



December 18, 2017

Julia Lee
Conflicts of Interest Board
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Re: Comments on Proposed Rules – Local Law 181 of 2016

Dear Ms. Lee,

Lawyers Alliance for New York (“Lawyers Alliance”), Human Services Council (“HSC”) and Nonprofit Coordinating Committee of New York (“NPCC”) submit these comments regarding the proposed rules regarding organizations controlled by elected officials, to be codified at Admin. Code § 3-901 et seq.

Lawyers Alliance is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers. Among the services we provide to our clients is help complying with applicable law and rules, including regulations concerning relationships between nonprofit organizations and elected officials.

HSC fosters a diverse network of human service organizations. Together, we discuss ideas and take collective action on issues that impact the entire sector and those they serve. Through advocacy and collaboration, we support member organizations and their leaders in addressing their concerns of public policy, economic trends, and the regulatory environment. The human services workforce encapsulates 200,000+ providers in subsectors including: housing access, childcare, elder care, shelters, food pantries, mental health counseling, and disaster response. As the voice of the human services community, we highlight the struggles of those we serve, and amplify the need for a strong, well invested sector.

With more than 1,450 members, NPCC is the largest and most diverse nonprofit membership organization in New York City. NPCC members operate in all five boroughs of New York City and Westchester, Nassau, and Suffolk counties. NPCC provides capacity building education, resources

and advocacy designed to make 501(c)(3) nonprofit organizations stronger, more strategic and better able to improve the lives of millions of New Yorkers by achieving their missions related to social services, arts and culture, health, the environment and educational opportunities, among many others.

Lawyers Alliance, HSC and NPCC support the effort to increase transparency of donations to organizations controlled by elected officials. However, we are concerned that the proposed rules will unintentionally sweep in organizations with no real connection to an elected official, impinging on those organizations' constitutional rights, creating unnecessary administrative burdens for them, and creating unnecessary work for the Conflicts of Interest Board ("COIB"). Accordingly, we suggest that the rules be amended to more clearly define which organizations are covered because they are controlled by an elected official.

Clarifying the definition in this way is necessary for constitutional reasons, and to avoid unnecessarily increasing COIB's workload. Compelled disclosure of donors infringes on the First Amendment associational rights of both the donor and the nonprofit. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). As a result, statutes and regulations requiring nonprofits to publicly disclose their donors are subject to "exacting scrutiny," which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest." *Citizens United*, 558 U.S. 310, 366-67 (2010). See also *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-33, 137 (2d Cir. 2014); *Independence Inst. v. Williams*, 812 F.3d 787, 789, 792, 798 (10th Cir. 2016). Corruption concerns may constitute a sufficient interest in learning the identity of donors to organizations that really are controlled by an elected official. However, there is no such governmental interest in learning the donors of independent nonprofits with only a tenuous connection to an elected official. For this reason, the rules must exclude such organizations.

In addition, because the proposed rules regulate speech, they must be written with precision in order to provide reasonable notice to regulated parties, and to avoid arbitrary and discriminatory enforcement. Cf. *U.S. v. Williams*, 553 U.S. 285, 304 (2008). The precision must extend both to who is covered by the statute and what covered people must do in order to comply. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 621 (1976). The Supreme Court has said that a speech regulation will fail this test when "men of common intelligence must guess at its meaning," and when it does not "provide explicit standards for those who apply it," *id.* at 622. Thus, a speech restriction will be found to be unconstitutionally vague when government officials are guided only by a set of vague factors such as "public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 154-55 (1969). In the following sections, we suggest ways to clarify and narrow the proposed rules, to comport with these constitutional requirements.

I. Rebuttable presumption

- A. Create a rebuttable presumption that a nonprofit charitable corporation is not controlled by an elected official who neither appoints a majority of voting seats on the board nor serves as a principal officer.

The proposed rules contain a presumption "of control by an elected official where such official, or such an agent, appoints a majority of the board of the entity (not including appointees nominated by another individual or entity that is not such an agent of the elected official), or is a principal officer of the entity." COIB Rule 3-01(g). The rules should also contain the opposite

presumption: that a nonprofit corporation is *not* controlled by an elected official who, directly or through an agent, neither appoints a majority of seats on the board nor serves as a principal officer. A nonprofit corporation is controlled by its board or members, and is managed by the board, which may delegate certain powers to the officers. *See* N.Y. Not-for-Profit Corporation Law (“N-PCL”) § 701. If the board and officers are not controlled by an elected official, neither is the organization.

