Communications

April 29, 2010

DISCLOSE Act Released in Response to Supreme Court's *Citizens United* Ruling; Senate Version Would Greatly Impact Broadcasters, Cable, and Satellite Operators

by Clifford M. Harrington, Scott R. Flick and Paul A. Cicelski

Several members of Congress led by Senator Schumer and Congressman Van Hollen introduced today the "Democracy Is Strengthened by Casting Light On Spending in Elections" Act—the DISCLOSE Act. The House and Senate versions differ, with the Senate version vastly expanding eligibility for Lowest Unit Charge, reducing the Lowest Unit Charge, prohibiting preemption of political ads, and requiring the FCC to perform political audits of broadcasters, cable, and satellite operators.

The DISCLOSE Act is primarily aimed at reversing, to a large degree, the recent 5-4 decision of the Supreme Court in *Citizens United v. Federal Election Commission*, in which the Court held that corporations, and by implication unions, have a constitutional right to make independent expenditures for advertising supporting or opposing the election of political candidates. As we reported in a Client Alert in January of this year, the decision opened the way for increased political advertising by invalidating limits on corporate political ad spending. The decision allows, among other things, corporations (and unions) to purchase airtime at any time to directly advocate for or against candidates for federal elective office. While the decision invalidated limits on corporate spending on political advertisements, it did retain certain disclosure and disclaimer requirements found in the Bipartisan Campaign Reform Act.

Of particular interest to broadcasters, as well as to cable television and satellite service providers, is Title IV of the Senate version of the DISCLOSE Act. While entitled "TV Media Rates," it also applies to radio, cable television, and satellite services. The provisions affecting media are complex, some are internally inconsistent, and others misconstrue current political advertising laws, so their interpretation is challenging at best. However, it is safe to say that the changes would prove very costly to the affected media entities. Among the major changes to the law proposed are:

1. Sections 315 and 312 of the Communications Act would be amended to allow national committees of any political party (including a national congressional campaign committee of a party) to take advantage of Lowest Unit Charge and Reasonable Access rights previously only available to legally qualified candidates or their official committees.

2. References to "elective" office in the Reasonable Access provision of Section 312 would be deleted, so it appears that Reasonable Access rights would apply to candidacies for non-elective offices, such as appointment to the Supreme Court, a cabinet position, or to other non-elective federal offices.

3. Section 315 would be amended to provide that candidates and national party committees would receive the "lowest charge of the station for the same amount of time that was offered at any time during the 180 days preceding the date of use." If enacted as written, this could prove to be a dramatic change. The new language appears to eliminate the "same class" and "same period" language currently in Section 315, and would also change the current provision that limits Lowest Unit Charge computation to an analysis of what is actually currently running on the station. If that is the case, a candidate or political party committee would get the lowest rate that has run on the station in the past 180 days, regardless of the class of time purchased, or the time of day it airs. For example, if a TV station ran a preemptible 30 second spot at 3:00 a.m. four months ago for $20, and has since generally raised rates, a candidate would be entitled to purchase a fixed position, non-preemptible spot in the station's highest rated program for $20, even though the station's commercial customers might have to pay $2,000 for a similar spot. Such a result would appear to be nonsensical, but reflects the plain language of the Senate legislation.

4. The Senate legislation would prohibit preemption of political ads from legally qualified candidates for federal office and from national committees of political parties unless the preemptions are caused by circumstances outside the control of the licensee. This suggests that a licensee preempting a network program containing such a political ad might have to still clear the ad in its substitute programming.

5. During the 45 days before a primary election and the 60 days before a general election, the FCC would be required to perform random political audits of at least 15 DMAs of various sizes, including "each of the 3 largest television broadcast networks, 1 independent television network, 1 cable network, 1 provider of satellite services, and 1 radio network" in those DMAs.

6. Corporations and unions placing ads supporting or opposing the election of a federal candidate would be subject to a "stand by your ad" requirement under which the CEO of a corporation or union head would be required to personally appear in the ad to state that the corporation or other organization approves the message.

7. Requests of candidates and party committees to purchase time would have to be listed promptly on stations' web sites.

As noted above, the bill is complex, and there are numerous other provisions that would also significantly impact media entities. President Obama has stated that he supports the legislation generally, and broadcast, cable, and satellite licensees should monitor the progress of this legislation carefully.

Should you have any questions regarding this matter, please contact any of the attorneys in the Communications Practice.

Clifford M. Harrington (bio)
Washington, DC
+1.202.663.8525
clifford.harrington@pillsburylaw.com

Scott R. Flick (bio)
Washington, DC
+1.202.663.8167
scott.flick@pillsburylaw.com

Paul A. Cicelski (bio)
Washington, DC
+1.202.663.8413
paul.cicelski@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The information contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.
© 2010 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.