

COMPONENTS OF AN EFFECTIVE DISCLOSURE LAW

In recent years, there has been a steep increase in election spending by outside actors. Much of this spending has come from entities that do not publicly disclose their donors — often referred to as “dark money.”¹ There has also been a rise in “gray money”— election spending by entities that disclose their donors in a manner that makes the original sources of money difficult or impossible to trace.²

Dark money groups spent almost \$181 million in federal contests during the 2016 election cycle.³ This spending took place on both sides of the aisle, with outside groups providing substantial financial support to candidates of both major political parties without disclosing the source of their funds.⁴ The overall rise in dark money partly reflects a sharp uptick in donations to super PAC spenders.⁵ Although super PACs must legally disclose their donors, nonprofit groups that donate to super PACs, such as 501(c)(4) social welfare groups and 501(c)(6) trade associations, do not.⁶ Together, super PACs and dark money groups spent over \$1.4 billion in the 2016 federal election cycle.⁷ With such large sums of money at play, the public needs to have the information necessary to make informed decisions at the polls.

Transparency is especially crucial at the state and local level, where dark money poses a unique threat.⁸ State and local elections are relatively low-cost compared to federal contests, so it is easy for dark money to dominate with unaccountable messages that voters cannot assess meaningfully.⁹ In many contests that the Brennan Center has studied, in fact, dark money groups outspend candidates with amounts in the low \$100,000s, or even in the \$10,000s.¹⁰ Such sums could be prohibitively expensive for candidates and community groups to overcome, but are pocket change for special interests.¹¹ Sources of dark money often harbor a direct economic interest in a state or local election’s outcome.¹² Attempts to influence election outcomes have proliferated, from charter school interests donating in local school board elections, to power suppliers targeting an Arizona public utilities commission race with \$3.2 million in dark money ads.¹³ Dark money spending also impacts ballot measure initiatives, which take place in all 50

¹ CHISUN LEE ET AL., SECRET SPENDING IN THE STATES 5 (2016)

https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.

² *Id.* at 5.

³ Robert Maguire, *\$1.4 billion and counting in spending by super PACs, dark money groups*, CTR. FOR RESPONSIVE POLITICS (Nov. 9, 2016), available at <https://www.opensecrets.org/news/2016/11/1-4-billion-and-counting-in-spending-by-super-pacs-dark-money-groups/> (last accessed Apr. 3, 2018).

⁴ *Id.*

⁵ LEE ET AL., *supra* note 1, at 8.

⁶ *Id.*

⁷ Maguire, *supra* note 3.

⁸ LEE ET AL., *supra* note 1, at 10.

⁹ *Id.*

¹⁰ *Id.* at 17.

¹¹ *See id.*

¹² *Id.* at 1, 17.

¹³ *Id.* at 13-14.

states.¹⁴ Because ballot measures are often high-stakes but low-cost for business interests, secret outside spenders have poured money into these contests.¹⁵

Strengthening disclosure laws is a key way to increase transparency. Despite significant changes in campaign finance law in recent years, disclosure is among the few campaign finance rules that the Supreme Court still embraces. The Court has noted that disclosure requirements “provid[e] the electorate with information, deterring actual corruption and avoiding any appearance thereof[.]”¹⁶

Disclosure also has broad popular support. In a November 2015 Associated Press poll, for example, 76 percent of respondents agreed that “all groups that raise and spend unlimited money to support candidates should be required to publicly disclose their contributors.”¹⁷ Eighty-seven percent of respondents in that same poll reported that they believed that disclosure would be at least somewhat effective at reducing the influence of money in politics.¹⁸ And a 2015 New York Times/CBS News poll underscored that disclosure has broad bipartisan support, with Democrats and Republicans equally supporting a requirement that groups spending money in political campaigns publicly disclose their contributors.¹⁹

States and local governments have been working to strengthen transparency in their elections. For example, Montana’s disclosure law requires *all* groups engaged in election spending to disclose the source of their funds.²⁰ Strong disclosure provisions have also been enacted in California, Delaware, and New York City.²¹ Most recently, Washington State enacted the [Washington DISCLOSE Act of 2018](#), which will strengthen existing transparency measures by requiring disclosure by nonprofits spending significant sums in politics.²²

¹⁴ *Id.* at 14-15.

¹⁵ *Id.* at 15.

¹⁶ *McCConnell v. Fed. Election Comm’n*, 540 U.S. 93, 196 (2003).

