

**Legislative Bulletin.....May 28, 2010**

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**H.R. 5175 - Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act**

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*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.  
- First Amendment to the U.S. Constitution*

**Key Conservative Concerns**

*Take-Away Points*

- **Partisan ploy to get Democrats elected to Congress.** The bill, “coincidentally” sponsored by the chairman of the Democratic Congressional Campaign Committee in charge of electing Democrats to Congress, re-writes campaign finance laws in favor of Democrats right before elections. It was crafted behind closed doors with no input from Republican members of the House Administration Committee.
- **Favors unions over corporations.** Current law already bans foreign nationals from contributing to elections. DISCLOSE makes current law much more restrictive and bans independent expenditures on activity by American corporations with 20% or more foreign ownership. However, similar restrictions are not included for unions with foreign members or non-citizen members. Additionally, the new threshold for reporting (\$600 in donations for independent expenditures) will have little effect on unions whose members’ annual dues average much lower than \$600. *This would preclude unions from having to report.* The bill also prohibits independent expenditures or disbursing funds for electioneering communications by anyone with a government contract greater than \$7 million. (Originally, the threshold was \$50,000, which was changed in mark-up.) *This does not apply to unions in collective bargaining agreements with the government.*
- **Threatens organizations with lawsuits for non-compliance.** The bill becomes effective 30 days after enactment, giving the Federal Election Commission no time to craft regulations relating to the implementation of the bill, which will certainly be complicated, and not to mention expensive, to execute.

- Organizations would have to operate without any guidance from the FEC and risk possible lawsuits.*
- **Onerous disclosure and reporting requirements will deter citizen engagement.** The bill includes requirements that every incorporated entity engaged in independent campaign activity – from the National Rifle Association to the Sierra Club to your neighborhood civic league to a local job-training facility – must list all donors of \$600 or more with the Federal Election Commission (FEC). The bill also requires the CEO of an organization to appear in the ad, state their name and their organization two times. Additionally, the top five funders of the organization must be listed in the ad (and top two for radio), and if there is a top “significant” funder, he or she must identify himself or herself, his or her title, and state the name of the organization *three times in the ad*. These tedious and onerous requirements will have the effect of deterring organizations from getting involved in elections (and potentially take up most of the ad time).
  - **Bloggers do not fall under the media exemption.** The bill would affect how certain incorporated entities exercise their free speech rights, with an exemption for some in the media sphere like newspapers, TV news, and the like. However, bloggers do not get the same exemption provided to other media sources. Never mind that the Supreme Court’s opinion in the *Citizens United* case said, “Differential treatment of media corporations and other corporations cannot be squared with the First Amendment.” In order to exercise their right to political free speech, many bloggers would have to jump through the same onerous new hoops as many businesses, nonprofit groups, and your local homeowners’ associations.

*For more details on these concerns, see the conservative concerns section below.*

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## **H.R. 5175 - Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act (*Van Hollen, D-MD*)**

**Order of Business:** The bill is not currently on the official schedule. However, it will be considered by the Rules Committee on Thursday and will possibly be on the floor on Friday.

**Summary:** On April 29, 2010, Congressman Chris Van Hollen (D-MD) introduced H.R. 5175, the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act. The bill amends the Federal Election Campaign Act of 1971 to require that additional campaign-related spending information be reported to the Federal Election Commission (FEC) and creates new prohibitions on political spending by certain government contractors, Troubled Asset Relief Program (TARP) recipients, and companies with a 20% ownership by foreign nationals.

The bill is a direct response to *Citizens United v. Federal Election Commission* – a First Amendment victory in which the Supreme Court overturned the prohibition on corporations and unions using treasury funds for independent expenditures supporting or

opposing political candidates at any time of the year. Simply put, the DISCLOSE Act aims to limit (and even deter) the political speech that was protected and encouraged by *Citizens United*. As reported by the Center for Competitive Politics, Congressman Michael Capuano (D-MA) said at the mark-up, **“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.”**

See below for a detailed summary of key provisions.

