



Construction Industry Round Table

Legislative News

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6/25/10 – DISCLOSE Act Passes U.S. House of Representative

After receiving a full-press endorsement from President Obama, House Democrats on Thursday, June 24th, narrowly passed a campaign finance reform package tightening rules on political spending by outside groups (especially corporations and businesses, while exempting labor unions from similar rules). The bill (HR 5175), called the DISCLOSE Act, passed 219-206 (details of which were reported on by CIRT in its 5/27/10 article). The highly partisan bill was a top Democratic leadership priority as the midterm elections near, believing that the bill would off-set what they believed to be a negative development arising from the First Amendment decision by the Supreme Court in January lifting limits on outside spending. Notwithstanding the narrow victory, the path forward in the Senate remains unclear, with strong Republican opposition and a likely filibuster looming against the outright partisan attempt to improve Democrat chances in November through manipulation of campaign finance rules. CIRT has joined the U.S. Chamber of Commerce in urging its members to oppose the bill because it attacks business first amendment rights to fully participate in the political process. [[See Summary of House passed bill HR 5175](#)].



H.R. 5175 – As passed by the House

On April 29, Democratic Congressional Campaign Committee Chair Rep. Chris Van Hollen introduced H.R. 5175. On May 20 the Committee on House Administration marked up the bill. On June 23 the Rules Committee adopted a rule that self-executed a 45-page manager's amendment and made five other amendments in order. On June 24 the House approved four of the five amendments and passed the bill 219-206.

This bill seeks to re-write campaign finance laws just months before an election. The bill's sponsors have openly stated that its purpose is to discourage political speech following the Supreme Court's decision in *Citizens United v. Federal Election Commission*. It accomplishes this in a biased manner, clearly favoring unions over other organizations. The bill adds roughly 100 pages of complexity to a campaign finance law that already rivals the Internal Revenue Code.

The bill's effort to limit political speech is not even-handed. It burdens some speakers more than others. It also includes sections that are ambiguous and certain to lead organizations to avoid political speech because that speech may violate the law, even though they cannot be certain whether it does. This problem is made worse by the bill's extreme accelerated implementation schedule and delayed process for court review.

The following summary and comments are provided by the Committee on House Administration – GOP Office.

§ 101(a) – Government Contractors

Prohibits independent expenditures and electioneering communications by anyone with a government contract over \$10,000,000 (originally \$50,000, then \$7,000,000 as reported by House Admin).

- The legislation does not apply equally to unions in collective bargaining agreements with the government, unions who receive dues from government payroll deduction, or grant recipients.

§101(b) – TARP recipients

Prohibits independent expenditures and electioneering communications by TARP recipients who have not repaid assistance.

- Does not apply equally to the unions of TARP companies.

§101(c) – Offshore oil leases

Prohibits independent expenditures and electioneering communications by any person holding or entering into negotiations for a lease to drill for oil or gas under the outer continental shelf.

- Applies ban based on rationale of preventing corruption by those receiving government funds to entities paying funds to the government.
- Selectively bans speech by one class of mineral lease holders but not others.

§102 – Foreign Nationals

Expands the ban on independent expenditures or electioneering communications by foreign nationals to include corporations where:

- a) 5% or more of the company is owned by a foreign government, 20% or more of the company is owned by a foreign national, or 50% or more of the company is owned by two or more foreign nationals each owning 5% or more (“owns” refers to direct or indirect ownership or control)
- b) The majority of the board is foreign nationals,
- c) Foreign national(s) have power to control decision making in the U.S., or
- d) Foreign national(s) have power to control decision making on political activities.

The CEO of the company must certify, under penalty of perjury, the company’s eligibility for political spending to the FEC.

- The bill does not apply equally to unions with foreign members, non-citizen members, foreign board representation or other foreign agreements/affiliations.
- It also excludes from political participation U.S. based companies with U.S. employees and revenue.

§ 103 & 104 – Coordinated Communication

Defines “coordinated communication” as having either conduct showing coordination or content prepared by a candidate that is republished or distributed by an independent entity.

Expands the period in which coordinated communication is treated as a contribution to start 90 days before House primaries and end at the general election.

Excludes the political party committees from the contribution rule for coordinated spending on public communications unless the communication is “controlled by or under the direction of” the candidate.

- The new definition of coordination based solely on conduct may conflict with court holdings.
- The definition of coordination based solely on content could lead to a finding of coordination where a candidate had no control or knowledge of the communication.
- The expansion of the covered period means issue ads would be subject to coordination limits for an extremely long period (up to a year in some states).

§201 – Express Advocacy

Expands the definition of independent expenditure to include express advocacy or its functional equivalent. Requires the filing of independent expenditure reports within 24 hours regardless of when made.

§202 – Electioneering Communication

Changes the definition of electioneering communication to begin 120 days before the general election. Adds to the electioneering communication reporting requirement.

