ELEC WHITE PAPER

"Contribution Limits and Prohibited Contributions"

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ELECTION LAW ENFORCEMENT COMMISSION

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This paper is the first in a series of occasional analyses that the New Jersey Election Law Enforcement Commission (ELEC) will publish on topics of interest in the field of public disclosure. These studies will be based on staff research as well as work by outside persons such as university professors and graduate students Analyses written by external sources will be published with a disclaimer. It is ELEC's goal to contribute substantive research for the ongoing debate on improving the way our State regulates the impact of money on its political process.

The topic of this paper is a review of the issue of contribution limits and prohibited contributions.

A. Contribution Limits

There are four commonly accepted approaches to limiting the influence campaign contributors have over legislators: 1) disclosure, 2) contribution limits, 3) expenditure limits, and 4) public financing.

A June 19, 1988, Eagleton/Star-Ledger poll indicated that the majority of New Jerseyans support full disclosure, contribution limits, and spending caps as a way of preventing members of the Legislature from being obligated to campaign contributors This same poll suggested that there is a high degree of reluctance among the public to use public money to help legislators get elected.

With this information in mind, it is important to note that the U.S. Supreme Court, in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976), tied expenditure limits and public financing together. In other words, the high court said that it is permissible to impose spending caps only if a candidate opts to be subject to those caps by taking public financing. Consequently, the public opinion represented in the poll has only a limited utility in any blueprint for reform.

There are currently four bills in the Legislature that would establish legislative public financing Unless these bills are enacted, disclosure and contribution limits alone remain as feasible approaches toward controlling undue influence over the legislative process.

There is no question that disclosure is fundamental to checking the potential influence contributors might have over would-be officeholders. As the ultimate watchdog over the process, disclosure forces accountability. And accountability, by its very nature, must enhance the public trust. Accordingly, the Commission would be well advised to continue its efforts in insuring that the State of New Jersey has strong disclosure laws Whether through tightening disclosure, i.e. identification of contributor's employers, closing the loophole in the lobbyist law, or, as Professor Stephen A. Salmore of Eagleton Institute suggests, beefing up ELEC's staff in order to turn around summary information more quickly, most New Jerseyans would probably agree this effort should be made.

While the importance of disclosure is certain, the viability of contribution limits as a means of controlling influence is somewhat conjectural.

To be sure, many members of the disclosure co unity, some academics, numerous politicians, and a majority of the public in New Jersey, favor curbs on contributors as a way of keeping the process honest. Moreover, certain voices in the political science community, in particular, believe that contribution limits force campaigns to demonstrate broad support among the electorate by collecting adequate funds from many small contributors.

Indeed, contribution limits are designed to accomplish two major purposes 1) to reduce a candidate's and future public official's dependence on large donors, and 2) to encourage small donations from a broad base of contributors.

Moreover, in the Buckley case, the U.S. Supreme Court acknowledged a real or potential connection between corruption and political contributions. It found that large donations potentially could influence a candidate's position on issues and his or her actions when elected to public office.

At the same time, the Court found contribution limits to be constitutional because they reduce the influence wealthy persons and groups potentially have over the electoral process and help to keep the costs of political campaigns under control.

In sum, the arguments for contribution limits are that they democratize the process of elections by restricting the potential influence that big donors might exert over the governmental process. Moreover, they prevent an appearance of undue influence, if not the reality.

On the other hand, there are numerous arguments against contribution limits. Professor Larry J. Sabato writes that contribution limits may result in contributions being hidden by deceptive reporting or non-reporting. He suggests that in states that have weak lobbying and personal financial disclosure laws, such as New Jersey, contribution limits may result in money being channeled to candidates in other, more "direct" ways. These more "direct" ways may be more corrupting because the money goes directly to the candidate personally, not the campaign.

Another argument against contribution limits is that they can result in the proliferation of PACs, and improperly disclosed contributions by affiliated corporations and unions. To prevent the occurrence of this phenomenon, strong anti-proliferation laws would have to be enacted. Even so, the mere existence of these laws would not be enough to stop entities from circumventing contribution limits if the Commission did not have the staff resources to enforce them. Sufficient enforcement staff would be of paramount importance.

Contribution limits, opponents argue, might also encourage independent expenditures; that is, expenditures made without the cooperation or consent of a candidate. This constitutionally protected device for an individual, PAC, corporation, or union to exercise First Amendment rights may not be in the best interest of the election process.

