

**Strengthening Democracy: Initiatives, Referenda, and Charter Amendment Referenda in the District of Columbia**

December 2001



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**STRENGTHENING DEMOCRACY: INITIATIVES, REFERENDA,  
AND CHARTER AMENDMENT REFERENDA IN THE DISTRICT OF  
COLUMBIA**

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## PREFACE

*Strengthening Democracy: Initiatives, Referenda, and Charter Amendment Referenda in the District of Columbia* is the first in a series of DC Appleseed projects with the single goal of strengthening the democratic systems that significantly affect the lives of District of Columbia residents. DC Appleseed began this first project in March 2001, by convening a team of volunteers to examine certain aspects of the laws and processes that govern initiatives, referenda, and charter amendment referenda in the District of Columbia.

Much of the research and writing contained in this report was performed by a team of volunteers, including several attorneys from the private bar. Each volunteer project team member served as an individual and, therefore, the report reflects their individual views, not necessarily those of their organization or law firm.

DC Appleseed first became interested in examining the District of Columbia laws and processes that govern initiatives, referenda, and charter amendment referenda during the campaign for Charter Amendment III, the School Governance Charter Amendment Act of 2000. The subsequent controversy led DC Appleseed to re-examine our own involvement and activities related to advocacy on this and any future ballot measure. During our review, we often found the laws and regulations to be vague or confusing in their applicability, and in need of clarification or other revisions. DC Appleseed decided to undertake this in-depth review of the laws and regulations governing initiative and referendum campaigns in the District of Columbia and to recommend certain reforms. The District's history with respect to initiative, referendum, and charter amendment referendum campaigns has been categorized by significant questions and controversies.<sup>1</sup>

Throughout this report, DC Appleseed proceeds from the widely accepted view, originally expressed in *Convention Center Referendum Commission v. District of Columbia Board of Elections & Ethics*, 441 A.2d 871, 876 (D.C. 1980), *affirmed on rehearing*, 441 A.2d 889, 907 (D.C. 1981), that “absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures.” Only where relevant do we distinguish between ballot measures initiated by the voters (*e.g.* initiatives and voter-initiated referenda) and ballot measures referred to the voters by the Council (*e.g.* charter amendment referenda).

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<sup>1</sup> Consider, for example, the following headlines from *The Washington Post*: “D.C. Campaign to Fight Referendum Held Illegal; Common Cause Challenges Use of City Funds,” October 9, 1986; “Bottle Bill Opponents Solicit Record Funds; Industry Group’s Spending Raises Eyebrows,” August 5, 1987; “D.C. Loses Appeal on Spending Case,” September 21, 1988; “Judge Disallows Anti-Shelter Leaflets,” October 31, 1990; “D.C. Homeless Fliers Prohibited; School Board Fight Spurs Ethics Debate; Mayor’s Use of Staff in Bid Prompts Complaint,” June 11, 2000; “Ethics Panel Probes School Board Lobbying,” June 14, 2000; and “Ethics Panel Faults William’s Lobbying,” September 7, 2000.



In August 1993, the American Bar Association issued a report entitled *The Challenge of Direct Democracy in a Republic: Report and Guidelines of the Task Force on Initiatives and Referenda* (hereinafter referred to as the “ABA Guidelines”). A number of these guidelines have been adopted in other jurisdictions to improve public understanding of the issues raised by initiatives and referenda. Each of our recommendations is preceded by the full text of the applicable ABA Guideline.

Since 1993, when the ABA Guidelines were issued, one charter amendment referendum and four initiatives (one of which was recently repealed by the Council) have been passed in the District of Columbia. During this time period, only limited reforms have been made to the laws and regulations governing initiatives and referenda. Accordingly, this report examines those instances in which the District’s laws and regulations are currently, in some cases, more restrictive or ambiguous than what DC Applesed believes to be the best practices represented by the laws and regulations currently being implemented in other states where initiatives and referenda are allowed.

