Time to shed light on disclosure bill

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For a bill supposedly about "disclosure," Sens. Ron Wyden (D-Ore.) and Lisa Murkowski (R-Alaska) gave surprisingly few details about their Follow the Money Act in their POLITICO op-ed, (**"Shedding Light on Anonymous Ads,"** May 13). While they wrote in broad generalities about requiring "full transparency on the part of independent political spenders," they had already articulated that principle in a **Washington Post op-ed last December**. Five months later, they now have a completed bill pending in the Senate yet shy away from discussing the legislative details. What are they hiding?

Let's begin with the bill's overall framework, which Wyden and Murkowski describe breathlessly as a "whole new approach" to campaign finance law. This is a broad overstatement. The legislation requires any person or entity sponsoring "independent federal election related activities," or receiving or soliciting contributions for such activities past certain thresholds, to register and report as an "independent political actor" with the Federal Election Commission. Those requirements parallel the treatment of PACs, which have been around for almost 40 years.

But the Supreme Court ruled 37 years ago, and reiterated recently in *Citizens United v. Federal Election Commission*, that citizens and entities wishing to speak out about political issues cannot be forced to assume the "onerous restrictions" of PACs. Far from introducing a "new approach," Wyden-Murkowski ignores a series of landmark Supreme Court cases that struck down vague and overbroad requirements in earlier laws that bear a remarkable resemblance to their proposal.

For example, one especially troublesome provision is how the bill defines "independent federal election related activities." In a partial and incomplete disclosure, Wyden and Murkowski's op-ed conceded they would be "exploring additional clear and understandable standards" for their bill. What they should have acknowledged is that their IFERA standard, which underpins their entire legislation, is incomprehensible and unworkable. Craig Holman of Public Citizen, with whom we almost never agree on speech laws, has called IFERA a "subjective standard" and a "serious problem." On this, Wyden-Murkowski at least achieves consensus.

Specifically, the bill defines IFERA as "any expenditure that … considering the facts and

circumstances, a reasonable person would conclude is made solely or substantially for the purpose of influencing or attempting to influence the nomination or election of any individual to any federal office." The standard is so broad and vague that it would force most issue advocacy and social action groups, such as the the Sierra Club, National Taxpayers Union, ACLU, NRA, or the NAACP, to name just a few, to register and report their donors to the FEC.

As the Supreme Court stated in *Buckley v. Valeo*, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Thus, even discussions about policy issues could be considered candidate advocacy if they somehow were deemed to influence an election under the IFERA standard. But the solution the court devised in 1976 was not to conflate issue and candidate advocacy, as Wyden-Murkowski does. Rather, the court created a bright-line separation, whereby only communications expressly advocating a candidate's election or defeat are treated as expenditures triggering PAC status.

Moreover, the IFERA standard in Wyden-Murkowski obviously alludes to the IRS's "facts and circumstances" test for determining impermissible political intervention by nonprofits. Loyola Law School tax professor Ellen Aprill has written that this standard "reaches broadly, gives discretion to the administrators and leaves many organizations and their advisors with little certainty on how to conduct their activity day to day."

Which brings us to the next problem: Wyden-Murkowski would charge the IRS with implementing and interpreting the legislation in conjunction with the FEC. If the two agencies fail to jointly issue regulations by 2014, the Obama administration-controlled Treasury Department would have sole authority to interpret the law on its own. The IRS also would have the authority to impose severe tax penalties for violations, and groups also must designate a "responsible person" to bear personal liability for an entity's inadvertent mistakes.

This is the same IRS whose "facts and circumstances" test has led it to single out groups with "tea party" and "patriot" in their names, as well as those whose mission is to "make America a better place to live" or to "criticize how the country is being run." Wyden-Murkowski would not only place that same IRS in charge of regulating political speech, it would give ultimate implementing authority to the White House. That's not just unwise, it's frightening.

In introducing their bill last month, Sens. Wyden and Murkowski wrote, "The goal of this effort is disclosure, for disclosure's sake." From the many fatal flaws in their legislation — of which we have highlighted only a few above — it appears they are so fixated on "disclosure" that they are oblivious of their proposal's actual details or are willfully concealing the particulars. Either way, the Wyden-Murkowski "disclosure" bill does not withstand the light of day.

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