DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: "District of Columbia Drug Price Relief Act of 2018 ."	Administrative Hearing No. 18-001 Re: Rejection of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections ('the Board") on Wednesday, December 6, 2017, pursuant to D.C. Official Code § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, "District of Columbia Drug Price Relief Act of 2018," ("the DPR Act"), is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer of the initiative, Mr. Jeffrey Blend, appeared before the Board *pro se*. Mr. Frederick D. Cooke, Jr. Esq. of *Rubin, Winston, Diercks, Harris & Cooke, LLP* offered testimony in opposition to the proposed measure on behalf of the Pharmaceutical Research and Manufacturers of America (PhRMA). Chairman Michael Bennett and Board Members Dionna Lewis and Michael Gill presided over the hearing. Executive Director, Alice Miller, General Counsel, Kenneth McGhie, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery were also present.

Statement of the Facts

On October 6, 2017, Jeffrey Blend filed the DPR Act initiative pursuant to D.C. Official Code § 1-1001.16(a). However, no verified statement of contributions was filed with the Office

of Campaign Finance pursuant to §§ 1-1163.07 and 1-1163.09.[1] Except as prescribed by federal law, the Measure prohibits any District of Columbia department, agency, or entity from: 1) entering into an agreement to purchase a prescription drug from a manufacturer, and 2) agreeing to pay for a prescription drug, unless the net cost of the drug equals or is less than the lowest price paid for the drug by the United States Department of Veteran Affairs (VA), inclusive of cash discounts, free goods, volume discounts, rebates, or any other discounts or credits.[2]

On October 11, 2017, the Board's General Counsel requested that the Office of Documents and Administrative Issuances ("ODAI") publish in the D.C. Register a "Notice of a Public Hearing: Receipt and Intent to Review" ("the Notice") with respect to the Initiative. The Notice was published in the D.C. Register on October 20, 2017. *See* 64 D.C. Reg. 42 (2017). On October 11, 2017, the General Counsel's office also sent the Notice to the Attorney General for the District of Columbia ("the Attorney General") , the Office of the Mayor's Legal Counsel, and the General Counsel for the Council of the District of Columbia ("the Council") inviting them to comment on the issue of whether the Initiative presented a proper subject.

On November 30, 2017, the Attorney General submitted comments to the Board stating that the Initiative was an improper subject. "The measure is not a proper subject for an initiative because it is a law appropriating funds under the Court's reasoning in *Hessey v. District of Columbia Board of Elections and Ethics*. . . In addition, the Measure impermissibly attempts to bind the Council."[3]

During the Proper Subject Hearing convened on December 6, 2017, Mr. Cooke testified

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[1] The verified statement of contributions consists of the statement of organization required by D.C. Official Code §1-1163.07 and the report of receipts and expenditures required by D.C. Official Code § 1-1163.09.

[2] Opinion of District of Columbia Attorney General, Karl A. Racine, Esq. (Nov. 30, 2017) p. 1

[3] *Id.* pp. 2-3.

on behalf of PhRMA in opposition to the proposed measure. Mr. Cooke testified that the "measure would interfere with locally elected officials' decisions about how District government revenues will be spent and compel the allocation of funds by the Council, and is therefore a law appropriating funds and an impermissible subject for an initiative."[4] By requiring the Council to adhere to the Department of Veterans' Affairs (VA) pricing schedule for prescription medication, Mr. Cooke reasoned that the District would be required to establish and staff an agency or administration to identify prescription drugs purchased directly or indirectly by the District that fall within the ambit of the proscription to ensure compliance with the DPR Act. Moreover, Mr. Cooke detailed the difficulty of price valuation under the measure's scheme—thereby putting a strain on the appropriation process. Finally, Mr. Cooke relayed his concerns with the proposer's formulation of the Short Title and Summary Statement of the proposed measure to the extent that nomenclature used such as "relief" intentionally creates prejudice for the measure, and that the measure is misleading because the VA does not purchase every prescription medication that the District purchases. Mr. Cooke postulated that these defects render the measure an improper subject for initiative.

The proposer of the DPR Act, Jeffrey Blend, thanked the Board for its consideration of his proposed measure, and adopted the Board General Counsel's position that the summary statement and short title are ultimately drafted by the Board pursuant to D.C. Code § 1-1001.16(c)(1).[5] The proposer's summary statement and short title are mere suggestions, and the Board makes the ultimate determination of how they are presented to the electorate on the

[4] Cooke memorandum in opposition to DC DPRA at 2 (Nov. 30, 2017)

[5] D.C. Code § 1-1001.16(c)(1) states: "(c) Within 20 calendar days, of the date on which the Board accepts an initiative or referendum measure, the Board shall: (1) Prepare a true and impartial summary statement, not to exceed 100 words, bearing the serial number of the measure, and expressing the purpose of the measure. Such statement shall not intentionally create prejudice for or against the measure;

petition and ballot.

Analysis

Pursuant to D.C. Official Code § 1-1001.02(10), "[t]he term 'initiative' means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." The Board may not accept an initiative measure if it finds that it is not a proper subject of initiative under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

(A) The verified statement of contributions has not been filed pursuant to §§ 1-1163.07 and 1-1163.09;[6]
(B) The petition is not in the proper form established in subsection (a) of this section;[7]
(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[8] or
(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[9.]

D.C. Official Code § 1-1001.16 (b)(1).

