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Fading Disclosure

**Increasing Number of Electioneering Groups
Keep Donors' Identities Secret**

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Acknowledgments

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In his 2010 majority opinion in *Citizens United v. Federal Election Commission*, Justice Anthony Kennedy justified lifting restrictions on corporate and union electioneering activities in part because of disclosure requirements in the Bipartisan Campaign Reform Act of 2002 (BCRA).

“It must be noted, furthermore, that many of Congress’ findings in passing BCRA were premised on a system without adequate disclosure,” Kennedy wrote in *Citizens United*. With BCRA’s disclosure requirements, he continued, “citizens can see whether elected officials are ‘in the pocket of so-called moneyed interests.’”¹

Citizens United upheld the constitutionality of BCRA’s requirement for independent groups making electioneering communications to disclose within 24 hours who funded a given expenditure and how much was spent. Electioneering communications are advertisements broadcast shortly before an election that mention candidates but stop short of expressly advocating voting for or against them. But *Citizens United*, coupled with the court’s 2007 decision in *Federal Election Commission v. Wisconsin Right to Life*, opened gaping loopholes in the very disclosure requirements that Kennedy extolled.

After nearly 100 percent of groups revealed the donors funding their electioneering communications in the 2004 and 2006 election cycles, fewer than 50 percent did so in 2008. In the primary season of the 2010 election cycle, fewer than one-third of groups disclosed their funders, a Public Citizen analysis shows. [See Figure 1]

Figure 1: Disclosure of Donors for Electioneering Communications, 2004 to 2010

Election Cycle	Number of Groups Making Electioneering Communications*	Number of Groups Reporting the Donors that Funded their Electioneering Communications	Pct. of Groups Reporting the Donors that Funded their Electioneering Communications
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010**	22	7	31.8

Source: Public Citizen analysis of FEC electioneering communications reports, available at www.fec.gov/finance/disclosure/ec_table.shtml

* Regards electioneering communication defined by BCRA, *i.e.*, broadcast advertisements depicting the likeness of a federal candidate (but stopping short of expressly voting for or against the candidate) within 60 days of a general election or 30 days of a primary.

** Includes electioneering communications through Sept. 2, 2010, the day before the general election reporting period began.

¹ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 916 (2010).

Disclosure is particularly low among entities that favor Republicans.² Of 10 Republican oriented groups that broadcast electioneering communications during the 2010 primary season, only one disclosed its funders as required under BCRA. [See Figure 2]

Figure 2: Party Breakdown of Electioneering Groups, 2010 Primary Season

Party Allegiance	Election Cycle	Number Groups Making Electioneering Communications	Number of Groups Reporting the Donors that Funded their Electioneering Communications	Pct. of Groups Reporting the Donors that Funded their Electioneering Communications
Republican	2010	10	1	10.0
Democratic	2010	12	6	50.0

Source: Public Citizen analysis of FEC electioneering communications reports, available at www.fec.gov/finance/disclosure/ec_table.shtml and Public Citizen's analysis of electioneering groups history and activities this election cycle.

Shortly after *Wisconsin Right to Life*, which permitted independent groups to broadcast "issue-oriented" messages near elections funded with corporate or union money, the Federal Election Commission (FEC) issued rules requiring disclosure only of donors who contribute funds "for the purpose of furthering electioneering communications."³

The loosening of BCRA's disclosure requirements appears to have motivated many Republican oriented electioneering groups to choose to operate under the auspices of Section 501(c) of the tax code, which is reserved for social welfare groups, unions and trade associations, instead of Section 527, which is for political organizations. Whereas 527s must disclose all of their donors quarterly, 501(c)s are not required to disclose their donors at all.

Some longstanding organizations, such as unions and legitimate trade associations, are 501(c)s by definition. Spin-off electioneering entities and those that were created solely for the current election cycle should be registered as Section 527s, but most are choosing the less transparent 501(c) status. For example, the American Action Network, whose principals include former Sens. Norm Coleman (R-Minn.) and George Allen (R-Va.), opted to establish itself under Section 501(c)(4).⁴ American Crossroads, which was set up as a 527 in March by Republican operatives Karl Rove and Ed Gillespie with a stated intent of raising at least \$50 million for this year's elections, established a spin-off 501(c) group in June after fundraising for the 527 got off to a slow start.⁵

² Public Citizen's analysis is based on ascribing a party allegiance to each group and organization studied based on its activities in the current election cycle and their history. Although groups' allegiances conceivably could be ambiguous, each of the entities in this data set clearly aligned with either the Republicans or Democrats.