¹⁷ LEE ET AL., *supra* note 1, at 23; *see also* AMERICANS’ VIEWS ON MONEY IN POLITICS, THE ASSOCIATED PRESS-NORC & CTR. FOR PUB. AFFAIRS RESEARCH 7 (2015), *available at* http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Topline_FINAL.pdf.

¹⁸ LEE ET AL., *supra* note 1, at 23; AMERICANS’ VIEWS ON MONEY IN POLITICS, THE ASSOCIATED PRESS-NORC & CTR. FOR PUB. AFFAIRS RESEARCH 11 (2015), *available at* http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Topline_FINAL.pdf.

¹⁹ AMERICANS’ VIEWS ON MONEY IN POLITICS, N.Y. TIMES/CBS (June 2, 2015), *available at* <https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html> (76% of Republicans polled, and 76% of Democrats polled, reported that such groups “should publicly disclose”) (under tab labeled “Show responses from,” select “Republicans” and “Democrats,” respectively).

²⁰ MONT. CODE ANN. § 13-37-232 (2015) (outlining disclosure requirements for “incidental committees”); *id.* § 13-1-101(23)(a) (defining “incidental committee” as “a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure”).

²¹ *See* LEE ET AL., *supra* note 1, at 23-24, 26.

²² Political Campaign Financing—Disclosures, S.B. 5991, 65th Leg. Reg. Sess. (Wash. 2018).

Disclosure, on its own, does not replace other necessary campaign finance reforms, but it is a crucial tool to unearth special interest spending that can distort policy. A model disclosure law would:

❖ **Ensure that voters and regulators know who is really behind the spending:**

- ***Extend disclosure to organizations that donate to spender organizations.*** In California, even a nonprofit must disclose donors for contributions made to organizations that engage in outside spending, and outside spenders must list the top two donors who gave them at least \$50,000.²³ Subject to certain exceptions, [Connecticut](#) requires spenders to list the names of their own contributors, as well as the five biggest aggregate donors to those contributors if their funds are used for independent expenditures.²⁴
- ***Require disclosure of the people in charge of opaque spending entities.*** The individuals contributing to a dark money group are generally not the same individuals running the group. Information about the identities of both makes meaningful accountability more possible. Delaware, for example, requires entity contributors to provide “one responsible party” for the entity.²⁵ In New York City, entities contributing to organizations engaging in outside spending are required to disclose “at least one individual who exercises control over the activities of such contributing entity.”²⁶
- ***Require disclaimers on political advertising.*** Public information about funders is most helpful to voters if that information appears on the advertising itself in the form of a “paid for by” disclaimer.²⁷ Disclaimer requirements should require that advertisements state whether they are paid for and/or authorized by a candidate or another group. Lawmakers may consider additional requirements, such as requiring advertisements from outside groups to list the group’s top few contributors on each ad. Such a requirement helps bolster the efficacy of disclosure when ads are run by groups with anodyne names or that are unfamiliar to voters.²⁸

²³ LEE ET AL., *supra* note 1, at 25; CAL. GOV’T CODE § 84222(e)(5) (2014); CAL. CODE REGS. tit. 2 § 18422.5 (2015).

²⁴ LEE ET AL., *supra* note 1, at 25; CONN. GEN. STAT. § 9-621(j)(1) (2013); *see also* CONN. GEN. STAT. ANN. § 9-601(29)(A) (2017) (defining a “covered transfer” as “any donation, transfer, or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another person who makes independent expenditures”).

²⁵ LEE ET AL., *supra* note 1, at 26; 15 Del. C. § 8031(a)(4)(b) (2013) (requiring non-individual contributors to provide name and mailing address of “one responsible party” if the aggregate amount of contributions made by such entity during the election period exceeds \$1,200).

²⁶ LEE ET AL., *supra* note 1, at 26; N.Y.C., N.Y. Local Law No. 41 Int. No. 148-A (2014).

