COMMENTS ON HB 2716-5: ADVERTISING DISCLAIMERS

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This bill is very inadequate. This draft is worse than its predecessors.

In previous drafts, the most important defect was the lack of a drill down provision. This version is worse, because it completely eliminates the funder identification requirement for all ads placed by a candidate committee and it requires no identification of any contributor or independent spender providing less than $10,000 to any political committee or campaign.

I have attached the text of Washington Chapter 261, Laws of 2019, which does include a drill down provision very similar to the one in the Portland charter amendment, Measure 26-200 (2018). Without a drill down provision, HB 2716-5 will not accomplish the purpose of informing voters about who or what is paying for political advertisements.

Most of my comments on HB 2716-3 (May 6) and on HB 2716-4 (May 20) have been disregarded. HB 2716-5 does not come close to the effectiveness of the tagline provisions in Measure 47 (2016) or the Portland charter Measure 26-200 (2018).

Almost Zero Funder Identification Requirement and Very Inadequate Drill Down Provision

HB 2716-5 has no drill down requirements at all and almost no funder identification requirement. Section 2 establishes the funder identification requirement but then exempts all communications by candidates and candidate committees. This shows the change made from HB 2716-4 to HB 2716-5:

> SECTION 2.
>
> (1) Except as otherwise provided by a local provision, a communication in support of or in opposition to a clearly identified candidate must state the name of the persons that paid for the communication.
>
> (2) For the purpose of complying with subsection (1) of this section:

(a) Except as provided in paragraph (b) of this subsection, a communication in support of or in opposition to a clearly identified candidate by a political committee or petition committee must state:

(A) The name of the political committee or petition committee; and

(B) The names of the five persons that have made the largest aggregate contributions ~~to the candidate or~~ of $10,000 or more to the committee in the election cycle in which the communication is made.

(b) A communication in support of or in opposition to a clearly identified candidate by an individual, a for-profit business entity or a candidate or the principal campaign committee of a candidate must state the name of the individual, for-profit business entity or candidate.

Note that all communications in subsection (2)(b) are exempt from any requirement that any **funders** be identified. This renders the bill quite nearly useless. It applies only to political committees (other than candidate committees) or petition committees (for unknown reasons).

Even for non-candidate political committees, HB 2716-5 has a very limited provision for determining the true original sources of the funds used to disseminate political advertisements. An ad placed by a political committee needs to disclose the top 5 funders of at least $10,000 to the campaign. All of those funders could be political committees and/or nonprofit corporations with euphonious names. So the disclaimer could convey no actual information to voters.

A communication placed by an individual or a for-profit corporation does not have to disclose anything except the name of the individual or corporation, regardless of where the funds originated. This also could provide no actual information to voters.

If the communication is placed by an entity that is neither an individual nor a for-profit corporation, then it must disclose "the names of the five persons that have made the largest aggregate donations of $10,000 or more to the person in the election cycle in which the communication is made," except for donations that are restricted from political use by the donors or by law.

This provision is designed to apply to nonprofit corporations, associations, and other groups. But all of the persons making the $10,000 contributions could be political committees or other nonprofit entities with euphonious names, again thwarting the purpose of the disclaimer requirement.

There needs to be some level of drill down to the true original sources of the funds. The Portland Measure 26-200 (2018) provides:

> If any of the five largest Dominant Contributors or Dominant Independent Spenders is a Political Committee (other than a Small Donor Committee) or nonprofit organization, the prominent disclosure shall include its top three funders during the current Election Cycle.

This solves the problem in several ways. First, it makes it more difficult to avoid disclosing the true sources of the funds by requiring at least one level of drill down. Second, it requires a longer disclaimer by entities that may be serving as cover for the true original sources.

I provided another solution to legislative staff on May 7:

> I have thought more about the drill down for nonprofit corporations. How about this: If one of the top 5 contributors is a nonprofit corporation, then in place of the name of the nonprofit corporation the disclaimer would name the single largest donor of funds (that can be used for political purposes, not 501c3 funds or restricted funds) to the nonprofit corporation in the current election cycle; provided, that the donor is itself not a nonprofit corporation or political committee. If it is, then its name would be replaced with its own largest donor of funds, and so on.
>
> In other words, it would be a drill down with a width of one.

This same approach would work for political committees as contributors.

On May 14 I further noted:

> Minnesota has a top-3 funder disclaimer law. It has this interesting provision regarding tagline drill-down:
>
> 25. [211B.0445] DISCLOSURE CIRCUMVENTION PROHIBITION.
>
> A committee placing a campaign advertisement or persons acting in concert with that committee is prohibited from creating or using another committee to avoid, or that results in the avoidance of, the

disclosure of any individual, industry, business entity, or another committee as a top contributor.

