



Money in Politics Research Action Project

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A Resource Guide for Making Voting Decisions on Ballot Measures 46 and 47

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Background

The goals of the Money in Politics Research Action Project (MiPRAP) are to increase access, accountability, and participation in politics and governmental decision-making. An underlying premise of our work is that electoral and legislative systems are not accessible or accountable to many people and communities. Campaign finance and other democracy reforms are needed to address these structural barriers to meaningful participation in politics.

MiPRAP has provided advice to organizations on both sides of Measures 46 and 47. Significant differences of opinion about these measures increase the potential for voter confusion. It is also troubling that people who might be inclined to support reform could give up on the feasibility of adopting campaign finance reform because broad support has not coalesced behind these particular measures.

In this environment and because MiPRAP's focus is on public financing reform¹ rather than the contribution limits strategy emphasized in these measures, MiPRAP is neutral on Measures 46 and 47. We are using these proposals as an opportunity for campaign finance reform education. In that spirit we present this guide for individuals to assist in their voting decisions on Measures 46 and 47 and generally to deepen public understanding of campaign finance reform issues.

¹ Public funding, sometimes referred to as Clean Money or, as in Portland, Voter-Owned Elections, is proving itself as a viable alternative to “business as usual.” In Maine and Arizona politics this reform has been in place since 2000 and have withstood all legal challenges meaning that public funding is the only constitutional way to limit campaign spending.

Candidates have a new way to run for office without big money. Voter-owned candidates agree to a) collect a large number of \$5 qualifying contributions to demonstrate community support, b) reject private money contributions, c) limit campaign spending, and d) agree to strict administrative regulations.

In return, participating candidates receive limited amounts of campaign dollars from a publicly financed fund. More important, communities benefit as voters gain more choices as candidates can run based on leadership skills and community support rather than fundraising ability. In addition, voters are the focus of campaigns - not contributors and fundraising – with new opportunities for meaningful participation in deciding who runs for office. Finally, elected officials can focus on community concerns, avoiding even the perception that special interests win over public interests.

This guide identifies policy issues with a particular emphasis on providing information from other states and money in politics data to inform decision making on setting contribution limits. Legal issues, particularly federal First Amendment concerns, are also addressed. Finally next steps for reform are discussed.

Public financing of campaigns is the reform strategy of most interest to MiPRAP, but discussion of Measure 46 and 47 provide an opportunity to point out that public funding and contribution limits strategies are by no means mutually exclusive. Historically, development of full public financing reform occurred during the 1990's in response to concern that contribution limits as a stand-alone strategy did not meet comprehensive reform goals. Oregon is one of five states without any contribution limits, so limits are a needed piece of the reform puzzle in this state. Because of state budget difficulties and public distrust of the legislature, MiPRAP believes it is premature to consider public funding reform at the state-level at this time and supports the decision by the bill drafters to not include public financing in Measure 47.

Why Two Measures?

To understand why Measure 46 is a constitutional amendment accompanied by statutory details in Measure 47, a bit of history is helpful.

In 1994 Measure 9, a statutory measure focusing on contribution limits, was adopted with a 71 percent "yes" vote. The 1995 legislature attempted to amend this measure, but was unsuccessful. Contribution limits were in place during the 1996 elections. A legal challenge went to the Oregon Supreme Court and contribution limits were overturned in February of 1997.² As a result, any attempt to impose contribution limits in Oregon must amend the state Constitution.

It should be noted that the need for a constitutional amendment to ban or limit contributions is unique to Oregon. The U.S. Supreme Court has upheld such restrictions on political contributions. However, both the Oregon and U.S. Supreme Courts have struck down expenditure limits.

This is the legal background behind why Measure 46 must pass in order for all provisions of Measure 47 to go into effect. If Measure 46 fails at the ballot, Measure 47 will be added to state statutes. But its legal effect would be uncertain with court challenges probably being necessary to determine which components of Measure 47 require a state constitutional amendment to take effect. For example, disclosure provisions in Measure 47 would likely be legal without a constitutional amendment. Confusion about which parts of Measure 47 are legally viable without Measure 46, however, could well set the stage for a legislative repeal of all Measure 47's provisions in what some could argue would be a valid housekeeping action. In general, the result of Measure 47 being enacted without Measure 46 presents a legally muddy situation.

Ballot Measure 46

Measure 46 adds an Article II, Section 24 to the Constitution of Oregon as follows:

Notwithstanding any other provision of this Constitution, the people through the initiative process, or the Legislative Assembly by a three-fourths vote of both

² *VanNatta v Keisling*, 324 OR 514, 931 P.2d 770 (1997).

