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Summary of Statement by David Keating
President, Center for Competitive Politics

While the stated goal of S. 2219 is to increase disclosure of spending to elect or defeat candidates, this radical proposal will chill speech, force nonprofits to radically alter their fundraising and public advocacy efforts, and hijack 25% or more of any advertising in an election year that merely mentions the name of a congressman. Not surprisingly several provisions in the legislation also present significant First Amendment problems, which will generate litigation that has a good chance of success.

There are six key flaws in the bill.

1. The bill would force nonprofits to radically alter their fundraising and public advocacy efforts as nearly all broadcast ads aired in an election year that mention the name of a congressman would be covered by the bill.
2. It would force nonprofits to cut their ad copy by 25% or more in many cases.
3. The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.
4. The bill would add a new and complicated bureaucratic disclosure regime to federal campaign finance law while federal elections are in full swing. The FEC would not have time to draft clarifying rules.
5. The new definition of the “functional equivalency of express advocacy” is vague.
6. The rule regarding covered transfers is probably unenforceable, and would be a nightmare for many non-profits.

As a result of the burdensome new requirements, the legislation would cause nonprofit’s fundraising costs to go up dramatically or cause donations to decline, or some combination of the two. Alternatively, many groups would avoid lobbying ads during even numbered years, which is when many important bills become law.

The new television ad disclaimers would take 7-8 seconds or more to speak and the radio ad disclaimers would take 20 seconds or more. Such absurdly long disclaimers would silence many groups or make ads unaffordable.

Conclusion

S. 2219 piles enormous costs on nonprofits and other speakers – costs that are certain to chill speech, and which appear intended to accomplish indirectly, through costly and arbitrary compliance provisions, what the Congress may not do directly: silence disfavored speakers.



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Statement of David Keating
President, Center for Competitive Politics
Before the Committee on Rules and Administration
United States Senate
March 29, 2012

Mr. Chairman and members of the Committee, thank you for inviting me to present our analysis of S. 2219, a bill which would expand campaign finance regulations.

While the stated goal of the legislation is to increase disclosure of spending to elect or defeat candidates, this radical proposal will chill speech, force nonprofits to fundamentally alter their fundraising and public advocacy efforts, and hijack 30% or more of any advertising in an election year that merely mentions the name of a congressman.

Not surprisingly, several provisions in the legislation also present significant First Amendment problems, which will generate litigation that has a good chance of success.

Additionally, if approved, the legislation would go into effect on July 1, 2012. Changing the basic ground rules for campaign finance so far into an election year would be unprecedented. McCain-Feingold, which was considered and debated for years, still only went into effect for the following election cycle.

Key Flaw #1: The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.

Current law defines a so-called “electioneering communication” as a broadcast ad that mentions the name of a candidate within 60 days prior to a general election or 30 days before a primary. The bill would radically expand that definition. The new time period would be from January 1 to Election Day of each election year for congressional candidates.

Therefore, if the bill became law the following ad would be considered an electioneering communication subject to burdensome restrictions if aired on January 2 of an even numbered year in the district of a hypothetical congressman John Doe who is running for reelection and faces a September primary:

[Pelosi]: Hi. I'm Nancy Pelosi, lifelong Democrat and former Speaker of the House.

[Gingrich]: And, I'm Newt Gingrich, lifelong Republican and I used to be Speaker too.

[Pelosi]: We don't always see eye-to-eye, do we, Newt?

[Gingrich]: No, but we do agree that our country must take action to address climate change.

[Pelosi]: We need cleaner forms of energy and we need them fast.

[Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.

On screen: Call Congressman John Doe and urge him to vote for HR 10000.
202-224-3121
Paid for by American Action for the Environment

I think most people would agree that there is no justification for forcing any additional disclosure on such an ad by this hypothetical group. Yet this legislation would do just that.

American Action for the Environment (AAFE) would face several bad choices in funding such an ad. It might have to disclose all donors, as proposed by the bill, to the public, several of whom might work for utilities or coal industries. Those donors might have supported the group's clean water efforts in response to an appeal for funds on that specific basis, but had not thought to earmark their checks.

Under the bill AAFE would report these donors to the FEC, where they would be publicly listed, and several might find it hard to keep their jobs. Worse yet, imagine if one of the donors didn't even agree with the ad, but was listed as a major donor on the ad itself.

