TESTIMONY OF MICHAEL E. TONER
BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION
REGARDING THE DISCLOSE ACT
MAY 11, 2010[1]

Thank you Chairman Brady, Ranking Member Lungren, and Members of the Committee for the opportunity to testify before you today regarding the Democracy is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE Act"). I am a Partner at Bryan Cave LLP in Washington, DC and I head the firm's Election Law and Government Ethics Practice Group. I am a former Chairman of the Federal Election Commission ("FEC") and served as a Commissioner on the FEC from 2002 – 2007. I submit these comments in my personal capacity and not on behalf of any particular client.

At the outset, I would like to emphasize that I am very troubled by the process by which Congress is considering the DISCLOSE Act. The legislation, which purports to respond to the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), was crafted behind closed doors with little or no consultation with the Republican congressional leadership in either the House or the Senate. In addition, the DISCLOSE Act seeks to make major changes to the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") only months before a national election, with an effective date of 30 days after enactment, regardless of whether the FEC has promulgated any regulations to effectuate the legislation. Moreover, the DISCLOSE Act fails to define a multitude of key statutory terms, which creates the potential for widespread confusion among candidates, political parties, corporations, labor unions, trade associations, and other affected organizations about what their obligations are under the law. Needless to say, the presence of any one of these phenomena would seriously jeopardize the enactment of sound legislation; the presence of all three with respect to the DISCLOSE Act makes it nearly impossible for Congress to act in a responsible way.

I will not attempt to catalogue all of my objections to the DISCLOSE Act, which are numerous, but I would like to highlight some of the biggest problems with the proposed legislation.

First, the DISCLOSE Act would severely restrict the political activities of a large number of American corporations – including many successful and longstanding companies run by American citizens and with substantial U.S. earnings – if foreign nationals are associated with the corporations in certain ways. These provisions of the DISCLOSE Act are unwarranted given that FECA and FEC regulations prohibit foreign nationals and foreign corporations from making contributions and expenditures in connection with U.S. elections. In addition, FECA's foreign-national restrictions were strengthened by Congress in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Moreover, there has been no evidence that existing law since BCRA has been ineffectual in preventing foreign national involvement in American elections, and the *Citizens United* ruling did not disturb any of these significant legal restrictions.

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[1] I would like to thank Karen Trainer for her able assistance in preparing this testimony.

FECA currently bars foreign nationals, including foreign corporations, from directly or indirectly making contributions or expenditures in connection with U.S. elections, including independent expenditures and electioneering communications. *See* 2 U.S.C. § 441e. In addition, the FEC has promulgated detailed regulations restricting foreign nationals from *inter alia*:

- directly or indirectly making contributions or donations in connection with federal, state or local elections (11 C.F.R. § 110.20(b));
- directly or indirectly making contributions or donations to political party committees, including national, state, and local political party committees (11 C.F.R. § 110.20(c));
- directly or indirectly making any disbursements for electioneering communications (11 C.F.R. § 110.20(e)); and
- directly or indirectly making any expenditures, including independent expenditures, in connection with federal, state, or local elections (11 C.F.R. § 110.20(f)).

In addition, under current FEC regulations no foreign national may "direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, state, or local office or decisions concerning the administration of a political committee." 11 C.F.R. § 110.20(i).

Notwithstanding these stringent restrictions on foreign national involvement in American elections, and despite no evidence of abuses in this area in recent years, the DISCLOSE Act would extend the existing prohibition on foreign national contributions and expenditures to U.S. corporations associated with foreign nationals under the following circumstances:

- If a foreign national directly or indirectly owns 20% or more of the corporation's voting shares;
- If foreign nationals comprise a majority of the members of the corporation's board of directors;
- If one or more foreign nationals have the power to direct, dictate, or control the decision-making process of the corporation with respect to its interests in the U.S.; or
- If one or more foreign nationals have the power to direct, dictate, or control the decision-making process of the corporation with respect to activities in connection with federal, state or local elections, including the making of contributions, expenditures, independent expenditures, electioneering communications, and the administration of a PAC established or maintained by the corporation.

