DEMOCRATIC POLICY COMMITTEE

Legislative Bulletin

DPC

BYRON L. DORGAN
CHAIRMAN

DPC Staff Contact: Erika Moritsugu and Jesse Comart (202) 224-3232
DPC Press Contact: Barry Piatt (202) 224-0577
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S. 3628, the *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act*

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Summary

In January 2010, the Supreme Court issued a closely divided 5-4 decision in *Citizens United v. Federal Election Commission*. Under this ruling, big businesses are permitted to spend unlimited amounts of money on elections, counter to long-standing law and precedent that had restricted political expenditures by corporations.

In response, Senator **Schumer** introduced the *Democracy Is Strengthened by Casting Light on Spending in Elections* (DISCLOSE) *Act*, to mitigate the harmful decision by the Supreme Court in *Citizens United*. This legislative response would amend the *Federal Election Campaign Act of 1971* to carefully limit the ability of special interests to pour money into our election process. The original Senate legislation enjoys the support of 49 co-sponsors who recognize the real-world impact of the Supreme Court's decision.

On June 24, the House passed their version of the *DISCLOSE Act* by a 219-206 vote. Senator **Schumer** subsequently introduced a revised version of the *DISCLOSE Act*, incorporating some of the changes made in the House, that will be considered by the full Senate (**S. 3628**). The bill would provide important protections to the American people by:

- Promoting effective disclosure of campaign-related activity by special interests;
- Preventing foreign influence in U.S. elections; and
- Banning "pay-to-play" by preventing government contractors and government bailout recipients from spending money on elections.

Senator **Reid** filed cloture on the motion to proceed to **S. 3628** on July 22, 2010. The Senate is expected to consider this legislation the week of July 26.

Background

In January, the Supreme Court's closely divided 5-4 decision disregarded settled law by ruling that corporations are permitted to spend unlimited amounts of money on elections. The ruling in *Citizens United v. Federal Election Commission* overturned long-standing law and precedent that had restricted political expenditures by corporations.

This ruling gives corporations the same rights as individuals and will have a devastating impact on American elections. Special interests are now allowed to spend freely on political advertising, specifically advocating the defeat or election of political candidates. Without adequate information about who is spending the money and how much is being spent, the voices of ordinary Americans are at risk of being drowned out by direct corporate spending on elections – a practice that had been banned for decades.

Senate Democrats understand that open and fair elections are a cornerstone of our nation's democratic values. Special interests, including foreign-controlled interests, should not have the same rights as American citizens. We are committed to ensuring that individual Americans continue to have a meaningful voice in Washington. That is why Democrats are fighting to protect American voters and restore public confidence in our electoral system.

Major Provisions

The following summary is drawn from analyses provided by the Senate Rules Committee.

Regulating Certain Political Spending

Banning Pay-To-Play. Under the *DISCLOSE Act*, government contractors would be barred from making campaign-related expenditures (for independent expenditures and electioneering communications). This is an extension of an existing ban on contributions made by government contractors. A $10 million contract threshold would be included to exempt small government contractors from the expenditure ban.

Financial service companies that received emergency rescue funding from the federal government should not be permitted to use taxpayer money to influence elections. The *DISCLOSE Act* would prohibit TARP beneficiaries from making campaign-related expenditures. Once the TARP money is repaid, however, the restrictions would be lifted.

Preventing foreign influence in U.S. elections. While foreign nationals, including foreign corporations (those incorporated overseas), are banned from making contributions or expenditures to influence U.S. elections, the opinion in *Citizens United* created a loophole for spending by domestic corporations controlled by foreign nationals. To close the loophole, the *DISCLOSE Act* would extend the existing prohibition on contributions and expenditures by foreign nationals to include domestic corporations under the following circumstances:

- If a foreign country, foreign government official, or a corporation principally owned or controlled by a foreign country or foreign government official owns 5 percent or more of voting shares in the corporation;
- If any foreign national owns 20 percent or more over of the voting shares;
- If two or more foreign nationals (each owning 5 percent or more) together own or control 50 percent or more of the voting shares;
- If a majority of the board of directors are foreign nationals;
- If one or more foreign nationals have the power to direct, dictate, or control the decision-making of the U.S. subsidiary; or
- If one or more foreign nationals have the power to direct, dictate, or control the activities with respect to federal, state or local elections.

This would not affect corporations establishing separate segregated funds as long as none of the money in the funds is provided by a foreign national and no foreign national has the power to direct, dictate or control the fund.

Preventing organizations from coordinating their activities with candidates and parties. The *DISCLOSE Act* would ensure that corporations and unions are not allowed to coordinate campaign-related expenditures with candidates and parties in violation of rules that require these expenditures to be independent.

