The DISCLOSE Act (H.R. 5175): Overview and Analysis

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Summary

As it has periodically for decades, Congress is again considering how or whether to regulate campaign financing. The latest iteration of the debate over which kinds of groups should be permitted to spend funds on political advertisements, and how so, was renewed on January 21, 2010, when the Supreme Court of the United States issued its decision in *Citizens United v. Federal Election Commission*. Following *Citizens United*, corporations and labor unions may now fund political advertisements explicitly calling for election or defeat of federal candidates—provided that the advertisements are not coordinated with the campaign. The legislative response receiving the most attention to date—and the emphasis of this report—is the House version of the DISCLOSE ("Democracy is Strengthened by Casting Light on Spending in Elections") Act, H.R. 5175, sponsored by Representative Van Hollen. This bill was reported, as amended, by the Committee on House Administration on May 25, 2010. Senator Schumer has introduced a companion measure, S. 3295.

This report provides an overview and analysis of (1) major policy issues addressed in *Citizens United* and the DISCLOSE Act; (2) major provisions of H.R. 5175 versus current federal campaign finance law; and (3) issues for congressional consideration and potential implications of enacting or not enacting the DISCLOSE Act. H.R. 5175 proposes a combination of disclosure and disclaimer provisions designed to provide additional information to regulators and the public about political advertising that could emerge following *Citizens United*. The legislation also prohibits government contractors, foreign nationals (including some U.S. subsidiaries of foreign corporations), and recipients of Temporary Asset Relief Program (TARP) funds from making certain political expenditures. A variety of issues for Congress discussed in this report, such as how various provisions in the bill might be interpreted or implemented, may be relevant for House and Senate consideration of the DISCLOSE Act.

The report will be updated as events warrant.

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Introduction

Political information—particularly political advertising—has been at the heart of American campaigns and elections for more than a century. Throughout the last century, candidates, parties, and interest groups have competed to make their case to voters in the hopes of winning elections and shaping policy debates. At the same time, Congress, regulatory agencies, and the courts have wrestled with how much, and what kind, of information should be available to the public about the sources of those political messages. Questions have also emerged about whether certain actors, such as corporations and unions, should be permitted to participate in elections and other political debates to the same extent as voters. Modern campaign finance policy and law, which emerged in the 1970s, but which built on reforms first pursued in the early 1900s, has responded with a combination of provisions designed to restrict the amounts and sources of funds in federal elections on one hand, and documenting the sources and amounts of funds that are permitted on the other.[1]

Political advertising has both enabled the public to become more informed about campaigns and policy contests, and, perhaps, made it more challenging for the electorate and policymakers to keep track of the various players and issues involved in political debates. This has been particularly true since the 1960s, when broadcast political advertising first became prominent, political professionals began to specialize in media production, and the electorate increasingly turned to television for information.[2]

The latest iteration of the debate over which corporations, unions, and other groups should be permitted to spend funds on political ads, and how so, was renewed on January 21, 2010, when the U.S. Supreme Court issued its highly anticipated decision in *Citizens United v. Federal Election Commission (FEC)*.[3] The DISCLOSE Act, "Democracy is Strengthened by Casting Light on Spending in Elections," which the Committee on House Administration reported, as amended, on May 25, 2010, is the most prominent legislative response to *Citizens United* to date. As with the case itself, the DISCLOSE Act is particularly relevant for the ongoing policy debate surrounding political advertising and its transparency.

This report is designed to provide an overview and analysis of (1) major policy issues addressed in *Citizens* United and the DISCLOSE Act; (2) major provisions of H.R. 5175 compared with current federal campaign finance law, as shown in **Table 1** at the end of this report; and (3) issues for congressional consideration and potential implications of enacting or not enacting the DISCLOSE Act.[4] Although the report briefly discusses the Senate companion measure, it

[1] On the development of federal campaign finance policy and law, see, for example, Kurt Hohenstein, *Coining Corruption: The Making of the American Campaign Finance System* (DeKalb, IL: Northern Illinois University Press, 2007); Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988); Raymond J. La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Ann Arbor, MI: University of Michigan Press, 2008); and John Samples, *The Fallacy of Campaign Finance Reform* (Chicago: University of Chicago Press, 2006).

[2] See, for example, Stephen Ansolabehere, Roy Behr, and Shanto Iyengar, *The Media Game: American Politics in the Television Age* (New York: Macmillan, 1993); and *Crowded Airwaves: Campaign Advertising in Elections*, eds. James A. Thurber, Candice J. Nelson, and David A. Dulio (Washington: Brookings Institution Press, 2000).

[3] 130 S. Ct. 876 (2010).

[4] This report does not provide a constitutional analysis and does not address all policy or legal factors that might be relevant for Congress. For analysis of the constitutionality of possible legislative responses to *Citizens United*, see CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, by L. Paige (continued...)

primarily addresses the House measure, as reported. As the two bills are substantially similar, much of the following analysis of H.R. 5175 is also relevant for S. 3295. Additional material about the Senate bill will be added in future updates.

Evolution of Policy and Legal Issues

Citizens United is significant because of its potential to change the ways in which corporations, unions, and tax-exempt organizations participate in American elections. Although restrictions on those actors have evolved over time, corporations, unions, and certain tax-exempt organizations were largely banned from spending treasury funds in federal elections for decades. As a result of *Citizens United*, these groups are permitted to use general treasury funds to make *independent expenditures*, which are defined as communications "expressly advocating the election or defeat of a clearly identified candidate" and that are not coordinated with any candidate or party,[5] and *electioneering communications*, which are defined as broadcast, cable or satellite transmissions that refer to a clearly identified federal candidate, aired within 60 days of a general election or 30 days of a primary.[6] Corporations and unions are still subject to the prohibition on using general treasury funds to make contributions to candidates and political parties.[7]

The 1907 Tillman Act,[8] which is considered to be the first major federal campaign finance law, prohibited corporations from making contributions to political parties. With the 1947 Taft-Hartley Act,[9] Congress expanded the prohibition to include corporate contributions to both parties and candidates, as well as expenditures in federal elections. Taft Hartley also included labor unions in the prohibition. The early prohibitions on corporate and labor union treasury funded contributions and expenditures were included in the first modern federal campaign finance law, the Federal Election Campaign Act of 1971, also known as FECA.[10] The prohibitions are codified at 2 U.S.C. § 441b. In an exception to the prohibition on corporate and union treasury spending, FECA allows for the creation of *separate segregated funds* or *political action committees*, also known as *PACs*. Specifically, corporations and unions can use their treasury funds to establish, operate and solicit voluntary, limited contributions to their PACs.[11] These voluntary PAC donations can then be used to contribute to federal campaigns or to make expenditures that expressly advocate election or defeat of federal candidates.