See DISCLOSE Act § 102. The DISCLOSE Act would also require the CEO or highest-ranking official of the corporation to certify to the FEC under penalty of perjury that the corporation is not prohibited from making contributions, expenditures, independent

expenditures, or electioneering communications prior to doing so, unless the CEO or highest-ranking corporate official has already filed a certification during the year. *See* DISCLOSE Act § 102.

The practical effect of these provisions, if they were to become law, would be to prohibit many American companies from making any contributions or expenditures in connection with U.S. elections, from making any independent expenditures or electioneering communications, and even from operating a corporate political action committee ("PAC") funded by personal contributions from company employees who are American citizens and who wish to support the company's PAC. The biggest targets of the legislation are longstanding American subsidiaries of foreign parent corporations – companies that employ tens of thousands of Americans, have operations across the country, have significant U.S. earnings, and who may wish to make contributions or expenditures in connection with U.S. elections and to operate a company PAC.

The Organization for International Investment, which represents U.S. subsidiaries of foreign parent corporations, has highlighted in powerful detail the wide range of American companies that could be adversely affected by the DISCLOSE Act. Nancy McLernon, who is the President of the Organization for International Investment, has emphasized that:

> The DISCLOSE Act chips away at the political rights of the five million American workers who collect over $400 billion in paychecks from the U.S. subsidiaries of companies based abroad or 'insourcing' companies. Insourcing companies are American companies in every sense of the word, especially in the contribution they make to the U.S. economy and their local communities. As a company incorporated in the U.S., they have the same obligations and rights as any U.S. company.

Organization for International Investment Press Release (issued April 29, 2010) (attached hereto as Exhibit 1).

Approximately 160 U.S. corporations are members of the Organization for International Investment, and they include many companies that are household names in America and that employ tens of thousands of Americans, including Anheuser-Busch, BASF Corporation, Food Lion, Michelin North America, Miller Brewing Company, Nestle USA, Panasonic Corporation of North America, Thomson Reuters, and The John Hancock Life Insurance Corporation, just to name a few. Moreover, U.S. subsidiaries of foreign parent corporations employ millions of Americans and are active in communities across the nation. U.S. subsidiaries of foreign parent corporations reportedly:

- Employ 5.5 million Americans, which represents 4.6% of total U.S. private-sector employment;
- Support an annual payroll of $403.6 billion, with average compensation per worker of approximately $73,000, which is 35% higher than the compensation at all U.S. companies;
- Heavily invest in the American manufacturing sector, with 29% of the jobs at U.S. subsidiaries in manufacturing industries;

- Manufacture American export goods across the globe, accounting for nearly 18.5% of all U.S. exports; and
- Have a larger percentage of their workers (12.4%) covered by union collective bargaining agreements than do other U.S. companies.

See 4/29/10 Organization for International Investment Press Release (Exhibit 1).

A recent article in *The Hill*[2] highlighted additional concerns that American companies have regarding the DISCLOSE Act. For example:

- David Lustig, a Vice President of Unilever, indicated that Unilever is "concerned that the measure could implicitly undercut the principle of 'national treatment' embodied in U.S. investment policy and in bilateral investment treaties, deny equality of treatment to U.S. subsidiaries of foreign companies, send a chilling signal to potential foreign investors and encourage states to restrict the First Amendment rights of companies to defend their interests on initiatives and referenda."

- Sean Kevelighan, a spokesman for Zurich, stated that "Zurich American Insurance Co. is dedicated to ensuring we can continue to fairly and fully participate in the American political system, and we believe that any campaign reform measure must recognize this fundamental right for all Americans."

