

April 4, 2012

Alliance for Justice Statement on S. 2219

Based on our understanding of the current version of the bills, a lot of smaller—and even larger—501(c)(3) public charities and 501(c)(4) social welfare organizations will limit their advocacy and refrain from speaking out on environmental, economic, social justice, and other important issues that protect and strengthen the public good.

We are troubled by the creation of the new term, “campaign-related disbursements,” that covers both independent expenditures and electioneering communications. No one disputes that independent expenditures are disbursements related to and focused on campaigns. By defining electioneering communications as “campaign-related disbursements,” however, the bill makes two troubling assumptions. First, it assumes that any and all advertising that references an elected official is intended to influence their reelection. Second, it assumes there are no legitimate advertising campaigns aimed at influencing an elected official’s position on an issue or legislation. This is simply not true and dilutes the disclosure for communications actually meant to influence elections.

This new terminology presents particular concerns for 501(c)(3) organizations. While these organizations are prohibited by federal tax law from supporting or opposing candidates for public office, are appropriately excluded from the definition of “covered organizations,” it is our understanding that they still must disclose electioneering communications under the existing regime. Forcing them to report a greater number of electioneering communications, characterized as “campaign-related,” could wrongly suggest that they are engaging in prohibited activity and lead to frivolous complaints and unnecessary IRS examinations, at significant cost to the organization and divert the IRS from important and valid complaints. Rather than run “campaign-related” advertisements, these organizations may instead decide to remain silent—a loss to the policy-making process.

This concern is exacerbated when the bill expands the period of time during which communications are treated as electioneering communications. Under current law, an electioneering communication is defined as a broadcast communication that refers to a federal candidate within 60 days of a general election or 30 days of a primary election. S. 2219 significantly expands this time period to include any broadcast communication that refers to a candidate for the House or Senate disseminated after January 1 of an election year—the entire second session of a Congress. And, where a broadcast communication refers to a candidate for President or Vice President, the time period is broadened to

include any such ad disseminated in the period beginning 120 days before the first primary or preference election or convention—beginning as early as September of the year preceding a presidential election. To be clear, this rule applies when an elected official is merely mentioned in the advertisement even if their candidacy or an election is not. The fact that the official is up for reelection is sufficient to meet the standard for electioneering communication.

To understand the potential impact of the new time periods for all entities, consider, for example, an ad like the following if it were aired on CBS in Rhode Island on April 2012 with the legislation in place:

“Our elections have been co-opted by wealthy corporations. We need to change the law. Call Senators Reed and Whitehouse and tell them to vote yes on the DISCLOSE Act of 2012.”

Because Senator Whitehouse is up for reelection in November 2012, he is a candidate for public office and, thus, this ad will be considered an electioneering communication under the expanded windows of the proposed bill. Clearly, this ad is not intended to influence the election nor is it intended to be campaign-related. The hypothetical organization wants the bill to pass and would run the ad even if neither of the senators were up for reelection.

The practical effect of this expanded window is that any and all broadcast communications during the vastly expanded prescribed timeframe—whether intended to influence a vote in Congress, the signing of a bill by the President, thanking a Member for her vote, or even a PSA featuring an elected official—would be characterized as “campaign-related.” This reinforces the misconception that groups only run broadcast advertisements to influence elections rather than to legitimately mobilize grassroots support for or opposition to pending legislation.

We strongly believe that the *Citizens United* decision poses a threat to the integrity of the electoral process and we support legislation that provides for effective disclosure, while at the same time protecting free and independent speech and promoting active participation in elections by individuals and organizations. We applaud the goals of the DISCLOSE Act of 2012 and, in that spirit, are willing to bear some of the new administrative burdens that will result. However, we want to make sure this legislation is crafted in a manner that does not chill valuable, constitutionally protected speech. 501(c)(3) and 501(c)(4) organizations are often the only voice for underrepresented and vulnerable communities in this nation, and the new rules created by this legislation could effectively silence them.