Houses, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.

Measure 46's approach in amending the Constitution has several features that some will consider essential and others will likely view as being too open-ended. These features are:

- 1) Broad allowances for bans and limits of both contributions and expenditures.
- 2) Broad application to any election.
- 3) Allows for two methods to make changes:
 - By the people using the initiative process, or
 - By a $\frac{3}{4}$ "super majority" vote of both the Oregon House and Senate.

Each of these points is discussed below.

1) The U.S. Supreme Court has upheld the constitutionality of limits, and in some cases prohibitions, on contributions to campaigns.

Some limits on independent expenditures³ to influence elections have also been found constitutional. But limits on independent expenditures by individuals in Measure 47 push the legal envelope and are constitutionally vulnerable due to First Amendment concerns.

In addition, limiting campaign expenditures by candidates has been ruled unconstitutional by both the Oregon and U.S. Supreme Courts with the most recent federal decision released in July 2006 overturning mandatory spending limits in Vermont.⁴

For these reasons, allowing expenditure limits in Measure 46 could be considered unnecessary or so open ended that there could be unintended consequences. On the other hand, including this option in Measure 46 allows for a future test case that could be strategic if the composition of the U.S. Supreme Court changes or if the federal Constitution is amended on this point in the future. The likelihood of these changes, however, seems slight and far in the future.

2) Measure 46's allowance for establishing contribution and expenditure limits to influence the outcome of "any election" could also be considered troublingly open-ended or, at the other end of the spectrum, appropriately flexible. As noted in the Explanatory Statement, this measure would not apply to elections to federal offices.

It can be argued, however, that Measure 46 could enable limits on contributions to or spending by ballot measure campaigns. Some may appreciate this option and others will be troubled by opening up the door to regulations in this arena without specific details. It should also be noted that, as stated in the Explanatory Statement, federal litigation has not upheld limits pertaining to ballot measures. Given this legal history some will find Measure 46 unnecessarily open-ended in this regard.⁵

³ Independent expenditures are campaign efforts, for example a political advertisement or direct mail piece, produced and distributed independently of the candidate that it benefits.

⁴ The major Oregon case is *Deras v. Myers* 272 Or. 47 (1975) and U.S. Supreme Court cases are *Buckley v. Valeo*, 424 US 1(1976) and *Randall v. Sorrell*, 126 S.Ct. 2479 (2006)

⁵ The legal basis for limiting contributions to candidates (corruption or perception of corruption) has not been accepted by the U.S. Supreme Court as a justification for limiting contributions or expenditures in initiative or ballot measure campaigns. Candidates could be corrupted or perceived as being corrupted by large contributions. Ballot

3) The “super majority” $\frac{3}{4}$ vote feature in Measure 46 addresses concerns that legislators may water down or eliminate reforms. Some will see this provision as being essential to avoid legislative tinkering. Others may dislike super-majority requirements in general or consider the $\frac{3}{4}$ vote requirement too difficult a hurdle for the legislature to make what some may view as legitimate housekeeping changes given the wide range of statutory details in accompanying Measure 47.

A final note is that Measure 46 was challenged by the ACLU on the grounds that it makes two changes to the Constitution that are both unrelated and substantial, thus violating what is called the separate-vote requirement. The Court of Appeals upheld the legal challenge and found Measure 46 in violation of the separate-vote requirement. Oregon Supreme Court, however, overturned this decision and Measure 46 will be on the ballot in November.

Ballot Measure 47

The backdrop for evaluating ballot Measure 47 is that Oregon is currently one of only five states with no limits on campaign contributions. Measure 47 includes an extensive array of bans and/or limits on campaign contributions including limits on self-financing and independent expenditures with an overall goal of creating a balanced regulatory package that champions the role of small contributions. Many of its provisions, particularly related to small donor committees, results in a broader set of reforms than the contribution limits in place at the federal level or in most other states.

Measure 47 also includes provisions that are constitutionally vulnerable due to federal First Amendment concerns. Keep in mind that just because Measure 46 amends the Oregon Constitution, the First Amendment in the federal Constitution doesn't go away. Of particular concern are limits on independent expenditures made by individuals and limits on self-financing. (Self-financing is personal contributions by a candidate to his or her own campaign committee.) Measure 47 also includes a ban on candidates making loans to his or her campaigns. Those interested in campaign finance reform may not like this legal reality, but how individuals spend their own money, particularly related to politics, has a long history of being upheld by the courts. Some may find it essential to push these legal envelopes. Other voters may be more accepting of current legal realities and be troubled by the inclusion of these provisions and resulting legal uncertainties. In any case, the strong likelihood that these provisions would be found unconstitutional undermines the goal of a comprehensive and balanced reform package.

