

Hidden Money in the 2010 Elections: A Pre-election Primer on Recent and Recently Exploited Avenues for Secretly Funding Elections

As the mid-term elections are in full swing, this primer outlines the changed landscape of political spending and influence and describes provisions that must be included in future transparency legislation in order to shed more light on the true sources of the spending. In addition, for those not fully versed in campaign finance disclosure lingo, definitions for key terms are included at the end of this document.

INTRODUCTION

In the much talked about, analyzed and criticized Supreme Court case known as *Citizens United v. Federal Election Commission*, the longstanding assumption that unlimited corporate (and by implication union) money has a corrupting appearance and impact on our political process was turned on its head. The decision widened existing paths for third parties to make independent expenditures and electioneering communications and created new avenues for 501(c) and 527 non-profit organizations to act as conduits for massive sums of undisclosed corporate and union money to our elections. The decision also paved the way for Super PACs—a new breed of an Independent Expenditure Political Action Committee that permit corporations and unions to spend unlimited funds explicitly advocating for or against specific candidates.

These new campaign operations that can shelter unidentified sources of money arose because the *Citizens United* court found that two provisions of the Federal Election Campaign Act (FECA) were unconstitutional under the First Amendment. The decision struck down the decades-long prohibition on corporations using their general treasury funds to make independent expenditures. It also found unconstitutional the already weakened provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that prohibited corporations from using their general treasury funds for “electioneering communications.”

Importantly, the Court upheld disclaimer and disclosure requirements, noting they “impose no ceiling on campaign-related activities” and that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”

Democratic leaders in Congress attempted to enact legislation to blunt the impact of the decision by using the Court’s strong endorsement of transparency as a launch point for the [DISCLOSE Act](#). The bill has, at its core, transparency provisions designed to shine a light on the largest, most distorting corporate and union independent expenditures and electioneering communications. The bill passed the House with only two Republican supporters but was blocked twice by Republican filibusters in the Senate.

NEW WAYS TO FUNNEL MONEY IN A POST-CITIZENS UNITED WORLD

Groups that wanted to spend corporate cash in the 2010 midterms quickly organized to take advantage of the *Citizens United* decision and have flooded the airwaves with both independent

expenditures and electioneering communications. Not including the political parties—which are still prohibited from accepting contributions from the general treasuries of corporations and labor unions—the outside groups spending most freely this election cycle are 501(c)s and Super PACs. Many organizations make use of both of these organizational forms in order to have an even greater financial impact on elections. Disclosure of donors varies depending on the type of organization, but in each case, had the DISCLOSE Act been passed, the funding of ads would be far more transparent.

501(c)s

Perhaps the most opaque political players since pre-Watergate days of anonymous cash contributions to candidates are a group of tax-exempt non-profit organizations organized under 501(c) of the tax code. Depending on the type of group, the various 501(c) organizations have different limitations on the amount of political activity in which they may participate. The focus on this election cycle has been on 501(c)(4) social welfare organizations, 501(c)(5) labor organizations and 501(c)(6) trade associations and chambers of commerce. All three are able to engage in political activities as long as these activities are not their “primary purpose.” At the same time, donors to these groups need not be disclosed.

By lifting the prohibitions on corporations’ ability to make direct expenditures influencing federal elections, the *Citizens United* decision allows 501(c)s to fund unlimited independent expenditures and electioneering communications from their general treasuries. *Citizens United* created an environment in which it is perfectly legal for a shell non-profit corporation to engage in election-related spending on behalf of a hidden interest.

Perhaps the biggest beneficiaries of the decision are the social welfare organizations that, in the 2009-2010 election cycle, are overwhelmingly favoring Republican candidates. The (c)(4) groups have become the tool used to hide corporate election-related spending. For example, Crossroads Grassroots Policy Strategies (GPS) is a 501(c)(4) spin-off of Super PAC American Crossroads (discussed below). As of October 19, it has spent almost \$8 million in eight Senate races on independent expenditures and electioneering communications opposing Democratic candidates. Another Republican-leaning outside group making outsized expenditures is American Future Fund, a (c)(4) that has spent \$12 million on independent expenditures and \$1.4 million on electioneering communications. Significantly, it is [reportedly](#) headquartered in a P.O. Box.

Also benefiting from the *Citizens United* decision are 501(c)(6) trade associations. Americans for Job Security, for example, has spent over \$4 million on independent expenditures opposing Democrats, as of October 19. Thanks to *Citizens United*, it can use its general treasury funds, which include undisclosed contributions from the general treasuries of other corporations. The U.S. Chamber of Commerce always pushed the envelope in terms of outside spending, and this year is no different. So far, it has spent \$18 million on electioneering communications in House and Senate races across the country, and has made no secret of its intentions to spend \$75 million to help, with limited exception, Republican candidates on November 2. What the Chamber is keeping secret is from where all that money comes.

