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E-ALERT | Election and Political Law

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DISCLOSE 2012 ACT

On February 9, 2012, Rep. Chris Van Hollen (D-Md.) introduced the "Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012," known in short as the "DISCLOSE 2012 Act." *See* H.R. 4010, 112th Cong. The legislation is supported by key Democratic congressional leaders and continues a legislative effort to blunt the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. The original DISCLOSE Act, which passed the then-Democratic controlled House and fell three votes short of the necessary 60 cloture votes in the Senate in 2010, was discussed in a previous Covington e-alert.

The DISCLOSE 2012 Act would amend the federal campaign finance and lobbying disclosure laws in four ways. *First*, groups that make independent expenditures or electioneering communications, or fund such ads, would have to disclose their donors. *Second*, such groups would need to include oral "stand by your ad" disclaimers and list their top donors in their ads. *Third*, such groups would need to report their political spending to their members, donors, or shareholders, and on the Internet. *Fourth*, lobbyists and entities registered under the Lobbying Disclosure Act would have to include independent expenditures and electioneering communications on their semi-annual lobbying disclosure reports.

Although the DISCLOSE 2012 Act is less ambitious in scope than its predecessor and omits several highly contested provisions, the reforms currently proposed are unlikely to be any less controversial. Absent Republican leadership support (currently none of the eighty-five co-sponsors are Republicans), this legislation is unlikely to make much headway in an election year. However, it may serve as a blueprint for Democrats' demands if, beginning in 2013, Republicans and Democrats engage in serious negotiations to remedy an increasingly piecemeal set of campaign finance rules.

We review key provisions of the DISCLOSE 2012 Act below.

DISCLOSURE OF CAMPAIGN-RELATED DISBURSEMENTS BY COVERED ORGANIZATIONS

If adopted, the biggest change the bill would bring to current law would be the obligation of outside groups that fund political ads—including corporations, labor unions, 501(c)(4) social welfare organizations, 501(c)(6) trade associations, 527 groups, and Super PACs—to disclose promptly their donors, irrespective of whether the donor contributed for the purpose of funding the ads or not.[1] Specifically, these groups would have to file within 24 hours disclosure reports each time they spend over $10,000 in a calendar year on independent expenditures (which have a new and broader definition), electioneering communications (which have a new and broader definition), or transfers to groups that fund such ads (collectively "campaign-related disbursements"). The filed statement would include, among other information and to the extent applicable:

[1] The bill would not change the rules for candidate committees, party committees, 501(c)(3) charitable organizations, or federal PACs that comply with the source restrictions (e.g., the prohibition on accepting contributions from corporations or labor unions) and amount limitations (i.e., the limit on contributions of $5,000 per year) in the Federal Election Campaign Act of 1971, as amended.

- The amount of the campaign-related disbursement;
- The election influenced or candidate identified in the ad;
- A certification that the campaign-related disbursement was not coordinated with the candidate; and
- The identity of any person who contributed more than $10,000 to the group in the calendar year.[2]

The statutory definition of an independent expenditure would be expanded to include ads that contain the "functional equivalent" of express advocacy: i.e., an ad that "can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, or political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office."

The definition of an electioneering communication also would be expanded to include any ad that mentions a House or Senate candidate and airs during the calendar year in which a general election is held (rather than the 30 days before a primary or 60 days before a general election). In the case of presidential candidates, the time period would run from 120 days before the first primary, preference election, convention, or caucus until the general election date.

The bill also creates a new category of regulated activity: "transfers." These are defined to include the transfer of funds from a corporation, trade association, social welfare organization, or other regulated entity to a third party:

- if the donor "designates, requests, or suggests" the funds be used for independent expenditures, electioneering communications, or transfers to another group to fund those activities;
- if the funds are given in response to a solicitation or "other request" for a donation or contribution to fund independent expenditures, electioneering communications, or a transfer to another group to fund those activities;
- if the donor and recipient engage in a discussion with respect to the making or paying for independent expenditures, electioneering communications, or a transfer to another group to fund those activities;
- if the donor is giving to a group that has a history of making independent expenditures or electioneering communications (i.e., if the group has made more than $50,000 in such expenditures in the past two years); or
- if the donor has reason to know the recipient will make more than $50,000 in independent expenditures or electioneering communications in the next two years.

Certain exceptions exist to this obligation to disclose transfers, including transfers made "in the ordinary course of any trade or business," investments, and transfers between affiliated entities.

STAND BY YOUR AD

Federal law requires groups funding television and radio ads on political topics to include written and at times oral disclaimers that identify the party paying for the ad, at times whether the ad was authorized by a candidate, and the group that is responsible for the content of the ad. This bill would create two new disclosure requirements for independent expenditures or electioneering communications broadcast on television or radio.

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[2] The bill contains an exception to this disclosure requirement if the ad is paid for from a separate segregated fund that discloses all its donors, in which case only donors to the segregated fund need to be disclosed.

First, the "stand by your ad" provision required for independent expenditures and electioneering communications would now require the highest ranking official in the organization to state orally (and in a television ad, to appear in person or in an image): "I am [name], the [title] of [name of the organization or other person paying for the communication], and [the organization or the payor] approves this message."[3] This disclosure statement must also appear in writing in a television ad and meet certain duration, timing, and format requirements.

Second, independent expenditures and electioneering communications must also contain information about the sponsoring entity's largest donors. Television commercials must list the five persons who provided the largest payments in the current year and the precise amounts provided. Radio ads must include the top two persons who provided the largest payments and the precise amounts provided.

SHAREHOLDERS RIGHT TO KNOW

Organizations would have to include information about spending on independent expenditures, electioneering communications, or transfers to entities that fund such ads to shareholders, members, or donors within 24 hours on the organization's website, and remain on the organization's homepage for a year-long period following the date of the relevant election. The information would also have to be included in any regular periodic reports the group provides to shareholders, members or donors, such as annual reports.

LOBBYISTS' CAMPAIGN FUNDING DISCLOSURE

Registered federal lobbyists and companies, trade associations, and other groups that register under the Lobbying Disclosure Act would have to include on their semi-annual contribution reports (the LD-203):

- The amount of any independent expenditure or electioneering communication equal to or greater than $1,000 made by the lobbyist or registrant, and for each such expenditure the name of each candidate being supported or opposed and the amount spent supporting or opposing each such candidate; and
- The amount of transfers to any covered organization greater than $1,000.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

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[3] The disclosure statement for an ad funded solely by an individual needs to consist only of the identification of the individual and his or her approval of the message.