As Nancy McLernon emphasized in a *Wall Street Journal* article, "[t]alking about restricting foreign influence in elections may sound like good politics, but when you peel back the layers, it could have a wide spectrum of unintended consequences. There is no reason to distinguish a Nestle from a Hershey's."[3]

I understand that advocating for additional foreign national restrictions in American elections makes for good politics, particularly in an election year. However, to potentially sweep up hundreds of longstanding U.S. companies run by Americans and restrict them from being involved in American elections is terrible public policy. It is also disingenuous given that the *Citizens United* ruling did not affect FECA's existing restrictions on foreign national contributions and expenditures, which were strengthened just eight years ago by BCRA, and given that no one has argued that there has been inappropriate foreign-national involvement in American elections in recent years. There is simply no place in credible campaign finance legislation for these kinds of legislative provisions and Congress should summarily reject them.

Second, the DISCLOSE Act would require Section 501(c)(4) social welfare organizations and other types of tax-exempt organizations to disclose their donors if the organizations exercise their constitutional rights, recognized by the Supreme Court in *Citizens United*, to make independent expenditures and electioneering communications. Such compelled disclosure of donors to 501(c) organizations — which by law are not partisan

[2] Kevin Bogardus, "Multinationals Wary of Citizens 'Fix,'" *The Hill* (May 4, 2010).
[3] Brody Mullins and Jess Bravin, "Foreign Spending on Politics Fought," *Wall Street Journal* (January 29, 2010).

political organizations and which are not required to disclose their donors under the Internal Revenue Code – is inappropriate, particularly when the disclosure requirements are onerous and burdensome and are linked to the exercise of fundamental constitutional rights. If these provisions of the DISCLOSE Act become law, they will likely impinge upon the ability of progressive and conservative 501(c) organizations alike to speak out about federal candidates and officeholder and the major public policy issues of the day.

The DISCLOSE Act would require covered organizations — including corporations, labor unions, Section 501(c)(4) social welfare organizations, Section 501(c)(6) trade associations, and Section 527 organizations — to report certain information to the FEC regarding their donors if the organization makes independent expenditures or electioneering communications. Specifically, if independent expenditures exceed $10,000 in a calendar year or if an organization is required to file a report detailing electioneering communications, the organization would be required to disclose donor information. The disclosure threshold would range from $600 to $10,000 depending upon the structure of the organization's bank accounts, whether or not the contribution was designated for the expenditure by the contributor, and whether the communication was an independent expenditure or an electioneering communication. *See* DISCLOSE Act § 211(a) and § 211(b).

A number of progressive 501(c)(4) groups have expressed serious reservations about the compelled donor disclosure provisions in the DISCLOSE Act. For example, David Willett, a spokesman for the Sierra Club, indicated that the Sierra Club is "working to change the legislation" and that the compelled disclosure of donors is "a significant issue."[4] The Alliance for Justice reportedly shares the Sierra Club's concerns about the DISCLOSE Act.[5] As *Politico* recently reported, "[s]ome advocacy groups that typically align with Democrats such as the Sierra Club and the Alliance for Justice have also grumbled about the legislation . . . "[6]

The compelled disclosure of donors to 501(c)(4) organizations, which by law are organized and operate as social welfare organizations and not as partisan political organizations, appears to be designed and has the potential to deter such organizations from engaging in independent speech regarding federal candidates and officeholders, which is constitutionally protected under the *Citizens United* ruling. Although certain disclosure requirements involving political speech are constitutionally permissible, they must be narrowly tailored and not imposed to harass speakers or chill disfavored speech. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). *See also New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); *Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment assures an "unfettered interchange of ideas for the bringing about of political and social change desired by the people."); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) ("[T]he purpose behind the Bill of Rights, and of the First Amendment in particular . . . [is] to protect

[4] Brody Mullins, "Disclosure of Donors Draws Fire from Left," *Wall Street Journal* (April 27, 2010).
[5] *Id.*
[6] Kenneth P. Vogel, "Dems Launch Citizens United Bill," *Politico* (April 29, 2010).

unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society."). The compelled disclosure of donors to 501(c)(4) social welfare organizations and to other tax-exempt organizations is an institutional concern, not a partisan or ideological one, and I am hopeful that the progressive 501(c) community will continue speaking out against the DISCLOSE Act.

