

OUTLINE OF WYDEN-MURKOWSKI DISCLOSURE PROPOSAL

This paper describes the framework for legislation to improve transparency and public understanding of spending in federal elections in the aftermath of the *Citizens United* decision. The *Citizens United* decision created a path for massive amounts of anonymous money to enter the political process, largely through organizations that enjoy federal tax advantages.

The premise of this proposal is that those who fund political activities above a *de minimis* threshold do not possess a right to do so anonymously, regardless of whether they are corporations, labor unions, individuals, or non-profit groups, and that inconsistencies between the disclosure regimes that govern candidate committees and these other entities should be minimized if not eliminated.

We welcome your comments and suggestions on this proposal and the specific questions noted at the conclusion of this document by January 15, 2013. Our objective is to avoid the creation of loopholes and unintended consequences. We would appreciate if you would identify any that come to your attention and propose solutions where possible. Your comments can be submitted to the website of Senator Wyden at www.wyden.senate.gov/campaign-finance-reform and emailed to Senator Murkowski's office at disclosure@murkowski.senate.gov.

PRINCIPLES

1. The public has the right to know who is contributing meaningful sums of money to any attempt to influence the selection, nomination, or election of a candidate to any federal office whether that money runs through a candidate committee or any other entity involved in Election Related Activity.
2. Given that candidate committees are already covered by an existing and thorough disclosure regime the only part of this proposal that applies to those entities is the change to real-time disclosure and the minimum contribution those committees must disclose. To the maximum extent feasible, the regime for disclosure by all other entities will be identical to that required of political candidates and PACs with respect to both receipts and expenditures.
3. Existing regulatory definitions including "independent expenditure," "electioneering communication" and "express advocacy" create ambiguity which allows loopholes for political money on the one hand and threatens to chill non-political issue advocacy on the other. This proposal requires a clear, comprehensive definition of what activities fall under the disclosure regime and a process to proactively determine what is or is not Election Related Activity when questions arise.
4. Organizations involved in Election Related Activity will be required to register a legally responsible individual executive who will remain responsible for the actions of the organization if it closes its doors during or following an election cycle.
5. Another consequence of *Citizens United* is that dues-supported organizations, ranging from local chambers of commerce to national membership groups have the opportunity to make unlimited political expenditures utilizing the dues paid by their members. These organizations (and their members) may have a reasonable and legitimate interest in the nondisclosure of their rank and file membership. A limited safe harbor is necessary to ensure this interest is protected.
6. Citizens have a right to support political candidates through donations but they do not have a right to have their anonymous political donations subsidized through the Tax Code. Tax-exempt

and taxpaying organizations that make Election Related Activity expenditures must be answerable both to the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) for compliance with applicable law and regulations.

7. The default punishment for tax-exempt entities who fail to register or to fully disclose their receipts and expenditures as required under this proposal is the loss of that exemption from the date of the first failure to report, along with any and all other appropriate penalties and interest. Tax paying entities must certify that they are not taking a tax deduction for political expenditures, as prohibited by current law.
8. There is a public interest in raising the minimum contribution that must be disclosed by all entities in the federal election regulatory process from its current “more than \$200” level to a new “more than \$500” level and in making contribution information available to the public much more quickly than the current system affords.

THE PROPOSAL

A. Definitions and Intent – Covered Entities and Election Related Activity

1. Covered Entities are anyone who utilizes or intends to utilize funds in excess of \$500 for Election Related Activity as defined in this proposal, excluding candidate and political party committees. This includes individuals, corporations and other business entities, labor unions, 501(c) tax-exempt entities, and unincorporated associations.
2. Under this proposal “Election Related Activity” means any expenditure made for the purpose of influencing or attempting to influence the selection nomination or election of any individual to any federal office (including presidential and vice presidential electors). This definition derives from Section 527(e)(2) of the Internal Revenue Code. Election Related Activity also includes any activity defined as an Independent Expenditure under the Federal Election Campaign Act and related regulations. Any activity which falls within the definition of “Election Related Activity” falls within the disclosure regime.
3. The intent is to fully capture both exploratory and campaign receipts and expenditures just as the current federal campaign regulatory regime captures such for candidates. Thus “Election Related Activity” includes polling, strategy and message development and all forms of public communication, without regard to the technology employed, so long as the goal of such efforts from an objective standpoint is to influence or attempt to influence a voter’s choice.
4. The IRS and the FEC will be required to establish joint regulations and guidance on what is and is not “Election Related Activity” to clearly distinguish between non-political advocacy and “Election Related Activity.” These regulations will need to be updated frequently to ensure that they account for changes in communications medium and technology utilized in campaigning. A system to provide expedited advisory opinions, perhaps funded by user fees, will provide further guidance on specific questions.