§211 – Additional Reporting

If donations to an organization are made for the purpose of campaign-related activity, or in response to a solicitation for funds for campaign-related activity, the organization must report all donations over \$600 (for independent expenditure reports) and \$1,000 (for electioneering communication reports).

If independent expenditures are not made from Campaign Related Activity Account, they must report all donations over \$600; if made from the Campaign Related Activity Account, they must report all donations over \$6,000.

If electioneering communications are not made from the Campaign Related Activity Account, they must report all donations over \$1,000; if made from the Campaign Related Activity Account, they must report all donations over \$10,000.

Transfers to other entities may be deemed to be for independent expenditure/electioneering communication and require reporting as such.

This applies to corporations, unions, 501(c)(4)s, 501(c)(5)s, 501(c)(6)s & 527s, EXCEPT that 501(c)(4)s are exempt if they meet all of these criteria (the “NRA exemption”):

- exempt from tax under section 501(c)(4) for each of the last 10 years
- at least 500,000 individuals who have paid membership dues
- at least one dues paying member from every state (including DC and Puerto Rico)
- not more than 15% of funds received are from corporations or unions (except funds from commercial transactions in the ordinary course of business)
- no funds from corporations or labor unions are used for campaign-related activity

- The new threshold for reporting is likely to have little effect on unions (whose average annual dues per employee were only \$377 in 2004) but a huge effect on associations and advocacy groups.
- These are highly complex reporting requirements and would likely come with high compliance costs, disproportionately affecting small entities.
- The new transfer rules could lead to widespread investigations based on transfers being “deemed” for political activity.
- Transfers between affiliated entities are exempt if they are under \$50,000.
- If a an amount transferred between affiliates is attributable to regular dues or assessments from individuals, then the transfer is attributable to the individuals rather than the organization so there is essentially no reporting requirement at all.

§212 – Donor Intent

Donors can avoid reporting of donations to the FEC by a mutual agreement that donations will not be used for campaign related activity (which is an independent expenditure or electioneering communication or a transfer to another who may make one). Donors making this agreement must receive a certification from the CFO that their donation will not be used for campaign activity.

- The donor and recipient must agree at the time a donation or payment is made to prohibit its use for campaign activity. This creates a question of whether union members must reach such an agreement with each paycheck from which dues are deducted. The certifications turn the presumption of voluntary compliance on its head. This section is clearly designed to impose so high a burden that it deters speech. It also imposes additional burdens on the rights to anonymity established in *NAACP v. Alabama*.

§213 – Campaign Related Activity Accounts

Describes and defines the newly created category of accounts called Campaign Related Activity Accounts

- Clearly circumvents and may violate holding in *Citizens United* that general treasury funds may be used for political speech.

§214 – Stand by your Ad

Expands the “stand by your ad” requirements to include the head of the organization and the organization’s largest donor. The organization must be named up to 3 times in each disclaimer. The bill also requires the 5 largest donors to be listed on screen (with the 2 largest stated in radio ads). Disclaimers include name, title and organization if applicable, and location of residence or principal place of business.

- The disclaimer can take an estimated 14 seconds and when combined they can easily use up the entire time of an ad. The disclaimer is designed to deter speech rather than provide useful information. It is not clear how an organization will comply if many donors gave the same amount. The disclosure may be misleading if the communication is for a matter of interest to smaller donors in an organization but not to its largest donors.
- The “hardship” exception added in the markup is meaningless for 2010 because it isn’t effective until the FEC issues rules. The bill’s requirements take effect immediately but the exception is delayed.

§ 221 – Lobbyists

Requires Lobbyist Disclosure Act-registered lobbyists and organizations to report spending on independent expenditures and electioneering communications.

§301 – Web site reporting

Requires annual reports to list each disbursement for campaign related spending in a clear and conspicuous manner, and the list must be made available on the company’s web site, in machine-readable format, linked directly from the organization’s home page. On its face this applies to corporations, unions, 501(c)(4)s, 501(c)(5)s, 501(c)(6)s and 527s.

§401 – Judicial review

Provides for judicial review through DC District Court, DC Court of Appeals, then the Supreme Court. Allows for actions brought by and intervention by Members of Congress.

- This new process for judicial review is in conflict with the review provisions in both FECA and BCRA. This is likely to lead to delays for collateral litigation to determine the correct review procedure, and an even longer review process.
- The section is clearly intended to frustrate rapid resolution of constitutional challenges and to delay them until after the 2010 election.

§402 – Severability

Contains a severability clause.

§403 – taking effect

The bill will take effect 30 days after enactment, regardless of whether FEC rules are promulgated.

- It is impossible for the FEC to pass regulations before the bill takes effect. Organizations would have to risk possible legal action to speak without detailed guidance from the FEC, especially on sections that are ambiguous or require forms or procedures.