CONCERNS ABOUT HB 4024-5

Honest Elections Oregon

March 3, 2024

HB 4024-5 has very large loopholes in its contribution limits and disclosure and disclaimer requirements that render those limits and requirements largely irrelevant to sophisticated providers and users of money in Oregon politics.

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We have identified a few of the loopholes, after first receiving a copy of the -5 amendment bill at 4:55 pm on March 1, 2024.

CONTRIBUTION LIMITS

Contribution limits expressed as "persons" instead of "individuals."

Initiative Petition 9 (IP 9) and Initiative Petition 42 (IP 42) authorize contributions by "individuals," as does federal law applicable in campaigns for federal office (since federal law bans contributions by corporations and unions).

HB 4024-5 authorizes contributions by "persons," without changing the current definition of "person" in Oregon campaign finance law, ORS 260.005(16):

> "Person" means an individual, corporation, limited liability company, labor organization, association, firm, partnership, joint stock company, club, organization or other combination of individuals having collective capacity.

In Oregon election law there are no definitions of "association" or "club" or "organization." Expressing contribution limits in terms of "persons" rather than individuals effectively multiplies the contribution limits available to anyone and any entity, because any of them can create new "persons" (in the form of new corporations, LLCs, associations, clubs or organizations) and enjoy additional instances of the authorized contributions.

Very large in-kind contributions by anyone and any entity.

HB 4024-5 allows any person to provide to any candidate (apparently per rolling 12-month period--another complication):

- physical space (office space, parking, etc.) limited to 2,500 square feet for 12 months
- legal services related to compliance with election laws and defending against complaints
- other personal services of child care, elder care, and interpretation and translation services (unlimited)
- $5,000 of food and beverages to any candidate for statewide office; $2,500 to any candidate for non-statewide office

- > $5,000 of transportation to any candidate for statewide office; $2,500 to any candidate for non-statewide office

- > $1,000 of small gifts to any candidate

These are very large amounts of in-kind contributions. 2,500 square feet of office space in downtown Portland is worth about $70,000 per year.

Membership Organizations allowed to receive and make very large contributions.

HB 4024-5 allows Membership Organizations to be composed of individuals or entities, which means that every trade organization is a membership organization.

HB 4024-5 allows Membership Organizations to receive unlimited donations from any person (individuals, corporations, unions, associations, etc.). It allows any Membership Organization to contribute per "election":

- > $3,300 x 10 per election (totals to $6,600 x 10 per election cycle) [that means $66,000 in the election year] to each statewide candidate

- > $3,300 x 5 per election (totals to $6,600 x 5 per election cycle) [that means $33,000 in the election year] to each legislative candidate

- > $5,000 to any and all multicandidate committees, with no limit on the number of multicandidate committees [HB 4024-3 allowed $25,000, so this is an improvement.]

Any Membership Organization may also contribute to any statewide candidate 36 FTE per calendar year of in-kind services, "limited to direct voter contact, community organizing, community outreach and staff support." This is an improvement over HB 4024-3, which had no stated restrictions as to what those services are--except that they could not be persons who served as paid campaign consultants during the previous 18 months.

We remained concerned, because "staff support" is vague and could allow the Membership Organization to provide professional services, providing a value in the range of $300,000 to any statewide candidate per calendar year. If the candidate begins her campaign in the year before the election year, this contribution can be in the range of $600,000 over the two calendar years (36 FTE x $100,000/year value of professional x 2 calendar years). The allowed in-kind contribution to any non-statewide is 12 FTE per year per candidate and could amount to $200,000 (12 FTE x $100,000/year value of professional x 2 calendar years).

HB 4024-5 has ineffective anti-proliferation language for Membership Organizations.

HB 4024-5's anti-proliferation language is different from that in HB 4024-3 but not materially better. It contains a new exception that allows anyone to create and finance any number of membership organizations, as long as each one "has the authority to make independent decisions as to which candidates, if any, to support or oppose a candidate." [sic] This would allow any person or entity to create and fully fund multiple Membership Organizations, appoint a colleague to head each one, and denote that each one has authority to make independent decisions. In reality, the funder would be making the decisions. The funder could even remove the heads of the Membership Organizations at will.

HB 4024-5 allows non-human entities (corporations, unions, clubs, associations, etc.) to be members of Membership Organizations, thus introducing another proliferation problem.