In the 1976 landmark Supreme Court decision, *Buckley v. Valeo*,[12] the constitutionality of many provisions in FECA was challenged. This case is important because it established the framework for constitutional analysis of campaign finance regulation. In *Buckley*, the Court upheld

(...continued)

Whitaker et al. For analysis of the policy implications of various legislative options, see CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett.

[5] 2 U.S.C. § 431 (17).

[6] 2 U.S.C. § 434(f)(3).

[7] 2 U.S.C. § 441b(a).

[8] 34 Stat. 864.

[9] 61 Stat. 136.

[10] Codified as amended at 2 U.S.C. § 431 *et seq*.

[11] 2 U.S.C. § 441b(b)(2)(C).

[12] 424 U.S. 1 (1976).

reasonable contribution limits, invalidated certain expenditure limits, and upheld reporting and disclosure requirements. In addition, the Court created the distinction between *issue advocacy* and *express advocacy*, finding that a communication could be regulated if it contained words express advocacy of the election or defeat of a candidate, which includes words such as "vote for" or "vote against." By contrast, such ads could not be regulated if they only contained general public policy messages that fell short of calling for election or defeat of candidates, sometimes referred to as *issue advocacy*. A generation would pass between the enactment of FECA and the next time that Congress would again enact major campaign finance legislation—the Bipartisan Campaign Reform Act of 2002 (BCRA)—but political advertising and the funding sources for that advertising remained prominent during both legislative debates.

As the legislation that became BCRA was being debated in the late 1990s and early 2000s, a chief concern surrounding issue advocacy was whether the ads were actually about public policy issues—as proponents of the advertisements suggested—or whether they were really messages designed to encourages votes for or against candidates within in the context of ads that were only nominally related to public policy.[13] In an effort to restrict issue advocacy, BCRA created a new concept within FECA known as *electioneering communications* in order to regulate messages that might affect elections, but did not expressly advocate for the election or defeat of a clearly identified federal candidate. Importantly, BCRA prohibited corporations and unions from using general treasury funds to pay for electioneering communications, meaning that potentially any ad that even mentioned a political candidate during pre-election periods would have to be paid for with PAC funds or not aired.

In 2007, in *FEC v. Wisconsin Right to Life, Inc.*,[14] the Supreme Court limited the application of the prohibition, thereby easing some restrictions on corporate- and union-funded ads that would otherwise be classified as electioneering communications. As a result of the Court's ruling, if an advertisement could reasonably be interpreted as something other than calling for a vote for or against a candidate, it could not be prohibited. While this ruling limited the application of the electioneering communication prohibition, it did not expressly overrule it.

Citizens United v. Federal Election Commission

Citizens United, a corporation exempt from taxes under Internal Revenue Code (IRC) § 501(c)(4), produced a documentary about a presidential candidate, then-Senator Hillary Clinton. The group released the film in theaters and on DVD, and planned to make it available through video-on-demand and to fund broadcast and cable television advertisements promoting the movie. In *Citizens United v. Federal Election Commission (FEC)*,[15] the U.S. Supreme Court considered to what extent the organization was subject to the federal prohibitions on corporate treasury

[13] For a historical overview, see, for example, Anthony Corrado et al., *The New Campaign Finance Sourcebook* (Washington: Brookings Institution Press, 2005), pp. 35-47.

[14] 551 U.S. 449 (2007). For additional discussion, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker; and CRS Report RL34324, *Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress*, by R. Sam Garrett.

[15] 130 S. Ct. 876 (2010). For additional discussion, *see* CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker.

funding of independent expenditures, electioneering communications, and related reporting requirements.

On January 21, 2010, the Supreme Court issued its long-awaited ruling in this case, and invalidated the prohibition on corporations and labor unions using their general treasury funds to make independent expenditures and electioneering communications. The Court determined that these prohibitions constitute a "ban on speech" in violation of the First Amendment.[16] In so doing, the Court also overturned its 1990 ruling in *Austin v. Michigan Chamber of Commerce*,[17] which had upheld restrictions on corporate-funded independent expenditures, finding that it provided no basis for allowing the government to limit such independent expenditures. The Court also overturned the portion of its decision in *McConnell v. FEC*[18] upholding the facial validity of the prohibition on electioneering communications in BCRA, finding that the *McConnell* Court relied on *Austin.*[19]

The Court in *Citizens United*, however, upheld the disclaimer and disclosure requirements for electioneering communications as applied to the documentary. These requirements, the Court held, could be applied to the film and related advertisements that Citizens United had produced.[20] According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities."[21]

It does not appear that the Court's ruling in *Citizens United* affects the validity of Title I of BCRA,[22] which generally bans the raising of unregulated, also known as "soft," money by national parties and federal candidates or officials, and restricts soft money spending by state parties for "federal election activities." Furthermore, *Citizens United* does not appear to affect the ban on corporate or union *contributions* to political candidates. As a consequence of *Citizens United*, federal campaign finance law does not limit corporate and labor union treasury funding for independent expenditures and electioneering communications. Corporations and unions may still establish PACs, but are only required to use PAC funds in order to make contributions to candidates, parties, and other political committees.

Congressional Response

Given these developments, questions have emerged about how political advertising might be affected by the Court's decision in *Citizens United* and whether the airwaves will be flooded with corporate and labor union express advocacy.[23] Similar questions have arisen about the extent to

[16] *Id.* at 898.

[17] 494 U.S. 652 (1990).

[18] 540 U.S. 93 (2003).

[19] *See* Citizens United, 130 S. Ct. at 912-14 . For further discussion of *McConnell v. FEC* and *Austin v. Michigan Chamber of Commerce*, *see* CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[20] *See id.* at 913-15.

[21] *Id.* at 914 (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976)).

[22] *See* 2 U.S.C. § 441i(a).

[23] For an overview of the questions and points of debate referenced in this section, see, for example U.S. Congress, House Committee on House Administration, *DISCLOSE Act*, report to accompany H.R. 5175, 111th Cong., 2nd sess., May 25, 2010, H.Rept. 111-492 (Washington: GPO, 2010).

which the Court's decision might lead to increased campaign activity by tax-exempt organizations, particularly § 501(c)(4) social welfare organizations and § 501(c)(6) trade associations. Many of the these organizations are incorporated, and thus, prior to *Citizens United*, were generally prohibited from using their treasury funds for independent expenditures and electioneering communications.[24] Additionally, all § 501(c) organizations, regardless of whether they were incorporated, could not serve as conduits for corporate or labor union treasury funds to fund independent expenditures and electioneering communications. In light of the Court's decision in *Citizens United*, some are expecting increased campaign activity by tax-exempt organizations. Additionally, some have expressed concern that organizations might be used as shadow groups—groups to which corporations, other entities, and individuals might give funds to engage in campaign activity with little or no public disclosure.

