

**BACKGROUND ON WYDEN-MURKOWSKI  
“FOLLOW THE MONEY ACT OF 2013”**

The **Follow the Money Act of 2013** closes loopholes in existing federal election campaign law that often leave independent spending in federal elections exempt from public disclosure.

Under the current disclosure of independent spending, some business models require significant disclosure while others require nearly none. Since the *Citizens United* decision, spenders have moved toward business models that require minimal, if any, disclosure of receipts and limited disclosure of expenditures.

The Follow the Money Act creates a simple and universal system of disclosure for independent spending in federal campaigns regardless of the spender or business model. The goal of this effort is disclosure, for disclosure’s sake, and for this reason a single uniform of rules needs to apply to all players in the independent spending arena.

In most respects the Follow the Money Act requires disclosures from independent spenders similar to those required of federal candidates. However, the requirements are not identical. Small spenders are subject to lesser requirements in deference to court decisions suggesting that reporting can chill speech by small players and impose burdens to First Amendment rights. And, the Follow the Money Act establishes a “safe harbor” roadmap to ensure that the membership lists of widely supported membership organizations do not need to be disclosed simply because those organizations engage in independent spending using a portion of a member’s dues

These new requirements will be effective in the 2015-2016 cycle.

The Follow the Money Act does more than address independent spending. It also makes a number of significant improvements to the overall campaign finance regulatory regime: Increases the threshold level at which candidates have to disclose contributions on their Federal Election Commission (FEC) reports from \$200 to \$1,000; Requires U.S. Senate candidates to file their reports with the FEC directly rather than the Senate so reports are up on the FEC website quicker; And, directs the FEC to establish an real-time reporting system for contributions not later than January 1, 2015 so that the public can “*follow the money*” going into both candidate campaigns and independent spending in real time rather than wait for quarterly reports.

## The Disclosure Regime for Independent Spending in Federal Campaigns

### 1. Independent Federal Election Related Activity

The Follow the Money Act requires comprehensive disclosure of “independent federal election related activity” – both the money coming in and the money going out.

Independent federal election related activity involves an expenditure – usually money – made by any person for the purpose of influencing the selection, nomination or election of any individual to any federal office which is made by a person or entity independent of the candidate and which is not coordinated with the candidate.

The full universe of independent political spenders is covered by this regime. It matters not who you are but what you do. And if what you do is independent federal election related activity you are subject to the regulatory requirements of this regime. This includes independent spending by individuals, unincorporated organizations, partnerships, Limited Liability Companies, corporations, trade associations, labor unions, SuperPACs, Indian tribes, 501(c) organizations of every stripe and 527 groups.

This common sense definition parallels what the general public perceives as independent expenditures. This is broader than what the Federal Election Campaign Act currently regards as an independent expenditure. The Federal Election Commission generally defines an independent expenditure to be an advertisement – done by someone other than the candidate and not in coordination with the candidate – which explicitly makes reference to the candidate or undeniably makes reference to the candidate. This new definition encompasses every expenditure including fundraising, polling, message development and delivery of the message to voters. This broader definition recognizes that many independent spenders today are running full spectrum parallel campaigns, mimicking those of candidate committees in every respect.

### 2. Registration Requirements

Every person who intends to undertake significant independent federal election related activity must register with the Federal Election Committee – just as candidate committees do. A registration is valid for one election cycle (January 1 of the odd year to December 31 of the even year).

The Follow the Money Act defines significant in three ways –

- Expending \$10,000 or more in any election cycle for independent federal election related activity **OR**
- Receiving \$10,000 or more in funds from donors that are earmarked by the donor or the recipient (with knowledge of the donor) for independent spending in federal races. **OR**
- Soliciting 500 or more people during that election cycle for donations which are expressly sought to conduct independent spending in federal races.

If an organization does none of these things, that organization is not regarded as a significant player: it need not register and need not disclose receipts or expenditures. This is one of the ways that the bill defers to the First Amendment speech interests of small players.

Those who are required to register must designate, by name, an individual who is responsible for compliance with Follow the Money Act requirements. Independent spending entities may come and go, some disappearing in the course of a campaign or shortly after its conclusion, but this bill ensures that there will always be a named individual who bears personal liability for compliance.

