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Nonprofits should be wary of new DISCLOSE Act

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The Senate Rules Committee will consider a revamped version of the previously dead DISCLOSE Act on Thursday. The bill, which has 38 Democratic co-sponsors and no Republicans, would amend the Federal Election Campaign Act to require additional disclosure requirements for corporations, labor unions and Super PACs. A similar bill was introduced in the House earlier this year.

The problem with this legislation is that in its zeal for disclosure, it would impose enormous requirements on precisely the sort of traditional, widely favored actions nonprofit advocacy groups have been taking for decades.

Imagine, for instance, a nonprofit that wants to support legislation imposing carbon emissions targets as part of an effort to combat global warming. It chooses to run a TV ad that says something like, "Global warming is a threat to our children's future. Call your senators, and ask them to support the Carbon Cap." The name and contact information of the states' U.S. senators are given.

Most people would see this for what it is: obvious issue advocacy. To be clear,we're not talking about campaign ads, however cleverly written. Nonetheless, under the act, this ad would be treated as an "electioneering communication" if it were run within a *year* of an election because it mentions the names of sitting senators, one of whom will presumably run for reelection. How a group is supposed to know, a year in advance, whether a sitting politician is in fact a candidate is never explained.

As we know, spending on "electioneering communications" must be reported, which is bad enough. But the DISCLOSE Act would go farther – requiring our hypothetical nonprofit to disclose any of its contributors who gave more than $10,000 to the organization.

And of course, requiring the membership list of a nonprofit has been unconstitutional since the worst days of the civil rights movement. And for good (and obvious) reason. Few today run anything like the risks taken by civil rights pioneers, but contributions to nonprofits can still be risky.

Why should an oil executive have to risk his career to give money to an environmental organization? Perhaps he contributed based on a solicitation calling for clean water, and didn't expect the organization to tackle global warming. Perhaps he didn't expect issue ads to be run at all. Why should he risk his career because an environmental group pivots to an issue his bosses take an interest in?

Of course, the law provides an out -- nonprofits can create a segregated account, and put only money solicited for political expenditures into that pot. So long as all electioneering communications is conducted from those funds, the general operating budget remains confidential.

Imagine the difficulties, though. Multiple solicitations, an inability to flexibly respond to events, the need to publicize donors to what may be controversial causes. Does anyone doubt that contributions will go down? Or that less money will be available to discuss issues? Or that a major effect of this law will be fewer ads mentioning incumbents, even in their official capacities?

Perhaps that's the point, perhaps not. At a minimum, the Senate needs to take a hard look at what these new provisions will mean, in practice, for the sort of constitutionally protected issue advocacy nearly every American views as central to a healthy polity.

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