

COMMENTS ON HB 2714-3 (second revised): CONTRIBUTION LIMITS

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May 23, 2019

These comments are on the version of HB 2714-3 that was distributed on Friday, May 17, as the bill will be further changed according to staff of Rep. Rayfield.

Subjects that appeared in previous versions of my comments but are omitted here have been resolved.

I think all of the proposed limits are still too high (except for the limit on individuals contributing to political parties), but my comments here apply mostly to the structure and language of the proposal.

HB 2714-3: CAMPAIGN CONTRIBUTION LIMITS

The problem remains that the proposed limits are so high that the result will be a proliferation of committees, because the creation of a committee gives the creator an additional large increment of contribution authority (both in receiving contributions and making them).

Earlier versions have lacked effective limits on the number of these large-inflow/large-outflow committees that can be created: Political Party Committee and Caucus Political Committee. I refer to these as "super-committees."

Limit on Number of Caucus Political Committees (partly solved)

The least limited committees are Caucus Political Committees and State Party Committees, which can accept \$2,800 per year from any individual and any Multicandidate Committee plus unlimited contributions from Candidate Committees, State Party Committees, other Caucus Political Committees, Small Donor Committees (SDCs), and federal candidate committees. Such committees can then spend those funds with virtually no limits (only limits of \$2,800 per year to any Caucus Political Committee, Multicandidate Committee, or Recall Committee).

I do not favor the creation of this sort of super-committee. But if it must exist, it should be limited to as few as possible.

I am told by staff that the HB 2714-3 language will be changed to expressly state that each political party can have only one Caucus Political Committee per chamber in the Oregon Legislature.

Limit on Number of Political Party Committees (solved)

I am told by staff that the HB 2714-3 language will be changed to limit each political party to only one Political Party Committee. That would be a statewide committee. Party subdivisions could create Multicandidate Committees, which have much lower limits on their inflows and outflows of money.

The Federal Candidate Money Loophole (partly solved)

The proposal allows any Caucus Political Committee or Political Party Committee to accept unlimited contributions from federal candidate committees. This huge loophole is not shown on the chart of Contribution Limits distributed with HB 2714-3.

Federal candidate committees (for candidates for Congress or President) obviously collect tens or even hundreds of millions of dollars per election cycle. Under current law, each federal candidate committee can accept contributions, per election (twice per election cycle) of up to \$2,800 from any individual, \$2,000 from any other federal candidate committee, \$5,000 from any multicandidate PAC, \$2,800 from any non-multicandidate PAC, \$5,000 from any state or local political party committee, and \$5,000 from any national party committee.

HB 2714-3 would allow an unlimited amount of these dollars (from an unlimited number of federal candidate committees) to flow into Caucus Political Committees and Political Party Committees, which in turn would be allowed to re-contribute or spend those dollars with virtually no limits (see above).

I am told by staff that the HB 2714-3 language will be changed to limit Political Party Committees and Caucus Political Committees to receiving contributions only from federal candidate committees established by bona fide Oregon candidates for U.S. Congress. This will limit the overall size of the potential funds flowing through this loophole. I believe the better approach is to close this loophole entirely.

Note also that Oregon law allows federal committees to not report anything to ORESTAR. Federal reporting requirements allow delays in reporting. And, as long as HB 2716 has no drill-down provisions, laundering funds through federal committees will allow Oregon candidates to avoid disclosing in their advertisements the true largest sources of their funds.

Lack of Meaningful Limits on the "Super-Committees" (new discussion)

As noted above, HB 2714-3 allows Caucus Political Committees and State Party Committees to accept unlimited contributions from several sources, including Candidate Committees, other Political Party Committees, other Caucus Political Committees, Small Donor Committees (SDCs), and federal candidate committees. Such committees can then spend those funds with virtually no limits (only limits of \$2,800 per year to any Multicandidate Committee and various limits to Recall Committees from Caucus Political Committees).

This structure would allow a single individual to contribute \$193,000 to a single candidate in a single election cycle, merely by contributing smaller allowed amounts to 5 statewide candidate committees, 15 state Senate candidate committees, and 60 state House candidate committees. Add to that additional money that could be funnelled through federal candidate committees and phony Oregon candidate committees. It takes maybe 5 minutes and no money to create an Oregon candidate committee. C&E Systems will, for a small fee, set up a bank account for it. Under HB 2714-3, each such committee can receive contributions of \$2,800 or \$1,500 or \$1,000 per election and send all of its funds to a Caucus Political Committee or Political Party Committee, which in turn can direct all of those funds to one or more favored candidates.