### 3. Disclosure Requirements

A key reform proposed by the Follow the Money Act is real-time electronic reporting and disclosure of contributions – by all federal election players, including the independent spenders. Until this system is in place the independent spenders will report their receipts and expenditures electronically (or if impracticable on a paper FEC form) on the same schedule as the candidates do.

#### a. Receipt Reporting

##### (i) Individuals

Individuals who are spending their own money for independent federal election related activity do not report receipts – only expenditures.

##### (ii) Businesses

Under *Citizens United*, businesses and other organizations are free to spend however much they choose from their treasuries in independent political activity. This money will generally come from the businesses earnings from the sale of goods and services and investment income. To the extent that the money a business spends on independent federal election related activity derives from the ordinary course of non-political business activity, the business would not report the source of its receipts (i.e. the names of its customers and the sources of its income) but it would have to report expenditures so long as the business meets the significance threshold for registration.

##### (iii) Organizations Funded Through Dues and Contributions

Also, under *Citizens United*, not for profit organizations, however organized, are free to spend however much they choose from their treasuries in independent political activity free from spending restrictions that were previously imposed on corporations by the Federal Election Campaign Act. That doesn't necessarily mean that they can spend their entire treasuries on politics. Many of these organizations have sought and received an exemption from federal taxation from the Internal Revenue Service and are limited in what they can spend on politics by the terms of that federal tax exemption.

Following *Citizens United*, it has become popular for newly created organizations intending to devote substantial resources in the independent political spending arena to obtain tax exemptions under Section 501(c)(4) of the Internal Revenue Code. A 501(c)(4) is organized to promote "social welfare," and may engage in limited political spending.

What troubles many advocates of campaign finance reform is that the Internal Revenue Service has never definitively stated just how much of a 501(c)(4)'s activity can be politics. Some attorneys say it is no more than 49 percent. Others say it is far less. And in the absence of a

comprehensive disclosure regime it is reasonable to question whether some of the newly established (c)(4) organizations are spending in excess of 50 percent of their income on politics. This bill does not address the question of how much a (c)(4) can spend on politics under the Internal Revenue Code and regulations. However, it does require that their federal independent spending be disclosed, if significant.

Another key premise of this bill is that those who give “small money” should be able to do so anonymously. Those who give “big money” would not enjoy this protection. Accordingly, the bill sets out a path through which organizations can use aggregate “small money” dues and contributions and put them to independent federal spending without publicly disclosing the names and addresses of the donors. This is referred to as the “safe harbor political war chest,” or “safe harbor.”

The Follow the Money Act defines “small money” as \$1,000 per person or less per year. That’s up to \$2,000 per member per cycle. The “safe harbor” account provision of the Follow the Money Act allows organizations to build a federal political war chest entirely of “small money” dues or contributions without disclosing the names and addresses of those whose donations make up that war chest. Under the “safe harbor” account provision in the Follow the Money Act, a 501(c)(4) organization would not have to disclose the names and addresses of any of its members if it funds its independent federal election related activity exclusively from this account.

However, the use of larger dues payments and contributions for independent political spending triggers a different set of disclosure requirements. The Follow the Money Act encourages organizations to fund independent federal election related activity exclusively from the “safe harbor” account coupled with a Supplemental Contributions Account. If the organization does so it will only have to attribute money in the Supplemental Contributions Account back to the individual donor.

Recent court decisions appear to prohibit the Congress to require that independent spenders create segregated accounts from which their independent federal election related activity is funded. The regime set out under Follow the Money Act would encourage organizations to elect to utilize a “safe harbor” account and a “supplemental contributions” account to fund their election related activities, but this is entirely voluntary.

Organizations that choose not to use this guidepost must report all of the funds in the treasury that are eligible to be spent on independent federal election related activity to the FEC just as they would report receipts.

As an alternative, an organization could petition the FEC to accept another allocation plan that is functionally equivalent to the “safe harbor” and the supplemental contributions account.

#### (iv) Conduits and Affiliated Organization

The Follow the Money Act prohibits undisclosed transfers of funds for independent federal election related activity between or among organizations, whether affiliated or unaffiliated, without full disclosure of the original source of the funds.

