



February 7, 2007

The Honorable Phil Mendelson
Chairman, Committee on the Judiciary
Council of the District of Columbia
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: ASAE Hearing Testimony on Bill 17-53, the "Nonprofit Organizations Oversight Improvement Amendment Act of 2007"

This testimony is respectfully submitted on behalf of the **American Society of Association Executives ("ASAE")**, a District of Columbia nonprofit corporation and an Internal Revenue Code Section 501(c)(6) tax exempt organization. ASAE was founded in 1920 and represents approximately 22,000 members, the majority of whom are CEOs or senior staff professionals of trade, professional, or philanthropic organizations – many of whom are also based in Washington, D.C. The number of people who belong to associations represented by ASAE totals more than 200 million. The core purposes of ASAE are to advance the value of voluntary associations to society, to support the professionalism of the individuals who lead them, and to advocate on issues that impact or threaten to impact the success of the association and nonprofit community. Nonprofit associations are the second largest private employer in Washington, D.C., comprise over ten percent of the city's workforce, and contribute importantly to the well-being and business base of the District. Countless association activities not only further the nonprofit purposes of these organizations, but also contribute to improving the general welfare of communities in the District and throughout the country.

ASAE would initially like to thank Councilmember Mendelson on behalf of its members and the District of Columbia nonprofit community for his willingness to work with the community to address our collective concerns on this matter. As discussed below, ASAE urges the Judiciary Committee to adopt the modifications proposed in the Working Group Draft of Bill 17-53.

BACKGROUND:

To consider Bill 17-53 in its proper context, it is useful to briefly note its evolution from Bill 16-759, the predecessor to Bill 17-53 introduced during the preceding D.C. Council session. The fundamental purpose of this legislation is to facilitate investigation by the Attorney General of suspected abuses of the nonprofit corporate form by a very small minority of suspected malfeasors in the District. Although the nonprofit community strongly supports this underlying purpose, Bill 16-759, as originally drafted, had numerous ambiguities and unintended consequences that could have had deleterious consequences for legitimate nonprofits organized or operating within the District. ASAE and the nonprofit community felt compelled to conduct a grass-roots and lobbying campaign to voice their concerns over such ambiguities and unintended consequences, including Bill 16-759's excessively broad scope, the fact that it could have been

interpreted to prohibit nonprofits from generating surplus operating income, and would have given nearly unfettered discretion to the Attorney General and D.C. courts to investigate and punish nonprofits – even if they had in fact done absolutely nothing wrong.

After meeting with representatives of the nonprofit community – and after a flurry of exchanges of proposed legislative edits between Councilmember Mendelson and the nonprofit community – Councilmember Mendelson agreed to withdraw Bill 16-759 from consideration in last year's session and to work with the nonprofit community to craft legislation that gives the Attorney General the needed tools to pursue true abusers of the nonprofit form while simultaneously protecting legitimate nonprofits.

COMMENT:

Bill 17-53 represents a marked step towards ameliorating many of the ambiguities and unintended consequences contained in the original version of Bill 16-759. However, ASAE and its members cannot support the introduced version of Bill 17-53 because several areas of deep concern remain unaddressed by this legislation. For example, Bill 17-53 contains a disputed definition of “nonprofit purpose”¹ and controversial provisions regarding a court’s ability to impose sanctions on a nonprofit organization,² provides for an overly broad application of the Consumer Protection Procedures Act to nonprofits,³ and lacks several technical modifications necessary to maintain the structure and consistency of the Nonprofit Corporation Act.