Because this is the first time in modern history that corporate and union independent expenditures have been permitted at the federal level, it remains to be seen how much additional money, if any, might flow into the political system. A more complete understanding of how *Citizens United* will affect the political environment, including campaign spending, will likely be unavailable until after the 2010 election cycle, at the earliest. Proponents of legislative action have, nonetheless, argued that preemptive legislation is necessary to avoid or at least document an expected onslaught of new political advertising.

Legislative Action on the DISCLOSE Act Thus Far

Legislative responses to *Citizens United* began developing immediately after the January 21 ruling. More than 40 bills that are potentially relevant have been introduced in the 111th Congress.[25] The primary focus has been on the DISCLOSE Act. Representative Van Hollen introduced the House measure, H.R. 5175, on April 29, 2010. Senator Schumer introduced the Senate version, S. 3295, on April 30, 2010.

Although committees in both chambers have held hearings on *Citizens United*, the House has largely focused on the DISCLOSE Act.[26] Both the Committee on House Administration and House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held hearings to assess the *Citizens United* ruling on February 3, 2010. The Committee on House Administration held two hearings on H.R. 5175 specifically, on May 6, 2010, and May 11, 2010.

[24] An exception existed for *qualified nonprofit corporations*, which were defined as a § 501(c)(4) corporation meeting the following criteria: (1) its only express purpose is the promotion of political ideas;v44 (2) it cannot engage in business activities; (3) it has no shareholders or other persons with an ownership interest or claim on the organization's assets or who receive any benefit from the corporation that is a disincentive for them to disassociate themselves from the corporation's position on a political issue; and (4) it was not established by and does not accept donations from business corporations. 11 C.F.R. § 114.10(c). The regulatory criteria for "qualified nonprofit corporations" is based on the U.S. Supreme Court ruling in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986), holding that the FECA prohibition on corporations using their treasury funds to make independent expenditures could not constitutionally be applied to certain non-profit corporations.

[25] See CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett.

[26] Thus far, the Senate Committee on Rules and Administration and Committee on the Judiciary have both held *Citizens United* hearings, although those hearings did not address specific legislation per se.

The committee held a markup on May 20, 2010, when H.R. 5175 was ordered favorably reported, as amended.[27]

The versions of the bill as introduced and as reported from the Committee on House Administration are generally similar. Among others, amendments adopted at the markup modified the bill to

- raise the threshold for prohibiting expenditures by government contractors from contracts valued of at least $50,000 to contracts of at least $7 million;
- clarify that Internet communications are generally not subject to FECA's disclosure and disclaimer requirements, except for paid political advertising;
- require that independent expenditures and electioneering communication reports be filed electronically and in a format that permits sorting and searching data (for reports with at least $10,000 in expenditures); and
- require automated political telephone calls (*robo calls*) to include "stand-by-your-ad" disclaimers.[28]

An Overview of H.R. 5175, As Reported

Table 1 analyzes major provisions of current law compared with the House version of the DISCLOSE Act. In brief, major provisions in the DISCLOSE Act would

- expand the current definitions of independent expenditure and electioneering communication, thereby mandating expanded disclosure and disclaimer requirements for certain political advertisements run by corporations, unions, and certain 527 or 501(c) organizations (*covered organizations*), and broadening the kind of ads that may be subject to FECA prohibitions;
- require *covered organizations* to report to the FEC information about their donors (including transfers) and spending for certain independent expenditures and electioneering communications;
- require corporate chief executive officers or other high-ranking officials in covered organizations to state their approval for advertising content, similar to current "stand by your ad" requirements for candidate ads;

[27] The Committee reported the bill on May 25, *see* U.S. Congress, House Committee on House Administration, *DISCLOSE Act*, report to accompany H.R. 5175, 111th Cong., 2nd sess., May 25, 2010, H.Rept. 111-492 (Washington: GPO, 2010). Also in the House, on March 11, the Committee on Financial Services, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, held a hearing addressing corporate governance and shareholder protection after *Citizens United*. In addition to exploring general themes, various legislative proposals, including Representative Capuano's Shareholder Protection Act (H.R. 4790), were discussed. At the May 20, 2010, Committee on House Administration markup, Rep. Capuano initially offered the Shareholder Protection Act as an amendment to the DISCLOSE Act. He ultimately withdrew the amendment, saying that it would be pursued separately.

[28] For additional discussion of automated political calls, see CRS Report RL34361, *Automated Political Telephone Calls ("Robo Calls") in Federal Campaigns: Overview and Policy Options*, by R. Sam Garrett and Kathleen Ann Ruane.

- prohibit certain government contractors, Troubled Asset Relief Program (TARP) recipients, and organizations subject to certain control or ownership by foreign nationals from making expenditures or contributions in federal elections; and
- remove existing limits on coordinated party expenditures in some circumstances.[29]

Major Differences Between the House and Senate Bills

The House and Senate versions of the DISCLOSE Act are substantially similar. The Senate bill, however, addresses at least two topics that are excluded from the House bill. First, and perhaps most notably, S. 3295, would address certain broadcasting provisions, including the *lowest unit rate* (LUR, also called the *lowest unit charge*).[30] Currently, the LUR essentially entitles candidate campaigns to purchase advertising time at the cheapest rates offered to commercial advertisers seeking to purchase the same class of time on the same day. Among other amendments to broadcasting provisions, S. 3295 would provide national party committees with access to the LUR.

A second issue addressed in S. 3295, but not in H.R. 5175, concerns electronic filing of Senate campaign finance reports.[31] Unlike all other federal political committees (except those raising or spending less than $50,000 annually), Senate campaign committees, party committees, and PACs currently are not required to file campaign finance reports electronically. Senate reports are also unique because they are filed with the Secretary of the Senate rather than directly with the FEC. S. 3295 would require Senate political committee reports to be filed electronically and directly with the Commission.

Potential Implications and Considerations for Congress

General Considerations

As Congress evaluates the DISCLOSE Act, several factors could be relevant. It could first be useful to consider what the bill would and would not do. In short, the DISCLOSE Act's provisions are essentially tailored to political advertising—the main policy issue raised by *Citizens United*. In brief, the DISCLOSE Act appears aimed at documenting additional political advertising in general, and restricting it where potential corruption might occur in specific circumstances. Nonetheless, the bill would not necessarily affect political spending per se, nor would it necessarily deter those entities that wished to call for election or defeat of federal

[29] Coordinated party expenditures permit parties to make purchases benefitting their candidates, and to do so in concert with those candidates. Additional discussion appears later in this report and CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

[30] 47 U.S.C. § 315(b).

[31] 2 U.S.C. § 432(g). For additional discussion, see CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by R. Sam Garrett.

candidates. As such, the bill would not necessarily ensure an equal playing field among various political advertisers—including campaigns—nor could it necessarily do so.

