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DISCLOSE: The Rise of Secret Money in Campaigns and Elections

July 24, 2012—Despite being fundamental pillars of campaign finance reform that have consistently been upheld by the Supreme Court, disclosure requirements have collapsed in the *Citizens United* era and unlimited secret money now flows into elections at levels reminiscent of the Watergate era.

Disclosure requirements had been fairly robust ever since the Federal Elections Campaign Act ("FECA") of 1971 and were upheld in a series of Supreme Court cases including the 1976 *Buckley v. Valeo* decision as well as the recent 2010 *Citizens United* decision.

The disclosure requirements were fine-tuned by the Bipartisan Campaign Reform Act ("BCRA") of 2002. Outside electioneering groups, and even the political parties, had learned since the mid-1990s that they could evade many of the disclosure requirements and contribution limits of FECA by running "sham issue ads," electioneering advertisements that skirted the campaign finance law by appearing as "issue ads" (not subject to FECA) rather than "campaign ads" (subject to FECA). At that time, campaign ads were widely defined as those that used the "magic words" of express advocacy ("vote for," "elect, "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject"). Ads that avoided the magic words were deemed issue ads outside the constraints of campaign finance law. Issue ads that were designed to affect the outcomes of elections, but avoided the magic words, grew increasingly problematic and became a widely abused means for electioneering groups to evade disclosure and limits.[1]

BCRA changed the definition of campaign ad to capture "sham issue advocacy." Campaign ads subject to the disclosure requirements and contribution limits of federal campaign finance law now included both those ads that use the magic words or its functional equivalent—"express advocacy"—and broadcast advertisements that depict a candidate, target that candidate's election district, and air within 30 days of the candidate's primary election or 60 days of the general election—"electioneering communications."

[1] Craig Holman and Luke McLoughlin, BUYING TIME 2000 (Brennan Center, 2001).

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The Disclosure Loophole

In the years between the passage of BCRA and the 2007 Supreme Court opinion in *Federal Election Commission v. Wisconsin Right to Life*, the public received almost complete disclosure of the major funders behind electioneering communications and could be reasonably assured that such messages were financed solely by individuals. But *Wisconsin Right to Life* poked a major loophole in BCRA's prohibition on using corporate or union money for electioneering communications. The court reversed in part the Supreme Court's 2003 *McConnell v. FEC* decision (which had upheld most of BCRA) by allowing corporate and union money to finance electioneering communications if the ads were "issue oriented." The Federal Election Commission (FEC) responded later that year by exempting groups making electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.

Simultaneously, in a stunning move in the summer of 2009, the Supreme Court on its own initiative transformed the *Citizens United* case from a limited challenge to BCRA into a sweeping challenge to one of the oldest and most established pillars of campaign finance doctrine: the ban on direct corporate and union spending to influence political campaigns. While the final January 21, 2010, decision removed the ban on corporate and union spending in campaigns, it upheld key disclosure rules and highlighted its importance in campaign finance:

> "It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. 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 supports … and see whether elected officials are in the pocket of so-called moneyed interests."[2]

While some outside spending groups register as political action committees or section 527s and are required to disclose donors, some groups register as non-profit organizations, such as 501(c)(4), social welfare organizations, or 501(c)(6)s, trade associations. Such nonprofit groups are not, in theory, primarily dedicated to electioneering. If these organizations had electioneering as their primary purpose, they should be required to register as political committees or section 527s, subject to disclosure. As long as they remain nonprofit groups

[2] 558 U.S. S.Ct. (2010), p. 55

without electioneering as their primary purpose, they do not have to disclose donors. (Senate Democrats recently asked the IRS to challenge organizations registering as nonprofit groups that are focusing on political advocacy. These organizations include Crossroads GPS, which is spending millions on political advertisements without disclosing any of its donors.[3])

The only groups that could withhold information about their funders in the past were "qualified non-profits," groups that have no business purpose and receive their funding exclusively from individuals. Today, nonprofit 501(c)(4) and 501(c)(6)s are becoming the preferred vehicle of electioneering front groups, like Crossroads GPS, that want to spend heavily to influence elections but not disclose their donors.

What Happened? The Facts About Disclosure

The combination of these two Supreme Court cases, and subsequent FEC and IRS regulations, have led to the ability of corporations, unions, and independently wealthy individuals to contribute unlimited amounts to outside spending groups and to evade the disclosure requirements. Immediately following the *Wisconsin Right to Life* decision, the percentage of groups disclosing the financers of their ads fell from nearly 100 percent in 2004 and 2006, down to about 50 percent in 2010, and continues to drop in 2012.