²⁷ BRENT FERGUSON, STATE OPTIONS FOR REFORM 4 (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf

²⁸ *See id.*

- ❖ **Close loopholes that allow nonprofits to keep donors secret when they spend money in politics:**
 - ***Require disclosure by all groups that spend a substantial amount of money in politics.*** [California](#), [Washington](#), and [Montana's](#) disclosure laws apply to groups even if their “primary purpose” is not deemed political.²⁹ The specific dollar amounts that would make spending by such groups “substantial” will vary by jurisdiction. Contact the Brennan Center to discuss the best way to determine the appropriate amount in your jurisdiction.
 - ***Require disclosure on both express advocacy ads and issue ads that mention candidates.*** Laws that only require disclosure of spending on “express advocacy” communications — that is, ads that specifically urge voters to vote for or against a candidate — only address a fraction of independent spending. Advertisers in states with such laws can easily dodge disclosure by avoiding using certain words. In reality, so-called “issue ads” provide an easy vehicle for hidden spending. State and local laws should require disclosure of issue ads within a reasonable window of time before an election.³⁰
 - ***Require disclosure of donors to political spending even if they don't earmark their contributions for that purpose.*** For example, [Delaware](#) requires disclosure of all donors to groups that buy electioneering communications.³¹ Lawmakers might also consider permitting donors to establish separate accounts specific to spending and receiving for election purposes if they do more than political spending. Connecticut and New York have taken this approach.³²
- ❖ **Require disclosure before Election Day.** Some states' disclosure schedules result in significant gaps between campaign spending and reporting. This can leave sources of major election spending undisclosed until just before, or even well after, Election Day.³³
- ❖ **Include reasonable accommodations to ensure disclosure rules are not overly burdensome:**
 - ***Set reasonable monetary thresholds.*** Not every penny needs to be disclosed for a transparency bill to be effective. Small contributions and expenditures do not raise

²⁹ LEE ET AL., *supra* note 1, at 24; CAL. GOV'T CODE § 84222 (defining “multipurpose organization”); MONT. CODE ANN. § 13-1-101(23)(a) (defining “incidental committee” to include groups that may be treated like political committees on account of their political activity); Political Campaign Financing—Disclosures, S.B. 5991, 65th Leg. Reg. Sess. (Wash. 2018) (requiring disclosure by “incidental committees,” defined as “nonprofit organization[s] not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure in excess of . . . reporting thresholds . . . directly or through a political committee”).

³⁰ LEE ET AL., *supra* note 1, at 24.

³¹ *Id.*; 15 Del. C. §§ 8002(27), 8031 (making third-party advertising expenditures, which include electioneering communications, subject to disclosure).

³² CONN. GEN. STAT. ANN. § 9-601d(g)(1) (2013) (allowing persons to establish a dedicated independent expenditure account and limit relevant disclosures to the funds in that dedicated account); N.Y. EXEC. LAW § 172-f(2)(c) (2016) (allowing social welfare nonprofits to establish a segregated account subject to donor disclosures for communications related to public officials or public policy).

³³ LEE ET AL., *supra* note 1, at 26.

the risks of corruption or distorting influence that disclosure laws are meant to address. Implementing reasonable thresholds is a smart way to ensure that disclosure measures are tailored to target big spending.

- ***Permit reasonable exemptions.*** In some instances, the publicity associated with donor disclosure can risk harming certain individuals, such as survivors of domestic violence. Disclosure is also inappropriate when there is evidence that past disclosure exposed a group's members to severe retaliation. Carefully crafted exemptions can protect these individuals' demonstrated need for privacy without meaningfully reducing the anticorruption or informational value of disclosure.³⁴
 - ***Make other reasonable accommodations.*** States should avoid capturing non-political spending in their campaign finance disclosure laws. Under California law, for example, individual donors may expressly prohibit a recipient organization from using their money for political purposes and thus avoid having to be disclosed.³⁵
- ❖ **Ensure adequate enforcement, but make penalties proportional.** Small or technical lapses should not be subject to adjudication procedures or large fines, and penalties should be predictable.³⁶

FOR MORE INFORMATION ON DISCLOSURE

BRENT FERGUSON, STATE OPTIONS FOR REFORM (2015),
<https://www.brennancenter.org/publication/state-options-reform>

CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER, & DOUGLAS KEITH, SECRET SPENDING IN THE STATES (2016),
https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf

MONEY IN POLITICS: EMPIRICAL EVIDENCE DATABASE, BRENNAN CTR. FOR JUSTICE *available at*
<http://www.brennancenter.org/analysis/money-politics-database>

³⁴ *Id.* at 27.

³⁵ *Id.* at 28; CAL. GOV'T CODE § 84222(e)(2).

³⁶ LEE ET AL., *supra* note 1, at 28.