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Note to the Press

Q and A on DISCLOSE Act of 2012 Introduced by Senator Whitehouse

Q. Is it constitutional to require outside groups that make campaign-related expenditures to disclose their donors?

A. Yes. In *Citizens United v. FEC,* 130 S.Ct. 876 (2010), the Supreme Court by an 8-1 majority upheld the provisions of federal law which require outside spending groups to disclose their expenditures on electioneering communications, including the donors funding these expenditures. Justice Kennedy, writing for the Court, noted that disclosure provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." 130 S.Ct. at 914.

Citing its prior landmark decision in *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court in *Citizens United* said that disclosure laws serve the important governmental interest of "providing the electorate with information about the sources of election-related spending" in order to help citizens "make informed choices in the political marketplace." *Id.* The Court specifically noted that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names." *Id.*

The Court in *Citizens United* praised the fact that "modern technology" makes disclosure "more effective" because it is "rapid and informative." *Id.* at 916. The Court said, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . .[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.*

Q. Are disclosure requirements limited only to ads which contain express advocacy or the functional equivalent of express advocacy?

A. No. In *Citizens United,* the Supreme Court rejected precisely this argument. The Court upheld a disclosure requirement for a broadcast ad that did not contain express advocacy and was instead intended to publicize a documentary, where the ad had only a commercial, not political, intent. The Court said that "we reject Citizens United's contention that the disclosure requirement must be limited to speech that is the functional equivalent of express advocacy." *Id.*

Q. Doesn't requiring disclosure of donors to groups that make campaign-related expenditures threaten unconstitutionally to chill donations to those groups?

A. No. The Supreme Court considered and rejected this argument in *Citizens United* as a basis for invalidating disclosure requirements in general. A disclosure requirement might be unconstitutional as applied to a specific organization but *only if* that organization could show "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S.Ct. at 916. Absent such a showing by a specific organization, a disclosure requirement is not invalid because of a general and theoretical concern about chilling donations.

Furthermore, the legislation has a number of built-in protections for donors to an organization. A group can set up a separate bank account for its spending on campaign-related disbursements and use only these funds for such expenditures. Under these circumstances, only those donors of $10,000 or more to this separate account established to make campaign-related expenditures must be disclosed. All other donors to the organization would not be disclosed.
In addition, *any* donor can restrict his or her donation to the organization from being used for campaign-related disbursements. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. By these measures, groups and donors can ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure.

Q. Doesn't the donor disclosure requirement mean that groups will have to disclose their membership lists in violation of the Supreme Court's ruling in the *NAACP* case?

A. No. First, the legislation requires disclosure only of donors who give $10,000 or more in a two-year election cycle to a group which engages in campaign-related spending. That will exclude the vast majority of donors to and members of most membership organizations, and require disclosure only of very large donors to such groups. Second, the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists that was struck down in the *NAACP* case. The Court said, "In *Buckley,* unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure." *Id.* at 198. Absent a showing by a specific organization of "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed," campaign finance disclosure requirements are constitutional.

Q. Does the contribution disclosure requirement impose an unreasonable burden on groups which want to spend money on campaign-related ads?

A. No. First, a group is required to disclose only its donors of $10,000 or more over a two-year election cycle. For most membership organizations, this will require the reporting of only a relatively small number of donors. Second, any group that wants to limit the scope of its disclosure obligations can set up a separate account from which to make all of its campaign-related disbursements. If it does so, the group is required to disclose only the donors of $10,000 or more to that separate account, not all of the donors to the organization.

Q. Does the disclosure requirement violate the privacy rights of a donor to an organization that makes campaign-related expenditures?

A. No. Any donor to an organization is permitted by the legislation to "restrict" his or her donation from use for campaign-related expenditures. If the recipient organization accepts the restriction and segregates the money, the identity of the donor is not subject to disclosure. By this means, any donor concerned about privacy can take steps to ensure that his or her identity is not disclosed.

Q. Is the "electioneering communications" disclosure provision unconstitutionally overbroad in requiring disclosure of broadcast ads for the election year in the case of congressional races, and for the period from 120 days before the first primary through the general election in the case of presidential races?

