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NEWSLETTER

Schumer-Van Hollen Is As Much about Prohibitions As about Disclosure

May 2010

Despite its name, the DISCLOSE Act (The Democracy Is Strengthened by Casting Light On Spending in Elections Act or Schumer-Van Hollen) is as much about campaign finance bans and prohibitions as about disclosure. Corporations and trade associations must pay close attention to these complex bills (there are two bills-one in the House and one in the Senate, and there are some differences between them) lest the bills pass as written and severely burden, and in some cases eliminate, the ability of corporations and trade associations and their American employees and members to participate in elections and legislative advocacy in the United States.

The following prohibitions constitute a major focus of Schumer-Van Hollen as introduced.

The Elimination of Coordinated Political Involvement by U.S. Employees of Certain Domestic Companies

While the Administration attacked the Supreme Court's decision in *Citizens United* from earlier this year for potentially allowing foreign corporations to engage in independent expenditures in U.S. elections, Schumer-Van Hollen proposes restrictions that virtually close off all federal, state and local political activity by American subsidiaries of foreign companies. For 35 years, the Federal Election Commission (FEC) has held that foreign nationals may not have Political Action Committees (PACs). The legislation, then, directly impacts U.S. employees of certain domestic companies by expanding the definition of "foreign national," which would eliminate all PACs at, among others, U.S. subsidiaries of foreign corporations and any other domestic corporation of which foreign corporations or foreign nationals own 20% or more. Schumer-Van Hollen, as introduced, also

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proposes to eliminate, by virtue of similar FEC precedent, communications by these American corporations to their American employees about candidates and parties (known in FEC regulations as "partisan communications") and appearances by candidates in front of these American employees (known as "candidate appearances"). Finally, the American corporations that would be classified and treated as "foreign nationals" for campaign finance purposes if the bill becomes law also would be banned from making corporate contributions and engaging in other political activities at the state and local levels.

The rights of individual Americans remain unaffected in Schumer-Van Hollen except to the extent that such persons would be unable to contribute to a federal, state or local PAC established by their domestic American employer. Further, domestic corporations would not be affected by the bans described above as long as they were not subsidiaries of foreign corporations; were not owned (20% or more) by foreign persons; did not have foreign persons constitute a majority of their board of directors; did not give to foreign persons the power to direct, dictate or control the company's decision-making process; and did not give to foreign persons the power to direct, dictate or control the activities of the company with respect to elections.

The Undoing of the Right to Corporate Grassroots Advocacy As Protected by *Wisconsin Right to Life*

In 2007, the Supreme Court in *Wisconsin Right to Life* ruled that corporations must be able to engage in constituency-specific television and radio grassroots advocacy near elections. Such corporate advocacy, known in the Federal Election Campaign Act of 1971, as amended, as "electioneering communications," were otherwise impermissible under provisions of McCain-Feingold. The court found, however, that corporations have a constitutional right to make these communications as long as they do not expressly advocate the election or defeat of a candidate for office.

Schumer-Van Hollen, as introduced, reverses this decision and not just for foreign-owned domestic corporations. If Schumer-Van Hollen were to pass, government contractors and recipients of Troubled Asset Relief Program (TARP) funds would be unable, for example, to defend themselves against pernicious election-year legislation with TV and radio ads that, to be effective, mention the name of a Senator or Member of Congress and are targeted at his or her home state or Congressional District. Moreover, the two bills that make up Schumer-Van Hollen would expand the coverage of this advocacy blackout period, with the Senate version eliminating this core political speech up to 90 days before a primary through the general election.

Domestic companies would not be affected by this ban as long as they:

- Were not government contractors;
- Were not recipients of TARP funds;
- Were not subsidiaries of foreign corporations;
- Were not owned 20% or more by foreign persons;
- Did not have foreign persons constitute a majority of their board of directors;
- Did not give to foreign persons the power to direct, dictate or control the company's decision-making process; and

- Did not give to foreign persons the power to direct, dictate or control the activities of the company with respect to elections.

The Reversal of *Citizens United* and the Elimination of Corporate Independent Expenditures

Earlier this year in *Citizens United v. FEC*, the Supreme Court ruled that business corporations could use corporate funds to expressly advocate the election or defeat of a clearly identified candidate. Despite the fact that half of the states already permitted such corporate express advocacy without devastating effects, Schumer-Van Hollen proposes to reverse *Citizens United* with respect to, among others, government contractors, recipients of TARP funds, U.S. subsidiaries of foreign corporations and other corporations owned 20% or more by foreign persons. Again, domestic companies would remain unaffected as long as they fell outside the categories discussed above with respect to grassroots activity.

Effect of Bans on Trade Association Activity-Beyond Communications

The effect of the prohibitions elucidated above also likely work to limit the ability of trade associations to participate in elections and to engage in targeted grassroots advocacy. The plain language of the bills seems to indicate that U.S. subsidiaries of foreign corporations, government contractors and TARP recipients also would be banned from making payments to third-parties that use those funds for independent expenditures or electioneering communications or, importantly, make such communications in the future or have made those communications in the current or past election cycle. As a result, if nothing else, trade associations and other nonprofits would need to be very careful about the funds they used to participate in grassroots advocacy or in politics and would be unable to accept unencumbered dues payments or other contributions from the "foreign national" American corporations, TARP recipients and government contractors.

Disclosure and Disclaimers Work to Effect Bans on First Amendment Activity

Schumer-Van Hollen also proposes many complicated and onerous disclosure and disclaimer requirements for those permitted, after the prohibitions discussed above, to engage in political discourse or to engage in targeted grassroots activity in election years. The proposed requirements run the gamut from disclosing additional contributors to the organization, to disclosures of campaign-related activity to shareholders and members, to lengthy disclaimers about top contributors, to stand-by-your-ad disclaimers involving corporate CEOs. These rules would affect domestic corporations unconnected to foreign nationals even if the corporations were not TARP recipients or government contractors.

Senate Version Expands Lowest Unit Charge Rules

Under the Senate version of Schumer-Van Hollen, broadcasters, cable and satellite operators would be subject to additional lowest unit charge requirements when corporations, for example, make independent expenditures.

Future of Bill Uncertain, Although Corporations and Associations Should Not Underestimate Its Prospects

The primary sponsors have set a timetable for Schumer-Van Hollen that includes consideration by July 4. Although there was no Senate Republican co-sponsor at the time it was introduced, the bill does have strong backing from President Obama. Thus, despite the legislation's focus on corporations and business associations and its inclusion of prohibitions well beyond the reversal of *Citizens United*, Schumer-Van Hollen's prospects should not be dismissed lightly.