Third, a number of key statutory terms are not defined in the DISCLOSE Act which makes the legislation unduly vague in a wide variety of areas. One of the most important of these areas concerns political party committee coordinated expenditures. The DISCLOSE Act provides that any payment by a political party committee for the direct costs of an advertisement or other communication made on behalf of a candidate affiliated with the party committee would be treated as a contribution to the candidate – and subject to FECA's party committee coordinated expenditure limits – "only if the communication is controlled by, or made at the direction of, the candidate or an authorized committee of the candidate." DISCLOSE Act § 104.

However, the DISCLOSE Act does not define or specify what types of candidate conduct or communications constitute direction or control and therefore would trigger the strict coordinated expenditure limits. Presumably if a candidate and a party committee chairman merely discuss particular advertisements that the party committee could air on behalf of the candidate, and the party committee subsequently airs the advertisements, such communications would not constitute direction or control within the meaning of § 104 of the DISCLOSE Act. But what if a candidate telephones a party chairman and requests or urges that the party committee air a certain advertisement on behalf of the candidate, and the party committee subsequently does so — does that constitute direction or control? What if the candidate calls the party chairman and demands that the party committee air an advertisement and the party committee subsequently complies? Or the candidate warns that he will have the party chairman ousted if he does not comply and the advertisement is subsequently aired? With the key statutory terms in § 104 left undefined, it is unclear what the legal consequences would be under any of these scenarios, and many of them are common occurrences in the daily interaction of candidates, political party committees, and their agents.

More broadly, given that political parties cannot corrupt their own candidates, political party committee should be permitted to make unlimited coordinated expenditures on behalf of their candidates without any qualifications or conditions. It is important to note that under current law, party committee coordinated expenditures must be made out of "hard dollar" funds which are raised subject to the source prohibitions, contribution limits, and reporting requirements of FECA. Permitting unlimited coordinated party expenditures would allow party committees to more efficiently target their hard dollars to the most important federal races in the country and could enable the parties to play a bigger role in federal elections. For all the foregoing reasons, if Congress decides to amend FECA's party committee coordinated expenditure provisions, it should lift the limits on coordinated expenditures altogether.

Fourth, the DISCLOSE Act includes a number of onerous reporting requirements. In most cases, these reporting requirements are duplicative and fail to provide any additional information to the public.

Under the proposed legislation, if an individual or entity makes or contracts to make independent expenditures aggregating in excess of $10,000 during the period up to and including the 20th day before an election, the individual or entity would be required to file a report with the FEC disclosing the expenditures within 24 hours. Additional reports would be required each time an individual or entity makes additional expenditures in excess of $10,000 during this time frame. *See* DISCLOSE Act § 201(b). Current law allows 48 hours for the disclosure of these independent expenditures.

The DISCLOSE Act would also require that all campaign-related disbursements made by covered organizations – including corporations, labor unions, Section 501(c)(4) social welfare organizations, Section 501(c)(6) trade associations, and Section 527 organizations – be disclosed on the organization's website with a clear link on the homepage within 24 hours of the organization reporting such disbursements to the FEC. The covered organization would be required to provide the information in a searchable, sortable and downloadable manner through a direct link from the organization's homepage. The organization would also be required to include the link on the organization's website until one year after the date of the election with respect to which campaign-related disbursements and communications were made. *See* DISCLOSE Act § 301.

In addition, by January 31 of each calendar year, the covered entity would be required to provide a summary of aggregate disbursements for campaign-related activity during the previous year. The organization would be required to provide the summary in a searchable, sortable, downloadable manner from a direct link on the organization's homepage. The summary must include a breakdown by political party of the total amount disbursed in support of and in opposition to candidates of each party and a breakdown of the amount disbursed in support of or opposition to incumbent candidates, candidates challenging incumbent candidates, and candidates for election to an open seat. The summary must remain on the entity's website until the end of the calendar year in which the summary is posted. *Id.*

Additionally, the DISCLOSE Act would require that all campaign-related disbursements made by covered organizations be disclosed to the shareholders and members of the organization in any financial reports that are provided on a periodic and/or annual basis to the organization's shareholders or members. The information disclosed must include the date of the independent expenditure or electioneering communication, the amount paid, the name and office sought of the candidate and whether the communication was in support of or opposition to the candidate, and certain information regarding funds transferred to other entities for the purpose of engaging in independent expenditures and electioneering communications. *Id.*

