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A First Look: The Wyden-Murkowski "Follow the Money Act of 2013"

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I. "For Disclosure's Sake"

Senators Ron Wyden and Lisa Murkowski are at least (somewhat) candid about their motivations when they say "The goal of this effort is disclosure, for disclosure's sake." (Backgrounder on Wyden-Murkowski at 1.) Whether or not they have an ulterior motive of protecting their own incumbency is another matter.

Notably, Wyden and Murkowski do not purport to be concerned about whether the disclosure they seek to compel is constitutional, whether it is meaningful, whether it is informative to the public, or whether it furthers a legitimate governmental interest in preventing corruption or the appearance thereof. Nor do they seem to care whether such disclosure is overly burdensome or deters political speech protected by the First Amendment.

The bill would radically expand the reach of government regulation on speech critical of elected officials and force many, if not nearly all, advocacy groups to register and file burdensome reports with the federal government. The registration and reporting scheme also includes the threat of stiff tax penalties on groups and individuals, along with an organizational death sentence that could be imposed by the IRS for errors. If enacted, this bill would dragoon the IRS into a role as political campaign enforcer, a role the IRS is ill-equipped for and does not want.

We base this first look on a near final draft of the bill before it had been introduced, but as it appeared on Sen. Wyden's website as of April 24, 2013. The final legislative language may differ from that analyzed here.

II. The Definition of "Independent Federal Election Related Activity" ("IFERA") is Overly Broad and Vague

The bill's registration, reporting, and disclaimer requirements apply to any entity that meets the definition of "independent political actor" ("IPA"), which in turn is determined in part by whether an entity engages in "Independent Federal Election Related Activity" **("**IFERA") that totals $10,000 or more during a Federal election cycle. (Sec. 101.) The other triggers for IPA status are whether an entity receives contributions aggregating $10,000 or more during the election cycle that "are intended by the transferor and understood by the recipient to be substantially used for making [IFERA]," or whether an entity solicits 500 or more persons for contributions to be used for sponsoring IFERA during the election cycle, regardless of whether or not anyone has contributed.

Because the definition of "contributions" depends on the definition of IFERA, IPA status really comes down to the definition of IFERA exclusively. Thus, the vagueness of the definition of IFERA is especially troubling and unconstitutional.

Vagueness

The Backgrounder misleadingly defines IFERA generally as "an expenditure . . . for the purpose of influencing the selection, nomination or election of any individual to any federal office which is made by a person or entity independent of the candidate and which is not coordinated with the candidate." (Backgrounder at 2.) This definition generally tracks the definition of expenditure under 2 U.S.C. § 431(9), and which the Supreme Court has limited to express advocacy activities.

However, the actual legislative language in the bill is much broader. It defines the term 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 (including an expenditure for a public communication that promotes, attacks, supports, or opposes a candidate) . . . ." (Sec. 101, emphasis added).

The "reasonable person" standard in the Wyden-Murkowski bill is NOT the "no other reasonable interpretation" ("NORI") objective standard the Supreme Court has used to identify the "functional equivalent" of express advocacy in *McConnell*, *Wisconsin Right to Life*, and *Citizens United*. Under the NORI standard, a communication is considered express advocacy only if it cannot reasonably be interpreted as anything other than a message urging the election or defeat of a candidate. By contrast, the Wyden-Murkowski standard would consider a message to be IFERA even if it can reasonably be interpreted as something other than IFERA – indeed, even if the better interpretation is that it is *not* IFERA. This standard invites all sorts of contextual and subjective considerations and regulates speech based on the vagaries of government bureaucrats or, worse, politically motivated officials.

The Wyden-Murkowski standard also incorporates the "promotes, attacks, supports, or opposes" ("PASO") standard. Even though this standard has been used in the Federal Election Campaign Act of 1971, as amended ("FECA") and FEC regulations, the FEC has had considerable difficulty defining and applying this standard, and declined to adopt it as a content standard for determining when communications are considered coordinated. *See* Explanation and Justification for the Final Rules on Coordinated Communications, 75 Fed. Reg. 55947, 55955 (Sep. 15, 2010).

Worse, the Backgrounder on the bill implies that advertising might not even need to mention the name of a candidate to be considered IFERA. It correctly notes that current law regulates speech only when a communication "explicitly makes reference to the candidate or undeniably makes reference to the candidate." It then goes on to tout that "this new definition encompasses every expenditure."