In general, instead of taking an incremental approach and focusing on a set of small bites of the reform apple, Measure 47 eats the whole apple. Some voters may well support Measure 47 precisely because it is detailed and broad in its scope, legal red flags and all. Others might oppose Measure 47 because it has too many “moving parts,” introduces too many uncertainties into political campaigns, and is too disruptive to the realities of the flow of political money.

The Explanatory Statement is used to organize more detailed discussion of Measure 47. Explanatory Statement provisions are in italics below. Given the 500-word limit some features of

measure campaigns don't involve any individual who can be corrupted. This is why various attempts to regulate contributions to ballot measure campaigns typically not withstood court challenges.

Measure 47 are not reflected in the Explanatory Statement and these are also addressed. The discussion below assumes that Measure 46 will be adopted, therefore, any mention of constitutional concerns or constitutional validity pertain to the federal Constitution.

1) *Corporations and labor unions may not contribute to candidates, political committees, or political parties.*

This ban is in effect regarding federal elections and in 19 other states. Five states (currently including Oregon) have no limits on this category of contributions. All other states don't prohibit but do limit corporate and labor contributions⁶. These bans refer to campaign contributions from corporate and labor union treasury dollars. The reason such a ban is constitutional is because these entities may form political committees, which is clearly permitted under Measure 47.

2) *Limits on contributions to candidates apply separately to primary and general elections. An individual may not contribute more than \$500 per election regarding candidates for any particular statewide office, or more than \$100 per election regarding candidates for any non-statewide office.*

When evaluating contribution limits courts typically consider three issues: time period, who is limited, and the dollar level of the limits.

The Brennan Center for Justice⁷ recommends setting limits on a per election basis rather than a per election cycle (primary plus general election) or per calendar year. Indeed, one factor in a July U.S. Supreme Court case overturning contribution limits in Vermont was that those limits were not set on a per election basis. So Measure 47 is fine on this point.

Another factor in the decision to overturn the Vermont (*Randall v. Sorrell*⁸) contribution limits is that they were unreasonably low. The Vermont limits were \$400 for statewide offices, \$300 for Senate, and \$200 for House races. These apply to both primary and general elections. So if they were split into two limits they would be \$200 per election for statewide positions, and \$150 and \$200 per election for Senate and House races.

The Measure 47 limits for statewide offices are more than double the Vermont limit when calculated on a per election basis, though the court⁹ also cites as low limits those in Colorado,

⁶ <http://www.ncsl.org/programs/legman/about/CorpCand.htm> Limits on Corporate and Union Contributions to Candidates updated as of August 2005 by National Conference of State Legislatures

⁷ *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*. Brennan Center for Justice at NYU School of Law, 2004 revised edition, page III-5.

⁸ *Randall v. Sorrell*, 126 S.Ct. 2479 (2006) Vermont also had mandatory campaign expenditure limits that were ruled unconstitutional. This case did not overturn the concept of contribution limits. Rather, as summarized by the Brennan Center for Justice: "Vermont's exceptionally low contribution limits fail to satisfy the First Amendment's requirement of careful tailoring. This failure is due to a combination of five factors "taken together:" (1) that the contribution limits appeared to restrict the amount of money available to challengers to run competitive elections; (2) political parties were subject to the same contribution limitations, infringing on rights of association; (3) Vermont's law "would seem to" count a volunteer's expenses against the volunteer's contribution limit, and in the context of a very low contribution limit, that imposes too high a First Amendment cost; (4) the limits were not indexed for inflation; and (5) the record did not show a particular need for such low limits."

⁹ *The Constitutional Status of Campaign Finance Reform after Randall v. Sorrell*, July 3, 2006 by Adam Lioz of US PIRG

Florida, Maine, and Montana which are \$500 per election limits for statewide positions. The Measure 47 limits for non-statewide offices are \$100 per election, which is close to the Vermont limit and less than limits mentioned by the court regarding the states noted above. This increases the possibility that Measure 47's \$100 limit could be vulnerable to legal challenge. However, it should be noted that Vermont's low limits were only overturned because other legally troubling features that are not in Measure 47 accompanied them.