B. Covered Entity Registration

1. Covered entities must register as such with the FEC once each cycle.
2. The obligation to register occurs on the later of the first day of the cycle or the date the first funds are deposited in account which can be used for Election Related Activity during that cycle. Those who may engage in Election Related Activity using treasury funds are

encouraged to register early for their flexibility to utilize treasury funds for this purpose may be impaired if registration is delayed.

3. An unregistered Covered Entity cannot utilize any funds for Election Related Activity.
4. A Covered Entity cannot use any funds received prior to registering for Election Related Activity.
5. Registration will include designating a legally responsible individual who has the power to receive and disburse funds. This individual will be liable for violations by the committee if it ceases to exist before a penalty is assessed or does not have the funds to pay an assessed penalty.

C. Reporting of Receipts and Expenditures

1. With two exceptions the identity of anyone who pays dues or makes contributions to a Covered Entity of more than \$500 per cycle and the amount of their payment or contribution must be disclosed to the FEC regardless of whether any part of those dues or contributions are ultimately used for Election Related Activity. The first exception is when such funds are deposited into one or more segregated accounts the proceeds of which may never be used for Election Related Activity. The second exception is the "Safe Harbor" described in Paragraph D below.
2. The intention is to prohibit all undisclosed pass-throughs or conduits, including those between or among affiliated organizations. If funds move between or among Covered Entities, or from a non-Covered Entity to a Covered Entity, the identity of the actual donor of those funds, as well as the entity which passed the funds, must be disclosed by each Covered Entity.
3. The proposal would create an "instant disclosure" system. The FEC will establish a web-based system for real time reporting of receipts to the FEC. The system will be compatible with widely used financial and campaign management software and allow direct entry of contributions to the system. Exceptions can be made to permit paper reporting in limited situations where Internet reporting is technically unfeasible, *i.e.* highly rural areas in which dial-up connections are unreliable. Credit and debit card donations must be reported within 48 hours of receipt and donations by check must be reported before the check is deposited, in no case later than 10 days after receipt.
4. Contributions to Covered Entities will be disclosed to the public on the FEC's website as soon as they are disclosed to the FEC.
5. Covered entities will report all expenditures to the FEC electronically on the same reporting schedule as required of candidate committees and all such reports will be made available to the public as soon as they are disclosed to the FEC.

D. Safe Harbor for Dues Supported Organizations Engaged in Election Related Activity

1. In any election cycle, a member supported organization may devote 100 percent of the dues paid by any member, not to exceed \$500 per member, to Election Related Activity without disclosing the identity of individual members whose dues are being used for this purpose. These funds must be segregated from the organization's treasury and deposited in a separate segregated safe harbor bank account. Funds derived from non-political business activities

e.g. profits from trade shows, book sales, etc. may also be deposited in this account. The organization must maintain an audit trail to ensure compliance.

2. An organization that chooses to undertake Election Related Activities in excess of the safe harbor maximum would be required to disclose the identity of those members and donors who have contributed more than \$500 to the organization in a cycle and the amount each contributes as described in Paragraph C.1 (except for receipts deposited into a segregated account that can never be utilized for Election Related Activities).
3. This does not relieve an exempt organization of the requirement to adhere to IRS limitations governing the allowable use of member dues and other revenues for election related purposes.

E. Stand By Your Ad Requirements

1. All public communications, including print and broadcast advertisements and robocalls, must contain Stand By Your Ad disclosures, in addition to those currently required by the FEC, for independent expenditures and electioneering communications. This disclosure must:
 - a. Identify the top three contributors to the organization as of the date of the first use of the ad; and
 - b. Include a pre-scripted statement that the public can find out more about the organization and its donors on a new FEC-managed website that will contain a user friendly database on Election Related Activity.

F. Enforcement

1. The FEC and the IRS will share enforcement responsibilities utilizing the full panoply of enforcement remedies available under their governing statutes. The default punishment for tax-exempt entities who fail to register or to fully disclose their receipts and expenditures as required under this proposal is the loss of their tax-exemption from the date of the first failure to report, along with any and all other appropriate penalties and interest. The IRS will be empowered to assess lesser sanctions for *de minimis* or accidental violations of regulatory requirements. The most severe existing IRS whistleblower provisions will apply to all non-reporting organizations.
2. Under current law, for-profit entities are barred from deducting political activity as a business expense. However, this ban is sometimes sidestepped or ignored. This proposal will clarify that the chief executive officer (or equivalent) of a for-profit entity will face criminal charges for deducting Election Related Activity expenditures as business expenses and require the chief executive officer (or equivalent) to certify on IRS filings whether that business made an Election Related Activity expenditure and whether a deduction was claimed.

G. New Rules for Candidate and Political Committees

1. Except for the following changes, this proposal will not change how candidate and political party committees are regulated by the FEC:
 - a. The contribution level triggering disclosure requirements to the FEC by candidate committees and political party committees will be raised from \$200 to \$500.