The IFERA definition is sufficiently vague that it would also appear to include newspaper editorials that attack or praise candidates for their stands, though this may be simply an oversight in the drafting of the bill. (Since IFERA is separate from the statutory definition of "expenditure" and "electioneering communication," the statutory "media exemptions" at 2 U.S.C. §§ 431(9)(B) and 434(f)(3)(B)(i) would not apply automatically to this bill.)

Groups that publish scorecards of votes by elected officials and calculate percentage scores, publish grades or give awards for excellent scores may find they have triggered the bill's provisions.

III. The White House Will Control FEC Regulations for Citizens Groups

Section 301 sets up a process by which the Treasury Secretary and the FEC are ordered to jointly issue regulations on how the law would apply to citizens groups. While the bill is silent on how this would work, it is at least possible that the Treasury Secretary would act as a new seventh vote at the FEC on the new law. This would mark the first time in the history of modern campaign finance law that the party that controls the White House could effectively take charge of writing a portion of campaign finance regulations. If the FEC and Treasury cannot agree on joint regulations by September 2014, the bill makes clear who is really in charge – the Obama Treasury Department, which would then act on its own, passing regulations for the 2016 election cycle.

This of course is a terrible idea. The FEC was set up purposely as an independent agency to ensure that partisans could not take charge of writing campaign finance rules to give an advantage to their party. Currently no more than three of the FEC's six commissioners may be members of one political party and all Commission actions require four votes.

This new power is especially dangerous because the language of the legislation is so vague and broad that a future president would have enormous discretion as to how to write the regulations, effectively controlling how citizens group can speak either about his reelection campaign, his party colleagues in Congress or both.

IV. Membership Communications

The draft bill contains no exemption for membership communications from the new restrictions and reports, which is a radical and likely unconstitutional departure from current law. *Cf.* 2 U.S.C. §§ 431(9)(B)(iii) and 441b(b)(2)(A) and (B). Membership meetings, newsletters, emails, and phone calls that described lawmaker actions critically would also likely trigger the bill's registration and reporting requirements.

V. Burdensome Reporting

The definitions of IFERA are so broad that they could be construed to cover normal issue advocacy by groups working on any contentious issue. This in turn would force those groups to file regular reports with the government that are nearly identical in scope to those filed by candidates, parties, and political action committees. This is a direct challenge to the landmark *Buckley v. Valeo* decision, which shielded groups that primarily engage in issue speech from having to file as political committees.

The measure contains obvious drafting errors, so it is not yet clear how the sponsors intend for reporting of contributions to such groups to be handled. However, it appears that in many cases the bill would require disclosure of more contributions than expenditures.

"Real-Time" Reporting

The bill also requires that donations to groups continue to be disclosed even if the group has no recent IFERA. This means that many groups that have had no IFERA for months might find themselves filing donor reports with the FEC every day.

The bill even goes to the absurd lengths to force "instant" disclosure -- groups covered by the bill would have to file a report of a contribution before the check is even deposited in the bank!

Beginning in 2015, the bill requires political committees to report their credit and debit card contributions to the FEC within 48 hours of receipt; check contributions must be reported prior to deposit, and all other contributions must be reported within 10 days of receipt. (Sec. 103.)

Entities that have to file FEC reports already devote substantial resources on staff and/or contractors to meet the existing reporting requirements. Real-time reporting would be even more burdensome and costly, and would effectively impose a tax and a barrier to entry on political activity and speech. Clearly, such a rule would favor established players while and deter unsophisticated newcomers. Grassroots groups run by volunteers would find it effectively impossible to comply with these new rules. Even many established organizations would find compliance difficult or impossible without greater resources and staff.

The real-time reporting would also apply to candidates and political committees, greatly increasing the burden on first-time candidates and challengers to incumbents. And to what end? If a donation is accepted 100 days before an election, why does it need to be disclosed before the check is taken to the bank? The sponsors identify no public benefit that accrues from requiring real-time reporting, as opposed to allowing reporting on a reasonable time schedule – apparently, it just sounds cool and up to date.

VI. Mandated Incorrect Reporting

Because of the bill's broad definition of "covered contribution", the bill would actually require inaccurate reporting. If, for example, a trade association with a $4 million budget spent $50,000 in IFERA, it could be required to report the entire $4 million as contributions for IFERA. Similarly, groups that raise funds for anticipated expenditures, but decide never to make those expenditures, would be required to report all of the donors to the group as required by the bill. In short, the bill guarantees that substantial amounts of money *not* raised or spent on political activity will be reported to the government.