In general, the bill would broadly apply additional disclosure and disclaimer provisions to entities making independent expenditures and electioneering communications, as defined in the bill. Corporations, unions, and certain tax-exempt § 501(c) and § 527 organizations would all be subject to these provisions—provided that their activities met the financial and time thresholds required to classify their communications as independent expenditures or electioneering communications. On the other hand, the bill's restrictions on political expenditures are tailored only to specific kinds of organizations—namely those government contractors, entities subject to foreign control, or TARP recipients falling under the DISCLOSE Act's provisions barring certain political expenditures.

The bill would not, however, directly affect candidate campaigns in most cases. Indeed, the provisions of the bill appear to be aimed primarily at non-campaign actors, particularly corporations, unions, and tax-exempt organizations. The bill does not increase contribution limits for candidate campaigns; it also generally does not address other political committees—parties and PACs. A notable exception, discussed below, would permit parties to make additional coordinated expenditures supporting their candidates. This is the only instance in which the bill explicitly allows for more political spending than would be possible under the status quo.

In addition to the general policy approaches described above, specific provisions in the legislation could be the subject of debate during House and Senate consideration of the DISCLOSE Act. Because the effects of *Citizens United* will be unclear until at least the conclusion of the 2010 election cycle, and because of the quickly evolving debate in Congress, all the bill's major implications cannot be predicted. The following sections discuss some of the potential implications of the bill, which Congress may wish to consider when evaluating the legislation.

Maintaining the Status Quo

If Congress chooses to maintain the status quo by not enacting a legislative response, some argue that certain spending by corporations, unions, and tax-exempt organizations to influence elections could go undocumented under current campaign finance law. In particular, it is possible that under certain circumstances, undisclosed funds could be transferred from one organization to another for the purpose of funding independent expenditures or electioneering communications. Those organizations that the bill proposes to prohibit making expenditures, such as certain U.S. subsidiaries of foreign corporations, would also be free to fund advertising as they saw fit. On the other hand, if substantial additional spending following *Citizens United* does not occur, it is possible that additional legislative action is unnecessary. In addition, some might contend that existing law is sufficient to cover many of the topics addressed in the DISCLOSE Act.[32]

[32] See, for example, Letter from Joan D. Aikens, et al., Former Members of the Federal Election Commission, to Reps. Robert Brady and Dan Lungren, Committee on House Administration, May 19, 2010, http://www.campaignfreedom.org/docLib/20100519_DISCLOSEcomments05192010.pdf.

Modifying the Definitions of Independent Expenditures and Electioneering Communications

As noted previously, now that corporations and unions are free to use general treasury funds for independent expenditures and electioneering communications, H.R. 5175 proposes to document such spending through disclosure and disclaimer requirements—and to prohibit some entities from making such expenditures. The activities to which these requirements would apply depend largely on how key terms are defined. Importantly, H.R. 5175 would broaden the definitions of independent expenditures and electioneering communications, thereby expanding the scope of FECA's regulation.

Specifically, the bill would expand the definition of *independent expenditure* to include an expenditure "that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it 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, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office."[33] In other words, it is possible that an advertisement could be subject to DISCLOSE Act regulation as an independent expenditure even if it does not explicitly call for election or defeat of a clearly identified candidate if the ad can reasonably be interpreted only as advocating election or defeat of a candidate. In addition, the bill would double the period (from 60 to 120 days) prior to general election in which communications are treated as electioneering communications. These provisions are noteworthy because they would affect the kind of political advertising subject to regulation under the DISCLOSE Act and, by extension, other provisions in FECA.

Entities Covered by the Disclosure and Disclaimer Provisions

The bill's disclosure, disclaimer, and shareholder/member reporting requirements would apply to covered organizations, which would be defined as corporations, labor organizations, tax-exempt § 501(c)(4), (c)(5), and (c)(6) organizations,[34] and § 527 political organizations that are not political committees for purposes of FECA.[35] One question that might arise concerns the extent to which the provisions would apply to tax-exempt organizations. While four types of tax-exempt

[33] DISCLOSE Act, § 201.

[34] Section 501(c)(4) organizations include social welfare organizations; § 501(c)(5) describes labor, agricultural and horticultural organizations; and § 501(c)(6) organizations are commonly referred to as trade associations.

[35] IRC § 527 provides tax-exempt status to *political organizations*, which are entities or funds that are organized and operated primarily to influence "the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.... " Under FECA, *political committee* is defined to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year," with both *contribution* and *expenditure* defined as monies or anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(4)(A), (8)(A), (9)(A). With respect to entities engaging in federal election activity, § 527 *political organizations* include the entities that are regulated as *political committees* under FECA. However, *political organization* is broader than *political committee*, in part because it also includes the groups colloquially referred to as 527s that have been controversial in recent years because they appear intended to influence federal elections in ways that may place them outside the definition of political committee. For more information on 527s, *see* CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

organizations are expressly listed—those described in IRC § 501(c)(4), (c)(5), (c)(6) and § 527—the term *covered organization* could apply to more tax-exempt entities because many are incorporated, and therefore would appear to fall within the definition of *covered organizations* as corporations. It is important to note that the IRC imposes restrictions on the ability of tax-exempt organizations to engage in campaign activity. For example, § 501(c)(3) charitable organizations are absolutely prohibited from engaging in campaign activity under the IRC,[36] although what constitutes campaign activity under the IRC and FECA are not always the same.[37]

Prohibitions on Making Contributions or Expenditures

In addition to its disclosure, disclaimer, and reporting requirements, H.R. 5175 contains several prohibitions. Specifically, it would prohibit certain government contractors, TARP recipients, and organizations subject to certain control or ownership by foreign nationals from making expenditures or contributions in connection with federal elections.

Government Contracts

Section 101 of H.R. 5175 would prohibit government contractors from making electioneering communications or independent expenditures "only if the value of the contract is equal to or greater than $7,000,000." This language appears to suggest that this prohibition is intended to apply only to contractors holding a single contract of at least $7 million.

As mentioned above, H.R. 5175 as introduced applied to contracts of at least $50,000, but was later increased to $7 million. Some have suggested that this modification was made to exempt small business government contractors from the prohibition. While the value of the "average" federal procurement contract may seem low ($120,634 in FY2008),[38] even small businesses routinely receive much larger contracts,[39] arguably providing one rationale for exempting contractors who have not received a contract valued at more than $7 million from the proposed ban on independent expenditures and electioneering communications.[40] Agencies may, for example, award contracts valued at up to $3.5 million ($5.5 million for manufacturing contracts) to small businesses participating in the 8(a) Minority Business Development Program without

[36] IRC § 501(c)(3) (prohibiting the organizations described therein from "participat[ing] in, or intervene[ing] in … any political campaign on behalf of (or in opposition to) any candidate for public office").

