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# Opponents of Campaign Finance Disclosure Create False Distinctions in Treatment of Unions and Corporations

*The DISCLOSE Act Would Apply Equally to Both*

**Acknowledgments**

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Opponents of campaign finance disclosure often explain their resistance on the basis that such proposals are more permissive toward unions than corporations. Critics of the DISCLOSE Act (S. 3369)—the most comprehensive current legislative proposal—have claimed that the law would disproportionately require reporting of corporate expenditure over those by unions, and that it includes exceptions for transfers of money that would permit unions to dodge disclosure.

In fact, the DISCLOSE Act treats unions and corporations identically. It requires both types of entities to report their contributions of $10,000 or more that are used for electioneering purposes. The act would waive the reporting requirement for transfers of less than $50,000 between an organization's affiliates. But if a transfer recipient spends more than $10,000 on campaign-related activities, the recipient must disclose all donors of greater than $10,000 to it as well as all donors of more than $10,000 to the affiliate that initiated the transfer.[1]

More broadly, although seldom publicized, unions already are required to report spending on electioneering expenditures and contributions to electioneering organizations while corporations are subject to no meaningful requirements tailored to their election-related spending.

## Existing Disclosure Requirements

### Disclosure Requirements Pursuant to Election Law

At present, federal election law permits individuals, corporations, unions and other entities to make anonymous contributions to organizations that seek to influence the outcomes of elections as long as they do not coordinate with candidates or political parties. This is at odds with an underlying premise of the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. The decision, which enabled corporations and unions to spend limitlessly to influence elections, was predicated in part on an assumption that the financial backers of the new spending would be disclosed.[2]

Although election law when *Citizens United* was handed down generally required organizations to disclose expenditures that are intended to influence elections,[3] the law did

[1] The DISCLOSE Act, S. 3369, 112th Congress, Sec 2 (2012), http://1.usa.gov/W7wnh1.
[2] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). "… [M]odern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today … 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."
[3] Current election law requires disclosure of independent expenditures and spending for electioneering communications. The Federal Election Commission defines an independent expenditure is defined as "an expenditure for communication 'expressly advocating for the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a

not (and still does not) require them to reveal the sources of their money. Individuals, corporations and other entities that seek to spend anonymously in the wake of *Citizens United* can do so by contributing to 501(c) nonprofit groups that use the money to engage in election-related spending. About half of the electioneering expenditures by outside groups in 2010, the first elections after *Citizens United*, were by groups that did not disclose their donors.[4] And a recent Public Citizen analysis found that in 2012's top 10 Senate races, nearly half of all outside spending was by organizations that do not have to disclose their donors.[5]

## Disclosure of Spending Pursuant to Organizations' Regulators

Consistent with the assumption in *Citizens United* that the sources of the new forms of electioneering spending permitted by the decision would be disclosed, the decision left intact the ability of federal agencies to require entities under their regulatory jurisdiction to disclose their political spending. Unions are primarily regulated by the Department of Labor and their election-related spending is subject to long-standing disclosure requirements. Publicly traded corporations do not, however, have a similarly comprehensive disclosure regime administered by their regulatory body, the Securities and Exchange Commission.

### *Rules Pertaining to Unions Overseen by the Department of Labor*

*Citizens United* permitted unions to spend unlimited money from their treasuries on independent expenditures and electioneering communications. But unions remain subject to rigorous and detailed disclosure requirements that are enforced by the Department of Labor. Labor organizations with receipts of more than $250,000 that are subject to the Labor Management and Disclosure Act of 1959, the Civil Service Reform Act of 1978, or the Foreign Service Act of 1980 must file an LM-2 Labor Organization Annual Report, which is a detailed accounting of the union's annual receipts and disbursements, including their its political spending.[6]

LM-2 forms provide a clear requirement for unions to report political activity—including election-related spending and lobbying—that is financed with money from their general funds. According to the instructions for the LM-2's Schedule 16, unions must report:

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candidate, a candidate's authorized committee, or their agents, or a political party or its agents." An electioneering communication is defined as "any broadcast, cable or satellite communication" that meets each of three criteria. First, "the communication refers to a clearly identified candidate for federal office." Second, "the communication is publicly distributed shortly before an election for the office the candidate is seeking." Third, "the communication is targeted to the relevant electorate (U.S. House and Senate candidates only)."

[4] Public Citizen, 12 MONTHS AFTER, 10 (January 2010), http://bit.ly/Uy8wWD.

[5] Public Citizen, DARK MONEY CASTS SHADOW OVER TOP SENATE RACES, 3 (Nov. 8, 2010), http://bit.ly/T3efSl.