*Please note that all terms marked with an \* have definitions at the bottom of the summary section.*

#### *Section 101.*

- Prohibits independent expenditures\* or disbursing funds for electioneering communications\* by anyone with a government contract greater than \$7 million. Originally, the threshold was \$50,000, which was changed in mark-up.
- Prohibits independent expenditures or disbursing any funds for electioneering communications by TARP recipients who have not repaid financial assistance.

#### *Section 102.*

- Applies the ban on contributions and expenditures by foreign nationals\* to covered corporations\* that have:
  - 20% ownership by foreign nationals;
  - A majority of the members of the board of directors who are foreign nationals;
  - At least one foreign national with the power to direct, dictate, or control the decision-making process of the corporation with respect to its U.S. interests; and
  - At least one foreign national with the power to direct, dictate, or control the decision-making process of the corporation with respect to elections and political activities.

#### *Section 103.*

- Defines **“coordinated communications”** as: 1) a covered communication which is made in cooperation with a candidate, an authorized committee of a candidate, or a political committee of a political party and 2) any communication that republishes, disseminates, or distributes campaign material that is prepared by a candidate, an authorized committee of a candidate, or their agents.
- Defines **“covered communication”** as a publicly distributed communication that refers to a clearly identified candidate for federal office and is publicly distributed 90 days before House primaries and ending at the general election, and 120 days before a Presidential primary election and ending at the general election.
- The term “covered communication” *does not include* “a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical

publication...” (note that this does not include the internet). An exemption also exists for a communication which constitutes a candidate debate.

#### *Section 201. Express Advocacy*

- Expands the definition of independent expenditure\* to include express advocacy\* or its functional equivalent because it can be interpreted by a “reasonable person” (note that this is not defined in the bill) only as advocating the election or defeat of a candidate.
- Includes a 24-hour reporting requirement for persons making independent expenditures each time a person makes an independent expenditure equal to or greater than the threshold amount. The threshold amount means: for contributions made up to the 20<sup>th</sup> day before an election, \$10,000; and for contributions made between the 19<sup>th</sup> day before an election to more than 24 hours before the date of the election, \$1,000.
- Becomes effective 30 days after enactment regardless of whether the FEC has promulgated regulations to carry out the section.

#### *Section 202. Electioneering Communication*

- Changes the definition of electioneering communications\* from beginning 60 days before a general election to 120 days before.
- Adds a reporting requirement that any electioneering communication must be electronically filed and “is publicly available through the Commission website not later than 24 hours after receipt in a manner that is downloadable in bulk and machine readable.”

#### *Section 211. Expanded requirements for corporations and other organizations*

- Requires that if donations to an organization are made for the purpose of campaign-related activity or in response to a solicitation for funds to be used for campaign-related activity, the organization must report donations or payments in an aggregate amount equal to or over **\$600 for independent expenditure reports.**
- Requires that **if independent expenditures are not made from the organization’s Campaign-Related Activity Account** (the definition for such accounts is available in the next section), **they must report all donations over \$600.** If they are made **from the Account, the organization must report all donations of \$6,000** or more.
- Requires that if donations to an organization are made for the purpose of campaign-related activity or in response to a solicitation for funds to be used for campaign-related activity, the organization must report donations or payments in an aggregate amount equal to or over **\$1,000 for electioneering communications reports.**
- Requires that **if independent expenditures are not made from the organization’s Campaign-Related Activity Account, they must report all donations over \$1,000.** If they are made **from the Account, the organization must report all donations of \$10,000** or more.

- States that transfers from an organization to any other person for the purpose of electioneering communication shall be reported as such.
- Defines covered organization as corporations, unions, 501(c)(4)s, 501(c)(5)s, 501(c)(6)s, and 527s.

*Section 212.*

- If a covered organization and a donor mutually agree that the donation will not be used for campaign-related activity, at the time of the donation, the organization does not need to report the donation to the FEC.
- The Chief Executive Officer of an organization must certify all disbursements for campaign-related activity using donor funds and file a statement with the Commission which contains various certifications listed in the bill (e.g. that none of the campaign-related activity was made in cooperation with any candidate or any authorized committee of the candidate, or political committee). The statement shall be filed no later than 15 days after the end of the quarter.
- Defines covered organization as corporations, unions, 501(c)(4)s, 501(c)(5)s, 501(c)(6)s, and 527s.

