May 6, 2014

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
United States Senate
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of the American Bar Association (ABA), I write to commend you for holding the hearing entitled “Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond” on April 30, 2014 and to request that this letter and its attachment be included in the hearing record.

The ABA has long been concerned with campaign finance and election issues and is a strong supporter of transparency in the political process. The overriding premise of these efforts has been to support candidate and citizen participation in the electoral process and increase public confidence through accountability and disclosure.

Most recently, we adopted policy supporting efforts to ensure consistent disclosure of political and campaign spending by entities making political expenditures, regardless of their tax status. The policy also urges Congress to require organizations not already required to do so by current law to disclose the amounts spent on electioneering communications and independent expenditures, as well as the sources of such funds. The full policy is attached for your review.

As you know, recent decisions by the Supreme Court in Citizens United v. FEC and McCutcheon v. FEC dismantled key components of our campaign finance framework, which will result in significant additional money pouring into the system and are bound to increase the public’s concern over undue influence in governmental decision-making. In light of these developments, it will be critical to ensure that this additional money is not used in a way that circumvents contribution limits still in place and to ensure full and timely disclosure of all federal campaign contributions and expenditures. These actions will make our democracy more viable and strengthen our citizens' faith and trust in government.

Thank you for the opportunity to share our views. We look forward to working with the Committee on this and other important issues in the future.

Sincerely,

Thomas M. Susman

Attachment
RESOLVED, That the American Bar Association supports efforts to increase disclosure of political and campaign spending and urges Congress to require organizations that are not already required to do so by current law as interpreted and applied by the Federal Election Campaign Act to disclose (a) the source of funds used for making electioneering communications and independent expenditures as defined in federal campaign finance law, subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association, and (b) the amounts spent for such communications and expenditures, in public disclosure reports filed with the Federal Election Commission according to requirements under the Federal Election Campaign Act and regulations thereunder that are applied consistently without respect to the nature of the entity making the communication.
The Supreme Court’s landmark decision in *Citizens United v. Federal Election Commission*, represents the most important campaign finance case in many years. The Court was presented with a non-profit corporation, partly funded by for-profit corporations, seeking to make what amounted to electioneering communications in violation of the Bipartisan Campaign Reform Act (BCRA) of 2002. Invoking the First Amendment, the Court struck down several key provisions of BCRA including its ban on certain political spending by corporations and unions.

While *Citizens United* is rightly credited with fundamentally altering the campaign finance regime in this country, the Court left intact one key aspect of campaign finance regulation: the central role of disclosure. Indeed, the Court in *Citizens United* not only affirmed the constitutionality of broad disclosure requirements, it highlighted the existence of such disclosure as justification for its other holdings. But current campaign finance law – as interpreted by the Federal Election Commission (FEC) – falls far short of the disclosure practices assumed to exist by the Court. This is particularly true of the disclosure requirements applicable to 501(c)(4) non-profit corporations and some 527 political organizations. These contributions and expenditures represent an increasing portion of campaign spending, yet they remain largely hidden from public sight. This resolution addresses this gap; it does not concern the wisdom or constitutionality of direct regulation of campaign contributions and expenditures.

In focusing on the need for even-handed disclosure requirements, this resolution is of a piece with existing ABA policies. Throughout the modern era of campaign finance regulation, the ABA has been an important and consistent voice in favor of thorough disclosure of campaign contributions and expenditures. The present resolution would simply apply those principles to entities that had not previously been engaged in political expenditures – but which collectively spent over $1 billion in the 2012 election cycle. Moreover, the thrust of the current resolution is not to advocate *more* disclosure per se, though that would of course be its effect. Rather, it urges *consistent* disclosure by entities making political expenditures, regardless of their tax status.

The *Citizens United* decision changed the role of money in political campaigns by opening the door to unlimited political spending by corporations and unions. At the same time,

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3 The following ABA policies are relevant to and consistent with this resolution:
   - August 1975 – Supports full and timely disclosure of campaign contributions and expenditures in excess of minimal amounts.
   - August 1992 – Supports full, accurate, readily accessible, and timely disclosure of campaign contributions and expenditures.
   - August 1998 – Urges that efforts be taken to ensure there is full disclosure of money spent in federal elections.
   - July 2000 – Urges adoption by Congress and state and territorial legislatures of campaign finance reform legislation that strives to achieve, among other goals, full disclosure of all money raised and spent in federal, state, local, and territorial election campaigns.
eight Justices agreed that disclosure of the entities and people behind that spending was crucial to a well-functioning campaign finance system. Indeed, not only did the Court uphold the disclosure requirements before it, its rationale for striking down prohibitions on spending relied on such requirements. As the Court stated: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” This emphasis is in keeping with a long series of campaign finance cases, including *Buckley v. Valeo* and *McConnell v. FEC*, which had also endorsed and upheld disclosure requirements, and on which Citizens United expressly relied.