[37] For more information, see CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.

[38] This figure was obtained by dividing the total contract dollars awarded by the total number of contracts, as reported on USASpending.gov. *See* http://www.usaspending.gov/explore?carryfilters=on&trendreport=top_cont&fromfiscal=yes&tab=By+Recipient&fiscal_year=2009&tab=By+Recipient&fiscal_year=2008&fromfiscal=yes&carryfilters=on&Submit=Go.

[39] For purposes of federal procurement, a "small" business is one that is independently owned and operated, is "not dominant in its field of operation," and meets any definitions or standards established by the Small Business Administration. 15 U.S.C. § 632(a)(1)-(2)(A). These standards focus primarily upon the size of the business, as measured by the number of employees, its annual average gross income, and the size of other businesses within the same industry. 13 C.F.R. §§ 121.101-121.108. For example, businesses in the field of scheduled passenger air transportation are small if they have fewer than 1,500 employees, while those in the data processing field are small if they have a gross income of less than $25 million. 13 C.F.R. § 121.201.

[40] The relevant provisions of the DISCLOSE Act appear to apply to the value of each individual contract, not the total value of contracts received by a particular contractor. However, it is unclear whether the value is measured in terms of the base contract, or all options under the contract.

competing them,[41] and some small businesses have received contracts valued at over half a billion dollars.[42] "Large" government contractors, in contrast, can receive contracts valued at over $1 billion.[43]

TARP Recipients

Section 101 of H.R. 5175 would prohibit recipients of TARP funds from directly or indirectly making contributions, independent expenditures, or electioneering communications. Notably, it appears that the prohibitions would apply to TARP recipients using TARP funds, as well as their own funds. The applicable period of the prohibition would begin on the later of the commencement of the negotiations for such financial assistance under title I of the Emergency Economic Stabilization Act of 2008[44] or the date of enactment of H.R. 5175, and end on the later of the ending of negotiations or the repayment of such financial assistance.

Foreign Nationals

Several questions of interpretation could be raised by Section 102 of the bill, which would apply existing prohibitions on contributions or expenditures by foreign nationals to "foreign-controlled domestic corporations." For example, it is unclear how the FEC or a court would interpret or administer some of the key terms contained in the various tests of foreign control that Section 102 would establish. One of these tests focuses upon direct or indirect ownership by a foreign national of 20% or more of the voting shares of a corporation, but would appear to leave the FEC substantial discretion in determining what constitutes "indirect ownership" or at what point in time ownership is determined. Another test similarly focuses upon whether one or more foreign nationals "has the power to direct, dictate, or control the decision-making process of the corporation with respect to its interest in the United States." However, this test would also appear to leave the FEC substantial discretion to determine what forms of conduct or business arrangements would indicate that a foreign national has the power to "direct, dictate, or control" corporate decision-making.

Coordinated Party Expenditures

Section 104 of H.R. 5175 appears to lift the existing caps on coordinated party expenditures unless "the communication is controlled by, or made at the direction of, the candidate or an authorized committee of the candidate."[45] In the absence of increased contribution limits, candidates may face substantial obstacles responding to corporate and union advertising post-

[41] 15 U.S.C. § 637 note; 48 C.F.R. § 19.805-1(b)(2). Certain group-owned 8(a) firms are not subject to even these limitations and may receive sole-source contracts of any value.

[42] Gov't Accountability Office, Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight, GAO-06-399, April 2006, at 15, *available at* http://www.gao.gov/new.items/d06399.pdf (reporting a $593 million sole-source award to Chugach Management Services, Inc.).

[43] For example, Lockheed Martin Corp., the top federal contractor in FY2009, received five contracts valued at over $1 billion in FY2009. *See* USASpending.gov, http://www.usaspending.gov/explore?tab=By%20Recipient&contractorid=359799&fromfiscal=yes&carryfilters=on&fiscal_year=2009.

[44] 12 U.S.C. § 5211 *et seq*.

[45] For additional discussion of coordinated party expenditures, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

Citizens United. Lifting the caps on coordinated party expenditures arguably provides parties with a way to help their candidates facing potential corporate, union, or tax-exempt organization-funded advertising. On the other hand, some may object to increasing the amount of money in the political system, even if it is to respond to corporate or union advertising. In addition, the standard for communications "controlled by, or made at the direction of, the candidate or an authorized committee of the candidate" is not defined. Given this potential ambiguity, and an ongoing FEC rulemaking on coordination, some in Congress might wish to clarify terms.

Potential Effects of Disclosure and Disclaimer Provisions

H.R. 5175 may expand donor disclosure and, in some circumstances, would require disclosing an organization's donors even if their donations were not specifically designated to support independent expenditures or electioneering communications. As noted in **Table 1**, the bill's disclosure provisions primarily include reporting information to the FEC. By contrast, disclaimer provisions primarily include the *stand-by-your ad* requirements. Disclosure and disclaimer requirements would not necessarily, in and of themselves, limit overall spending on political advertising. Ultimately, corporations, unions, and other groups intent on making independent expenditures and electioneering communications could choose to do so regardless of disclosure or disclaimer requirements. The additional reporting requirements proposed in the bill might, however, cause potential advertisers to consider whether they wish to be publicly accountable for the advertising.

One notable feature of the bill is that, under certain circumstances, a covered organization would be deemed to have transferred funds to another entity for the purpose of campaign-related activity. These deemed transfers would then subject the transferor to potential disclosure. The bill would provide exceptions for transfers occurring in the ordinary course of business.

The bill would require additional disclosure of donors to covered organizations. The provisions may be understood, at least in part, as a mechanism to limit the possibility that non-profit organizations might be used as "shadow groups"—groups to which corporations, other entities, or individuals would give funds to be used for campaign activities with little or no public disclosure. A notable aspect of the bill is that it would require the disclosure of certain donors who did not give money specifically for political activities, unlike, for example, the existing independent expenditure provision, which only requires the disclosure of donors who gave "for the purpose of furthering" the expenditure.[46]

Another potentially notable aspect of the donor disclosure provisions is that they apply to § 527 *political organizations* that are not *political committees* under FECA. These would include the "§ 527 groups" that have been controversial in recent years because they seem intended to influence federal elections in ways that might be outside the scope of FECA. Like political committees, these § 527 groups must periodically report information about their expenditures and donors to a federal agency[47]—political committees report to the FEC, while the § 527 groups report to the

[46] 2 U.S.C. § 434(c)(2)(C); 11 C.F.R. § 109.10.

[47] In general, these groups are required to periodically report to the IRS any expenditure of at least $500 and donors who have given at least $200 during the year. IRC § 527(j). These requirements do not apply to independent expenditures. For more information, see CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika K. Lunder; CRS Report RS20918, *527 Organizations and Campaign Activity: Timing of Reporting Requirements under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.