*Section 213. Campaign-Related Activity Accounts*

- Allows organizations to make disbursements for campaign-related activity using amounts from an established bank account known as the Campaign-Related Activity Account. The Account shall be maintained separately from all other accounts of the organization and shall only consist of donations for campaign-related activity. Once the account is established, an organization must use it for all campaign-related activity.

*Section 214.*

- Expands the “stand by your ad” requirements.
- Requires individual disclosure statements for each television and radio ad, where the head of an organization paying for an ad must state his or her name and title and the name of the organization twice.
- Any electioneering communication or an independent expenditure paid for by an organization for a campaign-related activity must list the top five funders on the screen for a television ad and the top two funders for a radio ad.
- Includes a significant funder disclosure statement which says that the top funder must state a disclaimer in the ad and mention the name of the organization three times.

*Section 221.*

- Requires registered lobbyists to report information on independent expenditures and electioneering communications.
- Lobbyists must report the amount of any independent expenditure equal to or greater than \$1,000 made, along with the name of each candidate being supported or opposed and the amount spent supporting or opposing the candidate.

- Lobbyists must report the amount of any electioneering communication equal to or greater than \$1,000 made by such person or organization, and the name of the candidate and how much was spent.

*Section 301.*

- Requires that a covered organization which submits regular reports to its shareholders, members, or donors on its finances shall include, in each report, information with respect to disbursements made by the organization for campaign-related activity.
- The information required to be disclosed by an organization must be posted via hyperlink on their internet site. The organization must post it no later than 24 hours after the Commission posts the information on their website.

*Section 401.*

- Provides for judicial review on challenging the constitutionality of the bill through the US District Court for DC, and an appeal to the Court of Appeals for the DC Circuit, and then to the Supreme Court.
- Any member of the House or Senate may intervene either in support or opposition to the position of a party to the case regarding the constitutionality of the provision of the bill.
- Any Member of the House or the Senate may bring an action for declaratory or injunctive relief to challenge the constitutionality of any provision of the bill.

*Section 402.*

- Contains a severability clause stating that if any provision of the bill is found unconstitutional, the remainder of the bill shall not be affected by the holding.

*Section 403.*

- The bill shall take effect 30 days after enactment, “without regard to whether or not the Federal Election Commission has promulgated regulations to carry out such amendments.”

*Definitions.*

- **Covered Corporation:** Applies to corporations, unions, 501(c)(4)s, 501(c)(5)s, 501(c)(6)s and 527s.
- **Electioneering Communication:** “Any broadcast, cable, or satellite communication that: Refers to a clearly identified candidate for Federal office” and “Is publicly distributed within 60 days before a general election...or within 30 days before a primary...” (2 U.S.C. 434(f)(3)) (This is changed in Section 202 of DISCLOSE)
- **Independent Expenditure:** An expenditure by a person - (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. (2 U.S.C. 431) Also of note is Justice Kennedy’s explanation in his opinion in *Citizens United* "...an independent

- expenditure is political speech presented to the electorate that is not coordinated with a candidate." (Opinion of the Court, Justice Kennedy)
- **Foreign Principal (national):** "A government of a foreign country and a foreign political party; a person outside of the United States... and a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." (22 U.S.C. 611)
  - **Express Advocacy:** Explicit words or activities calling for the election or defeat of a clearly identified candidate.