These provisions do little more than require entities that make disbursements in connection with election-related communications to re-disclose information that is already publicly available or will be publicly available under provisions contained in current law or

other provisions of the DISCLOSE Act. For example, the report that covered organizations making election-related expenditures would be required to disclose on a public website within 24 hours of filing with the FEC would contain the exact same information that the organization would required to disclose to the FEC. Information sent to shareholders would also repeat information previously reported to the FEC. Similarly, information that covered organizations would be required to disclose in a year-end online summary would generally include information previously reported to the FEC, as well as information on totals that could be ascertained from previously reported data and publicly available information regarding candidates' party affiliation and status as an incumbent or challenger. Such duplicative reporting requirements are not appropriate, particularly given how onerous and burdensome that they are likely to be for many covered organizations.

Thank you very much for the opportunity to provide this testimony regarding the DISCLOSE Act. As the legislative debate concerning the DISCLOSE Act proceeds, I am hopeful that Congress will determine that the legislation is misguided and should be not be enacted into law, particularly in the final months before a national election. If Congress disregards these concerns and nevertheless enacts the DISCLOSE Act, litigation almost certainly will be brought which will allow the Supreme Court to act once again to safeguard the fundamental constitutional rights that were recognized in the *Citizens United* ruling.

Exhibit 1

ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

FOR IMMEDIATE RELEASE
April 29, 2010

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"Insourcing" Companies Targeted by Legislators in Response to the Supreme Court's Citizens United Case

WASHINGTON, DC – In the wake of the Supreme Court case, *Citizens United v. Federal Election Commission*, U.S. Senator Chuck Schumer (D-NY) and U.S Representative Chris Van Hollen (D-MD) today each filed legislation that includes a proposal aimed at concerns over foreign influence on election spending which broadly sweeps all U.S. operations of companies based abroad or "Insourcing" companies into a category of concern. ***The following statements are attributed to Nancy McLernon, President & CEO of the Organization for International Investment.***

"We agree that foreign influence has no role in U.S. elections, but the DISCLOSE Act chips away at the political rights of the five million American workers who collect over $400 billion in paychecks from the U.S. subsidiaries of companies based abroad or 'Insourcing' companies. Insourcing companies are American companies in every sense of the word, especially in the contribution they make to the U.S. economy and their local communities. As a company incorporated in the U.S., they have the same obligations and rights as any U.S. company."

"While OFII remains concerned over limits the legislation places on the political rights of U.S. companies employing millions of Americans, some language has been added to the House version of the legislation to ameliorate the negative impact on these companies. The House bill, for example, includes language that suggests a U.S. subsidiary shall not be treated as 'foreign' for purposes of any law other than in the DISCLOSE Act."

Facts on the U.S. Subsidiaries of Companies Based Abroad, or "Insourcing" Companies:

- U.S. subsidiaries have insourced 5.5 million Americans - 4.6% of total U.S. private sector employment;
- U.S. subsidiaries account for 6% of total U.S. GDP;
- U.S. subsidiaries support an annual payroll of $403.6 billion — with average compensation per worker of $73,124, which is 34.7 percent higher than compensation at all U.S. companies;
- U.S. subsidiaries heavily invest in the American manufacturing sector; with 29 percent of the jobs at U.S. subsidiaries in manufacturing industries;
- U.S. subsidiaries manufacture in America to export goods around the world — accounting for nearly 18.5 percent of all U.S. exports, or $215.6 billion;

- U.S. subsidiaries have a larger percentage of workers covered by a union collective bargaining agreement than other U.S. companies -- 12.4% of employees at U.S. subsidiaries compared to just 8.2% at other U.S. firms.

The Organization for International Investment is a Washington-based business association representing U.S. subsidiaries of international companies headquartered. For additional information, see OFII's web site at www.ofii.org.