Labor unions—501(c)(5) organizations—are also taking advantage of the *Citizens United* decision and making independent expenditures out of their general treasuries, where they would have been forced to use limited PAC contributions before. SEIU has so far spent \$9 million and AFSCME \$8 million on independent expenditures. The vast majority of their spending has been used to oppose Republicans, although both made expenditures opposing Blanche Lincoln (D-AR) during the primaries. Like the other 501(c)s, donors to unions are not disclosed to the FEC.

Details of third party spending included daily updates can be [found here](#).

Super PACS

Super PACs, also known as Independent Expenditure-Only Committees, are a new breed of political organization stemming from the *Citizens United* decision. Traditional PACs that make independent expenditures as well as contribute directly to candidates are prohibited from taking contributions from corporations and unions, and are limited in the amounts they can receive from individual donors. Super PACs, on the other hand, can receive limitless funds from individuals, political committees, corporations and labor organizations if their purpose is only to make independent expenditures.

More than two-dozen Independent Expenditure-Only Committees have registered with the FEC and as of October 15, 2010, spending on independent expenditures has exceeded \$21 million.

The mother of all Super PACs is American Crossroads, a 527 political organization that accepts contributions and makes expenditures to influence elections. American Crossroads, with its ties to Karl Rove, has spent nearly \$12 million on eleven competitive Senate races and a handful of House races. All of its spending has benefited Republican candidates, with the overwhelming majority being spent on ads attacking Democrats. According to the [Center for Responsive Politics](#), American Crossroads has been the recipient of at least two million-dollar contributions from individuals—Texas oilman Trevor Rees Jones and TRT Holdings CEO and fellow Texan Robert Rowling.

On the other side of the aisle, Democratic powerhouse Emily's List has launched Women Vote! as its Independent Expenditure-Only Committee, and so far has spent over \$2 million supporting Democrats for the House and Senate in a handful of states. In addition to a number of five-digit contributions from individuals, Women Vote! received a quarter of a million dollars from SEIU-COPE (The Service Employees International Union Committee on Political Education).

Super PACs that are organized as 527s should disclose their donors with the FEC. Indeed, many experts think donor disclosure is the main reason that some trade groups, unions and other organizations might limit their use of Super PACs. That said, Super PAC disclosure at best occurs monthly, and often only quarterly—too late to provide voters with useful information about the money behind some of the nastiest campaign ads on television.

Moreover, the *Citizens United* decision makes it easy to hide funding to Super PACs. A Super PAC may receive unlimited contributions from an outside 501(c)(4) or a transfer from an affiliated (c)(4). Although it must disclose the name of the (c)(4), neither the Super PAC nor the

(c)(4) is under any obligation to disclose where its money came from. There is nothing illegal about the ease with which a single corporate, union or individual donor may hide its contribution from the public. At the same time, there is nothing preventing the candidate who ultimately benefits from the independent expenditure from knowing the true source of the funds, which are not anonymous, but merely not publicly disclosed. The unseemly opportunity for big money to influence candidates while leaving the public in the dark about its source is the result of combining old, flawed disclosure rules with new *Citizens United* limitless spending.

Stealth PACs

No document on secret spending in campaigns would be complete without a discussion of Stealth PACs, organizations incorporated under Section 527 of the tax code that have existed in something of a netherworld when it comes to disclosure. Even before *Citizens United*, Stealth PACs were able to skirt FEC disclosure and hide their donors by avoiding express advocacy independent expenditures and certain electioneering communications.

Citizens United seems likely to decrease the usefulness of 572 Stealth PACs as a way to funnel money to elections. Many Stealth PACs will become Super PACs in order to take advantage of the opportunity to make independent expenditures with full support of corporate contributions. Others, like Crossroads GPS will reorganize or create spin-off 501(c)(4) organizations to ensure that they will not trip over the line that would require FEC disclosure of donors.

DISCLOSURE AND DISCLAIMER RULES

Although the *Citizens United* court altered the methods of third party spending in elections, it is up to Congress to ensure that disclosure and disclaimer rules keep up with the new funding regime. Even before the decision, there were holes in laws intended to make electioneering funding transparent. After *Citizens United*, the gaps in the law simply grew wider. Unfortunately, since the DISCLOSE Act failed, we are left with an outdated system for shining a light on third party expenditures.

Disclosure of Independent Expenditures

When independent expenditures that are broadcast up to and including the 20th day before an election are made, the activity, including the purpose of the expenditure and the name of the candidate supported or opposed must be disclosed within 48 hours when the expenditure reaches \$10,000. Donors of \$200 or more to the independent expenditures must also be disclosed in electronically filed reports, including their occupation and employer. Additional 48-hour reports are required for subsequent independent expenditures that aggregate \$10,000 or more.

Independent expenditures that reach or exceed \$1,000 with respect to a given election, and are made fewer than 20 days before an election, must likewise be electronically reported to the FEC within 24 hours of the time the communication is publicly distributed. Donor information is again disclosed and made publicly available.