### **Possible Conservative Concerns:**

- ***Partisan ploy to get Democrats elected to Congress.*** The bill, "coincidentally" sponsored by the chairman of the Democratic Congressional Campaign Committee in charge of electing Democrats to Congress, re-writes campaign finance laws in favor of Democrats right before elections. It was crafted behind closed doors with no input from Republican members of the House Administration Committee.
- ***Favors unions over corporations.***
  - Current law already bans foreign nationals from contributing to elections. See the [RSC Policy Paper on Citizens United](#) for more details. DISCLOSE makes current law much more restrictive and bans independent expenditures on activity by American corporations with 20% or more foreign ownership. As eight former Federal Election Commissioners stated in a recent *Wall Street Journal* article, "... Disclose does not ban foreign speech but speech by American citizen shareholders of U.S. companies that have some element of foreign ownership, even when those foreigners have no control over the decisions made by the Americans who run the company." However, similar restrictions are not included for unions with foreign members or non-citizen members, despite efforts in mark-up by Republicans to include them. In fact, almost immediately after the bill passed out of committee, an article in *The Hill* reported "[Unions to spend \\$100M in 2010 campaign to save Dem majorities.](#)" Additionally, according to the House Administration Committee Republicans, **the new threshold for reporting (\$600 in donations for independent expenditures)** will have little effect on unions whose members' annual dues average much lower than \$600. **This would preclude them from having to report.**
  - The bill also prohibits independent expenditures or disbursing funds for electioneering communications by anyone with a government contract greater than \$7 million. (Originally, the threshold was \$50,000, which was changed in mark-up.) **This does not apply to unions representing government employees despite Mr. Lungren's efforts to do so in committee.**
- ***Threatens organizations with lawsuits for non-compliance.*** The bill becomes effective 30 days after enactment, giving the Federal Election Commission no

time to craft regulations relating to the implementation of the bill, which will certainly be complicated, and not to mention expensive, to execute.

Organizations would have to operate without any guidance from the FEC and risk possible lawsuits.

- ***Onerous disclosure and reporting requirements will deter citizen engagement.***  
The bill includes requirements that every incorporated entity engaged in independent campaign activity – from the National Rifle Association to the Sierra Club to your neighborhood civic league to your local job-training facility – must list all donors of \$600 or more with the Federal Election Commission (FEC). The bill also requires the CEO of an organization to appear on the ad, and state their name and their organization two times. Additionally, the top five funders of the organization must be listed in the ad (and top two for radio), and if there is a top “significant” funder, he or she must identify himself or herself, his or her title, and state the name of the organization three times in the ad. These tedious and onerous requirements will have the effect of deterring organizations from getting involved in elections (And potentially take up most of the ad time).
- ***High Costs.*** The complex reporting requirements would come with huge costs to small businesses which will need to comply. The requirements are complicated and will be virtually impossible for small corporations or citizens organizations to manage. It will have the effect of silencing grassroots organizations who cannot easily comply.
- ***Bloggers do not fall under the media exemption.*** The bill would affect how certain incorporated entities exercise their free speech rights, with an exemption for some in the media sphere like newspapers, TV news, and the like. However, bloggers do not get the same exemption provided to other media sources. Never mind that the Supreme Court’s opinion in the *Citizens United* case said, “Differential treatment of media corporations and other corporations cannot be squared with the First Amendment.” In order to exercise their right to political free speech, many bloggers would have to jump through the same onerous new hoops as many businesses, nonprofit groups, and your local civic associations.

### ***Democrat Inconsistency Alert!***

**Favoring Unions over Corporations:** Quote from bill sponsor Van Hollen: “The ban on political expenditures by federal contractors, for example, includes any entity that has a contract with the federal government, ***whether it is a corporation or a labor union*** (emphasis added).” vs. a quote from Josh Goldstein, a spokesman for the AFL-CIO: “We do agree that ***the final bill should treat corporations different than democratic organizations such as unions.*** We hold the position that, among other things, the legislation should counter the excessive and disproportionate influence by big business and guarantee effective disclosure of who is paying for what.” For more quotes, see yesterday’s article from **The Hill**: [Chamber: Citizens United ‘Fix’ gives unions upper hand.](#)

**Groups Opposed:** An \* denotes that a group who has provided a letter indicating that will score a vote on the bill. More groups have indicated opposition but are still putting together their letters. When more information on groups becomes available, we will disseminate it.