Under the Act, AAFE could set up a special bank account and deposit into it only funds from donors who want to support ads that might run in even-numbered years. But that would massively complicate their fundraising efforts, which are already difficult in this economy. Besides, the Supreme Court has already noted, in *Citizens United v. FEC*, that the existence of an alternative way of engaging in speech – in that case PACs – did not save a prohibition on the use of general-treasury funds to pay for political advertisements.

What would certainly happen is that AAFE's fundraising costs would go up dramatically, or their donations would decline, or some combination of the two. Alternatively, many groups would avoid lobbying ads during even numbered years, which is when many important bills become law.

And what of their donors? The Act's segregated funds provisions require donors to choose between their rights under *NAACP v. Alabama*, the seminal case that allows advocacy groups to shield their membership lists, and their rights under *Citizens United*. Under this law, they cannot exercise both by keeping membership payments and donations private while still contributing to a group's general fund.

Key Flaw #2: It would force nonprofits to cut their ad copy by 25% or more in many cases.

Since our hypothetical ad would now be defined as an electioneering communication, Action for the Environment would be required to speak a very long disclaimer.

What do you suggest they cut from the ad?

Here is the absurd spoken disclaimer that appears would need to be substituted for much of the television ad copy.

I am John Smith, the chief executive officer of American Action for the Environment, and American Action for the Environment approves this message.

When I tried speaking this disclaimer, it took me 7-8 seconds. Some persons have longer names or titles, and some groups have longer names, such as The American Academy of Otolaryngology—Head and Neck Surgery that would make the disclaimer far longer.

Now if this was a radio ad, here is what would have to be spoken today:

Paid for by American Action for the Environment.

Under the bill it appears the required spoken disclaimer would be as follows:

Paid for by American Action for the Environment
www dot AmericanActionfortheEnvironment dot org (or the address or phone)
Not authorized by any candidate or candidate's committee.
I am John Smith, the chief executive officer of American Action for the Environment, and American Action for the Environment approves this message.
Major funders are Ronald B. Coppersmith and Donald Wasserman Schultz

This disclaimer took me 20 seconds to speak. How are groups supposed to purchase 30 second radio ads, a common length for radio ads?

Although this legislation does provide for the FEC to exempt communications from the top two funders list disclaimer if that imposes a hardship, the bill does not allow the FEC time to craft regulations defining what constitutes a "hardship," meaning organizations wishing to speak during the 2012 elections will be forced to guess whether the FEC will find after-the-fact that their specific situation warrants a hardship exemption.

Even beyond 2012, however, either the law would gut advertising on politics and issues, or the FEC would have to craft a "hardship exemption" that essentially exempted all ads of 30 seconds or less – in which case, why include this provision in legislation at all? It is not clear that the FEC would have any statutory authority to write an exemption other than for listing major donors.

The issue of unconstitutional compelled speech is also still alive -- not only are citizens and organizations forced to engage in government-required speech, but the very real possibility exists that donors to organizations will be forced to be listed on an ad implying they "approve" of a particular commercial when in fact they may have little interest or may even oppose the particular expenditure. This is because the bill does not limit identification of "major funders" to those who give or were solicited to support independent expenditures or electioneering communications, but also includes persons or groups that give to an organization's general treasury.

Finally, what does the disclaimer showing the group’s leader accomplish? Viewers and listeners would learn something about John Smith – his sex, weight, appearance, race, age and accent. But nothing additional about AAFE. How does this “disclose” anything relevant to judging AAFE’s message? Do we want speech – whether it concerns issues or candidates – to be judged on that basis?

Key Flaw #3: The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.

I think it is appropriate to review and illustrate some of the disclosures already required by law.

Current 2 U.S.C. 434(c) requires that groups report independent expenditures greater than \$250. This includes the name of the group, individual, or other entity that is doing the spending, the date on which it occurred, the amount spent, the candidate who is supported or opposed by the independent expenditure, the purpose of the expenditure and a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate whom it promotes. This regulation requires that the reporting follow the money—both who gives and who receives. For example, in the recent Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands on independent expenditures. However, their political action committee, called [Our Country Deserves Better](#) PAC, was the source of the funds. A simple search of the FEC website shows that both of these names are listed on the filing papers, along with the names of any person who donated money that furthered the production of the communication. An example is shown below:



