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Analysis of the DISCLOSE Act (S. 3295)

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This analysis has been prepared by the Free Speech Coalition to explain 10 sections of the DISCLOSE Act that are likely to be of primary concern by member organizations.

On April 29, 2010, Senator Charles Schumer (D-NY) and Congressman Chris Van Hollen, Jr. (D-8th MD) introduced the “Democracy Is Strengthened by Casting Light On Spending in Elections Act” (“DISCLOSE Act”) as Senate bill S. 3295 and House bill H.R. 5175, respectively, to amend the Federal Election Campaign Act of 1971 (“FECA”).¹ This bill was crafted in response to the U.S. Supreme Court’s January 21, 2010 opinion in Citizens United v. Federal Election Commission (“Citizens United”).

The stated purpose of the DISCLOSE Act is “[t]o prohibit **foreign** influence in federal elections, to prohibit **government contractors** from making expenditures with respect to such elections, and to establish additional **disclosure** requirements with respect to spending in such elections, and for other purposes.” (Emphasis added.) While the issues of foreign influence and government contractors are given the headlines, the Act places real burdens on private domestic lobbying organizations and certain for-profit corporations, and, in particular, small organizations.

The effective date of nearly all sections of the DISCLOSE Act would be 30 days after enactment of the Act.² This would not provide sufficient time for the Federal Election Commission (“FEC”) to revise its regulations. Without implementing regulations, organizations would be forced to comply with the broadly-stated provisions of the Act at their peril.

¹ Section 401 of the DISCLOSE Act amends the Communications Act of 1934 regarding television media rates for candidates and national committees of political parties.

² Section 503 of the DISCLOSE Act states, “Except as otherwise provided, this Act and the amendments made by this Act shall take effect upon the expiration of the 30-day period which begins on the date of the enactment of this Act, and shall take effect without regard to whether or not the Federal Election Commission has promulgated regulations to carry out such amendments.”

Many observers believe that the real purpose of the DISCLOSE Act is to impose a chilling effect on for-profit and non-profit corporations (especially respect to the 2010 elections) that may wish to take advantage of their rights recognized by the Supreme Court's January 21, 2010 Citizens United decision, which struck down the provisions of FECA prohibiting corporations from using general treasury funds in making independent expenditures and electioneering communications. Some observers believe that certain provisions in the DISCLOSE Act may not survive scrutiny by the courts. The DISCLOSE Act presents a fundamental assault against the principle of anonymity.

Section 103. Treatment of payments for coordinated communications as contributions.

Current Law

If a communication is coordinated with a candidate, it is considered to be an in-kind contribution to the candidate. The FEC regulations provide for a three-prong test (*i.e.*, payment, content, and conduct prongs) to determine whether a communication is coordinated. One of the standards for the content prong is a "public communication" that refers to a clearly identified House or Senate candidate and is publicly distributed in the identified candidate's jurisdiction within **90 days** of the candidate's **primary or general** election. *See* 11 CFR 109.21(c).

Proposed Change

The applicable election period in determining whether a communication is "coordinated" would be expanded, and the new period would run from **90 days** prior to the primary election **through** the date of the general election.

Section 201. Independent expenditures.

Current Law

FECA defines "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate for federal office. 2 U.S.C. § 431(17). The FEC regulations define "expressly advocating" as (i) using "magic words" (*e.g.*, "vote for the President") (from the U.S. Supreme Court's 1976 opinion in Buckley v. Valeo), or (ii) meeting the "reasonable person test" (from the 9th Circuit Court of Appeals 1987 opinion in FEC v. Furgatch, which was included in the FEC regulations in 1995). *See* 11 CFR 100.22.

Proposed Change

The statutory definition of an “independent expenditure” would be expanded to include the “reasonable person test” (*i.e.*, the “functional equivalent of express advocacy”). That is, an expenditure would be considered to be an “independent expenditure” if “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 the candidate, or takes a position on a candidate’s character, qualifications, or fitness for office.”

Current Law

Every person, group of persons, or organization, other than a political committee registered with the FEC, making **independent expenditures** aggregating more than \$250 with respect to a given election in a calendar year must file quarterly FEC Form 5 reports (Report of Independent Expenditures Made and Contributions Received). In addition to quarterly reports, any person who makes or contracts to make independent expenditures aggregating (i) \$10,000 or more, which expenditures are made **more than 20 days** before the election, must file a report within **48 hours** following the date on which the independent expenditure is publicly distributed or disseminated (“48-hour report”), and (ii) \$1,000 or more, which expenditures are made **less than 20 days** before the election, must file a report within **24 hours** following the date on which the independent expenditure is publicly distributed or disseminated (“24-hour report”). *See* 2 U.S.C. § 434(g); *see also* 11 CFR 109.10.