\*Club for Growth  
\*Concerned Women for America  
\*Family Research Council Action  
National Rifle Association  
\*National Right to Life

60 Plus Association, Jim Martin, Chairman  
Americans for Limited Government, William Wilson, President  
Americans for Tax Reform, Grover Norquist, President  
American Target Advertising, Inc., Mark Fitzgibbons, President of Corporate and Legal Affairs  
Business Coalition for Fair Competition, John Palatiello, President  
CatholicVote.org, Brian Burch, President  
Center-Right Coalition of Florida, Rick Watson, Chairman  
Citizens for Limited Taxation (MA), Chip Faulkner, President  
Citizens Against Government Waste, Erica L. Gordon, Director of Government Affairs  
Citizens United, David N. Bossie, President  
ClearWord Communications Group, Rick Hendrix, Founding Partner  
Coalition for a Fair Judiciary, Kaly Davy, President  
Center for Competitive Politics, Sean Parnell, President  
Center for Investors and Entrepreneurs  
ConservativeHQ.com, Inc. Richard A. Viguerie, Chairman  
Council for America, Ron Pearson, President  
Eagle Forum, Phyllis Schlafly, President  
Family Research Council Action, Tom McClusky, Senior Vice President  
Freedom Action, Myron Ebell, President  
Free Speech Coalition, Dick Dingman, Vice President  
Gun Owners of America, Larry Pratt, Executive Director  
Home School Legal Defense Association, J. Michael Smith, President  
Let Freedom Ring, Colin A. Hanna, President  
Liberty Counsel, Mathew Staver, Founder and Chairman  
Liberty Guard, Bob Barr, Chairman  
Liberty Guard, Joe Seehusen, President and CEO  
Management Association for Private Photogrammetric Surveyors (MAPPS),  
Maryland Center-Right Coalition, Richard Falknor, Chairman  
John Byrd, Government Affairs Manager  
Morgan, Meredith & Associates, Dan Morgan, President  
National Tax Limitation Committee, Lewis K. Uhler, President  
National Taxpayers Union, Duane Parde, President  
NetworkGeorgia LLC, Louie Hunt, Owner

Pioneer Institute, Jim Stergios, Executive Director  
Property Rights Alliance, Kelsey Zahourek, Executive Director  
RightMarch.com, Dr. William Greene, President  
Small Business & Entrepreneur Council, Karen Kerrigan, President & CEO

Note: The Heritage Foundation also wrote this blog post listing concerns with the bill:  
<http://blog.heritage.org/2010/05/25/impending-government-censorship/>

**Committee Action:** The bill was introduced on April 29, 2010 and referred to the House Committee on House Administration and to the Committee on the Judiciary. The bill was marked up and reported out of Committee, as amended, by a vote of 5-3, on May 20, 2010.

**Administration Position:** As of press time, no Statement of Administration Policy was available.

**Cost to Taxpayers:** CBO estimates that implementing H.R. 5175 would cost \$2 million in fiscal year 2011 and about \$10 million over the 2011-2015 period, subject to appropriation of the necessary funds.

**Does the Bill Expand the Size and Scope of the Federal Government?:** Yes. The bill would greatly expand the federal control over political speech by citizens associations.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?:** H.R. 5175 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 5175 contains private-sector mandates, as defined in UMRA, on lobbyists, political organizations, and other entities or individuals that make political expenditures. Based on information from the FEC, CBO estimates that the aggregate cost to comply with the mandates would fall below the annual threshold established in UMRA for private-sector mandates (\$141 million in 2010, adjusted annually for inflation). Many organizations would likely opt out of political speech, rather than try to comply.

**Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10<sup>th</sup> Amendment?:** No known violation exists.

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:** According to the Committee Report, "Clause 9 of House rule XXI requires committee reports on public bills and resolutions to contain an identification of congressional 'earmarks,' limited tax benefits, limited tariff benefits, and the names of requesting Members. The bill as reported contains no such items."

**Constitutional Authority:** The Committee states that Article 1, Section 4 of the U.S. Constitution grants Congress the authority to make laws governing the time, place and

manner of holding Federal elections. *Many conservatives may find this citation inaccurate in light of the First Amendment protection of free speech.*

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