March 28, 2012

The Hon. Charles Schumer, Chairman
The Hon. Lamar Alexander, Ranking Member
Committee on Rules and Administration
U.S. Senate
Washington, D.C.  20510

Testimony Submitted on Behalf of Public Citizen
Before the Senate Committee on Rules and Administration

Hearing on the DISCLOSE Act of 2012 (S. 2219)

Public Citizen is pleased that the Senate Committee on Rules and Administration has decided to hold a hearing without hesitation or delay on the “Democracy Is Strengthened by Casting Light on Spending in Elections” (DISCLOSE) Act of 2012, which was introduced last week by Sen. Sheldon Whitehouse (D-R.I.). As of this writing, the legislation has already been endorsed by 38 cosponsors in the Senate and more than 160 cosponsors of companion legislation in the House (H.R. 4010).

Public Citizen respectfully submits testimony to the Committee on behalf of our more than 250,000 members and activists in strong support of this newest version of the DISCLOSE Act and applauds this effort to lift the veil of secrecy cloaking who is funding our elections.

The DISCLOSE Act is a desperately-needed step to repair some of the damage caused by Citizens United. It can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages. The legislative proposal also closes major loopholes in the current disclosure laws – loopholes that will become all the more problematic as corporations and wealthy individuals seek ways to influence elections and pressure lawmakers by funneling money into innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf.
This legislation is a transparency-only measure. It avoids all the regulatory controversies of earlier versions of the bill, such as restricting campaign expenditures by foreign subsidiaries of corporations, and provides only that the sources of money used to pay for elections are fully disclosed to the American public. The DISCLOSE Act of 2012 would require all entities that make campaign expenditures, including super PACs and third party front groups, to disclose the true sources of those funds. At the same time, the legislation carefully protects legitimate non-electioneering donations from disclosure by allowing groups to establish segregated campaign accounts and only disclose contributions into those accounts. The segregated campaign accounts permit such groups as the League of Conservation Voters, who conduct both electioneering campaigns and educational drives, to disclose only those donors who contribute to the electioneering activities.

The Influx of New Money

On January 21, 2010, the U.S. Supreme Court startled the American public when it ruled in *Citizens United v. Federal Election Commission*, contrary to long-standing precedent, that corporations have a constitutional right to spend unlimited amounts of money to elect or defeat candidates for public office.

The impact on our elections was felt almost immediately. In just the first year following the decision, campaign spending by outside groups in the 2010 election soared 427 percent over spending levels in the previous midterm election. Spending by outside groups jumped to $294.2 million in the 2010 election cycle from just $68.9 million in 2006, the last mid-term election cycle. The 2010 figures nearly matched the $301.7 million spent by outside groups in the 2008 presidential cycle. Of the $294.2 million spent in the 2010 cycle, $228.2 million (or 77.6 percent) was spent by groups that accepted contributions larger than $5,000 (the previous maximum a federal political action committee, or PAC, could accept in a single election cycle) or that did not reveal any information about the sources of their money. Nearly half of the money spent ($138.5 million, or 47.1 percent) came from only 10 groups.\(^1\)

The rapid rise of new spending in the 2010 election presages what is likely to be blockbuster spending in the upcoming 2012 election, when the grand trophy of the White House is at stake. Outside groups had just sprung into action to tap into the new source of unlimited electioneering funds in 2010, not quite sure how to do it, or whether corporate CEOs would be willing to dip into the corporate till for campaign money. The learning curve is now over.

As we enter the 2012 election, estimates of the growth of campaign spending, especially by outside groups and super PACs, suggest that it will shatter all previous records. Though the actual amount of new campaign spending will not be known until after the 2012 election, estimates range as high as nearly $10 billion in state and federal elections, a 30 percent increase over the 2008 and 2010 election cycles.\(^2\)


Fading Disclosure

Perhaps even more alarming than the flood of new money into elections is the dramatic decline in transparency as to where all this money is coming from.