³ 11 CFR 104.20(c)(9).

⁴ See American Action Network Web site, available at <http://americanactionnetwork.org/content/about>.

⁵ Kenneth P. Vogel, "Rove-linked Group Uses Secret Donors to Fund Attacks," Politico, July 20, 2010 and Kenneth P. Vogel, "New GOP 527 Far Short of \$52M goal," Politico, June 21, 2010.

Disclosure pursuant to Section 527 is far less useful to the electorate than disclosure pursuant to the electioneering communications statute because 527 disclosure occurs only quarterly while electioneering communications' must be disclosed within 24 hours. Nonetheless, disclosure pertinent to 527 rules is better than nothing.

While seven of 12 Democratic groups making electioneering communications during the primary season of 2010 were registered under Section 527, only two of 10 Republican groups so registered.⁶ [See Figure 3]

Figure 3: Electioneering Groups Operating as 527s, 2010 Primary Season

Party Allegiance	Election Cycle	Number Groups Reporting Electioneering Communications	Number of Groups Operating Under Section 527
Republican	2010	10	2
Democratic	2010	12	7

Source: Public Citizen analysis of FEC electioneering communications reports, available at www.fec.gov/finance/disclosure/ec_table.shtml

Evolution of the Statutory and Regulatory Disclosure Requirements

A growing number of groups now claim that they are required to disclose their funders only when donations are specifically earmarked for a campaign ad. But that is not what the law as amended by Bipartisan Campaign Reform Act (BCRA) calls for, and even Federal Election Commission (FEC) regulations are not so narrowly worded.

The new dearth of disclosures is the result of groups pushing the envelope and an FEC declining to enforce the law or to clarify its own regulations.

BCRA's explicit purpose is to provide a database of the donors who fund all independent electioneering communications.⁷ The goal was both to permit voters to learn who is funding campaign ads and to ensure that unlimited contributions – termed “soft money” – were not being used to fund the ads. In *Wisconsin Right to Life* and *Citizens United*, the Supreme Court weakened, then later eradicated, the restriction on using soft money to fund electioneering communications and independent expenditures. But neither case invalidated the disclosure requirements. In fact, the Court explicitly upheld BCRA's disclosure requirements. As Justice Kennedy wrote in *Citizens United*:

⁶ Most non-527 entities engaging in electioneering activities are registered under Section 501(c), but others may operate as for-profit corporations, unincorporated coalitions, or under other auspices.

⁷ Section 201 of the Bipartisan Campaign Reform Act requires that groups sponsoring electioneering communications from their general treasury funds must disclose “the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.”

The First Amendment protects political speech and disclosure 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.⁸

Section 201 of BCRA lays out the disclosure requirements for groups funding electioneering communications. BCRA clearly states that all major donors to the person making the electioneering communication must be disclosed, not just those who contributed for a campaign ad. The provision reads in part: “Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing . . . the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.”

After *Wisconsin Right to Life* created a broad exemption to BCRA’s ban on independent electioneering communications close to elections – the case permitted corporations and unions to fund any ad that could be interpreted as something other than an appeal to support or oppose a candidate – the FEC modified its regulations implementing the disclosure requirements. The agency essentially preserved its provision that required a *non-corporate entity* engaging in electioneering communications to disclose all donors of at least \$1,000 dating back through the last calendar year.⁹

But the FEC reasoned that since corporations and labor unions could make electioneering communications, they should not be required to disclose the names of everyone who provides them with \$1,000 or more for purposes unrelated to electioneering. The agency added a separate section to that effect, requiring a corporation or labor organization that makes electioneering communications to disclose “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications.*”¹⁰ BCRA makes no such exception.