Contribution limits may also give unfair advantage to wealthy candidates and inadvertently result in an insurance policy for incumbents. Only if a public financing program exists, and only if a candidate opts to participate in it, can the expenditure of a candidate's personal funds be limited. While every candidate would be subject to contribution limits from outside sources, the wealthy candidate could spend his or her own money at will and derive a significant advantage in the campaign. Likewise, incumbents would perhaps benefit from contribution limits because these limits would make it more difficult for all candidates, but especially challengers, to raise money Since incumbents generally have higher name recognition than challengers, better access to the media, and the ability to provide constituent services, opponents of limits believe that incumbents gain more advantage through them than challengers.

In addition, contribution limits might encourage committees or political parties to channel funds from corporations, unions, PACs and individuals to non-profit foundations to conduct voter registration drives and turn-out-the-vote efforts. Not only would this tactic be a way around the limits, but it would also transfer traditional campaign functions to entities outside of the mainstream campaigns.

Contribution limits also may encourage a practice known as bundling. Bundling occurs when an individual or group, such as a PAC, collects a number of individual contributions and delivers these contributions to the candidate. This practice should not be confused with the normal fund-raising activity undertaken by PACs, for instance. Nor should it be confused with the contribution made by the contributor. It is a distinctly different activity and one that some people feel allows a contributor to circumvent contribution limits. The contributions that are collected in this way are earmarked for one particular candidate or campaign committee.

Finally, contribution limits, opponents argue, merely shift influence over candidates and future public officials from big contributors to big fund-raisers. Those individuals with the ability to raise large amounts of money in small contributions from many contributors become more important to campaigns and more influential in the process.

Thus, reasonable people disagree on the merits of contribution limits. One point that most do not disagree on, however, is that if contribution limits are introduced into the system they should, as Professor Salmore says, "not be too low." Contribution limits that are too low are an inducement for people to go outside of the system. Reasonable contribution limits, while preventing the appearance and

perhaps reality of impropriety, would still permit candidates to raise enough money right away, on an ongoing basis, to get their campaigns off the ground and sustain them throughout. Adequate limits would permit enough money to be raised to get the candidate's message to the voters. Moreover, if candidates cannot do this then perhaps it would be fertile ground for a constitutional challenge.

But what is a reasonable contribution limit in New Jersey? Perhaps the best way of determining that relative to legislative races is to look at the average contribution, the mean contribution, the highest and lowest contributions, and the percentage of contributors over and under certain numerical levels in the most recent legislative elections. Also, it is important, for establishing contribution limits in New Jersey, to consider the cost of living in the State, and that the State has a large population and a sophisticated electorate.

In the 1985 primary and general elections, the average contributions were $425 and $769 respectively. The mean contributions were $200 and $250. In the 1987 primary, the average contribution was $531 and the mean contribution $200. Figures are not yet available for the general election of 1987 but will be later this year.

Likewise, the highest PAC contributions in the primary and general election of 1985 were $2,000 and $10,000 respectively. In primary 1987, the highest PAC contribution was $5,000.

The percentage of contributions over $2,500 in primary 1985 was two percent, in general 1985 five percent, and in primary 1987 three percent. The percentage of contributions under $500 in these elections was 78 percent, 67 percent, and 76 percent respectively.

Based on these statistics, and with the expectation that general 1987 statistics will be somewhat higher, a reasonable contribution limit might fall between $2,000-$2,500. Such a limit should be adjusted for inflation periodically. It would be low enough to prevent any appearance of impropriety yet high enough to withstand any constitutional challenge on the grounds that it did not permit candidates to raise adequate funds to get their message to the voters or contributors to exercise their First Amendment rights. The *Buckley* opinion upheld for congressional candidates a $1,000 contribution limit in 1976, and adjusting for inflation since then the $2,000 to $2,500 range appears comparable.

Certainly the range might be somewhat higher or lower. But it is a good starting point and one that balances the two public interests involved: 1) eliminating undue influence and 2) protecting First Amendment rights.

B. Prohibited Contributors

New Jersey law prohibits certain regulated corporations from using corporate funds to make campaign contributions, but does not prohibit all corporations from contributing.