It must be reiterated at the outset, that the Board may not accept this initiative on procedural grounds because the proponent did not file the verified statement of contributions within ten (10) days of formation of his committee. The Board does not have discretion to

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[6] The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1163.07 and the report of receipts and expenditures required by D.C. Official Code § 1-1163.09.

[7] Subsection (a) of D.C. Official Code § 1-1001.16 provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative[.]"

[8] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act, the intent of which is to secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Official Code § 2-1401.

[9] D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

excuse this omission. The mandatory language of D.C. Code § 1-1001.16(b)(1)(A) requires the Board to refuse to accept any measure where the verified statement of contributions is not filed. Since the proponent did not file the requisite information with the Director of Campaign Finance, the Board is without authority to accept this measure even if the Board found it to be a proper subject. While such an omission can be rectified upon resubmission, the instant measure unfortunately has been determined to also be an improper subject for the Board to present to the electorate as an initiative.

The District of Columbia Court of Appeals has determined that "a measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative. This is true whether or not the initiative would raise new revenues." *Hessey v. District of Columbia Board of Elections and Ethics, et al.,* 601 A.2d 3 at 19 (D.C. 1991) ("*Hessey*"). In order for an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, the measure must not: block the expenditure of funds requested or appropriated; directly appropriate funds; require the allocation of revenues to new or existing purposes; establish a special fund; create an entitlement enforceable by private right of action; or directly address and eliminate any revenue source. Finally, the mandatory provisions of the initiative may not be precluded by any lack of funding. *See District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788, 794 (D.C. 2005) ("*Campaign Treatment*").

By requiring the District pay a specified rate for prescription medication, the DPR Act intrudes upon the discretion of the Council to allocate District government revenues in the budget process. The allocations are not insignificant as the District spends a considerable amount on prescription medication through a myriad of programs. Notwithstanding the proposed measure at issue exhibits altruistic intentions of lowering drug prices and saving

taxpayer money, it runs afoul of the appropriation prohibition because it directs the Council to pay a specific rate for prescription medication. By requiring the Council to adhere to a pay rate equivalent to the VA, the measure hampers the District's purchasing ability for ostensibly critical medications if the manufacturers are unwilling to yield to such pay-rate demands. Moreover, funds previously allocated for the purchase of drugs may be insufficient in the event that a manufacturer refuses to meet the District's required pay-rate—essentially negating the Budget Request Act that appropriated the funds for the medication purchase.

The actual cost of initiating such a universal pay-rate for prescription medication is nebulous due to the uncertainty of which manufacturers would oblige the District's demands. There is no accounting for which drug manufacturers would be able to accommodate the District by providing them with the prices that the Department of Veterans' Affairs garners. The Council would be left in a fiscal quandary at a loss to budget properly for such unanticipated contingencies. This is precisely the reason for the appropriation prohibition on the right of initiative. This unfunded mandatory program is exactly what the Council feared when enacting the "Dixon Amendment" prohibiting initiatives and referendums that appropriate funds or negate or limit an existing Budget Request Act. Moreover, the effective date of July 1, 2019 is in the middle of a fiscal year where funds will already be appropriated for prescription medication purposes. The affirmative requirement of matching VA price guarantees could potentially leave the District without any authority to negotiate different terms in the event a manufacturer decides they cannot bear the costs of granting the District the VA's price guarantees.

The Attorney General poignantly asserted that, "[i]f passed the initiative could impact a variety of District programs and entities, including D.C. Medicaid, D.C. Health Care Alliance,

AccessRX, and the Department of Behavioral Health."[10] "By establishing an affirmative price ceiling for any prescription drug purchased or paid for by the District, the Measure interferes with the discretionary process by which the Mayor and Council allocate District revenues among competing programs and activities."[11] The Board recognizes that this measure has the potential to upend the appropriation process as it pertains to prescription medication purchases. PhRMA, by and through Mr. Cooke, detailed that "the measure would require the allocation of funds to both restructure existing policies and programs for prescription drugs purchased by the District and to implement and enforce the new prescription drug program."

New processes and functions would have to be developed to identify all prescription drugs purchased by the VA and negotiate those same rates on behalf of the District. In the event that any manufacturers are not amenable to such negotiated rates, the DPR Act is silent as to how the government is to proceed. Moreover, effective July 1 2019 by terms of the measure, all existing procurement contracts that do not adhere to the VA rate would necessarily have to be renegotiated or nullified. While the Attorney General concedes in his memorandum opinion that the Court has not had occasion to squarely address a price ceiling on the District's elected officials' revenue allocation powers, it stands to reason that this type of activity falls within the ambit of the appropriation prohibition on the initiative right in the District of Columbia.

[10] Opinion of District of Columbia Attorney General, Karl A. Racine, Esq. (Nov. 30, 2017) p. 1

[11] *Id*. at 3.

Conclusion

In conclusion, the DPR Act did not meet the procedural hurdle of submitting the verified statement of contributions within the requisite time span. Additionally, the measure presents an improper subject for initiative because it violates the prohibition on laws appropriating funds by establishing a price ceiling on the District's elected officials' revenue allocation powers. The measure cannot function as intended without forcing the Council to appropriate funds for an unknown expense. Moreover, the July 1 2019 effective date is in the midst of a fiscal year with outstanding procurement allocations that could be negated or limited by the terms of the proposed measure.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "District of Columbia Drug Price Relief Act of 2018," is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(2)

Date January 3, 2017

D. Michael Bennett, Esq.
Chairman