SCHEDULE A

ITEMIZED RECEIPTS
All Listed Line Numbers

Committee: OUR COUNTRY DESERVES BETTER PAC - TEAPARTYEXPRESS.ORG

There are a total of 1111 Itemized Receipts

Displaying 1 through 500

Previous Page	Page 1 of 3 [1 2 3]		Next Page
Contributor's Name Contributor's Address	Employer Occupation Memo/Description	Date Memo Text	Amount (\$) Aggregate (\$) Limits
QUINTEN WARD PO BOX 8000 #263 MESQUITE, Nevada 89024	NONE	01/01/2010	500.00
	RETIRED		800.00
Mr. DON WILLIAMS 1615 EVE DRIVE CONCORD, California 94521	NONE	01/01/2010	25.00
	RETIRED		250.00
Dr. DONALD LIDSTER 47-109 EL MENARA PALM DESERT, California 92260	NONE	01/02/2010	100.00
	RETIRED		500.00
ROBERT MAYFIELD 11309 PICKFAIR AUSTIN, Texas 78750	ROBERT MAYFIELD	01/02/2010	100.00
	DQ		800.00
WILLIAM GILES 22587 COVERT ROAD ORBISONIA, Pennsylvania 17243	WILLIAM GILES	01/03/2010	500.00
	ARTIST		500.00
CHARLES E LADER 50 COBURN DRIVE WEST BLUFFTON, South Carolina 29909	NONE	01/03/2010	25.00
	RETIRED		205.00
...	NONE	01/03/2010	50.00

Reporting also follows where the money in independent spending goes. A separate tab on the FEC report shows the disbursements by the group—to whom each payment was made and for what purpose. Consider the example below:

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Email Newsletter Costs
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/06/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = \$11027.73
Calendar YTD Per Election for Office Sought = \$348671.17

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Internet Newsletter Costs - Candidate Specific
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/09/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = \$10500.00
Calendar YTD Per Election for Office Sought = \$348671.17

2 U.S.C. 434(f) requires groups to report “electioneering communications” when they exceed \$1,000.

Current law also requires reporting of “electioneering communications.” This mandates that the identity of the person making the disbursement, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the person making the disbursement, the principal place of business of the person making the disbursement (if not an individual), each amount exceeding \$200 that is disbursed, the person to whom the expenditure was made and the election to which the communication pertains be disclosed. Contributions made by individuals that exceed \$1,000 are disclosed, accompanied by the individual’s name and address.

As with independent expenditures, the reporting of electioneering communications also tracks the money. Looking again at the Massachusetts Senate election in January 2010, a quick search of the FEC database shows that the ambiguous-sounding group “Citizens for Strength and Security” spent \$265,876.96 for a communication on Jan. 13, 2010. While the name of the group may not reveal much, the list of donors who funded the electioneering communication do—the eight donations listed came from two labor unions, the SEIU and Communications Workers of America. Such concerns that corporations like Exxon could set up “shadow groups” through which to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by “Citizens for Strength and Security” were.

ELECTIONEERING COMMUNICATIONS

1. Individual, Organization or Qualified Nonprofit Corporation Making the Disbursement/Obligations

(a) Name
CITIZENS FOR STRENGTH AND SECURITY

(b) Address (number and street) Check if different than previously reported
1718 M STREET NW S342

(c) City, State and ZIP Code
WASHINGTON DC 20036

(d) Name of Employer or Principal Place of Business (e) Occupation

2. FEC Identification Number
C 330001259

3. Is This Statement New or Amended

4. Covering Period M / D / Y through M / D / Y

5. (a) Date of Public Distribution(s) M / D / Y (b) Communication Title The Same

6. The filer is a(n): (a) Individual (b) Unincorporated Organization (c) Qualified Nonprofit Corporation (11 CFR 114.10)

(d) Corporation, Labor Organization or Qualified Nonprofit Corporation making communications under 11 CFR 114.15

(e) Other, specify: 527 Political Org.

7. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes No

8. Custodian of Records (a) Name
Lora Haggard

(b) Address (number and street)
1718 M Street, NW

(c) City, State and ZIP Code
Washington DC 20036

(d) Name of Employer or Principal Place of Business (e) Occupation
Citizens For Strength And Security Treasurer

9. Total Donations This Statement 1250313.00

10. Total Disbursements/Obligations This Statement 265676.96

Under penalty of perjury, I certify that this statement is true, correct and complete.
TYPE OR PRINT NAME OF PERSON COMPLETING FORM Lora Haggard