## **EXECUTIVE SUMMARY**

This report, *Strengthening Democracy: Initiatives, Referenda, and Charter Amendment Referenda in the District of Columbia* is limited in scope, examining only certain aspects of the laws and processes that govern initiatives, referenda, and charter amendment referenda in the District of Columbia. DC Appleseed's initial goals for this project were to: 1) devise ways to increase the availability of public information, and opportunities for public education, on both sides of ballot measures; 2) review the laws and rulings that govern the conduct of elected officials during initiative and referendum campaigns; and 3) review and clarify the rules that govern campaign finance registration and reporting by private individuals and organizations during initiative and referendum campaigns. After interviewing several individuals for this report, DC Appleseed's Initiatives and Referenda Project Team (Project Team) decided to examine, in addition, the Council's authority to overturn laws passed by initiatives and referenda.

Two competing views exist about the utility of initiatives and referenda. One view is that the electorate's ability to initiate and pass laws is an important mechanism of self-governance that should be utilized frequently. The other view is that initiatives and referenda are costly and are not subject to the same level of analysis and compromise to which legislative proposals are subjected.<sup>2</sup>

Section I of this report presents an overview of the initiative and referendum powers in the District of Columbia, as well as a discussion of the limits on these powers. The roles and responsibilities of the District of Columbia Board of Elections and Ethics and the Office of Campaign Finance during initiative and referendum campaigns are also discussed.

In Section II, DC Appleseed explores the ways in which the District of Columbia and other jurisdictions seek to ensure that the electorate is educated about initiative and referendum processes, and about the pros and cons of every ballot measure – including the proposed measure's projected fiscal impact. A number of the recommendations presented in this section are likely to require additional appropriations for the District of Columbia Board of Elections and Ethics, but nevertheless warrant serious consideration. DC Appleseed also considers the role of the media in educating the public. We encourage media organizations, well in advance of an election, to devote more coverage to ballot issues and the views expressed by proponents and opponents.

### **Summary of Recommendations - Educating the Public**

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<sup>2</sup> See District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974 § 301, Pub. L. No. 93-376, 88 Stat. 454, (effective August 14, 1974), *codified at* D.C. CODE §1-1103 *et seq.* (2001). [INTERSECTIONAL TASK FORCE, SECTION ON TORT & INSURANCE PRACTICE, AMERICAN BAR ASSOCIATION, THE CHALLENGE OF DIRECT DEMOCRACY IN A REPUBLIC: REPORT AND GUIDELINES OF THE TASK FORCE ON INITIATIVES AND REFERENDA 665 \(1993\) \[hereinafter ABA REPORT\].](#)

- *Distribution of Voters' Pamphlets* – DC Appleseed supports the overall purpose of Bill 14-271, the “Voter Information and Education Act of 2001.” This legislation, if enacted, would require the Board of Elections and Ethics to prepare and distribute voters’ pamphlets before each primary and general election, as well as to post the pamphlet on the Board’s website.
- *Content of Voters' Pamphlets* – DC Appleseed strongly recommends that in addition to general election information and neutral summary statements on ballot measures, the voters’ pamphlets should also include a neutral explanation of the effect of both “yes” and “no” votes, pro and con arguments, and a fiscal impact statement.
- *Board of Elections and Ethics Review of Pro and Con Statements* – DC Appleseed recommends that the Board of Elections and Ethics develop rules to administer the submission and approval of pro and con statements for inclusion in a voters’ pamphlet.
- *Independent Fiscal Impact Statement* – DC Appleseed recommends that voters’ pamphlets include independent fiscal impact statements on all ballot measures.
- *Voters' Pamphlet Distribution* – DC Appleseed recommends that voters’ pamphlets be distributed to all District households with registered voters, public libraries, and other locations accessible to the public, at least thirty days prior to an election on a ballot measure. The pamphlet should also be printed in languages other than English and posted on the Board of Elections and Ethics website.
- *Education and Advocacy by Private Individuals and Organizations* – DC Appleseed believes that with improved media coverage, private organizations (proponents, opponents, and other interested parties, such as civic organizations) should be more effective in sponsoring, or participating in, pre-election forums and debates on the pros and cons of ballot measures.

