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First Amendment Limitations on Disclosure Requirements

The government often requires regulated entities to make disclaimer statements or disclose information. These disclosure requirements are often seen as a more speech-friendly alternative to governmental prohibitions on speech. They can still run afoul of the First Amendment, however, because the Free Speech Clause limits the government's ability to compel speech. This In Focus provides an overview of First Amendment limitations on disclosure requirements.

Compelled Speech: Basic Principles

The Free Speech Clause applies both when the government punishes a person for speaking and when the government compels a person to speak. For example, a public school cannot force a student to recite the Pledge of Allegiance, as it is generally unconstitutional to force a person to espouse certain political or social views. Compelled factual disclosures can also trigger constitutional protections when they require a person to communicate an unwanted message. The burdens associated with disclosure requirements, and any penalties for noncompliance, can chill protected speech, potentially dissuading regulated entities from speaking at all.

The Supreme Court has applied a variety of "means-end" tests to determine whether disclosure requirements comply with the First Amendment. These tests ask the government to prove a speech regulation is appropriately tailored to a sufficiently important goal—that is, to justify its means and end. Under this framework, laws raising more significant free speech concerns must be more carefully tailored to a more weighty government interest. The Court's approach has varied depending on the type of speech being compelled.

In a 2018 case, the Supreme Court suggested compelled disclosures ordinarily trigger rigorous scrutiny. The Court said that when the government compels "individuals to speak a particular message," it engages in content-based regulation of speech. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Content-based regulations usually trigger strict scrutiny, as discussed in CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion. The **strict scrutiny** standard requires the government to show its regulatory approach is narrowly tailored to achieve a compelling interest. A law is narrowly tailored if no less-speech-restrictive alternatives would achieve its goal. This standard is so difficult to meet that courts consider laws presumptively unconstitutional under strict scrutiny review.

For some types of laws, including those regulating campaign finance or donor disclosures, the Supreme Court has applied an **exacting scrutiny** standard. That level of review is less rigorous than strict scrutiny but still relatively stringent. It requires the government to show its action is substantially related to a sufficiently important interest. The Court has applied a form of exacting scrutiny to government-compelled subsidization, such as requiring public employees to pay fees to a union bargaining agent. Such cases are discussed in *Compelled Subsidization*, CONSTITUTION ANNOTATED. This standard has also generally applied to claims involving expressive association, meaning the right to associate with others to engage in First Amendment activity.

The Court has applied less stringent standards of scrutiny when evaluating disclosures involving commercial speech. In the commercial context, courts generally apply a level of **intermediate scrutiny** that requires the regulation to directly advance a substantial interest. Certain commercial disclosure requirements are subject to an even more lenient standard that requires only a **reasonable relationship** between the means and ends.

Specific Types of Disclosures

Although the Constitution generally protects against compelled speech, courts have upheld disclosure requirements in various circumstances. At the same time, courts have struck down disclosure requirements that are unduly burdensome and fail means-end scrutiny.

Campaign Finance Disclosures and Disclaimers

The Federal Election Campaign Act (FECA) sets forth disclosure and disclaimer requirements for federal campaign financing. In this context, the term *disclosure* refers to periodic reporting to the Federal Election Commission, which is publicly available, and the term *disclaimer* refers to a statement of attribution appearing directly on a campaign-related communication. The Supreme Court has generally affirmed the constitutionality of FECA's disclosure and disclaimer requirements even though they infringe "on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Applying the exacting scrutiny standard outlined above, the Court has identified three government interests justifying these requirements: (1) providing voters with information; (2) deterring quid pro quo candidate corruption and avoiding its appearance; and (3) facilitating the enforcement of campaign finance law. For more information, see CRS In Focus IF11398, *Campaign Finance Law: Disclosure and Disclaimer Requirements for Political Campaign Advertising*, by L. Paige Whitaker; or *Campaign Finance Disclosure and Disclaimer Requirements*, CONSTITUTION ANNOTATED.

In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Court applied a more rigorous form of exacting scrutiny requiring narrow tailoring to a non-campaign-finance donor disclosure requirement. This case is discussed in more detail under "Private Entity Financial Disclosures." Some lower courts have since applied this stricter form of exacting scrutiny in cases challenging campaign finance disclosure and disclaimer laws, with mixed results. *Compare No on E v. Chiu*, 62 F.4th 529, 533 (9th Cir. 2023) (holding that a city's disclaimer requirement for certain campaign ads was likely constitutional), *with Wyo. Gun Owners v. Wyo. Sec. of State*, 592 F. Supp. 3d 1014, 1023 (D. Wyo. 2022) (holding that a state's disclosure requirement for donations "related to" electioneering communications was not narrowly tailored), *appeal filed*, No. 22-8021 (10th Cir. May 10, 2022).