Measure 47 anticipates the possibility of its limits being found too low and authorizes the courts to raise a problematic limit to a point where it is considered valid. This is a clever approach, but one caution about taking too much comfort in this provision's effectiveness is that judges typically view their job to be evaluating and not writing legislation. Indeed, it is possible that a court may find this "then raise the limit until it is constitutional" clause as being inappropriate or even offensive.

3) *Per year, an individual may not contribute more than \$50 to any single small donor committee, more than \$500 to any other single political committee, more than \$2,000 in aggregate to a political party, or more than \$2,500 in aggregate contributions.*

Eight states have aggregate limits on contributions from individuals.¹⁰ The limits range from \$3,530 per election in Arizona to \$25,000 per year in Maine. Maryland's aggregate limits are similar to Measure 47 with a \$10,000 aggregate limit per a four-year election cycle. Aggregate limits of \$95,000 per election cycle are in place at the federal level.¹¹

It should be noted that these aggregate limits typically don't apply to individual contributions to political nonprofits. In effect, then the aggregate limits in Measure 47 have a greater impact on "how much money there is to go around" than such limits in other states that only focus on aggregate contributions to candidates, parties, and political committees. Just as other states with aggregate limits, individuals will have the responsibility for tracking their spending and not exceeding an overall cap.

Those particularly interested in the role of political parties may be concerned about the \$2,000 aggregate limit on contributions to party committees. It should be noted that this aggregate limit applies to "a political party, including all subdivisions thereof." This means that an individual could give \$1,000 to the state Republican Party and \$500 each to two county Republican committees, but not \$2,000 to each of these party committees.

An additional clarification is that the four caucus committees (PACs focused on electing Democrat and Republicans to the Oregon House and Senate) are not subdivisions of a political party based on committee definitions in current regulations and MiPRAP's reading of the Measure 47 definitions.¹²

¹⁰ <http://www.ncsl.org/programs/legman/about/IndCand.htm> Summary of limits on individual contributions updated as of August 2005 by National Conference of State Legislatures

¹¹ <http://www.opensecrets.org/basics/law/index.asp?Format=Print> Summary of federal contribution limits compiled by the Center for Responsive Politics

¹² The four caucus PACs, Senate Democratic Leadership Fund, The Leadership Fund (Senate Republicans), Majority 2006 (House Republicans), Future PAC, House Builders (House Democrats) are all miscellaneous committees, while state and county party committees are listed by the Secretary of State's Office as party

Another topic that space evidently didn't allow for including in the Explanatory Statement is that the aggregate limit also applies to individual contributions per year to political nonprofit organizations. In general, Measure 47's provisions regarding political nonprofits have generated opposition from many of those organizations. Concerns include:

- a) A prohibition on receiving directly or indirectly any assistance from any corporation, other business entity (which could include another nonprofit), or labor union.
- b) Difficulties in converting existing PACs to small donor committees, particularly in regard to administrative burdens and costs given a \$500 per year limit on use of organizational treasury funds to create and administer a committee. Current federal law allows administrative costs related to a membership organization's PAC to be covered with non-PAC dollars.
- c) In addition, a membership organization that wants to create a small donor committee can transfer no more than 40% of a member's annual dues, up to \$50 per year. The goal of the 40% limit is to address the potential for creation of sham membership organizations. However, a membership organization with wealthy members could simply have higher dues.
- d) Measure 47 provisions regarding electioneering also affect activities of political nonprofits that are currently allowed under IRS regulations. Helpful background is that 501 c (3) organizations can do issue-related political work if it comprises a small portion, typically 20% of its total budget while a 501 c (4) organization can devote all their attention to political issue work, but its primary purpose cannot be partisan politics. Measure 47 would further restrict 501 c groups. One example, is that Measure 47's regulations on electioneering communications means that these groups could no longer mention positions of political parties in their issue-related political work. Another example is that political nonprofits could spend no more than \$20,000 to distribute educational materials such as officeholder scorecards or candidate surveys.
- e) In general, there is uncertainty about how the measure's definition of political nonprofits dovetails with IRS definitions for nonprofit organizations.
- f) To retain the right to make independent expenditures, political nonprofits cannot receive any contribution of more than \$500 from any one donor. This would likely be especially troubling to a political nonprofit that is a particularly effective messenger for a targeted set of voters.

