

What Does the DISCLOSE Act Actually Do?

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PRELIMINARY COMMENTS Regarding HR 5175 (as passed by the House)

Most of this bill is unconstitutional -- a fact which Obama and its sponsors realize. It is unconstitutional because *Buckley v. Valeo* treats independent expenditures as the most protected of First Amendment rights, and *NAACP v. Alabama*

prohibits delving into the membership lists of organizations exercising their First Amendment rights. But the exercise is not to enact lasting legislation, but, rather, to keep potential adversaries out of the 2010 elections -- only to discover, when it's too late, that they acted unconstitutionally in attempting to do so. This is comparable to the "inconvenient truths" about ObamaCare which were revealed shortly after its passage.

Barack Obama is both brilliant and ruthless in going after his opposition. Consider the "grandfather clause" in ObamaCare which would, supposedly, allow you to "keep the coverage you currently have." HHS has just released draft regulations on this, and it turns out that a microscopic change in employer coverage defeats the grandfather clause, which is, in effect, now worthless (as we predicted it would be). IT IS FOOLISH TO ASSUME ANYTHING WHICH COULD THEORETICALLY GO WRONG UNDER H.R. 5175 WILL NOT GO WRONG.

In the following, note particularly (1) the treatment of unions in section 211, (2) the extensive disclosures in section 214 which would effectively make broadcast ads useless, and (3) the potential for demanding membership lists under section 301.

DESCRIPTION OF BILL on a Section-by-section Basis

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-- Section 101 would prohibit a government contractor (with a contract of \$7,000,000) from making independent expenditures and "electioneering communications" (broadcast statements, exceeding a de minimus statutory threshold, which mention a candidate in a favorable or unfavorable light within 60 days of a general election). Subsection (b) extends the ban to TARP recipients, who are, in addition, (unconstitutionally) barred from making any contribution.

-- Section 102 would prohibit contributions, independent expenditures, or electioneering communications by a corporation with over 20% direct OR INDIRECT foreign ownership or, apparently, which has (as an officer) any foreign national with significant decision-making responsibilities. And, although the corporation could set up a separate segregated fund, it would have to have a certificate of compliance with the government before doing anything else.

-- Section 103 would treat as a "contribution" (subject to statutory limits) any "communication" that disseminates, in whole or IN PART, any other form of campaign material." Hence, in theory, a web log which quotes from a candidate's brochure COULD be interpreted as a contribution to the candidate. Anyone who thinks this is a far-fetched interpretation might note that press editorials (which would presumably do no more than quote snippets from a brochure) are carefully excluded. Inserted subsection (c) excludes from "coordination" a request to a candidate for a position on an issue, but that still doesn't resolve our hypothetical.

-- Section 104 would deal with the "outreach efforts" of the GOP by treating as a "contribution" payments by the party for the direct costs of a public communication if made at the direction of a candidate.

-- Section 105 would exempt Internet communications from the definition of "general public political advertising," but it does not exempt the Internet from the provisions of this act for any other purposes. And, in fact, it might have been better for Internet freedom if the statute had not carved out this narrow exception.

-- Section 201 would unconstitutionally (in violation of *Buckley v. Valeo*) require persons making independent expenditures (not in coordination with any campaign) to file a report with the government within 24 hours if the expenditures were more than \$10,000 (\$1,000 within 20 days of an election). The definition of "independent expenditure" explicitly makes it clear that you don't (as under *Buckley*

v. Valeo)

have to say "vote for X" or "vote against Y" in order to invoke the reporting requirement. Furthermore, it's far from clear how you determine whether you've reached the \$10,000 (\$1,000) threshold. In particular, is an independent expenditure which is taken to be "worth \$1,000" to the candidate a reportable event? Could any statement on RedState.org be taken to exceed this threshold?

-- Sections 202 and 203 would require mandatory electronic filing for electioneering communications and independent expenditures.

-- Section 211 would require organizations making direct or indirect independent expenditures to disclose, in most cases, anyone contributing over \$600 to the organization during a cycle. The number "\$600" was carefully chosen because this section (unlike some in the bill) applies to unions, and the average annual union membership payment is a little over \$300. (To say this applies equally to unions and corporations is like saying the law, in its majesty, prohibits both the rich and the poor from sleeping under bridges.) Amounts transferred to another organization are deemed independent expenditures by the transferring organization if it had "reason to know" of the recipient's intent.

-- Section 212 would require an organization's officers to make a series of Sarbanes-Oxley-type certifications to the government, including, most importantly, a representation that independent expenditures and electioneering communications were not, effectively, contributions because they were made in coordination with a candidate.

-- Section 213 would allow an organization to avoid certain donor disclosure risks by setting up a separate campaign account. But this is a trap, because, once that account is established, the organization cannot spend a single penny from its general funds for campaign-related expenditures. And, as we have seen, the definition of "independent expenditures" and "electioneering communications" are broad -- and may get a lot broader.

-- Section 214 would require the broadcast disclaimers, which, in the case of some ads, could require the recitation, orally, of the name of the organization, its head, and his title, together with the five biggest "funders" of the ad.

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-- Section 221 would require all registered lobbyists to file reports of independent expenditures and electioneering communications.

-- Section 301 would require "regular, periodic reports" to members, including, presumably, GOA'S newsletter, to include statement-by-statement disclosures of all "independent expenditures" and "electioneering communications," together with "such other information as the [Federal Election] Commission determines is appropriate to further the purposes of this subsection." [Section 301 (a) (2) (F).] And this is where it gets REALLY problematic. Because allowing the FEC to require ANY information it wants opens the door for much mischief, extending to a requirement for disclosure of GOA's membership list. True, the FEC theoretically consists of equal numbers of Democrats and Republicans. But does anything think Obama is above nominating a de facto Democrat for a GOP slot, and would anyone count on hapless Senate Republicans to stop him?

-- Sections 401, 402, and 403 provide for expedited judicial review, severability, and a 30-day-from enactment effective date.

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