Current Federal Election Commission (FEC) rules bar corporations and unions from coordinating with Congressional candidates and parties about ads that refer to the candidate and are distributed within 90 days before a primary election or within 90 days before the general election. For Presidential contests, current FEC rules prohibit coordination on ads that

reference a Presidential candidate in the period beginning 120 days before a state's Presidential primary election and continuing in that state through the general election.

The *DISCLOSE Act* would:

- For House and Senate races, ban coordination between a corporation or union and the candidate on ads referencing a Congressional candidate in the period beginning 90 days before the *primary* continuing through *general* election.

  For Presidential campaigns, ban coordination between a corporation or union and the candidate on ads referencing a Presidential or Vice Presidential candidate in the period beginning 120 days before the first Presidential primary held in any state and continuing through the general election.

  The *DISCLOSE Act* would not change existing law relating to coordination outside these time periods;

- Clarify that there will be no finding of coordination based solely on a person's sharing of their legislative or policy position; and

- Specifically preserve the safe harbor provision for endorsements and solicitations by federal candidates and for the establishment and use of firewalls within organizations.

Political party communications. The *DISCLOSE Act* would subject any payment by a political party committee for the direct costs of an ad or other communication to the coordination party expenditure limits only if the communication is controlled by or made at the direction of the candidate.

Internet communications. The *DISCLOSE Act* would reinforce the current FEC policy that internet communications are not considered to be public political advertising, unless it was placed on another person's website for a fee, so that internet speech will not be curtailed.

Promoting Effective Disclosure of Campaign-Related Activity

The *DISCLOSE Act* would ensure that the public will have full and timely disclosure of campaign-related expenditures (both electioneering communications and public independent expenditures) made by covered organizations (corporations, unions, section 501(c)(4), (5), and (6) organizations and section 527 organizations). There is an exception included for well-established 501(c)(4) organizations who have been in existence for more than ten years, have over 500,000 dues-paying members, including one in each state, and have received less than 15 percent of their funds from corporations or unions in the previous year.

The *DISCLOSE Act* would impose disclosure requirements that will mitigate the ability of spenders to mask their campaign-related activities through the use of intermediaries. It would also require disclosure of both disbursements made by the covered organization and also the source of funds used for those disbursements.

Improving Reporting to the Federal Election Commission

The *DISCLOSE Act* would expand FEC definitions and reporting requirements:

- **Independent Expenditures.** The definition of an "independent expenditure" would be expanded to include both express advocacy and the functional equivalent of express advocacy, consistent with Supreme Court precedent. The *DISCLOSE Act* would impose a 24-hour reporting requirement for expenditures of $10,000 or more made 20 days or more before an election, and expenditures of $1,000 or more made within 20 days before an election. It would require the FEC to make this information publicly available through its website within 24 hours of receipt.

- **Electioneering Communications.** The *DISCLOSE Act* would expand the definition of "electioneering communications" to include all broadcast ads that refer to a candidate within the periods beginning 30 days before a primary election and 120 days before a general election. Any such "electioneering communication" would be subject to the disclosure requirements in the *DISCLOSE Act*.

- **Mandatory Electronic Filing.** The *DISCLOSE Act* would require electronic filing for individual persons making independent expenditures or electioneering communications exceeding $10,000 at any time.

Expanding Requirements for Disclosure

Improving disbursement reporting requirements. The *DISCLOSE Act* would require covered organizations to report all donors who have given $600 or more to the organization during a 12-month period if the organization makes independent expenditures or electioneering communications in excess of $10,000 out of its general treasury.

If an organization makes a transfer of funds of $10,000 or more to another person for the purpose of making an independent expenditure or electioneering communication, the transfer itself would be treated as making an independent expenditure or electioneering communication.

If a deemed transfer is made between affiliated organizations and is less than $50,000 aggregate in a calendar year, then it would be exempt from disclosure. This is to avoid reporting common transfers within organizations that are not for political purposes. If the covered organization is required to report donor information solely because of deeming, disclosure would only apply to those payments equal to or exceeding $10,000 (in aggregate).

Disclosing use of general treasury funds. If a donor to a covered organization and the organization mutually agree at the time that the donation is made that the donation will not be used for campaign-related activity, then not later than 30 days after the organization receives the donation it would be required to provide the donor a written certification that the organization will not use the donation for campaign-related activity and it will not include any information about the person in any report filed under the *DISCLOSE Act*.

If a covered organization makes a disbursement for campaign-related activity, the CEO would be required to file a statement with the FEC certifying that the expenditure was not made in coordination with a candidate, that funds designated by the donor not to be used for campaign-related activity have not been used for any campaign-related activity, and that the spending has been fully disclosed and made in compliance with law.