Presumably the rationale for including political nonprofits into Measure 47 was to address the possibility that they could become a loophole, given the measure's other limits on political spending. Some may welcome this proactive thinking on the part of Measure 47 proponents. Others may prefer an "if it ain't broke don't fix it" approach and be concerned that the right of political nonprofits to engage in political activities is unduly and unnecessarily hindered by Measure 47.

4) A political committee may not contribute more than \$2,000 per election regarding candidates for any particular statewide office or more than \$400 per election regarding

committees. Measure 47's definition is political party "means an assembly of electors qualified by law to nominate candidates for election to public office." Caucus PACs do not have that authority.

candidates for any non-statewide office. During a calendar year, a political committee may not contribute an aggregate amount exceeding \$2,000 to a political party.

Limits in other states on what PACs can give candidates vary widely.¹³ Federal PACs can give \$5,000 per year to other political committees.¹⁴

Thirteen states have no limits on contributions that can be made to political parties and 14 states only limit contributions to parties from corporations and labor unions. The remaining 23 states have limits on contributions to political parties that range from \$2,000 per year in Vermont to \$100,000 per four years in Louisiana.¹⁵

As noted above, for those concerned about the role of political parties in elections, the aggregate limit on contributions from PACs to political parties could also cause concern.

Since Measure 47 specifies that political committees can only contribute to candidate committees and political parties, this means that political committees cannot give to other political committees. Presumably the intent behind this ban is stop, say PAC X, also giving contributions to several other PACs that could then, in turn, give contributions over and above what PAC X can give directly to candidates.

It should be noted that no other state bans these PAC-to-PAC transfers. At the federal level and in 14 states there are limits on PAC-to-PAC contributions. State limits range from \$500 per two-year election cycle in Colorado to \$7,200 per year in New Jersey.¹⁶ Other states allow for unlimited contributions from one PAC to another or are silent on this issue.

In Oregon a ban on PAC-to-PAC contributions would particularly affect caucus leadership PACs. For example, in the 2004 general election, 81% of the dollars contributed to Future PAC came from other political committees. PAC contributions to Senate Democratic Leadership Fund comprised 88% of its 2004 general election fundraising. PAC contributions comprised 62% of total 2004 general election fundraising to The Leadership Fund and 76% of total dollars contributed to Majority 2004.

In general, this feature of Measure 47 would require PACs to shift their fundraising focus more to individual donors. Some people will applaud this change in Oregon's political landscape. Others could be concerned that this is too dramatic a shift in how money flows in Oregon politics and unduly change the role of leadership PACs.

A related concern for some is that Measure 47 could simply take so much money out of politics that it isn't feasible to get out a viable campaign message. This would be because of the relatively low limits on giving to candidates and PACs as well as the aggregate cap of \$2,500 on

¹³ <http://www.ncsl.org/programs/legman/about/PACCand.htm> Limits on PAC contributions to candidates updated as of August 2005 by National Conference of State Legislatures

¹⁴ <http://www.opensecrets.org/basics/law/index.asp?Format=Print> Summary of federal contribution limits compiled by the Center for Responsive Politics

¹⁵ http://www.ncsl.org/programs/legman/about/contrib_pol_parties.htm Limits on contributions to political parties updated as of August 2005 by National Conference of State Legislatures

¹⁶ http://www.ncsl.org/programs/legman/about/cont_to_pac.htm Limits to PACs compiled by National Conference of State Legislatures

all political contributions from individuals. Indeed the Brennan Center for Justice urges that limits not be so low as to inappropriately “starve the system.”¹⁷ Others will support taking as much money out of politics as possible.

5) *A small donor committee accepting only contributions of \$50 or less per individual per year may contribute any amount to candidates, political committees and political parties.*

The Brennan Center for Justice¹⁸ suggests consideration of provisions that enhance the voices of small donors. In Measure 47 this takes the form of small donor committees that don’t accept contributions of more than \$50 and, in turn, are subject to no limits on the size of contributions to candidates.

6) *A political party finance committee may not contribute more than \$50,000 per election regarding candidates for any particular statewide office or more than \$10,000 per election regarding candidates for any particular non-statewide office. A political party may have unlimited finance committees.*

Measure 47 defines political party finance committee as a committee maintained by an Oregon political party or its subdivision. So this means the state level major and minor party committees as well as any county level party committees. As noted earlier, leadership caucus PACs are not party committees and would be subject to the lower limits noted above in #4.