HB 2716-5 adopts neither of my suggestions.

As noted above, I have attached the text of Washington Chapter 261, Laws of 2019, which does include a drill down provision very similar to the one in the Portland charter amendment, Measure 26-200 (2018). It states:

> (2) If one or more of the top five contributors identified under subsection (1) of this section is a political committee, the top three contributors to each of those political committees during the same period must then be identified, and so on, until the individuals or entities other than political committees with the largest aggregate contributions to each political committee identified under subsection (1) of this section have also been identified. The sponsor must identify the three individuals or entities, not including political committees, who made the largest aggregate contributions to any political committee identified under subsection (1) of this section in excess of the threshold aggregate value to be considered an independent expenditure in an election for public office under RCW 42.17A.005(29)(a)(iv) reportable under this chapter during the same period, and the names of those individuals or entities must be displayed in the advertisement alongside the statement "Top Three Donors to PAC Contributors.

Donation Threshold is Too High

HB 2716-5 is worse than its predecessor versions, because it dramatically raises the threshold for identifying any donor in an advertisement to a minimum contribution of $10,000. This is too high. The threshold in the Multnomah County and Portland measures is $500. The threshold in Washington is $700.

I suggest setting the threshold at $1,000 and making the requirements the same: the disclaimer must name the top 5 contributors to the campaign (candidate or independent expenditure) of $_______ or more, with political committees and nonprofit organizations subject to the "drill down" provisions of the Portland measure, described above.

Need to Have Nature of Business Disclosed

The proposal does not require any disclaimer to identify the business(es) engaged in by the individual or for-profit entity paying for the advertisement. Many individuals have names that are not recognized by the public. Many corporations have names that do not identify their businesses. For both reasons, the Portland charter amendment requires that the disclaimer include:

> The types of businesses from which the maker of the Contribution has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).

Every corporation has an NAICS code, as it is required for federal tax filings.

Stating the type of business of the contributor is critical to the effectiveness of the disclaimer requirement.

Applies Only 30 or 60 Days Before Election

The proposal requires disclaimers only if the communication is printed or transmitted "within the time frame provided in ORS 260.005 (10)(c)(B)(iii)." That is 30 days before the date of a primary election or 60 days before the date of a general election.

These timeframes are too short. There are no timeframes in the Portland or Multnomah County measures. The timeframe in California is 120 days before the primary election and continues until the date of the general election. We suggest that approach, at a minimum.

I am informed by legislative staff that the intent of HB 2716-5 is to extend the period to 120 days before any primary or general election. That would supposedly be accomplished by means of language in HB 2983 that would amend ORS 260.005 (10)(c)(B)(iii). But HB 2983 may not be enacted, or it may be changed before it is enacted. The change to ORS 260.005 (10)(c)(B)(iii) needs to be in this bill as well.

The Local Provision Reverse Preemption Problem

HB 2716-5 conditions any disclaimer requirement with this: "Except as otherwise provided by a local provision * * *." This is a "reverse preemption"

clause that would allow any local government to preempt any disclaimer requirements in this proposal.

This language probably meant to protect the Portland and Multnomah County disclaimer provisions from preemption, but the wording is wrong. It should be deleted, and elsewhere should be this provision:

> Local governments may enact and enforce provisions requiring that political advertisements state the names and other information about the persons that paid for the advertisements. Those who place political advertisements shall comply with the requirements stated in this 2019 Act and with such local government provisions to the highest possible extent.

Needs Definition of Political Committee

Since this proposal refers to requirements upon a "political committee," that term should be defined as including:

> Caucus committees
> Multicandidate political committees
> Political party committees
> Recall political committees
> Small donor committees (SDCs)

I believe that the workgroup more or less agreed that the disclaimer requirements would not be imposed on ads for or against measures, so measure committees would not be included. Nor would petition committees, so that references to such committees should be stricken.

Need to Go Backward to Previous Election Cycle

One way to evade the proposal would be for a committee to accept large contributions in, say, October 2020 (near the end of the 2020 election cycle) and then use those funds during the 2022 election cycle). As written, the proposal would require no disclaimers regarding those funds.

We should add a provision stating:

> If the funds used for the political advertisements exceed the amounts contributed to the person during the election cycle in which the communication is made, then the names to be stated in the

advertisements shall include the names of the five persons that have made the largest aggregate donations of $_______ or more in the current or previous election cycle.