#### (v) Substance Over Form

Undoubtedly, people will try to conceive of ways of moving money around between entities in order to avoid the disclosure requirements of the Follow the Money Act. The FEC will be empowered to promulgate regulations to ensure compliance of both the letter as well as the spirit of the law. In promulgating these regulations, and in the enforcement of the law, it is the substance, rather than the form of transactions that will be closely scrutinized

#### 4. Expenditure Reporting

Generally, those engaged in independent federal election related activities will report expenditures similar to the way candidates do. However, unlike candidate committees, independent registrants accounts do not carry over from one election cycle to another. At the end of a cycle unspent funds in safe harbor and supplemental contributions accounts are returned to the registrant's treasury. If these funds are to be used in the succeeding cycle, they will need to be disclosed in accordance with the requirements of the Follow the Money Act.

#### **Protection of Donors Against Retaliation**

The Follow the Money Act contains numerous provisions to protect individuals who choose to participate in independent federal election related activity from retaliation. Individuals who engage directly in independent federal spending in an amount of \$10,000 or less are fully exempt from the regime. The identities of individuals who contribute to a safe harbor account are protected from disclosure.

Over and above this, the FEC may direct that a registrant confidentially report the identity of a donor of less than \$5,000 who has demonstrated to the FEC that disclosure of the donor's identity will place the donor at a particularized and specific risk of substantial injury to his or her person or business as a consequence of the disclosure. The FEC will publicly disclose the donation but note that the identity of the donor is confidential under the donor protection provision of the Follow the Money Act.

Moreover, no federal officer or employee may take any adverse action against a donor solely or substantially on account of the fact that the donor has made contributions to the registrant. Penalties against the federal officer or employee for violating this provision are analogous to those imposed against federal officers and employees who misuse trade secret information in their possession (e.g. forfeiture of position) in addition to any other penalty provided by federal law.

## **Additional “Stand by Your Ad” Disclaimers Pertaining to Independent Federal Election Related Activity**

All advertising constituting independent federal election related activity must disclose the name of the registrant, and the names of the top three donors to the registrant. The disclosure of the top three donors need not be disclosed if the registrant elects to fund all of its election related activity in an election cycle only from the safe harbor war chest. The FEC may waive the disclosure of top three contributors in any particular public communication if it finds that the disclosure is impracticable and it is empowered to issue regulations to address situations in which more than three people donate similar amounts. Robocalls will need to include a staffed telephone number which recipients can call with complaints and comments.

### **Disavowal of Independent Advertising**

Candidates are often asked by members of the media whether they agree with the message of a particular independent political advertisement and they often reply that they cannot respond out of fear that the FEC will regard the comment as coordination with the independent spender. The Follow the Money Act enables candidates to file a notice of disavowal with the FEC which will be posted on its website.

### **Enforcement and Penalties**

Any person who violates the provisions of the Follow the Money Act will be subject to the full panoply of sanctions that can be imposed under the Federal Election Campaign Act. However exempt organizations will also be subject to a separate set of Internal Revenue Service penalties which can include a loss of the federal tax exemption for the entire election cycle in which a significant violation occurs.

### **New Minimum Contribution Reporting Level for Candidates**

Accounting for decades of inflation the Follow the Money Act raises the minimum contribution that must be itemized on a candidate’s FEC report by name, address and employer from \$200 to \$1,000.

### **No Business Expense Deduction for Independent Federal Election Related Activity**

To ensure that non-exempt taxpaying businesses do not unlawfully take business expense deductions for their independent federal spending, the Follow the Money Act requires that the Internal Revenue Service include questions on the tax return inquiring about these issues and establishes severe penalties on those who fraudulently claim such deductions.

### **New Real-Time Reporting and Disclosure System for All FEC Regulated Entities**

Effective January 1, 2015, the FEC shall make available a real-time contribution disclosure system to its regulated community. This will replace the current system which requires quarterly reports with more frequent reports for receipts and expenditures in close proximity to an election. Once this system is implemented the regulated community will be required to report contributions not more than 10 days after receipt and in some cases, just 48 hours after receipt. The FEC will immediately disclose this information to the general public upon receipt.