Due to the vague definition of IFERA, a group that simply commissioned a poll to test messaging might find that it has triggered the burdensome registration and reporting requirements, even if it never published any communication!

Persons who make general contributions to a 501(c)(4) or pay general dues to a trade association or union as much as two years in advance of an ad being run by the group, even if the contributor had no prior knowledge of the ad and even if they disagree with the particular expenditure, would find themselves listed as financing the expenditure. Thus, the public is intentionally misinformed as to how much is being spent, and who is truly responsible for, various expenditures. For a bill allegedly aimed at creating a well-informed public, this is a particularly odd strategy.

Given the vague definition of IFERA and draconian penalties for noncompliance, organizations are likely to report activities that have no relation to IFERA, just to be safe. Some groups could conceivably report every expenditure, no matter how trivial, which might be the only prudent course of action to avoid penalties. Such junk disclosure would further mislead the public.

VII. Definition of a "Covered Contribution"

Although, as described above, IPA status depends on "contributions" (which in turn depends on whether funds are given with the intent they will be used to sponsor IFERA), "covered contributions" are defined much more broadly as simply "anything of value . . . which *can be used*" to make an IFERA. (Sec. 101, emphasis added).

"Covered contributions" are the transactions that are actually subject to the bill's reporting requirements. The bill exempts ordinary commercial transactions, as well as funds received in a fair-market-value exchange of goods or services. However, that still leaves general donations to 501(c)(4) organizations, as well as union dues and membership dues paid to trade associations, as "contributions" for political purposes. (In fact, the safe harbor language, discussed below, explicitly suggests dues are considered reportable "covered contributions.")

Accordingly, if any of these organizations sponsor any IFERA aggregating $10,000 or more during the election cycle, they must report all of their funding – regardless of whether those funds were given for the purpose of influencing the outcome of elections or for sponsoring IFERA.

The backgrounder on the bill says "The Follow the Money Act defines 'small money' [for IFERA] as $1,000 per person or less per year. That's up to $2,000 per member per cycle." Yet the bill itself only exempts reporting for a "safe harbor" account consisting of funds aggregating $1,000 or less that an entity receives from any person during the two-year election cycle.

There are a number of estimates of average union dues and the National Institute for Labor Relations Research estimates an average of $855 a year (or $1,710 per election cycle). Even if their estimate is high, it appears from the backgrounder that the bill's sponsors intend that unions sponsoring IFERA likely would not have to report members' dues on the new FEC reports.

VIII. Unnecessary Entanglement of the IRS in Speech

The backgrounder explains, "This bill does not address the question of how much a (c)(4) can spend on politics under the Internal Revenue Code and regulations." (Backgrounder at 4.)

That is the central tax law question when it comes to 501(c)(4)s' political activities, and this bill does not address that issue. Everything else this bill addresses is within the realm of campaign finance reporting and disclaimer requirements (i.e., IPAs are required to register with and report to the FEC under Sec. 101). Yet, oddly enough, the bill places the definition of IFERA in the Internal Revenue Code (Sec. 101), and imposes tax penalties

(Sec. 201) and loss of tax-exempt status (Sec. 202) for non-compliance with these essentially campaign finance requirements.

The IRS should not be entangled in assessing penalties and offering advisory opinions (more on this below) on matters that are primarily campaign finance issues. The FECA gives the FEC "exclusive jurisdiction" with respect to the "administration, [civil] enforcement, and formulation of policy" of federal campaign finance law, and Wyden-Murkowski proposes a radical encroachment on the FEC's statutory jurisdiction. *See* 2 U.S.C. § 437c(b).

IX. Personal Liability for Reporting and a New Tax – Candidates Exempted

The bill requires every IPA to designate a "responsible person" and a treasurer who both may be "jointly and severally liable" for acts and omissions This "responsible person," and perhaps also the treasurer, are personally liable for penalties in the event of noncompliance, even if the noncompliance is due to mere negligence. (Sec. 201.)

This is a drastic departure from current law, under which PAC treasurers are held personally liable only for knowing, willful, or reckless violations. *See "*Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings," 70 Fed. Reg. 3 (Jan. 3, 2005).

