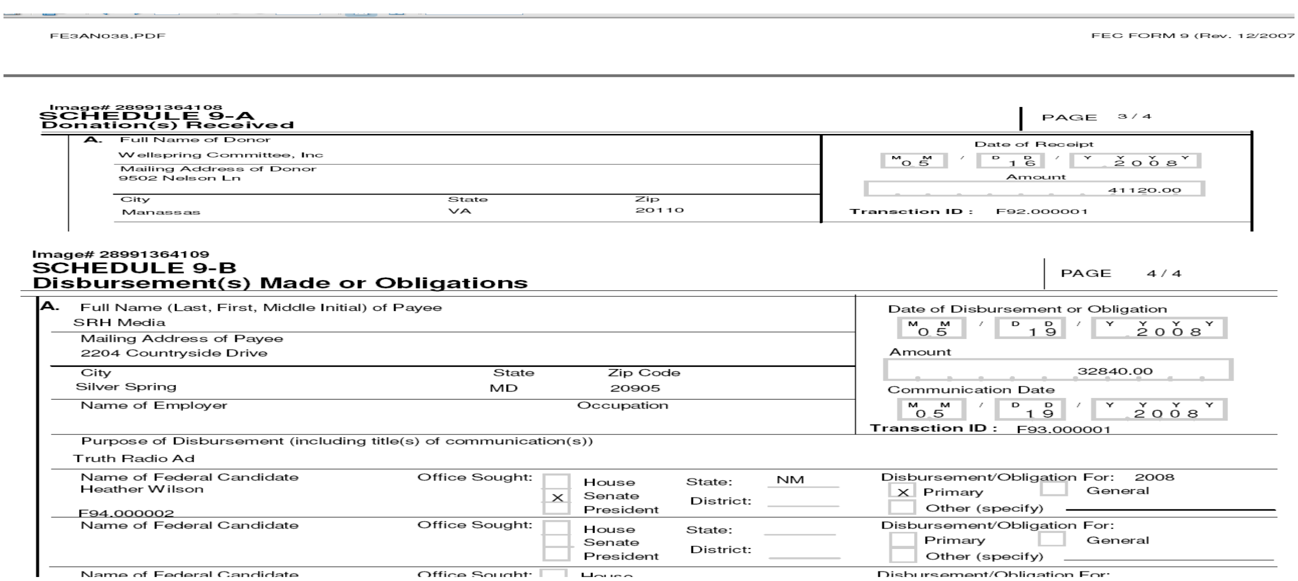
Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes [ ] No [ ]

Custodian of Records
(a) Name: Lora Haggard
(b) Address (number and street): 1718 M Street, NW
(c) City, State and ZIP Code: Washington DC 20036
(d) Name of Employer or Principal Place of Business: Citizens For Strength And Security (e) Occupation: Treasurer

Total Donations This Statement: 1250313.00
Total Disbursements/Obligations This Statement: 265876.96

Under penalty of perjury, I certify that this statement is true, correct and complete.
TYPE OR PRINT NAME OF PERSON COMPLETING FORM: Lora Haggard

Similarly, nonprofit groups, such as 501(c)(4)s, are also subject to the same kind of disclosure when they commit to running electioneering communications. FEC records show that Susan B. Anthony List Inc., a 501(c)(4), spent $32,840.00 on creating and airing a radio advertisement called “Truth.” The funding for the ad came from another group, Wellspring Committee, Inc, which is clearly identified on the form.



FE3AN038.PDF FEC FORM 9 (Rev. 12/2007

Image# 28991364108
SCHEDULE 9-A
Donation(s) Received
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A. Full Name of Donor: Wellspring Committee, Inc
Mailing Address of Donor: 9502 Nelson Ln
City: Manassas State: VA Zip: 20110
Date of Receipt: 05 / 16 / 2008
Amount: 41120.00
Transaction ID: F92.000001

Image# 28991364109
SCHEDULE 9-B
Disbursement(s) Made or Obligations
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A. Full Name (Last, First, Middle Initial) of Payee: SRH Media
Mailing Address of Payee: 2204 Countryside Drive
City: Silver Spring State: MD Zip Code: 20905
Name of Employer Occupation
Date of Disbursement or Obligation: 05 / 19 / 2008
Amount: 32840.00
Communication Date: 05 / 19 / 2008
Transaction ID: F93.000001
Purpose of Disbursement (including title(s) of communication(s)): Truth Radio Ad
Name of Federal Candidate: Heather Wilson Office Sought: House [x] Senate President State: NM District:
Disbursement/Obligation For: 2008 [x] Primary General Other (specify)
F94.000002
Name of Federal Candidate Office Sought: House Senate President State: District:
Disbursement/Obligation For: Primary General Other (specify)
Name of Federal Candidate Office Sought: House Disbursement/Obligation For:

Other disclosures required by existing law

In addition to the above reporting requirements, existing law requires that any organization organized under section 527 of the tax code must also file its donors who donate more than $200 in the calendar year with the IRS. In turn, that information is publicly listed. Moreover, any group whose “major purpose” is the funding of express advocacy expenditures—whether organized under section 527 or some other provision—would also become a PAC, subject to additional, ongoing reporting to the FEC, including the names of all donors of more than $200 to the group. Finally, all independent expenditures and electioneering communications already must include "disclaimers" clearly stating who is paying for the ad.

Key Flaw #4: The rule regarding covered transfers is likely unenforceable and will be a nightmare for many nonprofits.

The bill requires any entity transferring $10,000 or more in funds to a "covered organization" to disclose its donors if a donor knew or "should have known" that the "covered organization"—a definition that includes corporations, labor unions, trade associations, 527s, and nonprofit 501(c)(4) organizations—would make expenditures or electioneering communications of $50,000 or more in the coming two years, or had made such expenditures in the prior two years. The look-back requirement is bad enough; a donor may not know of those expenditures by another, unrelated organization, and has no safe-harbor even if it inquires of the receiving organization and receives an innocent but incorrect answer. The look-forward requirement, however, is worse. If the donating organization does not "designate[], request[], or suggest[]" that the donation be used for "campaign-related disbursements," and does not make the donation in request to a "solicitation or other request" for "campaign-related disbursements," and does not "engage[] in discussions ... regarding ... campaign-related disbursements"—all separate liability triggers—how is it supposed to know that the organization will spend $50,000 on "campaign-related disbursements"?

The provision seems designed to trip up the unwary and provide a means for post-hoc investigations of unsuspecting organizations.

Conclusion

Although S. 3369 removes onerous and untenable disclaimer requirements present in the previously-introduced version of the DISCLOSE Act, this legislation still piles enormous costs on nonprofits and other speakers—costs that are certain to chill speech, and which appear intended to accomplish indirectly, through costly and arbitrary compliance provisions, what Congress may not do directly: silence disfavored speakers.

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