Since the introduction of Bill 17-53, the D.C. Council, the D.C. Attorney General, and members of the nonprofit community have, through an ongoing working group, collaboratively developed a draft proposal of this legislation (the “Working Group Draft,” a copy of which is attached to this testimony) that both gives the Attorney General the power to investigate and prosecute suspected malfeasors and protects legitimate nonprofits from unwarranted intrusions upon their activities. The Working Group Draft has the support of ASAE because it removes many of the ambiguities, unintended consequences, and controversial provisions contained in previous version of this legislation. For example, the Working Group Draft removes the excessively narrow definition of “nonprofit purpose,”⁴ reasonably limits the application of the consumer protection laws to nonprofit activities,⁵ imposes legal standards on the power given to the Attorney General and DC courts to help ensure the exercise of such power is equitable,⁶ and makes most of the necessary technical corrections lacking in Bill 17-53.⁷

¹ See Bill 17-53 § 2(a).

² See Bill 17-53 § 2(b)(1)

³ See Bill 17-53 § 4.

⁴ See Working Group Draft § 2(a).

⁵ See Working Group Draft § 5.

⁶ See Working Group Draft § 2(b)(1).

⁷ See, e.g., Working Group Draft § 2(b)(2).

The Honorable Phil Mendelson
February 7, 2007
Page 3 of 3

CONCLUSION:

ASAE and its members strongly support the underlying purpose of Bill 17-53: to minimize abuses of the nonprofit form to help ensure that the nonprofit sector continues to be accountable and deserving of public trust. ASAE believes that the advances embodied in the Working Group Draft will fulfill this purpose better than Bill 17-53. Accordingly, while ASAE cannot support the introduced version of Bill 17-53, ASAE would support – and urges the Committee to adopt – the modifications to Bill 17-53 contained in the Working Group Draft.

In the future, ASAE encourages the D.C. Council to consult with the nonprofit community from the outset when considering legislation that would impact the nonprofit community in order to ensure that the legislation ultimately passed is the product of an open, systematic, and deliberative process and reflects the best interests of the general public and the nonprofit community. ASAE would again like to express its appreciation for Councilmember Mendelson's willingness to accommodate the legitimate concerns of the nonprofit community as addressed in the Working Group Draft, and looks forward to continuing to work with the D.C. Council in a positive, collaborative manner.

Respectfully submitted:

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February 7, 2007
Draft 3

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Nonprofit Corporation Act to facilitate investigation by the Attorney General into whether nonprofit corporations are acting contrary to their authority or purposes, to clarify that nonprofit corporations are to be organized only for nonprofit purposes, and to expressly authorize alternatives to corporate dissolution in cases involving nonprofit corporations that have exceeded or abused their authority or have acted contrary to their nonprofit purposes, to amend the District of Columbia Charitable Solicitation Act to facilitate investigation by the Attorney General into suspected violations; and to amend the Consumer Protection Procedures Act to eliminate the judicially-created exemption for nonprofit organizations.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Nonprofit Organizations Oversight Improvement Amendment Act of 2007".

Sec. 2. The District of Columbia Nonprofit Corporation Act, approved August 6, 1972 (76 Stat. 266; D.C. Official Code § 29-301.01 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 29-301.04) is amended to read as follows:

"Corporations may be organized under this subchapter for any lawful, nonprofit purpose or purposes including, but not limited to, one or more of the following or similar purposes: benevolent; charitable; religious; missionary; educational; scientific; research; literary; musical; social; athletic; patriotic; political; civic; professional,

commercial, industrial, business, or trade association; mutual improvement; promotion of the arts; except that organizations subject to any of the provisions of the insurance laws of the District may not be organized under this chapter.”

(b) Section 53 (D.C. Official Code § 29-301.53 is amended as follows:

(1) Section 53(a) (D.C. Official Code § 29-301.53(a)) is amended to read as follows:

“(a) A court may order the involuntary dissolution of a corporation, place a corporation in receivership, impose a constructive trust on compensation paid to a corporation’s director, officer, or manager, or grant other injunctive or equitable relief with respect to a corporation, in an action brought by the Attorney General in the name of the District of Columbia when the court finds by a preponderance of the evidence that:

(1) The franchise of the corporation was procured through fraud;

(2) The corporation has continued to exceed or abuse the authority conferred upon it by this subchapter;

(3) The corporation has failed for 90 days to appoint and maintain a registered agent as provided in this subchapter;

(4) The corporation has failed for 90 days after a change of its registered office or registered agent to deliver to the Mayor a statement of such change;

or

(5) The corporation has continued to act contrary to its nonprofit purposes.”