This personal liability is made worse by the proposal's 2.5% tax on individuals held responsible for errors in reporting. Nobody will want to be held personally liable for an IPA's actions or this new tax. IPAs either will have substantial difficulty in meeting their requirement of appointing a "responsible person" under this bill, or they will have to pay such individuals a substantial premium. Again, this is an effective deterrent or tax on political activity.

Interestingly, candidate committees, such as Senator Wyden's or Senator Murkowski's campaigns, would be exempt from this new tax, even though many candidates fail to file reports on time under current law. Candidates generally also are not held personally liable under current law.

X. IRS Death Sentence for Noncompliant Groups

In addition to the 2.5% tax on individuals, the bill proposes a 10% tax on nonprofits that err on reports. Once again, candidate committees and parties would be exempt from the 10% tax.

More worrisome is that the IRS would be forced to yank nonprofit status for a group that makes an error of $25,000 or more on its reports. This denial of nonprofit status would in many cases result in a financial catastrophe and effective death sentence for such groups.

Because of the burdensome reporting requirements that will in many cases require daily reporting of contributions, errors are much more likely to occur. A group with a budget in the millions filing reports that were 99% correct could easily make errors totaling over $25,000 in an election cycle, and find its tax status threatened as a result.

Tax-exempt groups (other than 501(c)(3) organizations) do not provide any tax relief to donors or receive any "tax subsidies" from the government, as these groups may only accept donations that are not tax deductible. Generally, tax-exempt status means only that donations are not considered income to the groups, but the money given to the organizations has already been taxed to the donor.

Denial of tax-exempt status could presumably mean that a nonprofit citizens' group whose tax exemption is pulled would be deemed a profit-making entity and its donations would become income subject to a 35% tax. Under the bill, the group's expenditures would also not be considered tax deductible business expenses, creating a tax bill that few, if any, could pay. Even if the group somehow had enough to pay the enormous tax bill, the public damage to its reputation would likely ensure its demise.

This death sentence is all the more worrisome because the provisions in the bill are so vague and broad that the government for the first time would have enormous discretion to decide which groups would live on, and which would die.

Recently, more legitimate news gathering and reporting, much of it critical of elected officials, has been done by nonprofit groups. These entities could also be subject to the death sentence if the IRS deems their activities out of compliance. These news gathering and reporting groups are organized as 501(c)(3) educational organizations, and the revocation of their tax status would not only put these groups out of business but cause enormous problems for many donors who supported the group.

XI. Absurd New Disclaimer Requirements

In addition to the already-too-long disclaimer requirements mandated under current law that add 10 seconds or more to a radio ad, this bill would create silly new disclaimers for TV and radio ads that would gobble up more air time with meaningless information that detracts from the group's message. Again, candidates are exempt from these new disclaimers.

Perhaps the silliest new requirement is that the announcer must state the nine-character FEC registration number for the group. If it becomes law, Planned Parenthood can look forward to adding the following to their radio and TV ads: "Our FEC number is C –three, zero, zero, zero, one, nine, four, five."

The bill also would require the top three funders of the group to be listed in the ads, whether they agreed with the ad or had any knowledge of it or not.

XII. User Fees for Advice

The bill authorizes the Secretary of the Treasury to impose user fees to cover the cost of advisory opinion requests to clarify the vague definition of IFERA, as discussed above, and to share such fees with the FEC to the extent the latter agency is also needed to weigh in.

This merely adds insult to injury. Not only do potential speakers face a prior restraint on their speech, but now they have to pay an additional tax merely for the "privilege" of having the government tell them what its own laws mean, whether the advice is correct or not.

To put it simply, this is a shakedown.

XIII. Interference with Legitimate Polling and Message Testing

The backgrounder also suggests that IFERA would include "fundraising, polling, message development and delivery of the message to voters." Backgrounder at 2 (emphasis added). Under the bill, sponsors of IFERA are required to include a disclaimer with their top three funders if the IFERA is distributed by TV or radio, mass mail, or political robocall. (Sec. 104.)