Moreover, corporate and tax law require the board and officers of a nonprofit charitable corporation to serve the corporation’s purposes, and not to benefit an individual. *See* N-PCL § 102(a)(5); Internal Revenue Code (“IRC”) 501(c)(3). Directors and officers who allow an elected official to control the corporation are liable for a breach of their fiduciary duty. *See* Office of the Attorney General, *Right From the Start*, pp. 6-7 (2015) (describing duty of loyalty), <https://www.charitiesnys.com/pdfs/Right%20From%20the%20Start%20Final.pdf>; N-PCL §§ 715, 717(a). They may also risk the organization’s tax exempt status if the organization is run for the benefit of one or more individuals, rather than for the organization’s charitable purposes. 26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii). The ban on benefitting a private individual extends to the organization’s activities, and it covers activities that benefit an individual in nonmonetary ways. *Id.* 1.501(c)(3)-1(d)(1)(iii). These potential personal and organizational liabilities provide another reason to presume that a nonprofit charitable corporation is not controlled by an elected official, particularly if the official neither appoints a majority of board seats nor serves as a principal officer.

The legislative history of Local Law 181 further supports such a presumption. In its bill memo, the City Council’s Committee on Standards and Ethics wrote, “An organization that has four out of ten board members appointed by the Public Advocate, none of whom chairs the board, and which does not otherwise have indicia of control by the Public Advocate, would likely not be considered to be controlled by the Public Advocate.” NYC Council, Committee on Standards and Ethics, Report of the General Counsel on Proposed Int. No. 1345-A, p. 14 (Dec. 14, 2016), <http://legistar.council.nyc.gov/View.ashx?M=F&ID=4842592&GUID=CAA23E43-E3BB-4B05-9067-C18F5B464ED6>. Such an organization should not have to apply to the Conflict of Interest Board for a determination that it is not controlled by an elected official, and should instead be able to rely on a presumption that it is not controlled. This would, of course, also reduce the Board’s workload.

- B. In examining whether a majority of the seats on the board are appointed by an elected official, consider only voting members of the board.

An appointee who is a nonvoting member of the board cannot exercise control over the organization. *See* N-PCL § 713(d) (ex-officio board members may have voting rights unless the certificate of incorporation or bylaws specify otherwise). For this reason, nonvoting members should not be counted.

- II. Define “agent of an elected official” to exclude appointees serving *without compensation*, and City employees who are not appointed by and do not report to the Mayor.

Under the rules, a nonprofit executive who was appointed to a position by, and serves “at the pleasure” of, an elected official is considered an “agent” through which the official can control the organization. COIB Rules § 3-01(g)(3). The Mayor and other elected officials often invite nonprofit executives to serve on advisory boards and commissions, such as the Archives,

Reference and Research Advisory Board; Commission on Gender Equity; Procurement Policy Board; Advisory Council to Enhance Procurement Opportunities for MWBE's; and Sexual Health Education Task Force, to name just a few. The executives provide concrete information about the lives of the people they serve, as well as expertise regarding particular subject areas. Often, this advisory work is unpaid. It is implausible that a nonprofit would be subject to control by an elected official merely because a single executive lends his or her expertise to the City in this manner, without expectation of compensation. For this reason, the rules should exclude unpaid appointees from the definition of "agent of an elected official."

Clarifying the rule in this way will avoid COIB having to deal with a flood of applications from nonprofits seeking a determination that they are not controlled by an elected official. There are dozens of Mayoral boards and commissions, many of which do not compensate the nonprofit executive directors and others who serve as members. *See* <http://www1.nyc.gov/site/appointments/boards-commissions/all-boards-commissions.page>. The Mayor's Commission on Gender Equity alone includes the chief executive officer or executive director of at least eight nonprofit organizations. *See* <https://www1.nyc.gov/site/genderequity/about/commission-members.page>. Clarifying that a nonprofit executive does not become an "agent of an elected official" merely by accepting an uncompensated seat on these bodies will avoid the need for each organization to apply to the COIB.

The term "agent of" an elected official is vague in another way, too – does it include everyone under the direct or indirect control of that official, or only people who work in that official's office or otherwise directly for that official? The COIB rules should include a definition of "agent," to make clear that the latter is intended. Thus, a top advisor in the Mayor's office would be included, but a schoolteacher working for the Department of Education would not be. This is clearly the intent of the legislation, which was aimed at organizations like the Campaign for One New York. As the City Council noted, that organization "was established by the Mayor to support and promote his policy agenda, was run by his closest advisors, and staffed by personnel and consultants from his 2013 campaign." *See* NYC Council, Committee Report of the General Counsel on Proposed Int. No. 1345-A, p. 8, *supra*.

