New Federal Initiatives Project

DISCLOSE Act – The Legislative "Fix" to *Citizens United*

By

Allison Hayward*

May 10, 2010

The Federalist Society for Law and Public Policy Studies

The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.

www.fed-soc.org

DISCLOSE Act – The Legislative "Fix" to *Citizens United*

On January 21, 2010, the Supreme Court handed down its opinion in *Citizens United v. FEC*. Since then, congressional critics of the Court's broad holding have promised a legislative "fix." These Members believe that the decision to recognize constitutional protection for corporate (and labor) independent expenditures in federal elections will have a pernicious effect on American politics. Accordingly, on April 29, 2010, Senator Charles Schumer and Representative Chris Van Hollen introduced the DISCLOSE Act.[1]

The DISCLOSE Act contains two main features. First, it requires corporations to include certain notices in their expenditures and file additional disclosure reports. These provisions, the authors assert, will enhance the information available to voters about what interests are behind any specific ad. The sponsors note that without additional notices, a corporation could "hide" behind the name of a shell organization. Viewers would not know that the message was from a specific corporation and would be unable to evaluate the credibility of the message. Moreover, the CEO of a corporation making an expenditure must personally appear and declare that he approves the advertisement, much as federal law currently requires of federal candidates. Furthermore, corporations could either pay for such communications out of a segregated fund and would report what other sources contributed to that fund, or, if it paid out of its general treasury, would have to report not just donations designated for the expenditure but any undesignated funds of $1,000 or more. Proponents of the Act assert that these reporting requirements are intended to make the true sources of expenditures transparent, and the reports would be due to the FEC 24 hours from the expenditure. The Act would also require disclosure of political spending in an entity's annual report to shareholders, reports to members, and on the entity's website.

Second, the DISCLOSE Act identifies certain types of corporations that would not be permitted to make independent expenditures. Corporations with 20% or more foreign share ownership, or foreign control, would be prohibited from making independent expenditures. Also barred from making expenditures would be corporations with government contracts of over $50,000 in value, or who have received and not repaid TARP funds. The sponsors intend to strengthen existing laws banning foreign nationals from making expenditures and keep tax-funded businesses from using appropriated funds for politics. Also, it prohibits coordination between a candidate and an outside group on ads that reference a candidate from the time period beginning 90 days before a primary and running through the general election.

The DISCLOSE Act's authors appear to focus their restrictions on areas where the Supreme Court has recognized Congress has greater discretion to regulate. The Supreme Court upheld disclosure requirements in *Citizens United*, even as it determined that independent expenditures are not corrupting. Congress also has greater discretion to regulate the activities of foreign interests and contractors than with citizens and the public at large. Therefore, the Act's supporters anticipate that the Supreme Court will defer to Congress's judgment in crafting disclosure requirements and regulating foreign interests and government contractor activities in federal elections.

However, critics assert that some aspects of the DISCLOSE Act may not survive constitutional scrutiny. First, it could be difficult for Congress to identify an important interest that justifies

these restrictions, to say nothing of a compelling interest, such as that required to justify a ban on expenditures. No time has passed to evaluate the impact of *Citizens United*. The bill's advocates predict that corporate and union money will inundate federal campaigns. Critics assert that only those corporations and unions that already participated in issue advertising will continue to make expenditures. Other corporations that felt it unnecessary or unwise to spend money in election contexts may continue to stay away from this activity.

Federal law already requires that any person (including any entity) that makes an expenditure of $250 or more must itemize the donors of $200 or more who contributed to that expenditure. So existing law already contains provisions to go behind the name of a "shell group" to identify the true sources of funding. Critics assert that the DISCLOSE Act would effectively require organizations to attribute expenditures to donors even where the donor had not earmarked funds for the expenditure. This could lead to identification of more "donors" than is accurate or appropriate and confuse the public rather than enlighten them. Will this overly inclusive reporting requirement pass constitutional scrutiny? It could become the case that existing funding disclosure proves inadequate, but can Congress make that judgment now? The Act's sponsors and supporters do not want to wait for such issues to develop but instead want to head off any such reporting evasions more quickly.