DISBURSEMENT Electronically Filed by Lora Haggard DATE 01/14/2010

**SCHEDULE 9-A
Donation(s) Received**

<p>A. Full Name of Donor SEIU</p> <p>Mailing Address of Donor 1800 Massachusetts Avenue, NW</p> <p>City State Zip Washington DC 20036</p>	<p>Date of Receipt <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>12</u> / <u>08</u> / <u>2009</u></p> <p>Amount <u>100000.00</u></p> <p>Transaction ID : F92.000006</p>
<p>B. Full Name of Donor SEIU</p> <p>Mailing Address of Donor 1800 Massachusetts Avenue, NW</p> <p>City State Zip Washington DC 20036</p>	<p>Date of Receipt <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>01</u> / <u>12</u> / <u>2010</u></p> <p>Amount <u>100000.00</u></p> <p>Transaction ID : F92.000007</p>
<p>C. Full Name of Donor Communications Worker of America</p> <p>Mailing Address of Donor 501 Third Street, NW</p> <p>City State Zip Washington DC 20001</p>	<p>Date of Receipt <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>01</u> / <u>13</u> / <u>2010</u></p> <p>Amount <u>100000.00</u></p> <p>Transaction ID : F92.000008</p>
<p>D. Full Name of Donor SEIU</p> <p>Mailing Address of Donor 1800 Massachusetts Avenue, NW</p> <p>City State Zip Washington DC 20036</p>	<p>Date of Receipt <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>01</u> / <u>13</u> / <u>2010</u></p> <p>Amount <u>100000.00</u></p> <p>Transaction ID : F92.000009</p>

Similarly, non-profit groups, such as 501(c)(4)s, are also subject to the same kind of disclosure when they commit to running electioneering communications. FEC records show that Susan B. Anthony List Inc., a 501(c)(4), spent \$32,840.00 on creating and airing a radio advertisement called "Truth." The funding for the ad came from another group, Wellspring Committee, Inc, which is clearly identified on the form.

Image# 28991364108
**SCHEDULE 9-A
Donation(s) Received**

<p>A. Full Name of Donor Wellspring Committee, Inc</p> <p>Mailing Address of Donor 9502 Nelson Ln</p> <p>City State Zip Manassas VA 20110</p>	<p>Date of Receipt <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>05</u> / <u>16</u> / <u>2008</u></p> <p>Amount <u>41120.00</u></p> <p>Transaction ID : F92.000001</p>
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Image# 28991364109
**SCHEDULE 9-B
Disbursement(s) Made or Obligations**

<p>A. Full Name (Last, First, Middle Initial) of Payee SRH Media</p> <p>Mailing Address of Payee 2204 Countryside Drive</p> <p>City State Zip Code Silver Spring MD 20905</p> <p>Name of Employer Occupation</p> <p>Purpose of Disbursement (including title(s) of communication(s)) Truth Radio Ad</p>	<p>Date of Disbursement or Obligation <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>05</u> / <u>19</u> / <u>2008</u></p> <p>Amount <u>32840.00</u></p> <p>Communication Date <input type="checkbox"/> M / <input type="checkbox"/> D / <input type="checkbox"/> Y <u>05</u> / <u>19</u> / <u>2008</u></p> <p>Transaction ID : F93.000001</p>
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Other disclosures required by existing law

In addition to the above reporting requirements, existing law requires that any organization organized under section 527 of the tax code that does not file with the FEC (other than for

electioneering communications or independent expenditures) must also report its donors who give more than \$200 in the calendar year with the IRS, and that information is publicly listed. Moreover, any group whose “major purpose” is the funding of express advocacy expenditures—whether organized under section 527 or some other provision—would also become a PAC, subject to additional, ongoing reporting to the FEC, including the names of all donors of more than \$200 to the group. Finally, as noted previously, all independent expenditures and electioneering communications already must include “disclaimers” clearly stating who is paying for the ad.

Key Flaw #4: The bill would add a new and complicated bureaucratic disclosure regime to federal campaign finance law while federal elections are in full swing.

The legislation does not provide time for the FEC to update its regulations, ensuring that groups wishing to speak would face confusion and uncertainty about what is permitted and how to report under the new laws—perhaps the intent of incumbents wary of criticism. Groups would have to choose between disclosing all their donors (violating the right of anonymous association established in *NAACP v. Alabama*) and setting up a separate account for campaign activity (violating *Citizens United*’s holding that nonprofits, businesses and unions may spend from their general treasuries).

Similarly, donors—many unsophisticated grassroots activists unfamiliar with the laws—would have to affirmatively request that their funds not be used on campaign activity to remain anonymous. Current law mandates disclosure only when funds are given to further independent expenditures or electioneering communications. This is sufficient to provide transparency. And it avoids the misleading possibility that contributors to a group, whether the NRA or the Sierra Club, who do not specifically earmark their contributions for such ads, may be associated with advertisements they had no part in developing, and with which they may disagree.