Exempt Sources of Funds

The provision allowing "restricted donations" could be improved:

(ii) A restricted donation received from a foundation or other person that may not be used to make a communication in support of or in opposition to a candidate under federal or state tax law or at the instruction of the donor.

Digital Communication Exemption

The proposal allows a digital communication to not disclose the funders but merely present a link to that information. That is insufficient.

If this provision stays, it should at least require that the landing website "<u>prominently display</u> the additional information required by this subsection."

Anonymous Donations

All anonymous donations to the person making the communications should be disqualified from use in paying for the communication. Otherwise, the person could simply claim that the ad was paid for by a bunch of anonymous donations of $1,000 or less. I see no reason for this loophole.

De Minimis Value Exemption

The proposal seems to conflate items of de minimis value with items for which the disclaimer requirement would be impractical. For example, the proposal states that skywriting is of de minimis value. But the "value" of the method of communication is not relevant.

The Portland measure excludes various items in its definition of "communication":

> "Communication" means any written, printed, digital, electronic or broadcast communications but does not include communication by means

of small items worn or carried by Individuals, bumper stickers, Small Signs, or a distribution of five hundred (500) or fewer substantially similar pieces of literature within any 10-day period.

"Small Sign" means a sign smaller than six (6) square feet.

This itemization is superior to a generic reference to items of de minimis value. It also helps preserve the validity of the requirement under the U.S. Constitution by exempting "a distribution of five hundred (500) or fewer substantially similar pieces of literature within any 10-day period."

Specifications are Inadequate

The proposal directs the Secretary of State to adopt rules so that the disclaimers are perceptible to average persons. It suggests some elementary specifications for "print or digital" and then "audio" communications, but it does not mention video communications.

The Portland measure is more specific:

(o) "Prominently Disclose" means that the disclosure shall be readily comprehensible to a person with average reading, vision, and hearing faculties, with:

(1) any printed disclosure appearing in a type of contrasting color and in the same or larger font size as used for the majority of text in the printed material;

(2) any video disclosure remaining readable on the regular screen (not closed captioning) for a not less than 4 seconds;

(3) any auditory disclosure spoken at a maximum rate of five words per second;

(4) any website or email message in type of a contrasting color in the same or larger font size as used for the majority of text in the message;

(5) any billboard or sign other than a Small Sign: in type of a contrasting color and not smaller than 10 percent of the height of the billboard or sign.

We suggest using the Portland measure's specifications.

Another loophole allows the Secretary of State to subjectively exempt campaign communications that are "too small to feasibly include the identifying information required by this section." That language should be changed so that the determination is an objective one and applies only to physical items: "Any other physical item that is too small to feasibly include the identifying information required by this section."

$500 Exemptions Needs Clarification

The proposal exempts print ads "with a fair market value of less than $500." It is not clear whether that means $500 per ad or $500 in total spent by the committee or other source of the funds. Exempting all individual ads costing less than $500 per ad would be a huge loophole, particularly for digital ads. The same ambiguity applies to the exemption for "communications made via telephone that have a fair market value of less than $500."

The language should be changed to:

> (ii)" Communication in support of or in opposition to a clearly identified candidate" does not include newspaper editorials, one or more printed advertisements with an aggregate fair market value of less than $500, or one or more communications made via telephone with an aggregate fair market value of less than $500.

Operative Date

The operative date should be changed to the first day of the 2022 election cycle, which is November 6, 2020.

There is no need to wait for the effective date of SJR 18, because there is no serious question about the constitutionality of the provisions of this proposal.

Need for Severability Clause

The very short severability clause in HB 2714-5 is an improvement. I still recommend the severability clause from Measure 47 (2006):

> The provisions of this Act shall supersede any provision of law with which they may conflict. For the purpose of determining constitutionality, every section, subsection, and subdivision thereof of this Act, at any level of

subdivision, shall be evaluated separately. If any section, subsection or subdivision at any level is held invalid, the remaining sections, subsections and subdivisions shall not be affected and shall remain in full force and effect. The courts shall sever those sections, subsections, and subdivisions necessary to render this Act consistent with the United States Constitution and with the Oregon Constitution. Each section, subsection, and subdivision thereof, at any level of subdivision, shall be considered severable, individually or in any combination.

Need for Legislative Findings

The determination of validity under the U.S. Constitution involves issues of fact. If the statute at issue does not have legislative findings, then the defenders of the law in court may face difficult evidentiary issues.

Legislative findings in statutes are accorded near complete deference by the courts. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778, 82 LEd 1234 (1938), instructing courts to give great weight to legislative findings in considering the constitutionality of an Oregon law.

Measure 47 (2006) has extensive findings (its Section 1). The findings for HB 2716 need not be that long.