Proposed Change

The FEC Form 5 report required for independent expenditures of \$10,000 or more made **more than 20 days** before the election would be required to be filed within **24 hours**, instead of within 48 hours.

Section 202. Electioneering communications.

Current Law

An “electioneering communication” is defined as any broadcast, cable, or satellite communication that: (i) refers to a clearly identified candidate; (ii) is publicly distributed; (iii) is targeted to the relevant electorate; and (iv) is distributed within 30 days prior to a primary election, or within 60 days prior to a general election. *See* 2 U.S.C. § 434(f)(3).

Proposed Change

The coverage period for electioneering communications would be expanded to be within **90 days prior** to a primary election **through** the date of the **general** election.

Effective Date of Section 202

This section would apply to electioneering communications made on or after the date of enactment.

Section 211. Additional information required to be included in reports on disbursements by covered organizations.

Current Law

See Current Law regarding Section 201 above for summary of reporting requirements for **independent expenditures**. Schedule 5-A of the **FEC Form 5** requires the name, address, employer, occupation, amount, and date of receipt for each contribution over \$200 that was made for the purpose of furthering the independent expenditures. *See* 11 CFR 109.10.

Proposed Change

If a covered organization makes public independent expenditures of \$10,000 or more in a calendar year, **additional information** would be required in an FEC Form 5 report, including the following:

- A **listing of the persons** (in order of the aggregate amounts) who made donations of an aggregate amount of **\$1,000 or more** during the reporting period which were provided for the purpose of being used for campaign-related activity or in response to a solicitation for funds to be used for campaign-related activity.
- Information regarding the listed persons described above would be required; for example: (i) identification of persons who **designated** that the donations be used for a campaign-related activity with respect to a specific election or in support of a specific candidate, including the name of the election or candidate involved, or the specific independent expenditure, including a description of the expenditure; (ii) identification of persons who made **unrestricted** donations of an aggregate amount of **\$1,000 or more** during the reporting period if any of the disbursements

made by the organization for any public independent expenditure were not made from the organization's Campaign-Related Activity Account.

Current Law

Every person who makes a disbursement for the direct costs of producing and airing **electioneering communications** aggregating in excess of \$10,000 during a calendar year must report these disbursements by filing an **FEC Form 9** (24 Hour Notice of Disbursement/Obligations for Electioneering Communications) with the FEC. Each time subsequent disbursements for electioneering communications made by the same person aggregate in excess of \$10,000, another FEC Form 9 notice must be filed. The FEC must receive such Forms 9 within **24 hours** following the date on which the electioneering communication is publicly distributed for the first time, provided that the \$10,000 threshold has been reached. *See* 2 U.S.C. § 434(f). Schedule 9-A of the FEC Form 9 requires the name, address, amount, and date of receipt for each contribution used to finance the electioneering communications, regardless of the amount. *See* 11 CFR 104.20.

Proposed Change

The proposed changes regarding electioneering communications FEC Form 9 notices mirror the proposed changes regarding the additional information required for independent expenditure FEC Form 5 reports, as described above.

Section 212. Rules regarding use of general treasury funds.

Current Law

No current provision.

Proposed Change

The proposed changes regarding the use of general treasury funds include the following:

- (1) If any person who makes a donation to a covered organization notifies the organization in writing (at the time of making the donation) that the organization **may not use the donation for campaign-related activity**, not later than 7 days after the organization receives the donation, the organization would be required to transmit to the person a **written certification by the chief financial officer** that the organization will not use the donation for campaign-related activity.

- (2) If, at any time during a calendar quarter, a covered organization makes a disbursement of funds for campaign-related activity using funds received by the organization which are (i) designated to be used for campaign-related activity, (ii) unrestricted donor payments, and (iii) other funds of the organization received in the regular course of the organization's business, the **chief executive officer** of the organization must file a **statement** with the FEC, under penalty of perjury, which includes the following certifications:

Certification #1. A certification that none of the campaign-related activity for which the organization disbursed funds during the quarter was made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee of such candidate, or political committee of a political party or agent of any political party.

Certification #2. A certification that the chief executive officer of the organization has reviewed and approved each statement and report filed by the organization under 2 U.S.C. § 434 (*i.e.*, all reports filed with the FEC) with respect to any such disbursement made during the quarter.

Certification #3. A certification that each statement and report filed by the organization under 2 U.S.C. § 434 with respect to any such disbursement made during the quarter is complete and accurate and does not contain an untrue statement of material fact.

Certification #4. A certification that all such disbursements made during the quarter are in compliance with this Act and all other applicable federal laws.