[6] Website of the Department of Labor's Office of Labor-Management Standards (viewed Oct. 23, 2012), http://1.usa.gov/TayGrG.

> Direct and indirect disbursements to all entities and individuals during the reporting period associated with political disbursements or contributions in money. Also report the labor organization's direct and indirect disbursement to all entities and individuals during the reporting period associated with dealing with the executive and legislative branches of the Federal, state, and local governments and with independent agencies and staff to advance the passage or defeat of existing or potential laws or the promulgation of any other action with respect to rules or regulation (including litigation expenses).[7]

The LM-2 instructions define "political disbursements or contributions," as those intended to "influence the selection, nomination, election, or appointment of anyone" to federal, state, or local public office. These must be disclosed. Also included are disbursements "for communications with members … and their families for registration, get-out-the-vote and voter education campaigns." Within these categories, disbursements of more than $5,000 must be disclosed with great precision, including the recipient's full name and business address, and the date the disbursement was made.[8] Unions must also disclose the purpose of the payment, providing details that could include "get-out-the-vote campaign, voter education campaign, fund raising, advocating or opposing legislation."[9] LM-2 reports are available to view and download from the Department of Labor.[10],[11]

The LM-2 also requires disclosure of union transfers to super PACs and 501(c) groups on its Schedule 17, which captures the labor union's direct and indirect disbursements that are not covered by the form's other provisions.

One weakness of the union disclosure regime is timing. The LM-2 is filed annually, suggesting that the information contained within it would not likely emerge during relevant political campaigns, greatly reducing the value of such disclosure to voters.

### *Rules Specifically Governing Corporations' Electioneering Activities*

Publicly traded corporations, which can spend limitlessly in the post-*Citizens United* world, are not subject to electioneering regulations that pertain specifically to them. Though corporations (like unions) must disclose their independent expenditures and electioneering communications to the Federal Election Commission, corporations may funnel their spending through 501(c) groups, which do not have to disclose their donors. This type of spending goes largely undisclosed.

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[7] *LM-2 Form Instructions*, Department of Labor (viewed October 22, 2012), http://1.usa.gov/RDG00D,
[8] *Id.*
[9] *Id.*
[10] *LM-2 Form Searchable Database,* U.S. Department of Labor (viewed Nov. 14, 2012), http://1.usa.gov/W5xCrj.
[11] An example of a LM-2 form can be found at http://bit.ly/V2BrMT.

As a partial exception to this, the Center for Political Accountability reports that more than 100 major companies have agreed to voluntarily disclose at least some aspects of their political spending.[12]

However, there are serious weaknesses to voluntary disclosure. First, voluntary disclosure often omits highly relevant information, such as contributions to third-party organizations. For example Boeing in 2012 disclosed to its shareholders that it made a $200,000 in-kind contribution to a third-party group without even revealing the identity of the group.[13] Second, voluntary disclosure is often not timely. A corporation could reveal its spending weeks or even months after an election, which blunts the impact timely disclosure would have on voter decision-making.[14] Third, there is no enforcement or penalty if corporations do not fulfill the promises in their voluntary disclosure policies. For example, insurance company Aetna, which received "Best of Disclosure Honors" from the Center for Political Accountability for its policy, reportedly made a $3 million contribution to the American Action Network in 2011, but did not list the contribution on its disclosure form.[15] Finally, inconsistent formatting and criteria reduce the quality and comparability of disclosure.[16] The bottom line is that voluntary disclosure policies, while laudable in principal, are no substitute for mandatory, timely, standardized disclosure.

While the SEC has avoided regulating disclosure of corporate political activity, it recently announced that it will put a rule on the Regulatory Flexibility Agenda in December pertaining to shareholder notification of corporate political spending. The details are forthcoming, but early signs suggest that the SEC will address disclosure of corporate political spending.

[12] Press Release, Center for Political Accountability, *Political Disclosure Hits 100 Companies* (March 21, 2012), http://bit.ly/QaKOP7.
[13] Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending,* 101 GEORGETOWN LAW JOURNAL (April 2013 forthcoming) (discussing voluntary disclosure of corporate political spending).
[14] *Aetna Political Reports* (viewed Nov. 13, 2012), http://bit.ly/T1FGw2.
[15] Charles Riley, *Oops! Aetna Discloses Political Donations*, CNN (June 15, 2012), http://cnnmon.ie/UBddz3. *See also*, AETNA PAC AND AETNA INC. POLITICAL CONTRIBUTIONS AND RELATED ACTIVITY REPORT 2011, http://bit.ly/RVVe1X.
[16] CORPORATE REFORM COALITION, SUNLIGHT FOR SHAREHOLDERS: ACCOUNTABILITY FOR CORPORATE POLITICAL SPENDING, 10 (2012), http://bit.ly/QUkPrK.