Of the 308 groups (excluding party committees) that reported spending outside money on electioneering communications or independent expenditures to influence the 2010 election cycle, only 166 (53.9 percent) provided any information about their sources of money before the elections. Groups that did not provide any information about their sources of money collectively spent $135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.[4]

Among the top 10 groups, which accounted for nearly half of all spending, seven disclosed nothing about their donors. These seven groups accounted for 73.6 percent of the total amount spent by the top 10 groups. And in 2010, barely a third of electioneering communications groups disclosed their funders.

[3] "Filings by American Crossroads C00487363," Federal Election Commission Website (July 2012)
[4] Lincoln, Taylor "Disclosure Elipse: Nearly Half of Outside Groups Kept Donors Secret in 2010," *Public Citizen*, p. 3-4

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The results of this have had a drastic impact both on the effectiveness of campaigns and on policy. Of 75 congressional contests in which partisan power changed hands, spending by outside groups favored the winning candidate in 60. In the six Senate contests in which power changed hands, winning candidates enjoyed an average advantage of $2.7 million over their opponents in spending by outside groups. Excluding the North Dakota Senate contest, which was not competitive and was not the subject of outside spending, winning candidates enjoyed an average advantage of $3.3 million, amounting to a 7-to-1 edge over their opponents.[5]

DISCLOSE Act & Other Efforts

The DISCLOSE Act of 2010 (H.R. 5175 and S. 3628) was designed to enhance transparency for the public of who financed independent campaign ads. (DISCLOSE stands for "Democracy Is Strengthened by Casting Light On Spending in Elections Act.") The law would have filled many of the holes of the existing transparency regime, especially in regards to funneling campaign money through outside groups. The DISCLOSE Act of 2010 had several critical pieces.

First, it created a 24-hour reporting requirement for independent expenditures of $10,000 or more prior to 20 days before an election and expenditures of $1,000 within 20 days of an election. It extended the "electioneering communications" period for disclosure purposes to 90 days before a primary election and through the general election, and it required lobbyists to report the date and amount of any independent expenditure and electioneering communication.

Second, it required all electioneering groups and political organizations to report all donors who had given $1,000 or more to the entity's political budget if that entity (independently wealthy people, union, or corporation) spent more than $10,000 on electioneering activities. Donors who have not given money for campaign purposes would be exempt from the disclosure requirement. This section of the bill would have ended the ability of front groups to hide the identities of corporate donors to their political campaign budgets while maintaining the anonymity to those donors who do not intend their money to be used for campaign purposes.

[5] Craig Holman and Taylor Lincoln, "12 Months After: The Effects of *Citizens United* on Elections and the Integrity of the Legislative Process," *Public Citizen*, January 2011, p. 4-12

Third, the bill featured a "stand by your ad" disclaimer, in which the CEO or highest ranking official of the organization had to appear in any ad saying that he or she "approves this message." If the message was sponsored by a front group, the top funder of the group must also record a stand-by-your-ad disclaimer. Finally, the top five donors of the group must be listed on the screen at the end of the advertisement in the same fashion that is currently practiced in the state of Washington.[6]

Had the DISCLOSE Act passed in 2010, the secret money pouring into the 2012 election could have been avoided. No longer would pharmaceutical companies be able to secretly launder money to a front group, such as the United Senior Association, which received more than 90 percent of its funds from a single undisclosed corporate source but pretended to be a mass organization of concerned citizens opposed to health care reform in its television ads promoting or attacking candidates.[7] However, the Senate was unable to muster the 60 vote margin to override a Republican filibuster against the DISCLOSE Act, so it failed on a 59-41 party-line vote.

In July 2012, Sen. Sheldon Whitehouse (D-R.I.) reintroduced an amended version of the DISCLOSE Act that removed many of the aspects of the bill that were seen as controversial in 2010.[8] The 2012 version simply sought to expand the period during which certain communications were treated as electioneering communications and would have required corporations, labor organizations, and political committees that made campaign expenditures either to (i) create a political account from which all campaign expenditures must be made and disclose the donors to that political account, or (ii) disclose all donors to the electioneering group. However, even this simple disclosure bill failed along a strict party-line vote (51-44), though Sens. Lisa Murkowski (R-Alaska.) and John McCain (R-Ariz.) indicated they would be willing to work on a new DISCLOSE Act in the future.[9]

[6] Id. at 25
[7] Id. at 25
[8] Cong Record 158 s4989-4991
[9] Cong Record 158 S.5068