The Court’s confidence in the transparency of political speech is, unfortunately, unwarranted. The disclosure regime instituted with the Bipartisan Campaign Reform Act has proven inadequate. It turns out to be relatively simple to remain anonymous while making political contributions or expenditures; the mechanisms of choice are 501(c)(4) non-profit corporations, 527 organizations, and so-called “super PACs.” It is important to understand these entities and how they are used to skirt disclosure requirements.

A 501(c)(4) entity is a non-profit corporation, operated “exclusively” for the promotion of social welfare. Internal Revenue Service (IRS) regulations specify that: “An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.”

Although IRS regulations specifically exclude “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” from the category of activities that promote the social welfare, a 501(c)(4) is allowed to engage in “some political activity, as long as that is not its primary activity.” While there is no clear test for determining when political activity becomes an organization’s “primary activity,”

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5 *Citizens United*, 130 S. Ct. at 914.
6 *Id.* See also *Id.* at 917 (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”).
9 130 S. Ct. at 913-14.
12 Treas. Reg. § 1.501(c)(4).
the threshold is generally understood to be near 50% of total expenditures.  If an organization
crosses that line, it will likely have to become a 527 entity and be subject to the rules of those
organizations, described below.

To the extent a 501(c)(4) engages in political campaign activities (taking care to avoid
crossing the “primary activity” threshold), it is subject to some disclosure. These organizations
must disclose political campaign activities on the annual 990 Form filed with the IRS, and this
information is made public. However, contributions to a 501(c)(4) organization are not made
public. Such an organization must report to the IRS contributions it receives of over $5,000, but
that information does not become publicly available.

The second important entity is the 527 organization. These tax-exempt “political
organizations” were originally designed to increase the transparency of political activity in the
post-Watergate era. Since 2000, 527s have had to disclose to the IRS both contributions they
receive and expenditures they make. These disclosures are extensive and can be found on the
IRS web site. However, their value is significantly undercut by the fact that (a) the web site is
not easily searchable and, more important, (b) the disclosure generally does not occur until after
the relevant election.

In the 2004 presidential cycle, several prominent 527s, including Swift Boat Veterans for
Truth and America Coming Together, brought the 527 entity into the public consciousness. In
response to the resulting pressure to classify 527s as “political committees” subject to regulation
by the Federal Election Commission (FEC), the Commission began reviewing these entities on
a case-by-case basis. The FEC decides if a 527 must register as a political committee based, in
part, on a determination of whether the “major purpose” of the organization is to influence
elections. According to the FEC, “all political committees that register and file reports with the
FEC are 527 organizations, but not all 527 organizations are required to file with the FEC.”
The result is that some 527s fall under the FEC reporting regime, which is comparatively
transparent and frequent, and some continue to fall under the IRS regime, which is neither. With
the new, albeit limited, FEC involvement in 527 disclosure and the emergence of new funding
mechanisms, pure 527 organizations appear to be falling out of favor.

The final important entity is the super PAC. In brief, a super PAC is a 527 entity for tax
purposes and a political organization for FEC purposes, subjecting it to FEC regulation. Super

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17 Id. at 81.
18 I.R.C. § 527.
19 Torres-Spelliscy, Hiding Behind the Tax Code, supra note 16, at 82.
20 In contrast to 527s being classified as “political organizations” for IRS purposes.
21 Kalanick, Blowing up the Pipes, supra note 10, at 2254, 2256-61.
22 Paul S. Ryan, 527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation, 45 HARV. J. LEGIS. 471, 481-82, 503-6 (Summer 2008) (expressing frustration with the lack of clear guidance on which 527s must register with the FEC).
24 Kalanick, Blowing up the Pipes, supra note 10, at 2260.
PACs emerged as a result of two key court decisions, *Citizens United* and the D.C. Circuit’s decision in *SpeechNow.Org v. FEC*. As stated above, *Citizens United* held that corporate independent expenditures on political speech were constitutionally protected. *SpeechNow*, applying the rationale of *Citizens United*, subsequently struck down contribution limits on organizations making independent expenditures. The result of these rulings was the creation of Independent Expenditure PACs (“IE-PACS”), more commonly known as super PACs, which can accept unlimited corporate or union money for the purposes of making independent expenditures, but cannot funnel that money directly to federal candidates.

Super PACs are regulated by the FEC and are subject to the same reporting requirements as other PACs. This consists mainly of quarterly or monthly reports to the FEC with detailed information regarding contributions and disbursement totals, disbursement purposes, and donor information. Individual independent expenditures must be reported more frequently, usually within 48 hours of the expenditure.

In practice, a donor – be it a person, a corporation, or a union – wishing to remain anonymous can make a donation to a 501(c)(4), which can then give the money to a super PAC, which can then make an independent expenditure to influence a political campaign. The super PAC will disclose its donor, the non-profit, in its regular FEC filings, effectively masking the true source of the funds.