It would be simple to use this structure to enable any individual to contribute, say, \$400,000 to any candidate, which would qualify as one of the top 15 or so contributions in Oregon history.

Other states limit both the inflow to Political Party Committee and/or outflow from Political Party Committee. Very few states have Caucus Political Committees; states that do restrict either inflow or outflow or both.

Outflow Limits

For example, 11 states allow state political parties to contribute to any candidate only the same as any individual can contribute to that candidate:

Arkansas
Georgia
Hawaii
Kansas (in contested primaries)
Maine
Maryland

Missouri
Nevada
New Hampshire
New Mexico
West Virginia

These states allow state political parties to contribute to any candidate a multiple of what any individual can contribute to that candidate:

Idaho (2x)
Massachusetts (3x)
Minnesota (10x)
Montana (about 2-3x for legislative candidates)
Oklahoma (about 10x for governor, 4x for legislative)
South Carolina (14x for statewide, 5x for legislative)

These states allow state political parties to contribute to any candidate fixed amounts:

Alaska (\$100,000 governor, \$15,000 senate, \$10,000 house)
Arizona (\$80,100 statewide, \$10,100 legislative)
Colorado (\$570,000 governor, \$114,000 other statewide, \$20,500 senate, \$14,805 house)
Connecticut (\$50,000 governor, \$35,000 statewide, \$10,000 senate, \$5,000 house)
Delaware (\$75,000 governor, \$25,000 statewide, \$5,000 senate, \$3,000 house)

(more to add here)

If we take the 11-state Arkansas-West Virginia approach, the pipe from Caucus Political Committees and Political Party Committees to any candidate committee should be reduced from UNLIMITED to \$2,800 / \$1,500 / \$1,000. The Idaho-Montana approach would double those numbers. The Minnesota-Oklahoma approach would increase them by a factor of 10.

Inflow Limits

It is more difficult to document the limits on funds flowing into state political parties. Washington, for example, bans any transfers of funds from candidate committees to political party committees, except "surplus funds" after the election is over.

Measure 47 (2016) does not allow any candidate committee money to flow into Political Party Committees. It requires that Political Party Committees obtain

their funds from individuals (\$2,000 per year), Small Donor Committees (unlimited), and political committees (\$2,000 per year).

Suggested Limits

I suggest these inflow limits to each Caucus Political Committee and Political Party Committee: contributions per year of \$5,600 from any individual, \$5,600 from any type of Oregon political committee.

As noted above, most states also have outflow limits on Political Party Committees.

Allowing Unlimited Use of Personal Funds without Taglines

The proposal expressly allows unlimited use of a candidate's "personal funds." I have previously written about how this is a huge loophole to funnel corporate funds into campaigns. Corporations can award multi-million dollar bonuses to executives who retire and immediately use those funds to run for office (see Pete Ricketts in Nebraska). **At a minimum, candidates using substantial amounts of "personal funds" should be required to disclose that in all of their advertising, including the amount of personal funds so dedicated.** Unfortunately, the most recent version of HB 2716 does not require that.

No Provision about Money Balances held by Existing Committees

Existing committees can have lots of money as of the operative date of the proposal in December 2020. The proposal is silent as to whether these money balances can be retained and used after the operative date, except for SDCs. Say an existing candidate committee of an incumbent holds a balance of \$1 million on that date and that the candidate's opponents in the 2022 elections have no such balance. Those opponents will have to raise all of their funds under the contribution limits, while the incumbent is apparently allowed to spend the \$1 million.

There need to be limits on the money balances that existing committees can carry forward after the operative date and/or a requirement that those funds be donated to Oregon charities.

The Ninth Circuit Court of Appeals in *Lair v. Motl*, 873 F3d 1170, 1186, (9th Cir 2017), *cert denied sub nom. Lair v. Mangan*, 139 S Ct 916 (2019), noted that a feature that preserved the validity of Montana's limits on campaign contributions was that "by prohibiting 'incumbents from using excess funds

from one campaign in future campaigns,' Montana 'keeps incumbents from building campaign war chests and gaining a fundraising head start over challengers.'"