# Proposed Policy Changes: Impact on Unions and Corporations

### The Disclose Act (S. 3369)

The DISCLOSE Act would increase reporting of the funders behind political expenditures. Organizations covered by the DISCLOSE Act include corporations, 501(c)(4) non-profits (social welfare groups), 501(c)(5) non-profits (labor unions), 501(c)(6) non-profits (business trade associations) and organizations colloquially known as "527" groups, meaning that they operate under the section of the tax code that covers political entities but are not registered as regulated campaign committees or political action committees (PACs).[17] The act would expand the existing definition of independent expenditures to include messages that are functionality equivalent to those that invoke "express advocacy" language such as "Smith for Congress" and broaden the time frame within which electioneering communications must be disclosed. (Electioneering communications depict a candidate in a broadcast message but do not include express advocacy language.)

The DISCLOSE Act would require covered organizations that spend more than $10,000 on a campaign-related activity (independent expenditures or electioneering communications) to file a disclosure report with the FEC within 24 hours of the disbursement. A new report must be filed for each additional expenditure of $10,000 or more. These reports must contain each disbursement exceeding $1,000, specifying on which election the money was spent and providing the name of the candidate targeted in the spending. If the campaign-related spending comes from the organization's general treasury funds, the covered organization must disclose only those donors whose contributions exceed $10,000 since the last general election, as well as the amount of those donations. Some exceptions apply, such as funds received in the course of doing normal commercial business, funds received from donors who restrict the donation from being used for political purposes and funds received from affiliates.[18]

The DISCLOSE Act also establishes criteria for determining when a transfer from a covered organization to another organization must be disclosed. Essentially, if there is any reason to believe that the transfer would be used for campaign-related expenses, the transfer must be disclosed.[19] An exception waives the disclosure requirement for transfers of less than $50,000 between affiliated organizations.[20] However, if the recipient in an affiliate-to-affiliate transfer makes a campaign-related expenditure, it must "report the donors of more

[17] The DISCLOSE Act, S. 3369, 112th Congress, Sec 2 (2012), http://1.usa.gov/W7wnh1.
[18] *Id.*
[19] *Id.*
[20] An affiliated organization is defined as "A membership organization, including a trade or professional association, and the related State and local entities of that organization … A national or international labor organization and its State or local unions, or an organization of national or international unions and its State and local entities … A corporation and its wholly owned subsidiaries." The DISCLOSE Act, Sec 2 The DISCLOSE Act, S. 3369, 112th Congress, Sec 2 (2012), http://1.usa.gov/W7wnh1.

than $10,000 to it, as well as the donors of more than $10,000 to the affiliate that made the transfer to it."[21] The overall effect would be that individuals and entities that contribute more than $10,000 to an independent group for political purposes would be disclosed.[22]

### *Practical Impact on Unions and Corporations*

Unions and corporations would face several new, important regulations under the DISCLOSE Act. First, if a covered organization receives a transfer from an affiliated organization and then makes a campaign-related disbursement, the covered organization must report all donors of more than $10,000 and the donors of more than $10,000 to the affiliated group.

Second, covered organizations must disclose contributions to third-party groups, including super PACs and 501(c) groups, when there is a clear intention to spend on campaign-related activity or when whomever solicited the money intends to spend on campaign-related activity. The transfer would also be disclosed if the donor or recipient had made campaign-related expenditures exceeding $50,000 in the previous two years, or if there was reason to believe the recipient would spend in excess of $50,000 over the next two years.[23] Contributions to these super PACs or 501(c)s from a covered organization that exceed $10,000 do not have to be disclosed if they are barred by the donor from being used for election-related spending.

Finally, corporations and unions would also be required to abide by updated definitions established for independent expenditures and electioneering communications.

## Conclusion

Claims that proposed disclosure rules discriminate against corporations are inaccurate. Existing regulations allow for detailed disclosure of union spending but not corporate spending. The DISCLOSE Act would enhance disclosure for both unions and corporations without bias.

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[21] *Disclose Act Fact Sheet*, Democracy 21(Viewed Nov. 13, 2012), http://bit.ly/TGYI8f .
[22] Rosalind S. Helderman, *DISCLOSE Act, New Donor Transparency Law, Blocked in Senate,* THE WASHINGTON POST (July 16, 2012), http://wapo.st/SVuz4z.
[23] *Disclose Act Fact Sheet*, Democracy 21(Viewed Nov. 13, 2012), http://bit.ly/TGYI8f.