Small Donor Committees (SDCs) allowed to make very large contributions.

Under HB 4024-5, anyone and any entity can create an SDC. SDCs can receive contributions from any individual (although HB 4024-5 does not define "individual").

HB 4024-5 allows any SDC to contribute to any statewide candidate (twice during the election year) basically $33,000 times each increment of 2,500 contributors to the SDC. Thus, if a SDC has 10,000 donors, it can contribute to any statewide candidate $33,000 x 4 = $132,000 twice during the election year = $264,000.

HB 4024-5 allows any (SDC) to contribute to any candidate for the Oregon Legislature (twice during the election year) basically $16,500 times each increment of 2,500 contributors to the SDC. Thus, if a SDC has 10,000 donors, it can contribute to any legislative candidate $16,500 x 4 = $66,000 twice during the election year = $132,000.

HB 4024-5 also allows any Small Donor Committee (SDC) to contribute to any multicandidate committee $10,000 per year. There is no limit on the number of multicandidate committees receiving those funds. Each multicandidate committee can then contribute to candidates, political parties, caucus committees, and other multicandidate committees. The HB 4024-5 level is an improvement over the HB 4024-3 version, which allowed any SDC to contribute $132,000 per year to any multicandidate committee.

These high SDC limits are only for very large SDCs, those with 2,500 or more contributors. HB 4024-5 has unreasonably low limits for small SDCs. For example, an SDC with up to 2,499 contributors can contribute only $3,300 to a candidate per

election. That is far less than allowed by IP 9, which would allow such an SDC to contribute $20,000 to a statewide candidate or $10,000 to any other state candidate or $5,000 to any local candidate.

HB 4024-5 allows candidates of major parties twice the contributions as candidates of minor parties.

HB 4024's contribution limits are per "election," with the official primary and general elections apparently considered to be separate. Since minor parties in Oregon are not allowed to have official primary elections, supporters of their candidates can contribute only once up to the contribution limits. But supporters can contribute to any major party candidate up to the contribution limits twice, once for the primary and again for the general election. This is another instance of incumbent protection in HB 4024-5.

HB 4024-5 severely restricts political parties.

The HB 4024-5 contribution limits on political parties are low. All of the entities and divisions of any political party, taken together, can contribute only $5,000 to a candidate per election. In contrast, IP 9 allows $50,000 to a statewide candidate and $10,000 to any other candidate.

HB 4024-5 allows each political party to have only one "political party multicandidate committee" and apparently (but not clearly) intends that all contributions by all entities and divisions of the party be made through that committee.

Foreign corporations and entities allowed to make expenditures and contributions.

IP 9 bans contributions and independent expenditures in Oregon elections (including candidate and ballot measure elections) by all foreign corporations and entities. Without that ban, they can make unlimited contributions and independent expenditures regarding ballot measures and can form Membership Organizations and take advantage of the extremely high limits on contributions to candidates from such organizations.

Neither HB 4024-5 nor federal law bans or limits foreign corporations and entities from making contributions or independent expenditures regarding ballot measures. Federal law does ban them from contributing to candidates. Under HB 4024-5, however, they could create and fund Membership Organizations and probably use the very large contribution amounts allowed for Membership Organizations.

Limits on carrying over funds from one election cycle to another.

HB 4024-5 limits the amount of funds that candidates can carry over from one election cycle to another. But it allows them to transfer those funds to unions and trade associations, among others, who might return the favor in the next election cycle and thus provide the incumbent with an unfair advantage over newcomers, who would be required to comply with the new contribution limits. Such benefit to incumbents is considered a severe "red flag" by the United States Supreme Court, warranting striking down the entire law as violation of the First Amendment.

DISCLOSURE REQUIREMENTS

HB 4024-5 completely repeals the disclosure requirements enacted by the Oregon Legislature in 2019 (ORS 260.275, 260.281 and 260.285). Those laws required that each independent spender on either candidate races or ballot measures provide a list of all of their funders providing at least $5,000 to the independent spender.

HB 4024-5 replaces those requirements with illusory disclosure. There are no disclosure requirements at all applicable to amounts raised or spent by candidate campaigns or ballot measure campaigns (for or against). The only requirements apply to independent expenditures about candidates and only to persons spending $50,000 or more on such independent expenditure during the election cycle. Such independent spenders are required only to disclose their "donors" of $5,000 or more (no time period specified). There are no anti-proliferation provisions applicable to "donors," so any source of funds could create clubs or associations and split up its donations so that none of them reach the $5,000 threshold and none of them have to be disclosed.