Measure 47 addresses one of the factors in the U.S. Supreme Court overturning low contribution limits in Vermont by not setting the limits on what political party committees can give to candidates even close to the relatively low limits on individual contributions to candidates. Therefore, these Measure 47 limits should not be a legal problem in this regard. Practically speaking, however, party committees could have difficulty raising enough dollars to make these large contributions given the limits on what individuals can give to parties. But this reflects Measure 47’s interest in having the overall flow of political dollars be governed by what can be raised from individuals in relatively modest contributions.

7) *A candidate may not contribute to the candidate’s own campaign more than \$50,000 per election for statewide office or \$10,000 per election for other office. The candidate may contribute 50% more if the candidate is not the incumbent. A candidate who contributes more than \$5,000 to the candidate’s own campaign must report all subsequent candidate contributions within three business days and disclose in every paid communication the amounts the candidate contributed.*

Wealthy individuals making large personal contributions to his or her own campaigns trouble many people interested in campaign finance reform. All indications, however, are that this limit will be ruled unconstitutional as outlined in *Buckley v. Valeo* where the court said, “The primary governmental interest served by the Act -- the prevention of actual and apparent corruption of the political process -- does not support the limitation on the candidate's expenditure of his own personal funds.”¹⁹ The reporting requirements regarding self-financing would likely be

¹⁷ *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*, page III-3

¹⁸ *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*, page IV-2

¹⁹ *Buckley v. Valeo*, 424 US 1(1976)

acceptable. The requirements to display the amount of self-financing on paid communications could run into constitutional problems if deemed to be unduly burdensome.

8) *A candidate may not make loans to the candidate's own campaign.*

Just as self-financing faces significant federal First Amendment concerns, a ban on a candidate's ability to loan money to his or her own campaign would likely face constitutional problems.

9) *A corporation, labor union, or other entity may not make independent expenditures supporting or opposing a candidate or political committee.*

The exact language in Measure 47 is "no corporation or labor union shall make an independent expenditure to support or oppose any candidate or political party." MiPRAP believes that the inclusion of "or other entity" in the Explanatory Statement is an inadvertent error.

The U.S. Supreme Court has upheld prohibitions on independent expenditures by corporations and unions, when these entities have the right to set up separate segregated funds that may engage in candidate-related political activity. These funds are analogous to PACs. Measure 47 authorizes these funds, with some limitations. Therefore the limit on corporate and labor union independent expenditures is constitutional.

Unlimited independent expenditures, however, would be allowed from corporate and union separate segregated funds as well as from political committees, parties, and political nonprofits. The contributions to these separate segregated funds/political committees must come from employees, officers, shareholders, or members of the organization. These individuals must also comply with the \$500 limit on contributions to political committees. Use of treasury funds from the organizations forming separate segregated funds for administrative purposes is limited to \$500 per year. As noted above in #3, these groups may well view this as a burdensome change from current law.

Not noted in the Explanatory Statement is that Measure 47 also allows political committees (including small donor committees), political parties, and political nonprofit organizations to make independent expenditures from funds received in compliance with contribution limits. In the case of small donor committees, the original source of money is contributions of no more than \$50 per year.

It should be noted that, by definition, leadership caucus committees cannot make independent expenditures. All expenditures from these committees are considered to be on behalf of candidates and with their knowledge.²⁰

Regarding political committees, the original source of money that could be used for independent expenditures are contributions of no more than \$50 per year. For political parties, the original source of money is contributions of no more than \$2,000 in aggregate. For political nonprofits, independent expenditures may come from its organizational treasury if the funds come from individuals who comply with the \$500 spending limit on contributions to political committees. As noted in #3 this is a factor in opposition to Measure 47 from political nonprofits.

²⁰ Page 92, 2006 Oregon Campaign Finance Manual

Because of the limits on contributions to candidates from political committees and parties, the likelihood of independent expenditures is increased. This trend was evident in Oregon's 1996 elections that occurred under the contribution limits imposed by Measure 9 in 1994. Political players will have to address the issue of how coordinated campaign activities will be kept separate from independent expenditures. Strict rules and penalties in Measure 47 about coordinated expenditures and electioneering communications heighten these concerns.

Measure 47 language on electioneering communications are similar to those adopted at the federal level under the Bipartisan Campaign Reform Act (BCRA), popularly known as McCain-Feingold. Some will say that the Measure 47 provisions are workable and will appropriately change campaign practices, particularly with regard to issue ads and activities of political nonprofits. Others, particularly if they are more familiar with the inner workings of political campaigns, will be more troubled by these provisions of Measure 47.