The \$1,000 Limit on Contributions to All Local Candidates Should be Subject to Local Override only in a Downward Direction

Section 3(1)(b) now states:

- (b) Except as otherwise provided by a local provision or paragraph (c) of this subsection, the limits on aggregate contributions that may be accepted by a candidate or the principal campaign committee of a candidate for the office of state Representative under this section also apply to a candidate or the principal campaign committee of a candidate for any elected office that is not a state office.

That language would allow a local government to override the \$1,000 limit with any limit it wishes or no limit at all. Local governments should be allowed to alter the otherwise applicable limit only in a downward direction. I suggest this revision:

- (b) The limits on aggregate contributions that may be accepted by a candidate or the principal campaign committee of a candidate for the office of state Representative under this section also apply to a candidate or the principal campaign committee of a candidate for any elected office that is not a state office, unless local governments adopt lower limits applicable to such candidate.

Subsection (3)(1)(c) stands by itself. It is not necessary to refer to it in Subsection (3)(1)(b).

HB 2714-3 defines "local provision" by referring to any "provision adopted by a city, county or other local government." But it does not define "local government." I suggest:

"Local government" means the government of any county, city, municipality, regional government, or district.

The Metropolitan Service District ("Metro") is actually a regional government, as are 7 regional councils of governments (COGs).

I am told by staff that LC perceives a problem with the Legislature limiting a local "home rule" government to only lowering the \$1,000 limit and not raising it. Home rule counties and cities are subject to laws adopted by the Legislature. The Legislature bans them from doing many things, like controlling rents or diesel pollution or adopting higher minimum wages or banning use of GMO seeds. There are dozens of Oregon appellate court decisions so holding.

[A state] statute will displace a local ordinance only "where the text, context, and legislative history of the statute 'unambiguously expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." **Rogue Valley Sewer Services**, 357 Or. at 450-51, 353 P.3d 581 (quoting **Gunderson, LLC v. City of Portland**, 352 Or. 648, 663, 290 P.3d 803 (2012)).

Nw. Nat. Gas Co. v. City of Gresham, 359 Or 309, 336, 374 P3d 829, 845 (2016).

Thus, we begin by examining how state law might preempt a local law enacted pursuant to a city's "home rule" authority. Under that framework, a local law is valid and not preempted if "it is authorized by the local charter or by a statute," and if it does not "contravene[] state or federal law." **Rogue Valley Sewer Services v. City of Phoenix**, 357 Or. 437, 450, 353 P.3d 581 (2015) (quoting **La Grande/Astoria v. PERB**, 281 Or. 137, 142, 576 P.2d 1204, adh'd on recons.) 284 Or. 173, 586 P.2d 765 (1978).

Qwest Corp. v. City of Portland, 275 Or App 874, 882, 365 P3d 1157, 1162, (2015), *review denied*, 360 Or 465 (2016).

Small Donor Contribution Limit Preemption

HB 2714-3 has a new provision in Section 3:

- (1) (c) Notwithstanding any local provision, a candidate for any elected office not listed in this section may accept unlimited contributions from a small donor political committee.

This would preempt the provisions in the Multnomah County and Portland charters that limit "small donor committees" to receiving contributions only from individuals in amounts of \$100 or less per individual per year. This would allow a state-level SDC, receiving contributions of up to \$250 per individual per year,

to make unlimited contributions to candidates in Multnomah County and Portland races, preempting the local provisions.

While the Legislature has the power to override the voters of Multnomah County and Portland, doing so is not a good idea. Anything this language would accomplish could be better achieved with this:

A small donor committee at the state level may create a subaccount to qualify as a small donor committee under a local law. Any lawful contribution received from an individual by the state-level small donor committee may be allocated, in whole or in part, to the subaccount. Such allocation shall not prevent the subaccount from qualifying as a small donor committee under the local law, if each contribution amount allocated to the subaccount would comply with the local law, if it were made by the individual who contributed it to the state-level small donor committee.

The state-level small donor committee shall report, pursuant to ORS 260.057, every such allocation to a subaccount. Each expenditure by a state-level small donor committee reported pursuant to ORS 260.057 shall identify the subaccount, if any, from which it was made.

This would enable state-level SDCs to participate in local elections without overriding the local provisions regarding SDCs.

Need for Severability Clause

The very short severability clause in HB 2714-3 is an improvement. I still recommend the severability clause from Measure 47 (2006).

Need for Legislative Findings

I refer to my May 4 comments on this subject.

Need for Provision Allowing Entities to Create Separate Committees

I refer to my May 4 comments on this subject.