- b. All candidate and political party committees will be subject to the same expedited electronic disclosure requirements that are proposed for Covered Entities. Credit and debit card donations must be reported within 48 hours of receipt and donations by check must be reported before the check is deposited, in no case later than 10 days after receipt. This will eliminate paper reports for all federal candidates and political committees and eliminate quarterly reporting of receipts. Disbursements will continue to be reported on the existing FEC schedule but electronically.

QUESTIONS

1. *The authors of this proposal believe that a majority of the members of the United States Supreme Court would agree that mandatory reporting of the sources and expenditure of funds permitted by the Citizens United case to be used for political activity and associated accountability requirements is constitutionally permissible. Accepting that proposition, do you see any constitutional defects in the substance of the proposal?*
2. *Do you believe that there is any reasonable risk that those who participate in Election Related Activity will face retaliation from governmental entities for doing so? If so, what should be done to prevent such retaliation, short of allowing donors to do so anonymously?*
3. *Under current law, candidate committees and political party committees must disclose the names of donors making contributions exceeding \$200. Is it appropriate to raise the current minimum contribution reporting threshold to "exceeding \$500" for candidate and party committees as well as entities covered by this proposal?*
4. *Is there a better approach to ensuring organizations establish the necessary non-political segregated accounts? Under our proposal, the name of any donor or dues paying member that makes contributions in excess of \$500 to a labor union or membership organization must be disclosed to the FEC if the organization in receipt of the money places it into an account from which it also makes an Election Related Activity expenditure. It is our belief that such an approach will ensure membership organizations establish the necessary non-political segregated accounts but we would like to consider alternative ways to achieve this goal.*
5. *Under current law, candidate committees and political party committees must report contributions on a quarterly basis. This proposal would require those committees as well as entities covered under this proposal to report contributions in real time. Will the instant electronic reporting requirements create an undue burden? What exceptions should be made for electronic reporting in areas that suffer from barriers such as inadequate Internet access?*
6. *What specific additions to the "Election Related Activity" standard as outlined above are needed to sufficiently distinguish Election Related Activity, which is a trigger for the requirements of the Act, from non-political issue advocacy which falls outside of the purview of this Act? Would it be reasonable to classify politically targeted issue advocacy as Election Related Activity? Would it be appropriate for a user fee to be charged for advisory opinions related to "Election Related Activity" to ensure that they are generated in a timely fashion?*
7. *Do the expenditure disclosure requirements triggered by the making of "electioneering communications" and "independent expenditures" under existing law adequately inform the public in a timely fashion of those who have contributed to early activities such as polling, message development and seed money utilized to raise additional funds? If not, does the proposal adequately address these issues or would you suggest that they be addressed in another way or not at all?*

8. *In a Stand By Your Ad disclosure requirement, how should the problem arising when more than three contributors donate an equal amount of money to the Covered Entity be addressed? Are there other concerns about the Stand By Your Ad disclosure that you would like to bring to our attention?*
9. *How should the proposal deal with those who “bundle” contributions for forwarding to a Covered Entity? If a “bundler” were to expend funds in excess of \$500 solely in bundling of funds destined for Election Related Activity would the individual be required to register as a Covered Entity? Should the recipient Covered Entity be required to disclose the “bundler” as well as the actual donor of a bundled contribution?*
10. *It is the intent of the authors to evenhandedly require disclosure of receipts and expenditures by all who are taking advantage of the Citizens United decision without regard to the nature of the entity, e.g. corporation, labor union, 501(c)(4), etc., and without regard to the partisan or ideological predilections of the player. Have we met this objective? If not, please identify who in your opinion would benefit or be disadvantaged by the disclosure regime and what steps could be taken to make the proposal more evenhanded.*
11. *Under the Citizens United decision any person may utilize the profits or income of commercial transactions for Election Related Activity. Therefore, under our proposal, we must ensure that Covered Entities need not disclose the names of customers with whom they make commercial transactions undertaken in the ordinary course of business. Department of Treasury regulations provide that “a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent)” is not considered a gift. For Covered Entities, this could include such things as income from trade shows and book sales that are part of the regular business activities of the organization. Would applying the Treasury Department’s concept of “transfers made in the ordinary course of business” sufficiently protect entities that wish to use the profits of their commercial transactions to engage in Election Related Activity?*
12. *Would you object if the answers you submit to these questions were made available to the public?*

Once again, we welcome your comments and suggestions on this proposal as a whole. Our objective is to avoid the creation of loopholes and unintended consequences. We would appreciate if you would identify any that come to your attention and propose solutions where possible. While we encourage you to respond to each of the specific questions, all comments and suggestions will be considered. We would appreciate your adherence to the January 15, 2013 deadline for comments.