The corporations prohibited from making campaign contributions are described in N.J.S.A. 19:34-32, which bans insurance corporations or associations from making either direct or indirect contributions for any political purpose, and N.J.S.A. 19:34-45 which reads:

> No corporation carrying on the business of a bank, savings banks, co-operative bank, trust, trustee, savings indemnity, safe deposit, insurance, railroad, street railway, telephone, telegraph, gas, electric light, heat or power, canal or aqueduct company, or having the right to condemn land, or to exercise franchises in public ways granted by the State or any county or municipality, and no corporation, person, trustee or trustees, owning or holding the majority of stock in any such corporation, shall pay or contribute money or thing of value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party.

This prohibition against certain regulated corporations making campaign contributions was originally enacted in 1911 as part of a comprehensive corrupt practices act under Governor Woodrow Wilson. A federal statute

enacted in 1907 is the source from which the New Jersey statute probably sprang; see N.J. Attorney General Formal Opinion No. 14-1979. This federal statute made it unlawful for any national bank, or any corporation organized by Congress, to make a contribution or expenditure in connection with any election to any Political office; see 2 U.S.C. S441b. (Formerly 18 U.S.C. S610).

The Federal Election Campaign Act of 1971 amended the statute and excluded from the definition of "contribution and expenditure" the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for Political Purposes provided that they were given voluntarily and the contributor had knowledge of the intended use for Political purposes. Of course, this language is the basis for forming a Political action committee (PAC).

The U.S. Supreme Court upheld this amendment in Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 92 S.Ct. 2247 (1972). The Court maintained that the 1907 federal law did not intend to prohibit a corporation (or union) from making, through a political fund organized by it, political contributions or expenditures so long as the monies going into the fund were voluntary.

In sum, while federal law, originally through the 1907 statute addressing certain corporations, and later through the "Federal Elections Campaign Act" of 1971, prohibits all corporations from making contributions to federal candidates, it does not prohibit corporations from using corporate funds to establish and maintain a PAC. It does not prevent corporations from using corporate funds to help raise voluntary money for political purposes.

With respect to the 1911 New Jersey statute prohibiting certain regulated corporations from contributing, Formal Opinion No. 14-1979 arrived at a similar, but not identical, conclusion vis-a-vis the establishment of PACs by banks, one category of prohibited contributors.

The Attorney General's opinion suggests that since the 1911 New Jersey statute was enacted four years after the federal statute of 1907, the New Jersey Legislature operated under the same objectives as did Congress. It therefore concludes that N.J.S.A. 19:34-45 did not intend to prohibit bank PACs from being formed and funded voluntarily by members of the corporation. However, unlike the federal law which was amended to permit corporate assets to be used to set up such funds, in New Jersey, banks would not be permitted to use corporate assets to establish, administer, or solicit contributions for the political fund.

Presumably this advisory opinion can be extrapolated to govern the activities of all prohibited contributors in New Jersey.

The U.S. Supreme Court, in its 1972 Pipefitters opinion, suggested that an important congressional purpose in enacting the 1907 law was to overcome the influence over elections exercised by holders of large amounts of capital through campaign contributions. The federal law was addressing the influence over government officials by wealthy corporations.

In a related way, Attorney General Kimmelman, in Formal Opinion No. 4-1983, suggested that the intent of the 1911 New Jersey statute is to "insulate elective officials from the influence of regulated industries". It further states, "each business listed in the act may be characterized as of a type strongly affected with a public interest.

Each business has been made the subject of extensive and pervasive government regulation. Comprehensive regulatory programs, vital to the protection of the public, could become prime targets of elected officials seeking to satisfy perceived debts to corporate benefactors affiliated with a regulated industry."

This statutory provision in New Jersey law has been broadly supported by the public through the years. And, as evidenced by the recent Eagleton/Star-Ledger poll, which found a majority of citizens concerned about the negative affects of large contributions and campaign expenditures, it seems safe to say that New Jersey residents would continue to support the prohibited contributor provisions in the law.

Despite the legal justification for the New Jersey prohibition and the historical tradition surrounding it, approval for the ban on contributions from selected corporations is not unanimous.

It is not clear that the New Jersey Legislature, in enacting "The New Jersey Campaign Contributions and Expenditures Reporting Act" in 1973 supported prohibitions against certain contributors While not superceding the 1911 provision, the stated purpose of the Campaign Act is to "require the reporting of all contributions received and expenditures made to --- any candidate." The only contributions prohibited by this Act are anonymous contributions and certain currency contributions over $100. Indeed, the 1970 report of the Election Law Revision Commission that led to the enactment of the law stated that "public disclosure --- would do more to protect the political system from unbridled spending than legal limits on the size of the contributions."