This would very likely interfere with legitimate polling (as opposed to "push polls" that merely advocate for or against candidates) – including message testing polls – by skewing the results, because poll respondents may not answer honestly or candidly depending on the identity of the caller. *See* FEC hearing on Advisory Opinion 2012-10 (Greenberg Quinlan), Apr. 12, 2012, available at http://www.fec.gov/audio/2012/2012041204.mp3. This is especially so because the Wyden-Murkowski bill requires the disclaimer to be placed at the beginning of the robocall – before any polling questions can be asked. (The FEC currently does not enforce any disclaimer requirement for legitimate polling. *See* FEC MUR 5835 (Democratic Congressional Campaign Committee), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn.)

Although many legitimate polls are done with live callers and would not be subject to the bill's disclaimer requirements, many legitimate polls are also done by automated means. For example, *see* Rasmussen Reports, "Methodology," at http://www.rasmussenreports.com/public_content/about_us/methodology ("Data for Rasmussen Reports survey research is collected using an *automated polling methodology*.") [Emphasis added.]

Admittedly, the IFERA disclaimer requirements under Wyden-Murkowski would only affect the activities of "independent political actors" (i.e., candidate and party committees are not affected). Nonetheless, because, as discussed above, the definition of IFERA is so incredibly vague and broad, legitimate issue advocacy groups would be swept into the definition of "independent political actor." It is not unusual for such groups to have a legitimate need to conduct polling that may involve questions or message testing that could fall under the definition of IFERA, but that are not for the purpose of influencing the outcome of elections (e.g., Organizing for Action may wish to determine how best to target certain legislators on the issue of gun control).

This provision also raises the question of the bill's purpose. Supposedly, the bill exists so that the public will have information on those persons funding elections. However, in the case where an organization does polling and as a result decides *not* to speak out in the campaign, what public knowledge is gained that is helpful to voters?

XIV. The Donor Retaliation Protection Provisions Would Be Ineffective

The backgrounder states that "no federal officer or employee may take any adverse action against a donor solely or substantially on account of the fact that the donor has made contributions to the registrant." Backgrounder at 5 (emphasis added). This language seems to implicitly acknowledge that government officials and employees may nonetheless take into account the "election related activities" of a donor who is required to be reported under this legislation, so long as it is not a "sole" or "substantial" factor in the decision making process.

The bill's language (at Sec. 303) simply prohibits any federal official or employee from "discriminat[ing]… on the basis of any information reported" about "election related activities," and it leaves open the question of how discrimination is defined.

Any governmental action that is taken on the basis of an individual's or entity's " election related activities" is unethical and corrupt, and should be strictly prohibited, notwithstanding the opening that the Wyden-Murkowski backgrounder appears to provide for such considerations. Additionally, government retaliation is not the only concern when it comes to reporting of donors. As the rampant harassment of donors and supporters of Proposition 8 in California illustrated, private harassment needs to be considered as well.

The backgrounder also suggests "the FEC may direct that a registrant confidentially report the identity of a donor of less than $5,000 who has demonstrated to the FEC that disclosure of the donor's identity will place the donor at a particularized and specific risk of substantial injury to his or her person or business as a consequence of the disclosure." (Backgrounder at 5.)

This protection is illusory. Certain FEC commissioners have recently indicated a refusal to grant this type of exemption to the Socialist Workers Party (AOR 2012-38), and the Socialist Workers' request has been dragging on since last November. Indeed, consideration of the request has been postponed several times by the FEC. As Chief Justice Roberts has stated, "we don't trust our First Amendment rights to FEC bureaucrats."

XV. Commendable Provisions

While nearly all the bill's provision are unwise, unconstitutional or both, there are a few commendable provisions.

A) *Increasing itemized contributions reporting threshold*

Sec. 102 increases the FEC reporting threshold for itemized political contributions to candidate committees from $200 to $1,000. This is a reasonable and long-overdue adjustment for inflation. However, if this increase makes sense, then it should also apply to non-candidate committees.

B) *Allowing candidates to disavow ads*

Sec. 105 explicitly gives candidates the ability to publicly disavow ads run by non-candidate committee sponsors without the risk of running afoul of the FEC's coordination rules. This would obviate the need for gimmicks like the "People's Pledge" between Scott Brown and Elizabeth Warren in their 2012 Senate race.

C) *FEC filing for Senate candidates*

Sec. 106 requires Senate candidates to file their reports with the FEC (and presumably to be subject to the electronic reporting requirements), as opposed to filing with the Secretary of the Senate under the current law. This is already required of House and presidential candidates, and will save the government money that is currently spent by the FEC to scan and transfer the reports from the Secretary of the Senate into the FEC disclosure database.