IRS. In both cases, the information is publicly available. The other types of covered organizations are not currently subject to similar reporting requirements.

Campaign-Related Activity Accounts

Section 213 of H.R. 5175 would permit covered organizations to establish optional accounts for campaign-related activity, including independent expenditures and electioneering communications. Because such accounts do not currently exist, it is unclear how significant this provision might be. Several issues, however, could be relevant. First, it appears that once an organization elected to establish the account, it would be required to use that account exclusively for future *campaign-related activity*—a strategic or administrative decision that some organizations might not be willing to make on a permanent basis. Second, the provisions specify that amounts in the account be "exclusively for disbursements by the covered organization for campaign-related activity."[48] Given this language, it is unclear whether or not an organization using a campaign-related activity account could dispose of its funds if it decided to abandon political spending altogether. If Congress wishes to provide a non-campaign-related mechanism to do so, existing provisions in FECA permitting charitable contributions could be an option.[49] Finally, it should be noted that because the account would not be considered a separate segregated fund under FECA,[50] it appears any § 501(c) organization making expenditures from such an account could be subject to a 35% tax on the lesser of its net investment income or the taxable political expenditures.[51]

Potential Implementation Concerns

Even if Congress enacts the DISCLOSE Act quickly, aspects of the legislation will require agency implementation. The process could affect how quickly and how clearly the act affects campaigns and related spending (e.g., independent political advertising). Because the DISCLOSE Act would primarily amend FECA, the FEC would be responsible for administering and enforcing most of the bill's provisions.[52]

It is possible that the FEC could implement the DISCLOSE Act quickly, although various factors suggest that it is unlikely the Commission could fully implement the act before the 2010 November general elections.[53] In addition to the time required to develop and reach agreement on rules, for those rules to be finalized (upon publication in the *Federal Register*), the Commission would have to also approve an *explanation and justification* (E&J) statement explaining its rationale and offering practical guidance about what the regulations mean and how they will be

[48] DISCLOSE Act, § 213.

[49] 2 U.S.C. § 439a(a)(3). These provisions apply to permissible use of candidate campaign committee funds, suggesting that amendment would be required to make them applicable to campaign-related-activity accounts.

[50] DISCLOSE Act, § 213.

[51] IRC § 527(f). Because the tax is imposed on the lesser of the taxable political expenditures or the organization's net investment income, it would not be a significant disincentive to organizations with minimal investment income or taxable expenditures.

[52] 2 U.S.C. § 437c(b).

[53] Some primary elections have already occurred without FEC action or legislation implementing the Court's decision in *Citizens United*. Those who believe that the case marked a victory for protected speech might contend that an apparent lack of overwhelming new advertising could be evidence that additional regulation or legislation responding to the ruling is unnecessary.

enforced. This process routinely takes months, even for expedited rulemakings. The Commission would have to also amend its reporting forms to adhere to the act's new requirements.

Importantly, FECA requires that adopting rules and developing forms (among other provisions) requires affirmative votes from at least four of the six Commissioners.[54] A series of deadlocked votes (e.g., 3-3 ties) among members of the current Commission, however, suggests that disagreement among Commissioners is possible—particularly on controversial or ambiguous aspects of the legislation.[55] If disagreements resulted in deadlock or failure to implement the law as Congress intends, the DISCLOSE Act's effectiveness could be delayed or compromised.

Perhaps in response to those concerns, most of the bill's provisions would become effective 30 days after enactment, with at least one becoming effective immediately upon enactment. The bill specifies that its provisions would generally take effect regardless of whether the FEC had promulgated rules to implement the legislation. Nonetheless, the "regulated community" might lack practical and administrative guidance about how to comply with the act's provisions until the Commission could issue rules and begin considering advisory opinions. Nonetheless, even if rulemaking or amending forms were delayed, the law itself would still take effect as stated in the act. Therefore, even if some details remained to be determined, enacting the DISCLOSE Act or other legislation could permit Congress to place additional requirements on political advertisers or other campaign actors regardless of Commission action or inaction.

Conclusion

It is currently unclear precisely how *Citizens United* will affect campaigns or political advertising, but if Congress chooses to enact the DISCLOSE Act, it would provide additional information to the public and regulators about political advertising funded by corporations, unions, and tax-exempt organizations. It would also prohibit certain entities from funding electioneering communications and independent expenditures, as well as providing political parties with greater ability to make coordinated party expenditures in some cases.

Except for the spending prohibitions in the bill, nothing in the legislation would necessarily prevent corporations, unions, or other entities from funding political advertising calling for election or defeat of clearly identified candidates. The disclosure and disclaimer provisions could, however, provide the public and regulators with additional information about the sources of that advertising. Public disclosure could also cause would-be advertisers to think carefully before making political expenditures. For those who believe that *Citizens United* will usher in a new era or corporate- or union dominance in elections, such an outcome might be welcome. On the other hand, those who believe that *Citizens United* correctly strengthens corporate and union speech rights might be wary of any provisions perceived as stifling the ability to participate in elections. As Congress considers the DISCLOSE Act, issues related to how terms are defined, the kinds of organizations that would be regulated, implementation, and other concerns may be relevant.

[54] For a brief overview of Commission duties requiring consensus among at least four Commissioners, see CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

[55] For an overview of deadlocked votes during the current Commission's first year, between July 2008 and June 2009, see CRS Report R40779, *Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress*, by R. Sam Garrett. Deadlocks have continued on some matters since that time.

Table 1. Comparison of Major Provisions of H.R. 5175 With Current Federal Campaign Finance Law

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
Definition of *Independent Expenditure*	*Independent expenditure* is defined as an expenditure "expressly advocating the election or defeat of a clearly identified candidate" and that is not made in coordination with a candidate or party. [2 U.S.C. § 431(17)] According to Supreme Court precedent, the "functional equivalent of express advocacy" is a communication that is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. [*Citizens United v. FEC,* 130 S. Ct. 876, 889-90 (2010), quoting *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 469-70 (2007)]	Would expand definition of *independent expenditure* to include an expenditure "that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it 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, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office." Would impose 24-hour reporting requirement for expenditures of $10,000 or more made during the period up to and including the 20th day before an election and expenditures of $1,000 or more made during the period after the 20th day, but more than 24 hours before an election. [§ 201]
Definition of *Electioneering Communication*	*Electioneering communication* is defined as a broadcast, cable, or satellite transmission that refers to a clearly identified federal office candidate and is made within 60 days of a general election (or within 30 days of a primary). [2 U.S.C. § 434(f)(3)(A)(i)(II)]	Would expand period prior to general election in which communications are treated as electioneering communications to 120 days. [§ 202]
Definition of *Public Communication* Exempting Free Internet Communications	*Public Communication* is defined as a communication by means of broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. [2 U.S.C. § 431(22)]	Would exempt Internet communications, unless placed for a fee on another person's website, from being treated as a form of "general public political advertising, " thereby exempting such communications from the definition of *public communication*. [§ 105]
Involvement in Federal Elections by Foreign Nationals	Foreign nationals are prohibited from making contributions in federal, state, or local elections, and are prohibited from making independent expenditures and electioneering communications in federal elections, [2 U.S.C. § 441e], but U.S. subsidiaries of foreign corporations may form PACs to make expenditures and contributions under certain circumstances.	Would prohibit contributions in federal, state, or local elections; and independent expenditures and electioneering communications in federal elections by U.S. corporations if: a foreign national indirectly or directly owns at least 20% of voting shares; or the majority of the board are foreign nationals; or one or more foreign nationals can "direct, dictate, or control" decision-making of