To ensure compliance with prohibitions on coordinated activities, Measure 47 includes the option of filing a complaint in Circuit Court with the requirement of a hearing within three business days. Swift enforcement of election laws is important and has been a concern in Oregon politics. So this kind of enforcement "teeth" will be essential for some because current actions on complaints can be frustratingly slow. But for others this complaint procedure in Measure 47 may swing too far to the other end of the enforcement spectrum, since a three-day timeline is very tight and offers undue opportunities for frivolous or harassment complaints intended to divert resources and create negative publicity.

10) An individual may not make independent expenditures exceeding \$10,000 per calendar year.

This limit, as well as bans on independent expenditures from corporate and union treasury dollars, is of interest to campaign finance reform proponents because independent expenditures are seen as a frustrating way to get around contribution limits. In addition, candidates often feel that they lose control over their campaign message and sometimes disavow independent expenditures made on their behalf. Nevertheless, it is highly likely that due to the federal First Amendment, Measure 47's limit on the rights of individuals to make independent expenditures will be ruled unconstitutional as it was in *Buckley v. Valeo*.²¹

To the extent that Measure 47 is a detailed package intended to address all the ways in which political money can flow and ensure a level playing field, the anticipated elimination of the limit on individual independent expenditures represents a "break in the plumbing." Wealthy individuals could pour money into Oregon campaigns through unlimited independent expenditures. Measure 47 opponents have been particularly concerned about lack of balance in campaigns resulting from this legal likelihood. Union and corporate treasury dollars could not be used to offset large independent expenditures by individuals. Political committees and nonprofits

²¹ The U. S. Supreme Court in *Buckley v. Valeo*, 424 US 1(1976) overturned \$1,000 limits on individual independent expenditures. Adjusted for inflation this would be about \$4,000, which is lower than Measure 47's \$10,000 limit. It appears, however, that the Supreme Court decision was not contingent on the size of the limit, but rather based on the underlying unconstitutionality of such a limit. Also, in *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), the court reaffirmed the distinction made in *Buckley* between expenditures and contributions, which goes not to quantity of money, but rather the nature of the limit

could still make unlimited independent expenditures. But the size of “the spigot” into those groups is limited by the caps on individual donations, so practically speaking these groups could face difficulty in raising enough money to offset unlimited independent expenditures by wealthy individuals.

Finally, a particular reality facing political nonprofits is that because their independent expenditures can only be made with funds from individual contributions capped at \$500, if a nonprofit group has a wealthy member, those resources cannot be tapped by the organization. Measure 47 supporters would likely say that is exactly the point and this shouldn’t be allowed. But since the wealthy individual can spend the money by him or herself on an independent expenditure, the political nonprofit loses an opportunity to advise on message. Conversely the wealthy individual may view these regulations as hindering his or her opportunities to work with others under the auspices of a political nonprofit.

11) Advertisements funded by independent expenditures must disclose the names and businesses of persons who contributed \$1,000 or more toward expenditure. Persons whose independent expenditures exceed \$200 per year must report the expenditures.

The independent expenditure reporting requirements in Measure 47 are more extensive than could be noted in the Explanatory Statement and apply to individuals and other entities (political committees, parties, and political nonprofits). These disclosure requirements reflect suggestions from MiPRAP to ensure more prompt disclosure of independent expenditures, especially spending of \$1,000 or more close to elections.

Requiring that communications funded by independent expenditures of \$2,000 or more display the names of contributors to the advertising introduces logistical burdens and is more vulnerable to legal challenge.

12) A corporation or labor union may establish a political committee consisting only of contributions from individuals.

See discussion in #9 about separate segregated funds.

13) An individual whose contributions exceed \$500 per year must obtain a unique identifier from the Secretary of State and list it with subsequent contributions. The Secretary of State must report these individuals’ campaign contributions on the Internet, which committees and candidates must monitor to avoid penalties.

As an organization interested in campaign finance disclosure, MiPRAP supports making the unique identifier option available to individual donors on a voluntary basis. A similar system of identity numbers are assigned to political committees as part of their process of filing a statement of organization with the Elections Division. These identity numbers helps “track the money” because confusion about a contributor’s name is eliminated.

However, mandating that individuals giving more than \$500 obtain a unique identifier could be an inappropriate burden to individual donors that chills their interest in making campaign contributions. It is one thing to require PACs that are organized solely for political purposes to

use a mandatory identity number, but more troubling to impose such a requirement on individuals. Indeed, such a requirement could trigger First Amendment legal challenges.