Nearly all “third party” groups that spend corporate money on TV ads attacking candidates, such as Americans for Job Security or the U.S. Chamber of Commerce, are themselves incorporated and thus evade disclosing their major donors under the rule. As a result, this language has recently been interpreted by a growing number of outside groups to mean that only those donors who specifically “ earmark ” funds for a campaign ad need be disclosed. FEC staff has periodically requested full donor disclosure from outside groups financing independent ads, but the Commission itself has deadlocked on taking any actions

⁸ Citizens United v. FEC, 130 S.Ct. at 916.

⁹ See 11 C.F.R. § 104.20(c)(8) (requiring disclosure of “the name and address of each donor who donated an amount aggregating \$1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year”).

¹⁰ 11 C.F.R. § 104.20(c)(9) (emphasis added).

against those declining compliance. As documented in this study, more and more of these groups are now refusing to disclose the major donors funding their campaign ads, claiming that none of their funders earmarked the money for electioneering activity. This refusal to disclose donors is also expanding among groups funding other independent expenditures, not just electioneering communications.

On August 18, 2010, the Republican bloc of FEC commissioners further emasculated the disclosure requirements when it blocked a case alleging that an organization called Freedom's Watch failed to comply with the disclosure rule.¹¹

Freedom's Watch, a conservative nonprofit corporation, sponsored television ads in the 2008 elections that reportedly were funded by roughly \$30 million from a single donor. A *New York Times* article quoted an unnamed Republican operative saying that the group's \$30 million for ad spending "came almost entirely from casino mogul Sheldon G. Adelson," who has "insisted on parceling out his money project by project, as opposed to setting an overall budget, limiting the group's ability to plan and be nimble . . ."¹²

Substantial evidence showed that Mr. Adelson earmarked contributions for Freedom's Watch's electioneering communications budget. But in a written "statement of reasons," the three Republican commissioners announced a new, even higher bar for requiring disclosure: Not only must funds be earmarked for electioneering communications; they must be earmarked for a *specific campaign ad*.¹³

Through deregulation and lack of enforcement, very little is left of what by all rights should be a very robust transparency law.

¹¹ Statement of Reasons for Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Freedom's Watch, Inc., MUR 6002 (Aug. 13, 2010), available at: <http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf>

¹² Michael Luo, "Great Expectations for a Conservative Group Seem All But Dashed," *The New York Times*, April 12, 2008.

Appendix

Groups Reporting Electioneering Communications During 2010 Primary Season*

Filer Name	R or D	Registers as 527?	Sum Of Total Donations Reported	Sum Of Total Disbursements Reported
American Action Network	R	N	\$0	\$499,895
American Federation Of State County And Municipal Employees AFL-CIO	D	N	\$0	\$68,539
American Future Fund	R	N	\$0	\$1,211,702
American Public Policy Committee	D	Y	\$128,259	\$21,621
Americans For Job Security	R	N	\$0	\$6,113,460
Americans For Prosperity	R	N	\$0	\$76,751
Americans For Working Families	D	Y	\$250,000	\$63,933
Arkansans For Change	D	Y	\$3,260,000	\$1,516,021
Californians For A Balanced Budget And Better Economy	R	N	\$1,103,045	\$750,000
Citizens For Strength And Security	D	Y	\$1,450,313	\$590,877
CWA Non-Federal Separate Segregated Fund	D	Y	\$0	\$1,000,194
Emily's List Non-Federal	D	Y	\$0	\$74,300
Environmental Defense Action Fund	D	N	\$0	\$47,247
Independent Women's Voice	R	N	\$0	\$237,500
National Education Association	D	N	\$0	\$105,724
New Leadership In Colorado	D	Y	\$0	\$120,138
Partnership For American's Future	R	Y	\$0	\$80,000
Patriot Majority	D	Y	\$1,176,250	\$174,000
Send Harry Packing	R	Y	\$0	\$20,000
Susan B Anthony List Inc	R	N	\$0	\$167,549
U.S. Chamber Of Commerce	R	N	\$0	\$3,328,495
Workers For A Better Hawaii	D	N	\$200,000	\$115,143

* Include figures for electioneering communications broadcast between Jan. 1, 2010 and Sept. 2, 2010.