III. Sharpen the Factors by which the Board Will Determine Whether an Entity is Controlled by an Elected Official, § 3-03

Proposed rule 3-03(a) takes into account "whether the organization was created by such an elected official or the official's agent, or by an individual who was previously employed by, or was a paid political consultant of, the elected official, and, if so, how recently such organization was created." This factor should be narrowed in two ways. First, it should only consider whether it was created by someone who worked for an official *within the past year*, and not by someone who worked for the elected official years earlier. Many elected officials have decades of public service before they enter office. People who worked for them years or decades earlier are extremely unlikely to still be under their control. Additionally, this factor should consider only people who worked closely with the elected official. For instance, as with the definition of "agent" above, it should cover a top staffer in the Mayor's office, but not a school teacher employed by the Department of Education. This is consistent with the legislative history, in which committee counsel wrote that an organization founded by "a former high-ranking staffer of the Comptroller, or the Comptroller's campaign, shortly after leaving that position," would

likely be considered to be controlled, implying that an organization founded by a more remote employee, or someone who had left the position earlier, would not be. *See* NYC Council, Committee Report of the General Counsel on Proposed Int. No. 1345-A, *supra*, p. 13.

Proposed rule 3-03(e) takes into account “the degree of involvement or direction by such an elected official or the official’s agent in such organization’s policies, operations, and activities.” This rule should make clear that merely providing funding through a publicly disclosed process open to other organizations, without more, does not constitute the requisite involvement or direction by an elected official. In fiscal year 2018, members of the New York City Council provided discretionary funding to over 2,100 nonprofit organizations. *See* NYC Council, Discretionary Funding Database, <https://council.nyc.gov/budget/fy2018/>. Many more nonprofits receive discretionary funding from Borough Presidents. *See, e.g.*, Manhattan Borough President’s Office FY 2018 Capital Grant Awards, <http://manhattanbp.nyc.gov/downloads/pdf/MBPO%20FY%2018%20Capital%20Grant%20Awards.pdf> In order to avoid a flood of applications for a COIB determination, the COIB should clarify that the mere provision of such funding does not constitute control.

Proposed rule 3-03(f) takes into account “the degree to which public servants, acting under the authority or direction of the elected official or an agent of the elected official, perform duties on behalf of the organization as part of their official City employment.” As the COIB notes, this factor was created by the COIB and is not in the underlying legislation. It makes the illogical assumption that a person “performing duties on behalf of the organization” is in fact in control of the organization, when it is just as likely that the person is controlled by the organization. This factor could require a nonprofit to disclose donors merely because it accepts the services of an employee seconded by the Parks Department, or partners with a Borough President on a street fair. This factor should either be removed entirely, or the COIB should clarify that a nonprofit does not operate under the control of an elected official merely because it accepts the services of a City employee, where the nonprofit supervises or acts as an equal partner with the City employee.

Conclusion

We recommend that the proposed rules be amended in the following ways:

- 1) Amend the definition of “organization affiliated with an elected official,” § 3-01(g):

Organization affiliated with an elected official. “Organization affiliated with an elected official” means:

- (1) a non-profit entity other than an agency, public authority, public benefit corporation, or local development corporation;
- (2) which has received at least one donation in the previous or current calendar year; and
- (3) over which a person holding office as Mayor, Comptroller, Public Advocate, Borough President or Member of the Council, or an agent of such a person, which shall include an appointee of such person serving for compensation at the pleasure of such person, exercises control.

There shall be a rebuttable presumption that an entity is not controlled by an elected official (or the official's agent) if the official or agent neither appoints a majority of voting members of the board nor serves as a principal officer. There shall be a rebuttable presumption of control by an elected official where such official, or such an agent, appoints a majority of voting members of the board of the entity (not including appointees nominated by another individual or entity that is not such an agent of the elected official), or is a principal officer of the entity. Principal committees and political committees, as those terms are defined in Administrative Code § 3-702, are not organizations affiliated with an elected official.

2) Add a new definition of “agent of an elected official” to § 3-01:

Agent of an elected official. “Agent of an elected official” means a person who works in that official’s office or otherwise directly for that official, or who is an appointee of the elected official serving for compensation at the pleasure of such official. “Agent of an elected official” does not include a person who works for an appointee of the official.

3) Amend the factors by which the Board will determine whether an entity is affiliated with an elected official, § 3-03:

- Factor (a): “whether the organization was created by such an elected official or the official’s agent, or by an individual who within the immediately preceding 12 months was previously directly employed by, or was a paid political consultant of, the elected official, and, if so, how recently such organization was created”
- Factor (e): “the degree of involvement or direction by such an elected official or the official’s agent in such organization’s policies, operations, and activities, except that merely providing discretionary funding to such organization, without more, shall not be considered involvement or direction in such organization’s policies, operations, and activities.”
- Factor (f) should be deleted.

Sincerely,



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