A. No. The post-*Citizens United* experience shows that tax-exempt organizations and other groups are running broadcast ads to influence federal elections throughout the course of the election year, and even earlier, particularly in presidential elections. The calendar year of an election is an appropriate period to cover because broadcast ads to influence voters are run by outside groups throughout the period and campaigns are in full swing.

Even if the broadcast ads mentioning candidates also discuss issues, the ads run during this period can and will influence voters. Accordingly, citizens are entitled to know the identity of the groups spending money on those ads, and the donors funding the expenditures. The provisions do not restrict any campaign-related expenditures but just require that they be disclosed to the public. The Court in *Citizens United* in upholding the disclosure requirements noted that "[t]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States* v. *Harriss*, 347 U. S. 612, 625 (1954).

Justice Scalia wrote in a concurring opinion that upheld disclosure requirements in a case about petition signers for ballot measures:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously *(McIntyre)* and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Q. Is the $10,000 contribution disclosure threshold too high in light of the $200 contribution disclosure requirement for candidates and PACs? Does that high threshold discriminate against business groups?

A. No. The $200 threshold for candidates and PACs reflects the fact that they are in the business of raising and spending campaign contributions. By definition, their "major purpose" is to influence elections. Groups covered by the DISCLOSE Act, such as "social welfare" organizations, labor groups and business trade associations, have a major purpose *other than to influence elections.* When these groups make campaign-related expenditures, however, they should disclose those expenditures and the source of the funds being used to pay for them.

By requiring disclosure only of substantial donors to such groups, the $10,000 threshold balances the interests of non-campaign groups in privacy for their donors versus the public interest in knowing who is financing campaign-related expenditures. This does not discriminate for or against any particular kind of group, but rather provides citizens with important information about substantial donors who are financing campaign-related expenditures by groups that are not political organizations.

Q. Will the exemption for internal transfers among affiliated groups provide the opportunity to mask the actual donors of funds being spent on campaign activities and doesn't it discriminate in favor of unions?

A. No. This provision applies across the board and treats a labor organization and its affiliated groups the same as a business trade association and its affiliated groups. The provision eliminates the need to file a lot of unnecessary and meaningless disclosure reports about money moving back and forth between affiliates within an organization – information that is irrelevant to the goals of the disclosure provisions. At the same time, it protects against a donor funneling money through an affiliate to an affiliated organization in order to mask the actual source of the funds spent by the affiliated organization for campaign-related ads. Thus, if a donor gives $50,000 to a state affiliate which transfers money to a national organization that then makes campaign expenditures, the legislation requires the national organization to disclose the identity of the $50,000 donor to the state organization and the amount given.

Q. Won't this law require a group to disclose a $1 million donor who is giving the money to a group in order to support the group's work on the protection of whales or on educating on the use of firearms, even if the donor has no interest in supporting any candidate?

A. No. Any donor can be exempt from any disclosure by an agreement with the recipient organization that the donor's contribution will not be used to make campaign-related expenditures. Alternatively the organization can establish a separate bank account from which it makes all of its campaign-related expenditures, and then raise money from donors who contribute directly to that account. In this circumstance, only donors to the bank account established for campaign-related expenditures will be disclosed. The bottom line is any organization can ensure that donors who do not want to have their money used for campaign-related expenditures are not disclosed.

Q. Does the legislation address the problem that Super PACs supporting 2012 presidential candidates did not disclose their donors until after the key nominating events in Iowa, New Hampshire, South Carolina and Florida had already occurred?

A. Yes. The problem arose because Super PACs, which are federally registered political committees, were able to use the FEC's current reporting requirements to delay reporting their donors for the entire second half of 2011 until the end of January, 2012. This legislation fixes this problem by requiring all outside spending groups, including Super PACs, to report their donors within 24 hours after each expenditure of more than $10,000 is made on campaign-related expenditures.

Q. Is it constitutional to require disclaimers to be part of ads?

A. Yes. In *Citizens United*, the Court by an 8-1 majority explicitly upheld a requirement that electioneering communications include disclaimers. Disclaimers, the Court said, "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking." 130 S.Ct. at 915.

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