Creating a separate campaign-related activity account. Under the *DISCLOSE Act,* an organization would be permitted to establish a separate "Campaign-Related Activity" account to receive and disburse political expenditures. If an organization makes campaign-related expenditures exclusively from its separate account, then it would be required to disclose only donors who have contributed $6,000 or more for unrestricted use or donors who have contributed $600 or more specifically for campaign-related activity.

Enhancing disclaimers to identify sponsors of ads. If any covered organization makes disbursements for an independent expenditure or electioneering communication, the CEO or highest ranking official of that organization would be required to appear on camera to say that he or she "approves this message," just like candidates have to do now. In order to prevent individuals and entities from funneling money through shell groups in order to mask their activities, the *DISCLOSE Act* would require:

- The top funder of the advertisement to record a stand-by-your-ad disclaimer including the local jurisdiction and state where the individual resides; and

- The top five donors of non-restricted funds to an organization that purchases campaign-related TV advertising to be listed on the screen at the end of the advertisement. This method has been used very successfully in Washington State and is the model for this section in the legislation.

This disclaimer section will also apply to certain mass mailings and political robocalls.

Enhancing Reporting Requirements for Registered Lobbyists

In an effort to add to the transparency of lobbying activities, all registrants under the *Lobbying Disclosure Act* would be required to disclose the following information on their semiannual reports: the date and amount of each independent expenditure or electioneering communication of $1,000 or more, and the name of each candidate referred to in the communication.

Requiring Senate Candidates to Electronically File with the FEC

In addition to the increased disclosure and transparency placed on outside organizations, the legislation incorporates language from the bipartisan **S. 1858**, which requires Senators to electronically file their campaign finance reports directly to the FEC.

Disclosing Campaign-Related Activity

The *DISCLOSE Act* would require that all campaign-related expenditures made by a covered organization be disclosed on the organization's website with a clear link on its homepage to either the information itself or to the FEC's website page containing the information within 24 hours of reporting such expenditures to the FEC. Additionally, the *DISCLOSE Act* would require all campaign-related expenditures made by a covered organization be disclosed to shareholders and members of the organization in any financial reports provided on a periodic and annual basis to its shareholders or members.

Legislative History

On April 30, 2010, Senator **Schumer** introduced **S. 3295**, the *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act*, which was referred to the Senate Rules Committee. The *DISCLOSE Act* has 49 cosponsors. On July 21, 2010, Senator **Schumer** introduced **S. 3628**, a revised version of the *Democracy is Strengthened by Casting Light on Spending in Elections* (DISCLOSE) *Act*. On July 22, **S. 3628** was placed on the Senate Legislative Calendar under General Orders. (Calendar No. 476).

A substantially similar bill, **H.R. 5175**, the *Democracy is Strengthened by Casting Light on Spending in Elections* (DISCLOSE) *Act*, was introduced into the House on April 29, 2010. The House passed **H.R. 5175** on June 24, 2010 by a vote of 219 – 206. On June 28, 2010, **H.R. 5175** was received in the Senate and placed on the legislative calendar.

On July 22, Senator Reid filed a cloture motion on the motion to proceed to consideration of **S. 3628.** The vote on cloture is scheduled on July 27, 2010.

Expected Amendments

The DPC will distribute information on amendments as it becomes available to staff listservs.

Administration Position

On July 27, 2010, the White House released its Statement of Administration Policy, available here, on **S. 3628**:

> "The Administration strongly supports Senate passage of S. 3628. The Administration believes the DISCLOSE Act is a necessary measure so that Americans will know who is trying to influence the Nation's elections. S. 3628 also prevents those who should not interfere in the Nation's elections – such as corporations controlled by foreign interests – from doing so. Unless the strong new disclosure rules in S. 3628 are established, the Supreme Court's decision in the *Citizens United* case will give corporations undue power to influence elections. This bill is not perfect. For example, the Administration would have preferred no exemptions. But, by providing for unprecedented transparency, S. 3628 takes great strides to hold corporations that participate in the Nation's elections accountable to the American people. As this is a matter of urgent importance, the Administration urges the Senate to approve the DISCLOSE Act and looks forward to working with both Houses of Congress promptly to produce a final bill for the President's signature."

Resources

Congressional Research Service, *The DISCLOSE Act: Overview and Analysis* (July 16, 2010), available here.

Congressional Research Service, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress* (June 8, 2010), available here.

Congressional Research Service, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress* (July 2, 2010), available here.

Congressional Research Service, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues* (May 24, 2010), available here.

Democratic Policy Committee, *Senate Democrats Are On Your Side: Standing Up to Special Interests to Defend Fair and Transparent Elections*, available here.