Disclosures of Electioneering Communications

Disclosure rules surrounding electioneering communications are less comprehensive. Reports detailing the electioneering communication are filed within 24 hours when spending for electioneering communications reaches more than \$10,000. The reports need not include the name of the candidate supported or opposed by the expenditure. In addition, the disclosures are to include the names and addresses of donors who have contributed \$1,000 or more to the organization, but only if they have explicitly earmarked the contribution be used for the specific electioneering communication.[1]

Disclaimers on Independent Expenditures and Electioneering Communications

Disclaimers for independent expenditures and electioneering communications must state the full name, address, phone number or website of the organization that paid for the communication and that the independent expenditure or electioneering communication was not authorized by a candidate. In addition, TV or radio communications must include a “stand by your ad” statement in which the speaker states, “ABC organization is responsible for the content of this advertising.”[2]

THE FUTURE OF CAMPAIGN FINANCE DISCLOSURE

Despite the failure to pass the DISCLOSE Act before the midterms, Congress must quickly revisit this issue of disclosure of third party spending to ensure that 2010 isn’t merely a practice run for even more aggressive spending in 2012. The public mistrusts outside spending and, according to a recent poll by MoveOn, an overwhelming 84% of voters believe they have a right to know who is paying for ads for a particular candidate. Congress must also reject arguments that disclosure rules are unconstitutional. The *Citizens United* court itself supported disclosure and disclaimer requirements by a vote of 8-1, noting that they “do not prevent anyone from speaking.” Moreover, they facilitate the ability of a listener or viewer to “evaluate the arguments to which they are being subjected.”

The DISCLOSE Act contained provisions that went beyond pure transparency measures. In the end, provisions such as those banning Troubled Asset Relief Program (TARP) recipients and foreign owned corporations from spending money on elections probably didn’t destroy the bill’s chances of being passed—Republicans had little appetite to enact any disclosure legislation before the midterms—but the additional provisions certainly didn’t help.

Any new legislative effort should focus with laser-like precision on disclosure and disclaimer provisions that will make it clear exactly who is paying for campaign related expenditures.

- Legislation should define independent expenditures and electioneering communications to ensure complete disclosure of all campaign expenditures that include express advocacy or the functional equivalent of express advocacy. Such changes would prevent 501(c)s from exploiting existing loopholes that enable them to engage in electioneering communications with no disclosure of donors.
- All disclosure reports for independent expenditures and electioneering communications should be electronically filed with the FEC within 24 hours of making the expenditure,

and should be made immediately available to the public, ensuring timely reporting and removing current discrepancies in the timing of report filing.

- Meaningful disclosure demands that any donor who makes a contribution over a specified threshold to an organization that makes independent expenditures or electioneering communications must be identified in the disclosure report. Separate accounts may be set up for non-election related spending by the organization and donors to such accounts may remain anonymous.
- Any group that makes contributions over a certain threshold to an organization that makes independent expenditures or electioneering communications should be deemed as having made an independent expenditure or electioneering communication, and will have to disclose its donors as well. This prevents hiding true donors by laundering their contributions through organizations that are not required to disclose.
- Disclaimers should include stand-by-your ad statements, and the top funders to an organization should be listed in independent expenditures or electioneering communications. Strengthening disclaimers gives the public the opportunity to evaluate the speaker and solves the problem of benign sounding shell organizations paying for ads on behalf of undisclosed corporations or individuals.
- All disclosure data must all be made available online, in real time, in a structured data format, and available in bulk.

DEFINITIONS

The following definitions are critical to an understanding of the pre- and post-*Citizens United* political spending world.

EXPRESS ADVOCACY: Express advocacy is defined as political communications that use the “magic words,” such as “vote for” or “vote against” a particular candidate. This definition was unaffected by the *Citizens United* decision.

INDEPENDENT EXPENDITURE: An independent expenditure expressly advocates the election or defeat of a clearly identified federal candidate and cannot be coordinated with the candidate, candidate’s committee or their agents. *Citizens United* allows independent expenditures to be paid for with corporate funds.

ELECTIONEERING COMMUNICATIONS:^[3] Electioneering communications are defined as broadcast communications that depict a candidate within 60 days of a general election or 30 days of a primary election. *Citizens United* held that any restrictions on corporate spending on electioneering communications are unconstitutional.

[1] A Public Citizen report, *Fading Disclosure: Increasing Number of Electioneering Groups Keep Donors’ Identities Secret*, notes a substantial decrease in the reporting of donors who contribute to electioneering communications. In 2004, nearly 98% of groups that made electioneering communications reported their donors. By 2010, that percentage had decreased to below 32%.

[2] Disclaimers are not required if impractical, such as on bumper stickers.

[3]Adding to the confusion surrounding what is and is not permissible in terms of non-profit spending in elections is the IRS (not FEC) definition of “electioneering activity.” Electioneering activity is political activity designed to influence the selection of any individual to federal, state or local office, including issue advocacy, broadcast ads, polling, and get-out-the-vote activities.