These arrangements exist across the political spectrum. For example, Karl Rove and Ed Gillespie founded American Crossroads, a super PAC, which is affiliated with the conservative Crossroads GPS, a 501(c)(4); former White House Deputy Press Secretary Bill Burton founded a super PAC, Priorities USA Action, which is affiliated with a 501(c)(4), the liberal Priorities USA. Comedian Stephen Colbert, who has been mining campaign finance issues for television humor, exemplified and lampooned this structure when he founded a super PAC, “Americans for a Better Tomorrow, Tomorrow,” and a 501(c)(4), “Anonymous Shell Corporation,” with the latter’s sole function being to funnel anonymous funds to the former.

The upshot of these arrangements is that the donors to the non-profit are never publicly revealed, as long as the non-profit maintains its status as a 501(c)(4) and does not slip into 527 status by allowing political activity to become its “primary activity.” However, the IRS will not audit an organization while its tax year is still open -- essentially, until the organization files all appropriate paperwork for that tax year. In effect, this allows for a major lag in any reporting, especially in the first year of an organization’s existence.

For example, assume a hypothetical 501(c)(4) organization was formed in July 2010,
early enough to be involved in the 2010 midterm elections. By way of several easily obtained IRS filing extensions, the organization’s first public disclosure would not be required until May 2012, with its first tax year remaining “open.”31 Once the tax year closed, the IRS would have to undertake an investigation and determine whether the organization failed the primary purpose test. By the time any investigation into the organization’s purpose could be undertaken, its effect on the 2010 election would be long over and the organization itself could be dissolved.32 In fact, it is not unreasonable to imagine a scenario where the organization’s involvement in the 2012 election could have been complete before any meaningful action was taken by the IRS.

This Resolution recommends bringing disclosure into line with the ideal invoked by the Supreme Court in *Citizens United* by placing all political organizations and all political spending under the same disclosure regime, regardless of the type of organization or its tax status.33 This can best be accomplished through two straightforward changes. First, “campaign expenditure” should be defined as any contribution, disbursement, or, importantly, transfer related to making an electioneering communication or independent expenditure. Second, any group making a campaign expenditure should be subject to the disclosure requirements that currently apply to PACs and other political committees.34 Uniform definitions and disclosure requirements would greatly simplify the current hodgepodge of entities making political expenditures and the myriad rules that govern them. More important, these disclosure requirements would ensure actual, across-the-board transparency.

Consider the disclosures that would have occurred under this regime in the 2012 federal election cycle. All covered entities would have filed a mid-year report covering January through June 2011 on July 31, 2011, and a year-end report covering July through December on January 31, 2012.35 Monthly filings would have commenced on February 20, 2012, with a report covering January, and would have continued through an October 20 report, which would have covered September 2012. Prior to the general election, entities would have been required to file a pre-election report on October 25, covering the first half of that month. Thirty days after the election, on December 6, 2012, a post-election report would have been due. Finally, on January 31, 2013, a year-end report would have been due.36 Throughout the two-year cycle, any electioneering communications amounting to $10,000 in the aggregate would have triggered an

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31 That public disclosure would consist of IRS Form 990, which would not reveal any donor information.
32 *Id.*
34 Currently, PACs (including super PACs) can choose to disclose on either a monthly or quarterly basis. Selecting quarterly reporting requires additional reports before and after primary, general, and special elections, which can be onerous if a PAC operates in multiple states. Most major super PACs operating in the 2012 cycle have selected monthly reporting. Federal Election Commission, Campaign Guide: Corporations and Labor Organizations (2007), available at http://www.fec.gov/pdf/cologui.pdf; see supra notes 27-28.
37 2 U.S.C. § 434(f)(3) (defining electioneering communication as “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the
obligation to report within 24 hours. Additionally, independent expenditures of more than $10,000 would have to have been disclosed within 48 hours, and within 20 days of an election, independent expenditures of $1,000 or more would have to have been disclosed within 24 hours.

These disclosure requirements are meaningful and enjoy wide, bipartisan support. There is no justification for applying them only to a portion of functionally indistinguishable expenditures or practically fungible entities.

This Resolution endorses uniform disclosure rules for all entities that spend on elections. It takes no position on, and would not affect the First Amendment holdings of, *Citizens United*. Corporate, union, and non-profit money could and would still flow to political organizations; it would simply have be disclosed to the FEC and the public in timely and uniform fashion. This is precisely the world envisioned by the Court in *Citizens United*, one in which “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”

The resolution also does not take a view on whether, consistent with the First Amendment, Congress could mandate the disclosure of all individual contributions, regardless of size, to any sort of entity that engages in some amount of political activity. In deference to those who believe that potential freedom of association concerns may be implicated by such legislation, the resolution recommends that disclosure requirements be “subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association.”

Respectfully submitted,
James W. Conrad, Jr.
Chair, Section of Administrative Law and Regulatory Practice
February 2013

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39 See supra note 26.
41 *Citizens United*, 130 S. Ct. at 916.
42 See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that associational rights of members of nonprofit organization would be impermissibly infringed by state requiring disclosure of membership list in order to conduct business within the state).