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
	FEC regulations provide that foreign nationals shall not "direct, dictate, control, or directly or indirectly participate" in the decision-making process of a corporation, labor union, political committee, or political organization with regard to federal or non-federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with federal, state or local election or regarding the administration of a political committee. [11 C.F.R. § 110.20(i)]	the corporation with respect to its activities in connection with federal, state, or local elections, including making contributions, donations, expenditures, independent expenditures, disbursements for electioneering communications or administration of a PAC established or maintained by the corporation. [§ 102] Would require CEOs (or highest-ranking corporate official) to certify under penalty of perjury, to the FEC, before making expenditures in connection with federal office elections, that the foreign-national prohibitions above do not apply to the corporation. [§ 102] Would clarify that provision does not prohibit a corporation, which is not a foreign national, from establishing a political action committee (PAC) so long as none of the funds in the PAC are provided by a foreign national and no foreign national has power to "direct, dictate, or control" the PAC. [§ 102]
Involvement in Federal Elections by Government Contractors	Government contractors are prohibited from making contributions. [2 U.S.C. § 441c]	Would prohibit government contractors holding contracts of $7,000,000 or more from making independent expenditures and electioneering communications. [§ 101]
Contributions, Independent Expenditures, and Electioneering Communications by Those Receiving TARP Funds	Corporations are prohibited from using general treasury funds to make contributions. [2 U.S.C. § 441b(a)] As a result of *Citizens United*, it appears that regardless of whether having received TARP funds, corporations are permitted to make independent expenditures and electioneering communications. [*Citizens United v. FEC,* 130 S. Ct. 876 (2010)]	Would prohibit entities receiving or negotiating for TARP funds from making contributions, independent expenditures, or electioneering communications until the funds were repaid (or if the negotiations ended without the entity receiving funds). [§ 101]
Stand by Your Ad Disclaimers in Political Advertising	Corporations and labor unions funding *express advocacy* messages are required to indentify in the communication: their name, address, and contact information; and that the communication "is not authorized by any candidate or candidate's committee." [2 U.S.C. § 441d(a)(3)]	Would expand types of communications funded by "covered organizations" that trigger disclaimer requirements to include disbursements for an "independent expenditure consisting of a public communication." [§ 214]

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
	Corporate and union radio and TV ads are required to include an audio statement that the corporation or union paid for the ad. In TV ads, the statement is required to be conveyed by a view or voice-over of a corporate or union representative. [2 U.S.C. § 441d(d)(2)] Candidates are currently required to state their approval for their broadcast advertising. [2 U.S.C. § 441d(d)(1)] For automated political telephone calls (*robo calls*): Election law and telecommunications law do not address political robo calls per se. *Robo calls* that advocate for election or defeat of candidates or solicit funds appear to require disclaimers stating who paid for the communication. [2 U.S.C. § 441d(a)] Among other requirements, telecommunications law appears to require that prerecorded phone calls identify the entity responsible for the call at the beginning of the message [47 U.S.C. § 227(d)(3); 47 C.F.R. § 64.1200(b)(2)].	Would expand disclaimer requirements for disbursements by covered organizations for independent expenditures or electioneering communications to require the organization's CEO or highest ranking official or any "significant funder" to state their approval for the communication, and would require listing the "Top Five Funders." [§ 214] For automated political telephone calls (*robo calls*): Would require political robo calls to include a disclaimer at the beginning of the call. [§ 214]
Disclosure of Expenditures Disclosure of donors to organizations making independent expenditures and electioneering communications	In quarterly reports to the FEC, entities making independent expenditures in excess of $250 during a calendar year must disclose donors who contribute more than $200 "for the purpose of furthering" the expenditure. If the entity spends at least $10,000 toward independent expenditures during an election year, those expenditures must be reported to the FEC within 48 hours if the expenditure occurred up to 20 days before the general election. Entities that spend at least $1,000 on independent expenditures less than 20 days before the election must report that spending to the FEC within 24 hours. Donors of more than $200 must also be included in the 48-hour and 24-hour reports. [2 U.S.C. § 434(c)(2)(C); 11 C.F.R. § 109.10] Entities making at least $10,000 in electioneering communications must disclose donors who contribute at least $1,000; however, if the disbursement is made from a separate account that contains only contributions by U.S. citizens and legal	Would require covered organizations making independent expenditures that aggregate at least $10,000 in a calendar year to disclose, within 48 hours: (1) donors who gave at least $600 for campaign-related activity or in response to solicitation for funds for such activity; and (2) donors who gave unrestricted donations during the reporting period of at least: - $6,000 if the disbursements for "public independent expenditures" were made exclusively from Campaign-Related Activity Account , or - $600 if any disbursement was not from the account. For entities making at least $10,000 in electioneering communications, the $600 and $6,000 amounts are increased to $1,000 and $10,000. Rule would apply in lieu of existing statutory requirement..

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
	resident aliens made directly to the account for electioneering communications, then only those donors who contribute at least $1,000 to the account are disclosed. [2 U.S.C. § 434(f)(2)(E), (F)] 11 C.F.R. § 104.20 contains rules for corporations, labor unions, and qualified nonprofit corporations that make certain types of electioneering communications. Its applicability in light of *Citizens United* is unclear. Section 527 political organizations that are not political committees under FECA are generally required to periodically report information regarding their donors and expenditures to the IRS (or a state). Such information is made publically available. The reporting requirement does not apply to expenditures that are independent expenditures. [26 U.S.C. § 527(j), (k)]	Rules would not apply to payments received in the regular course of business. [§ 211(a), (b)] If organization uses Campaign-Related Activity Account, all disbursements for such activity would have to come from the account, and account funds must be used "exclusively" for such purposes. Account would contain: donations made for "campaign-related activity" or in response to solicitations for funds for such activity; and amounts transferred from other accounts (including general treasury funds). Could not contain funds the donor/payor said in writing could not be used for such activity. [§ 213] If the donation would be disclosed and the organization and donor "mutually agree" at the time of the donation that the funds are not to be used for campaign-related activity, then the organization's CFO would have to certify to the donor, within 30 days of receipt, that the funds would not be used for such activity and the person's identity would not be disclosed in any manner. [§ 212]
Disclosure of Expenditures Transfers subsequently used for campaign activity	No comparable existing statutory provision.	A covered organization would be treated as making an independent expenditure or electioneering communication if it transferred funds to another person for such purpose or was deemed to have made a transfer. The organization would be deemed to have made such a transfer if: • the transferor designates, requests, or suggests that the amounts be used for public independent expenditures or electioneering communications and the transferee agrees to do so; • the person making the expenditure (or someone acting on his/her behalf) solicited funds from the transferor or transferee for making such expenditures; • there were "substantial" discussions about such expenditures between the transferor and transferee;