Section III of this report focuses on the conduct of public officials and the use of public resources during initiative and referendum campaigns in the District of Columbia. Based on our review of the statutes and case law in other jurisdictions, DC Appleseed believes that the existing limitations imposed on District of Columbia public officials in expressing their views on ballot measures may be too severe. The Mayor and members of the Council routinely use government resources during government time to inform constituents about their views particular pieces of legislation. Similar conduct and use of resources should be permitted when the Mayor and members of the Council are educating the public on ballot measures.

### **Summary of Recommendation - Conduct of Elected Officials**

- *Public Officials' Use of Public Resources* -- DC Appleseed recommends limiting resources and activities for initiative, referendum, and charter amendment referendum campaigns to those already available to the public official expressing his or her views in his or her official capacity, and within the budget appropriated to the official for educating his or her constituents about other forms of proposed legislation.

In Section IV of this report, DC Appleseed considers existing laws and regulations in the District of Columbia governing the conduct of private individuals and non-governmental organizations during initiative or referendum campaigns, as well as the statutory and case law in other jurisdictions. DC Appleseed specifically recommends that a threshold for expenditures and/or contributions be established to trigger the campaign finance reporting and filing requirements, and that the existing prohibition on contributions “in the name of another person,” that applies to candidate campaigns be extended to initiative and referendum campaigns.

### **Summary of Recommendations - Registration and Reporting Requirements for Individuals and Private Organizations**

- *Threshold for Required Registration and Reporting: Monetary Contributions* – DC Appleseed recommends that the District adopt a threshold that would require an individual or private organization to register as a political committee and be subject to disclosure rules only if the organization accepts contributions and makes expenditures greater than \$500 in a calendar year for activities related to initiative and referendum campaigns.
- *In-Kind Contributions* – DC Appleseed suggests that a separate threshold triggering registration and reporting requirements for in-kind contributions and activity (such as staff time, mailings, forums, etc.) should be higher than the recommended \$500 threshold for reporting monetary contributions. Based on the threshold amounts adopted in other jurisdictions, DC Appleseed recommends that the threshold amount for in-kind contributions not exceed \$1,000.
- *Disclosure of Indirect Contributions* – DC Appleseed recommends that the District extend the prohibition on contributions “in the name of another person” to initiatives and referenda, and not limit this prohibition to candidate elections.

Finally, Section V of this report examines the arguments for and against the Council’s ability to amend or repeal laws passed by initiative or referendum. Almost everyone interviewed for this report views initiatives and referenda as checks on the legislative process. Two of the individuals interviewed noted, however, that the traditional legislative process in a representative democracy – where research is conducted, hearings are held, and public comments are received and considered – similarly should serve as a check on the initiative and referendum process.

## **Summary of Recommendation - Council's Power to Amend or Repeal Laws Passed by the Voters**

- *Super-majority Requirement* – DC Appleseed recommends that the Council be generally precluded from amending or repealing laws passed by initiatives or referenda by simple majority for a period of one year after the election. During this one year period, however, the Council should be allowed to overturn the voters' actions with a 2/3 majority vote of the members of the full Council. After the expiration of this one-year period, the Council can act on such laws normally by a simple majority. A one-year, 2/3 super-majority requirement should ensure that amendment or repeal of a law passed by initiative or referendum enjoys broad representative support.