National experts who have read HB 4024-5 find it confusing:

> Tracing to original sources is only required for a donor "who spends an aggregate of $50,000 on independent expenditures in an election cycle" (Section 13(4)(a)). Read literally, it means a donor must separately spend $50,000 on independent expenditures directly, i.e., on its own ads, which means there will be no tracing to original sources because big donors will just not buy their own ads (and largely already don't do that, which is why tracing is important).

DISCLAIMER REQUIREMENTS

Current law does not require any disclaimers (taglines) on advertising paid for by candidate committees or advertising about ballot measures. It applies only to some independent expenditure advertising about candidates and is (and has been) easily evaded by routing funds through nice-sounding nonprofit corporations. It also exempts all advertising paid for by for-profit corporations, who need not disclose their sources of funds for the ads.

HB 4024-5 contains no change to the existing ineffective disclaimer requirements, except that:

> it exempts all advertisements costing less than $10,000 each from any disclaimer requirement

> it requires certain advertisements to have links to websites where more information may be found

A savvy media buyer would simply have the invoices for an advertising campaign broken into amounts of less than $10,000 per invoice. Say the media buyer puts an ad on TV 11 times. The total price is $100,000. The media buyer just asks the TV station or network to bill each instance of the ad separately ($9,091 each). None of ads would exceed the $10,000 threshold, so none of the ads would be required to name any of the funders of the ad campaign.

A national expert states:

> Existing law is amended [by HB 4024-5] to only require top donor disclaimers on ads that individually cost $10,000 or more (Section 15, ORS 260.266(2)(a), (5)). Disclaimers should generally apply based on the spender, not the cost of the ad itself, and taking this approach could incentivize buying multiple $9,000 ads to avoid disclaimers.

IP 9, in contrast, requires that candidate or independent spenders spending more than $10,000 on political advertising about candidates or measures name the 4 largest funders to them of more than $5,000 each.

PENALTIES AND ENFORCEMENT PROVISIONS

HB 4024-5 has only one very minor change to existing enforcement procedures, which currently allow partisan officeholders to waive violations or impose less than adequate penalties without being subject to judicial review. The change is that the person alleging a violation of campaign finance law can "request" that the Secretary of State convene an administrative hearing, if the potential penalty for the alleged violation is $10,000 or higher. HB 4024-5 does not require that the Secretary of State grant the request. The result of an administrative hearing, even if the request is granted, is ultimately a decision on the alleged violation by the Secretary of State, not by any independent person. HB 4024-5 provides for no judicial review, if the Secretary of State disregards the complaint or dismisses it or imposes a trivial penalty for a serious violation. IP 9 provides for the opportunity for judicial review in those circumstances.

VOTERS' PAMPHLET CHANGES

The HB 4024-5 includes no improvements to the Voters' Pamphlet. IP 9 doubles the space allowed for each candidate, eliminates the fee for low-funded candidates, and requires that the Secretary of State maintain an online Voters' Pamphlet that shows the largest original source donors to each candidate and each ballot measure.

LIMITED CLOSING OF BRIBERY LOOPHOLE

HB 4024-5 partially closes the loophole in Oregon's law defining bribery of public officials, which allows bribery by means of campaign contributions. HB 4024-5 keeps the loophole open, "unless the contribution is made in exchange for a promise to perform or not perform an official act." IP 9 fully closes the loophole, so that the law would define the crime of accepting a bribe as occurring "if the public servant . . . Accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced."

HB 4024-5 DELAYS ALL REFORMS TO 2027 OR LATER

IP 9's contribution limits would take effect January 1, 2025. HB 4024-5 delays the operative date of all contribution limits to January 1, 2027.

IP 9's disclosure and tagline requirements would take effect June 1, 2025. HB 4024-5 delays the operative date of all disclosure-related requirements to January 1, 2028.

That is a substantial delay of over 3 years, particularly since HB 4024-5 immediately repeals the existing disclosure requirements for entities, including nonprofit corporations with nice-sounding names, making large independent expenditures (ORS 260.275 - .285).