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
		• the transferor or transferee knew (or should have known) of the transferor's intent to make such expenditures; or • the transferor or transferee made a public independent expenditure during the 2-year period ending on the date of the transfer. An exception would exist for commercial transactions occurring in the ordinary course of business between the transferor and transferee. [§ 211(a), (b)]
CEO Certification of Certain Information to the FEC	No comparable existing statutory provision.	If a covered organization makes a disbursement for "campaign-related activity" during the calendar quarter, the CEO or designee would be required to certify to FEC, within 15 days of the quarter's end, that the disbursement was made in compliance with applicable law. [§ 212] (See also CEO certification requirements in the *Involvement in Federal Elections by Foreign Nationals* row above. [§ 102])
Disclosure of Certain Lobbyist Spending	Lobbyists must semiannually report "contributions" exceeding $200 made to candidates, leadership PACs, or parties. [2 U.S.C. § 1604(d)(1)(D)] (Note: Additional FEC electioneering communication and independent expenditure reporting requirements may apply to lobbyists in certain circumstances, but are not intended to apply specifically to lobbyists.)	Would require lobbyists to disclose in certain Lobbying Disclosure Act (LDA) reports: (1) independent expenditures of at least $1,000 funded by those lobbyists; the names of candidates supported or opposed in the ads; and the amount spent supporting or opposing each candidate; (2) electioneering communications of at least $1,000 funded by lobbyists; the names of candidates referred to in the ads; and whether the ad supported or opposed the candidate(s). [§ 221]
Disclosure to Shareholders, Members, and Donors of *Covered Organizations*	There is no comparable requirement, although disclosure may be required to the FEC (e.g., for independent expenditures or electioneering communications) or, in the case of tax-exempt organizations, to the IRS, and such information is generally subject to public disclosure. [2 U.S.C. § 434; 26 U.S.C. §§ 527, 6033, 6103]	A *covered organization* would be required to disclose disbursements for campaign-related activity in any "regular, periodic reports" on its finances/activities provided to its shareholders, members, and donors. Information would include the date and amount spent on independent expenditures and electioneering communications, the source of the funds, the name of candidates referred to in the ads and whether the ads supported or opposed the candidate, and information

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
		about transferred funds. A covered organization would also be required to post a hyperlink on its homepage to the location at the FEC website which contains the required reports regarding public independent expenditures and electioneering communications. [§ 301]
Coordination of Certain Expenditures	Prohibits coordination between a corporation or union, for most communications, with candidates and parties made within 90 days before House or Senate primary or general election and within 120 days of presidential primary, nominating convention or caucus, or general election. [11 C.F.R. § 109.21(c)(4)(i), (ii)] Provides limits on expenditures by parties in connection with federal office candidates. [2 U.S.C. § 441a(d)] Safe Harbor for Endorsements/Solicitations: Provides that a public communication in which a federal office candidate endorses another federal or non-federal candidate is not considered coordinated with respect to the endorsement of the federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate seeking election to the same office. Further provides that a public communication in which a federal office candidate solicits funds for another federal or non-federal candidate, political committee, or tax-exempt organization is not considered coordinated with respect to the soliciting federal office candidate unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate seeking election to the same office. Safe Harbor for Firewalls: Provides that "conduct standard," under which coordination is found, is not met if commercial vendor, former employee, or political committee has established a firewall that meets certain requirements. Safe harbor provision does not apply if specific information indicates that despite firewall, information regarding candidate or	Would expand time period that coordination is prohibited between a corporation or union and House or Senate candidates, referenced in corporate/union ads, to those made 90 days before the primary *through* the general election. Would expand time period that coordination is prohibited between corporation or union and Presidential or Vice Presidential candidates, referenced in corporate/union ads made 120 days before the first presidential primary through the general election. Would specify that a covered communication may not be considered coordinated "solely on the grounds" that a person provided information to the candidate or committee regarding that person's position on a legislative or policy matter, (including urging the candidate or party to adopt that person's position), so long as there is no discussion regarding the candidate's campaign for federal office. Would expressly preserve FEC regulations, 11 C.F.R. § 109.21(g) or (h), providing safe harbor for endorsements and solicitations by federal candidates and for establishment and use of a firewall. [§ 103] Would provide that direct costs incurred by a political party for a communication made in connection with a federal office campaign is not subject to the coordinated party expenditure limits unless the communication is "controlled by, or made at the direction of" the candidate or the candidate's authorized committee. [§ 104]

Major Policy Issue	Overview of Major Relevant Provisions in Current Federal Campaign Finance Law	Overview of Major Provisions in H.R. 5175, As Reported
	party campaign plans, projects, activities, or needs, which are material to the creation, production, or distribution of the communication, was used or conveyed to the person paying for the communication. Further provides that firewall must prohibit flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants providing services to the candidate, who is clearly identified in the communication, or the candidate's opponent, or a party; and that the firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients. [11 C.F.R. § 109.21 (g), (h)]	
Judicial Review	—	If the constitutionality of the Act is challenged, the action shall be filed in U.S. District Court for D.C. and appealed to the Court of Appeals for the D.C. Circuit, with expedited review; any Member of the House or Senate shall have the right to intervene or bring suit challenging the constitutionality. [§ 401]
Severability	—	If any provision of the Act or application of a provision is held unconstitutional, the remainder shall not be affected by the holding. [§ 402]

Source: CRS analysis of H.R. 5175 and current federal campaign finance law, or applicable regulations as noted.

Note: H.R. 5175 would change the definitions of *independent expenditures* and *electioneering communications*. Thus, the terms do not have the same meanings in two of the columns. The column describing major provisions in current law use the terms *independent expenditures* and *electioneering communications* as defined under existing law, while the column describing major provisions in H.R. 5175 uses the expanded definitions of the terms as set forth in the legislation.

Throughout H.R. 5175, the term *covered organizations* is defined as corporations, labor organizations, tax-exempt § 501(c)(4), (c)(5), and (c)(6) organizations, and § 527 *political organizations* that are not *political committees* under FECA.

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