Thus, the Campaign Act views disclosure as the primary tool for preventing the corruption of State officials. It does not seem to lean in the direction of prohibiting certain contributors from participating in the process.

The argument put forth by proponents of the ban, and certainly a most reasonable one, is that banks, insurance companies and certain other regulated industries have, more so than other corporations, have been the subject of extensive governmental regulation. Also, because these corporations are vital to the public, it would invite undue influence to allow them to contribute to legislative candidates.

A response to this argument is that the prohibition against contributions by banks, insurance companies and certain regulated industries may be outdated. The rationale for why New Jersey banks, insurance companies and regulated industries cannot contribute comes from the national concerns of the early 1900's. It may be inapplicable to the State's interests in contemporary times.

The reasoning is that in modern times there are many other industries that are heavily regulated by the State - some even more so - but not subject to the same restrictions. The building industry, the chemical

and pharmaceutical industries, the legal profession, the medical profession, the dental profession, and the real estate business, are among these. Corporations in these categories are not prohibited from making political contributions. There is certainly a public interest in the governmental activities of these corporate entities not being perceived as unduly influencing public officials.

Moreover, there is today a significant problem in determining just what is a prohibited contributor because of modern corporate structure Large, contemporary industries are horizontally integrated; that is a major toy company, for example, may have interests in not only the production of toys but also of candy bars, automobiles, soap, and various other unrelated products. Such a company might even have an insurance affiliate. Therein lies the problem. Is the parent company a prohibited contributor because it owns an insurance company even if that company only represents a small percentage of its corporate holdings and profits?

Certainly, in the early twentieth century such problems did not arise with the frequency they do today. Horizontal integration creates major enforcement problems for an ethics agency attempting to prohibit only "certain classes" of corporate contributors. Perhaps, the two most viable options are to prohibit all corporate contributions or none.

Some members of the political science community also express concerns about prohibiting some or all contributors, but for different reasons. Professor Salmore suggests that the "unintended consequences of public policy are sometimes more important than the intended consequences."

His thinking is that no matter what kinds of prohibitions the State may place on certain contributors it cannot stop the flow of money; these prohibited contributors will simply rechannel where they spend it. Professor Salmore does not believe that expenditures will be decreased by prohibiting contributions. He says that public policy only affects the rules by which these entities play, not that they will play. Professor Salmore believes, as mentioned in the discussion about contribution limits, that the best answer is to tighten the disclosure laws.

The spectre of independent expenditures is not one that delights knowledgeable people in the field. Yet this is one of the ways that some experts believe the money will be channeled as prohibitory laws become more prohibitive.

The concern with independent expenditures is that they result in less accountability in the electoral process   Although reported by the committee doing the spending, independent expenditures are not contained in the candidates' reports; therefore, there is not the same degree of disclosure. It is more difficult to see what is going on.

Many different reports have to be reviewed and more staff would be needed to enforce campaign disclosure laws. Moreover, there is considerable concern that independent expenditures, because of the accountability issue, lead to campaign tactics that are offensive, in particular negative advertising. Most would agree that spending by the campaigns themselves is preferable to spending by independent committees.

With regard to prohibited contributors in New Jersey law, PACs established by employees of these corporations may begin spending independently from campaigns. While it has not begun to happen yet in New Jersey, it has begun to occur on the federal level.

Additionally, it is not a foregone conclusion that prohibited contributors in New Jersey could not tap their corporate funds to make independent expenditures on behalf of certain candidates. This possibility is raised because of the decisions in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) and Consolidated Edison Company v. Public Service Commission, 447 U.S. 530 (1980). These two cases state the proposition that corporations have rights under the

First Amendment to comment on public issues. Since elections involve public issues, the constitutional justification for prohibiting the right of speech via independent expenditures is questionable.

In sum, it is important for the Commission and the public to be aware of all sides of the questions in considering the important issues of contribution limits and prohibited contributors.

Recommendation 1:

The Commission recommends that contribution limits be enacted, provided that such limits are set high enough to permit candidates to raise enough money to run effective campaigns, and provided that sufficient safeguards are enacted to prevent the evasion of contribution limits.

Recommendation 2:

The Commission recommends that corporations and labor unions be prohibited from contributing, except through political action committees (PACs).

Recommendation 3:

The Commission recommends that it receive an adequate appropriation to enforce these changes to the law.

- The recommendations contained in this report are solely those of the New Jersey Election Law Enforcement Commission and do not necessarily represent the views of any other individual, institution, governmental agency or organization.

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