MiPRAP recommends that the Elections Division's upcoming web-based electronic reporting system mandated by HB 3458 include features to facilitate consistency in how campaign treasurers identify individual contributors. The Elections Division could also assist campaign treasurers by assigning contributors a unique identifier rather than placing a registration burden on individual donors. Consideration of mandatory unique identifiers for individual donors should occur only after the effectiveness of these ideas are evaluated.

Regarding availability of campaign finance disclosure reports on the Internet, Measure 47 is broader than indicated in the Explanatory Statement with requirements for Internet posting of all reports, not just those from individuals. This would mean Internet posting of reports from candidate and political committees, political parties, and independent expenditure campaigns.

Most of the Measure 47 disclosure provisions should be compatible with legislation adopted in 2005 (HB 3458) requiring significant campaign finance disclosure improvements including web-based reporting and Internet availability of information in a searchable database. The HB 3458 improvements, however, don't include the unique identifier program required by Measure 47. HB 3458 disclosure improvements go into effect January 1, 2007 while Measure 47 goes into effect 30 days after the November 2006 election. This difference in timing and the unique identifier requirement contributes to the fiscal impact cited by the Secretary of State to implement Measure 47.

14) Some unobligated funds of candidate committees may forfeit to the State of Oregon, after each election cycle.

Measure 47 reads: "Within 60 days after the close of the election cycle for the office sought, the unexpended funds of a candidate committee at the close of the election cycle for the office sought shall revert to the State of Oregon to offset the cost of producing the Voters' Pamphlet, except for those funds reasonably necessary to pay the obligations of the committee and to terminate its operations. A candidate elected to the Oregon Legislature may deposit not more than ten thousand dollars (\$10,000) of the unexpended funds into the account maintained for legislative office expenses during the legislative session."

This is a very interesting proposal that would bar incumbents from amassing war chests that often scare off challengers while helping fund the Voters' Pamphlet and legislative office expenses. In reality candidates would probably spend down all their campaign funds. Indeed, similar laws in other states just require that all campaign funds be spent without any requirement about turning over unspent funds to the state.

According to the Brennan Center of Justice²² courts have split on the constitutionality of spend-down provisions. In the Sixth Circuit (Oregon is in the Ninth Circuit) the Circuit court invalidated a spend-down law that required candidates to turn over unspent funds to the state. The Alaska Supreme Court, however, upheld a similar law.

²² *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*, page III-59-61

Though there could be constitutional concerns about this provision, if it is overturned it isn't particularly damaging to the overall goals of Measure 47. For this reason, pushing the legal envelope on this point seems worthwhile.

15) *Courts are directed to modify limits if necessary to comply with federal or state Constitutions.*

See item #2's discussion of the "then raise the limit until it is constitutional" authority given to courts in Measure 47.

16) *Civil fines and citizen actions to enforce the measure are provided.*

Similar to the concerns noted in #9, Measure 47 includes general enforcement provisions that involve significant fines and tighter timelines (administrative law hearing within 15 days after a complaint is filed and decision within 15 days after the hearing). For some, these prompt timelines are essential because current actions on complaints are too slow. Others, however, may find these timelines too tight and offer inappropriate opportunities for frivolous complaints or harassment complaints intended to divert resources, provide an opportunity to learn about an opponent's campaign, and create negative publicity.

Next Steps

If the public passes Measures 46 and 47, MiPRAP is committed to working on public funding campaign finance reform as a needed next step. The timing of these efforts will be strategic, reflecting political realities about state budget problems and public distrust of the legislature. Next steps will also be affected by the timing of legal challenges that will likely follow adoption of Measures 46 and 47.

If Measures 46 and 47 are not adopted, MiPRAP is committed to work on campaign finance reform options that strategically combine contribution limits and public funding reform in a multiple year strategy. Several features of Measure 47 deserve to be included in such a step-by-step plan. In some cases MiPRAP would likely focus on other options and pay close attention to setting contribution limits based on analysis of money in politics data to ensure that the reform does not inappropriately affect capacity by political players to get out an effective campaign message. For example, a graduated set of limits on what individuals, political committees, and political parties can give to candidates can be "sticks" that accompany enactment of public financing "carrot" when that reform strategy is politically feasible.

Such a multi-year strategy will involve amending the Oregon Constitution. It may be prudent, however, to amend the Constitution with more targeted language so as to avoid potential unintended consequences.