Before the Roberts Court reversed the precedents of two earlier landmark campaign finance decisions of previous Supreme Courts, the public was able to learn the identities of the sponsors of major campaign advertisements broadcast near federal elections. In the years following passage of the Bipartisan Campaign Reform Act (BCRA) of 2002, the public received nearly complete disclosure of funding sources behind electioneering communications and independent expenditures in the 2004 and 2006 elections. In the 2010 elections, with the sudden rise of corporate campaign money, donor disclosure fell to 34 percent for electioneering communications (ads that depict candidates very near an election but do not use the magic words of express advocacy, such as “vote for” or “vote against”) and fell to 70 percent for express advocacy independent expenditures – marking a collapse of overall donor disclosure from nearly 100 percent in 2004 and 2006 to about 50 percent in 2010.3

This fading disclosure cannot be entirely blamed on the Citizens United decision. In fact, the Court voted 8-1 upholding the disclosure requirements in the same ruling. The Court stated:

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.4

The greatest damage to the disclosure regime lies in rulemaking by the Federal Election Commission (FEC). Following the 2007 Wisconsin Right to Life v. FEC decision, in which the Roberts Court ruled that corporations and unions may make electioneering communications so long as the ads could be interpreted as something other than an appeal to support or oppose candidates, the FEC modified its regulation implementing the disclosure requirement of BCRA.

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.” BCRA makes no such qualification; all donors must be disclosed under the plain language of the law.5

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3 Public Citizen, Disclosure Eclipse (Nov. 18, 2010) at 4-5.
5 11 C.F.R. § 104.20(c)(9) (emphasis added)
The new FEC rule, however, has 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 action against those declining compliance. 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. Even some federally-registered super PACs have begun disclosing only their direct funders, such as a generic nonprofit group, without disclosing the actual donors behind those funds.

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.6

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….”7

Substantial evidence showed that 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.

Through deregulation and lack of enforcement, very little is left of what by all rights should be a very robust transparency law. Couple this lack of transparency with a flood of new money flowing into our elections from the Citizens United decision, and it becomes evident that financing campaigns in our country today is returning to the days of old when “Robber Barons” dominated government through secret corporate slush funds.

Conclusions: The DISCLOSE Act Reinstates Full Transparency, All the While Protecting Non-Electioneering Political Speech

It is a well-established norm of American politics that voters have a right to know who is paying how much for campaign ads. The Supreme Court has upheld the principle of disclosure in

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election spending over and over again – including most recently in the Citizen United ruling – recognizing that who is paying for campaign advertising is valuable information that helps voters judge the merits of the barrage of ads that overwhelm the airwaves every election. The DISCLOSE Act of 2012 will provide voters with exactly that information.

At the same time, the DISCLOSE Act is not overly burdensome for groups that conduct both electioneering activity and activity unrelated to elections, such as genuine issue advocacy. The measure allows any group that wants to get involved in elections to set up a separate electioneering fund and only disclose the sources of money going into that electioneering fund. If a group decides to spend general treasury revenues, then it must disclose all its donors as required under BCRA.

To ensure that groups take some responsibility for the tone and content of their ads, the legislation also would require electioneering groups to list their top five funders. The head of such an organization must also appear in the ad itself and declare that he or she approves of the message.

One disclosure requirement missing in the Senate version of the bill is a provision to require corporations to inform shareholders of any significant corporate political expenditure. Since unlimited corporate political spending has suddenly been thrust upon the American political arena by the Court, there are no rules or procedures established in the United States to ensure that shareholders – those who actually own the wealth of corporations – are informed of decisions to spend their money on politics.

The DISCLOSE Act of 2012 is commonsense, straightforward legislation that would reinstate full transparency of electioneering spending and go a long way toward reining in some of the damage caused by the Citizens United decision. Public Citizen supports this measure and would like to see it pass the Senate with the addition of the shareholder disclosure provision contained in the House version.

Respectfully Submitted,

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