Key Flaw #5: The new definition of the “functional equivalency of express advocacy” is vague.

There is a new “functional equivalency of express advocacy” standard in the bill. Despite claiming to be a “pure disclosure” proposal, it adds a new and indecipherable definition to a core element of campaign finance law. To remind the Committee, the bill states that any ad must be treated as an independent expenditure if it:

Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate’s character, qualifications, or fitness of office.

What does that mean? Doubtless, I could show 50 ad scripts to this committee, and its members would disagree as to which are issue advocacy and which are “the functional equivalent of express advocacy.” And if individuals who have gone through federal elections cannot agree, how can grassroots organizers, many of whom may be new to politics? How is a group to know, *in advance*, that it has not run afoul of this vague provision? How is it anything but an invitation to burdensome and costly investigations by federal officials?

Finally, even provisions that create specific burdens are themselves vague. I have already discussed the requirement that advertisement disclaimers include a list of major donors. But, unlike the heavily regulated “stand by your ad” provisions, no language is mandated for this section of the disclaimers. And the FEC will have no time to provide guidance. How are speakers supposed to know what they can and cannot do when the disclaimer that must be attached to every last ad may be the source of a federal penalty?

Key Flaw #6: The rule regarding covered transfers is probably unenforceable, and will be a nightmare for many non-profits.

The bill requires any entity transferring \$1000 or more in funds to a “covered organization” to disclose its donors if the donor knew or “should have known” that the “covered organization” - a definition that includes corporations, labor unions, trade associations, 527s, and non-profit 501(c)(4) organizations - would make expenditures or electioneering communications of \$50,000 or more in the coming two years, or had made such expenditures in the prior two years. The look-back requirement is bad enough; a donor may not know of those expenditures by another, unrelated organization, and has no safe-harbor even if it inquires of the receiving organization and receives an innocent but incorrect answer. The look-forward requirement, however, is worse. If the donating organization does not “designate[], request[], or suggest[]” that the donation be used for “campaign-related disbursements,” and does not make the donation in request to a “solicitation or other request” for “campaign-related disbursements,” and does not “engage[] in discussions ... regarding ... campaign-related disbursements” - all separate liability triggers - how is it supposed to know that the organization will spend \$50,000 on “campaign related disbursements”?

The provision seems designed to trip up the unwary and provide a means for post-hoc investigations of unsuspecting organizations.

Conclusion

S. 2219 piles enormous costs on nonprofits and other speakers – costs that are certain to chill speech, and which appear intended to accomplish indirectly, through costly and arbitrary compliance provisions, what the Congress may not do directly: silence disfavored speakers.



www.campaignfreedom.org

David Keating

David Keating is the president of the Center for Competitive Politics (CCP), the leading organization dedicated solely to protecting First Amendment political rights.

In 2007 Mr. Keating founded the organization SpeechNow.org due to his frustration by the incessant attacks on the First Amendment. His goal was to give Americans who support free speech a way to join together, pool their resources, and advocate for federal candidates who agree with them—and work to defeat those who do not.

At that time, current campaign finance laws were restricting SpeechNow.org's ability to engage in independent expenditures due to burdensome contribution limits on their donors. This led to the court case SpeechNow.org v. FEC and the result was a ruling by the federal courts that such a law was indeed unconstitutional. This ruling created what has now become known technically as an Independent Expenditure Only Political Committee, also known as a Super PAC.

Prior to becoming president of CCP, he was the executive director of the Club for Growth. He has played a key role in helping the Club grow its membership and influence in public policy and politics.

For many years, Mr. Keating served as executive vice president of the National Taxpayers Union. Mr. Keating also served as the Washington Director of Americans for Fair Taxation, a tax reform group that promotes passage of the FairTax to replace the income tax.

In May 1996 he was appointed to the National Commission on Restructuring the Internal Revenue Service by then Senator Bob Dole because of his leading role in the development and passage of the Taxpayers' Bill of Rights. The Commission's report was released in June 1997, and served as the basis for legislation approved by Congress in 1998, which included a further expansion of taxpayers' rights as advocated by Mr. Keating during his work on the Commission.

He also played key roles in passage of income tax indexing legislation to prevent inflation from boosting taxpayers into higher tax brackets and passage of a bill to protect innocent spouses from being dunned by the IRS for unfair tax debts.