The DISCLOSE Act's "stand by your ad" requirement is designed by its authors to provide the public with information about who is paying for and authorizing an expenditure. It is also designed to make an identifiable individual accountable for the content of a given advertisement. Again, supporters assert that disclosure requirements are among the most likely to survive a constitutional challenge while providing essential information to voters about who is attempting to influence elections. But critics assert that the Act's method of doing so might be faulty and that it could make more expenditures difficult, rather than add useful information to the public debate. What more does a viewer learn about the source of an expenditure by seeing a company's CEO – someone of whom they know nothing – "stand by" an advertisement? The CEO, on the other hand, may have strong personal or professional reasons for preferring not to appear, including the real possibility that he or she individually opposed the communication, but was outvoted. Or the CEO may enjoy the opportunity to appear, much as many CEOs choose to appear in commercial advertising. Unlike candidates for federal office, CEOs have not always entered the public sphere voluntarily and will react differently to this requirement. It is therefore not clear exactly how the Supreme Court would view the public interest served by this requirement, and it may instead find that the requirement unevenly burdens some corporations and results in imbalanced public debate.

While supporters note that Congress enjoys greater discretion to regulate foreign entities than domestic ones, critics assert that the DISCLOSE Act may sweep too broadly. Existing law already prohibits foreign nationals from making contributions or expenditures in federal, state, or local elections and also prohibits them from participating in fundraising or spending decisions. The Act reaches beyond existing law, but the sponsors do not explain why additional restrictions are needed. They have not elaborated on why 20% share ownership is the appropriate threshold to determine that a corporation is "foreign owned." The Act's supporters meanwhile assert that Congress holds broad authority to prevent the influence of foreign elements in U.S. elections. After all, what First Amendment speech rights do foreigners and foreign-controlled corporations

enjoy in the context of federal elections? Existing law also specifies that federal government contractors may not make contributions or expenditures in federal election. *Citizens United* did not consider this separate statute, but DISCLOSE Act sponsors believe that the decision could be extended to protect contractors and thus contend that legislative action is required. Critics of the DISCLOSE Act assert that under *Citizens United* it may be hard to justify a blanket ban on expenditures by all contractors with contracts valued at $50,000 or more, rather than just recipients of no-bid contracts, where the absence of a competitive bidding process could allow inappropriate favoritism.

Share ownership thresholds present practical difficulties and enforcement problems. In large publicly-traded corporations it may not be possible to determine at any given time exactly what share of a company's stock is held by any particular kind of shareholder. Oftentimes the beneficial owner of a share may be an individual, fund, or another corporation, but the corporation itself will only know the identity of a broker. Critics of this proposal assert that this restriction is not really meant to identify and restrict foreign expenditures but to make it very difficult for any corporation to exercise its rights as recognized in *Citizens United*. Yet the sponsors contend that without stronger restrictions on foreign corporations, the danger exists that foreign interests with allegiances to other countries will be able to influence and even manipulate American elections.

The DISCLOSE Act disallows coordination between a corporation making an independent expenditure referencing a candidate and a candidate from 90 days before a primary through the general election. This provision could have constitutional difficulties under the Court's precedent in *Citizens United* and *Wisconsin Right to Life v. FEC* because the Supreme Court has held that content restrictions on political speech are confined to communications containing express advocacy or its functional equivalent, not merely a "mention" of an individual who is also a candidate. The sponsors explain that this section will prevent corporations from being able to "sponsor" a candidate and will close coordination "loopholes." However, the Act also loosens restrictions on party committees making coordinated expenditures on behalf of their candidates. Party committees have sought moderation of these rules to provide them with greater ability to compete as against other interest groups.

Leaders in both the Senate and the House have promised expedited consideration of this legislation. The sponsors intend for it to enter into effect for much of the 2010 election cycle.

**Allison Hayward is Assistant Professor of Law, George Mason University School of Law. She previously worked as Chief of Staff and Counsel in the office of Federal Election Commission Commissioner Bradley A. Smith. Prior to this, Professor Hayward practiced election law in California and in Washington DC.*

---

[1] DISCLOSE stands for "Democracy is Strengthened by Casting Light on Spending in Elections." The House and Senate versions are similar but not identical. If the two chambers pass different versions, a conference committee will be required to generate a common bill that must then be passed again by both Houses of Congress.

Related Links:

Text of the DISCLOSE Act
http://electionlawblog.org/archives/DISCLOSE_Act.pdf

Citizens United v. FEC Decision
http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

“Shining a Light on Campaign Finance,” Albert R Hunt, May 2, 2010
http://www.nytimes.com/2010/05/03/us/03iht-letter.html?scp=5&sq=disclose%20act&st=cse