Public Employee Financial Disclosures

The Ethics in Government Act of 1978 requires certain high-level officials to make periodic public disclosures of their finances. Constitutional challenges to these disclosure requirements have centered more on one's right to privacy, rather than First Amendment concerns. However, in such a privacy challenge, at least one court rejected a strict scrutiny analysis in favor of a balancing test that weighs the injury imposed by the law against the government interest furthered by the law. The court ruled that the government interests furthered by employee financial disclosures—increasing public confidence in the government and deterring conflicts of interest—are "important." *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979).

Lobbying and Foreign Influence

The Supreme Court has long held that public disclosure of "who is being hired, who is putting up the money, and how much" is spent to influence legislation is a "vital national interest." *United States v. Harriss*, 347 U.S. 612, 625–26 (1954). The Lobbying Disclosure Act of 1995, as amended in 2007, contains disclosure obligations relating to lobbying activities. In evaluating a First Amendment challenge to the 2007 amendments, one court ruled that the disclosure provisions at issue satisfied strict scrutiny, obviating the need to decide whether to apply the less-stringent exacting scrutiny standard. The court held that the strength of the government interest in greater transparency about lobbying "reflects the seriousness of the actual burden" the disclosure placed on First Amendment rights. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 10 (D.C. Cir. 2009). For more information, see *Lobbying*, CONSTITUTION ANNOTATED.

Congress enacted the Foreign Agents Registration Act (FARA) in 1938 to reduce the influence of foreign propaganda circulating in the United States. Under FARA, agents of foreign principals must register with the federal government, make a public record of the nature of their principal-agent relationship, and maintain all records for official inspection. One court held that FARA satisfied exacting scrutiny, ruling that FARA's disclosures bear a substantial relation to the legitimate governmental interest in "protect[ing] the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals." *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1390–91 (S.D.N.Y. 1972). For more information, see CRS In Focus IF11439, *Foreign Agents Registration Act (FARA): A Legal Overview*, by Whitney K. Novak.

Commercial Disclosures and Product Labeling

The Supreme Court has defined *commercial speech* as speech that only proposes a commercial transaction or that is related solely to the economic interests of the speaker and its audience. Regulations of commercial speech—including disclosure requirements—will generally be subject to intermediate scrutiny, outlined above. Certain commercial disclosure requirements are subject to an even more lenient standard of scrutiny. Laws that compel only "factual and uncontroversial information" related to the goods or services the speaker provides may be upheld if they are "reasonably related" to a sufficient government interest. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Courts have disagreed about whether this standard applies outside the context of preventing deceptive advertising. Most courts to consider the question have held that it does apply to other types of commercial speech (such as product labels), and to other government interests as long as the interest is more than purely hypothetical. Even under this standard, though, a disclosure requirement may be struck down if it is unduly burdensome. For more information, see CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon.

Private Entity Financial Disclosures

Congress has long required financial disclosures related to investments (e.g., securities) and taxation. Outside the campaign finance context, financial disclosures may qualify as commercial disclosures subject to lower constitutional scrutiny. One court upheld certain SEC disclosures, applying only rational basis review after concluding that securities regulation involves a "different balance of concerns" than other compelled speech, particularly when disclosure is to the agency alone. *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011). Financial and corporate governance disclosures may be more susceptible to a First Amendment challenge, however, if they are "inextricably intertwined" with noncommercial speech or bear a speculative connection to the government's interest. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988). Additionally, disclosures available to the public might carry a greater risk of chilling protected speech than disclosures to the government.

In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Supreme Court signaled that financial disclosure laws implicating protected association should receive exacting scrutiny, regardless of whether the disclosure is made to the public or the government alone. The Court recognized that the right of association protects charitable donors' interests in contributing anonymously to groups and causes they support. The Court held a state law automatically requiring charities to submit donor information was not narrowly tailored to the state's interest in preventing fraud.

Valerie C. Brannon, Legislative Attorney
Victoria L. Killion, Legislative Attorney

Whitney K. Novak, Legislative Attorney

L. Paige Whitaker, Legislative Attorney

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