(2) Subsection (b) is amended to read as follows:

“(b) At least 30 days before any action based on subsection (a) of this section shall be filed against a corporation by the Attorney General, he shall notify the corporation by certified or registered mail addressed to such corporation at its registered office a notice of his intention to file such a suit and the reason thereof. If, before an action is filed, the corporation as the case may be shall submit satisfactory evidence that said franchise was not procured through fraud or that the corporation has not exceeded or abused such authority or shall appoint or maintain a registered agent as provided in this subchapter, or deliver to the Mayor the required statement of change of registered agent, the Attorney General shall not file an action against such corporation for such cause. If, after action is filed, for a reason stated in paragraph (3) or (4) of subsection (a) of this section, or shall deliver to the Mayor the required statement of change of registered agent, and shall pay the cost of such action, the action of such cause shall abate.”

(3) New subsections (c) and (d) are added to read as follows:

“(c) If the Attorney General, in the course of an investigation to determine whether to bring a court action under this section, has reason to believe that a person may have information, or may be in possession, custody, or control of documentary material, relevant to such investigation, the Attorney General may issue in writing and cause to be served upon such person, a subpoena or subpoenas requiring such person to give oral testimony under oath, or to produce records, books, papers, contracts, electronically-stored data and other documentary material for inspection and copying. Information obtained pursuant to this authority to subpoena is not admissible in a later criminal proceeding against the person who provided the information.”

“(d) The Attorney General may petition the Superior Court of the District of Columbia for an order compelling compliance with a subpoena issued pursuant to this authority to subpoena.”

Sec. 3. Section 13 (c) of the District of Columbia Charitable Solicitation Act, approved July 10, 1957 (71 Stat. 281; D.C. Official Code § 44-1712 (c)) is amended as follows:

(a) Designate the existing text as paragraph (1).

(b) A new paragraph (2) is added to read as follows:

“(2) The Attorney General for the District of Columbia or any of his assistants is hereby empowered to bring an action or actions in the Superior Court of the District of Columbia in the name of the District of Columbia to enjoin any person from soliciting in violation of this Act or in violation of any regulation made pursuant to this Act. If the Attorney General, in the course of an investigation to determine whether to bring a court action under this section, has reason to believe that a person may have information, or may be in possession, custody, or control of documentary material, relevant to such investigation, the Attorney General may issue in writing and cause to be served upon such person, a subpoena or subpoenas requiring such person to give oral testimony under oath, or to produce records, books, papers, contracts, electronically-stored data and other documentary material for inspection and copying. Information obtained pursuant to this authority to subpoena is not admissible in a later criminal proceeding against the person who provided the information. The Attorney General may petition the Superior Court of the District of Columbia for an order compelling compliance with a subpoena issued pursuant to this authority to subpoena.”

Sec. 4. Section 28-3901(a)(3) of the District of Columbia Official Code is amended to read as follows:

“(3) ‘merchant’ means a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice;”

Sec. 5. Section 28-3905(k) of the District of Columbia Official Code is amended to add a new subparagraph (5) to read as follows:

“(5) An action brought by a person under this subsection against a corporation organized under or subject to the District of Columbia Nonprofit Corporation Act may not be based on membership in such corporation, membership services, training or credentialing activities, sale of publications of the corporation, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase and sale of consumer goods in the ordinary course of business.”

Sec. 6. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 7. Effective date.

This act shall take effect following approval by the Mayor (or in the event of a veto by the Mayor, action by the Council to override the veto), a 30-day period of

Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.