Certification #5. A certification that no portion of the amounts used to make any such disbursements during the quarter is attributable to funds received by the organization that were restricted by the person who provided the funds from being used for campaign-related activity.

Section 212 defines the following new terms:

- **Covered organizations.** The term "covered organization" means: (i) any corporation or labor organization which is subject to 2 U.S.C. § 441b; (ii) any IRC section 501(c)(4), 501(c)(5), or 501(c)(6) organization; and (iii) any IRS section 527 political organization other than political committees registered with the FEC.

- **Campaign-related activity.** The term “campaign-related activity” means: (i) an independent expenditure consisting of a public communication,³ or (ii) an electioneering communication.
- **Unrestricted donor payment.** The term “unrestricted donor payment” means a payment to a covered organization which consists of a donation from a person which does not include: (i) any payment made pursuant to commercial activities in the regular course of a covered organization’s business; (ii) any donation which is designated by the person making the donation to be used for campaign-related activity or made in response to a solicitation for funds to be used for campaign-related activity; or (iii) any donation by a person who notifies the organization in writing that the organization may not use the donation for campaign-related activity.

Section 213. Optional use of separate account by covered organizations for campaign-related activity.

Current Law

No current provision.

Proposed Change

At its option, a covered organization would be allowed to establish a bank account, called the “**Campaign-Related Activity Account**,” which would be used to make disbursements for campaign-related activity. However, if such an account is established, the covered organization **may not make disbursements** for campaign-related activity **from any source** other than amounts from this account.

³ “The term ‘public communication’ means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. § 431(22).

Section 214. Modification of rules relating to disclaimer statements required for certain communications.

Current Law

A “**disclaimer**” notice is defined as a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who authorized the communication. The actual wording of the disclaimer depends on the type of communication. For example, independent expenditure communications must include the name and street address, telephone number, or World Wide Web address of the person who paid for the communication. *See* 2 U.S.C. § 441d(a)(3).

Proposed Change

A **disclaimer** notice would be required for all independent expenditure communications pursuant to the expanded definition of “independent expenditure” in Section 201. In addition, there would be **special disclaimer** requirements for any independent expenditure communication that is **broadcast** on radio or television, or any electioneering communication, as follows:

- **Individual or organizational disclosure statement.** For example, the organizational disclosure statement would be: “I am [name of applicable individual], the [title of applicable individual], of [name of organization paying for communication], and [name of organization paying for communication] approves this message.”
- **Significant funder disclosure statement.** A “significant funder” would mean any person who makes payment of more \$100,000 to the organization which was designated by the person to be used for campaign-related activity consisting of that specific independent expenditure.
- **Top 5 Funders List.** The “Top 5 Funders List” would be a list of the five persons who provided the largest payments which are required to be included in the reports filed by any organization (*i.e.*, over \$200 regarding independent expenditures, and any amount regarding electioneering communications) with respect to the independent expenditure or electioneering communication, together with the amounts of the payments each such person provided.

Section 301. Requiring disclosure by covered organizations of information on campaign-related activity.

Current Law

No current provision.

Proposed Change

Regular Periodic Reports. A covered organization which submits regular, periodic reports to its shareholders, members, or donors on its finances or activities would be required to include in each such report, with respect to disbursements made by the organization for campaign-related activity during the period covered by the report, the following information:

- Date of independent expenditures or electioneering communications
- Amount of the independent expenditure or electioneering communication
- Name of the candidate identified in the independent expenditure or electioneering communication, office sought, and whether the independent expenditure or electioneering communication was in support of or in opposition to the candidate

Public Dissemination. If the organization maintains an Internet site, the organization would be required to post on the Internet site the above information, in a machine-readable, searchable, sortable, and downloadable manner and through a direct link from the homepage of the organization. The organization would be required to post this information on its Internet site not later than 24 hours after the organization files the information with the FEC, and would be required to ensure that the information remains on the website until the expiration of a one-year period which begins on the date of the election with respect to which the independent expenditures or electioneering communications are made.

In addition, if the organization maintains an Internet site, the organization would be required to post on the Internet site by January 31 of a given year, in a machine-readable, searchable, sortable, and downloadable manner and through a direct link from the home page of the organization, the following information with respect to the aggregate amount of disbursements made by the organization for campaign-related activity during the prior calendar year:

- A breakdown by political party of the total amount disbursed in support of and in opposition to candidates of each political party
- The total amount disbursed in support of or in opposition to (i) incumbent candidates, (ii) candidates challenging incumbent candidates, and (iii) candidates for election to an office for which no incumbent is seeking re-election.

The above information would be required to be posted on the website of the organization until the end of the calendar year in which the information is posted.