## IX. INTRODUCTION AND BACKGROUND

Initiative and referendum measures are the means by which voters can change laws directly by voting on legislative issues during an election. Some form of initiative or referendum is available to voters in twenty-four states and the District of Columbia (the “District”). There are three forms of ballot measures in the District – “initiatives,” “referenda,” and “charter amendment referenda” – each with very specific and distinct meanings. In the District, initiatives allow voters to propose and enact legislation, referenda (as the term is used in this report) allow voters to approve or reject an act or part of an act already passed by the Council of the District of Columbia (the “Council”), and charter amendment referenda allow voters to approve or reject amendments to the District’s Charter proposed by the Council. While initiatives and referenda can be initiated only by the voters, charter amendment referenda can be initiated only by the Council. In the District, acts passed by the voters through all three types of ballot measures are subject to Congressional review prior to becoming law. As with legislation enacted by the Council, Congress can disapprove voter-approved legislation by adopting a joint resolution of both Houses of Congress of disapproval, which must be signed by the President of the United States.

### A. Granting of the Initiative and Referendum Powers to the Voters

The right of the voters to propose laws and reject acts of the Council was not originally provided for in the 1973 Home Rule Act.<sup>3</sup> Four years later, in 1977, a charter amendment proposed by the Council (and approved by the voters) granted voters the right to change local law through initiatives and referenda.<sup>4</sup> This law, the “Initiative, Referendum, and Recall Charter Amendments Act of 1977” (the “Charter Amendments Act”) granted District voters the right to legislate directly by voting to enact new law and to reject certain acts passed by the Council.<sup>5</sup>

The Council originally passed the Charter Amendments Act in May 1977. Following the Mayor’s signing of the Act on June 14, 1977, the measure was referred to the voters. The voters overwhelmingly approved the charter amendment during the November 1977 general election. The Charter Amendments Act became law on March 10, 1978, when the congressional review period expired.

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<sup>3</sup> The official title of what is generally referred to as “the Home Rule Act” is the District of Columbia Self-Government and Governmental Reorganization Act. Pub. L. 93-198, 87 Stat 777 (1973), codified, as amended, at D.C. Code §§ 1-201 *et seq.*

<sup>4</sup> The District Charter establishes the city’s limited Home Rule government. *See* D.C. Code § 1-204.01 *et seq.*; Home Rule Act, Title IV. D.C. Code section 1-203.03 provides for amendments to the District’s Charter by an act passed by the Council, presented to voters as a referendum for approval or disapproval, and ratified by the voting majority.

<sup>5</sup> *See* Initiative, Referendum, and Recall Charter Amendments Act of 1977 (the “Charter Amendments Act of 1977”), D.C. LAW 2-46, 24 D.C. REG. 199, codified at D.C. CODE § 1-204.101, *et seq.* (effective March 10, 1978). This report does not discuss the subject of recall measures, [however](#). [A recall measure is the means by which voters may remove an elected official from office before the end of the official’s term. Like initiative and referendum measures, recall measures are ballot measures. \*See\* D.C. CODE § 1-204.111, \*et seq.\*](#)

Although enacted into law, the voters' right of initiative and referendum did not become available until the Council adopted the implementing legislation – “Initiative, Referendum, and Recall Procedures Act of 1979” (the “Initiative Procedures Act”) – on June 7, 1979.<sup>6</sup> Less than one week later, on June 13, 1979, the very first initiative in the District was proposed.<sup>7</sup>

## B. The Initiative Power in the District of Columbia

### 1. The Power to Propose Laws

The Charter Amendments Act defines an initiative as “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 for their approval or disapproval.”<sup>8</sup>

### 2. Limits on the Power

The Board of Elections and Ethics exercises substantial control over the initiative process. Under the Initiative Procedures Act an initiative or referendum in the District may not appropriate funds, violate the Home Rule Act, negate a budget act, or violate the Human Rights Act.<sup>9</sup> The Board of Elections and Ethics has the authority to reject a proposed initiative or referendum if the Board determines that the measure is not proper based on these subject matter requirements. The Board of Elections and Ethics' subject matter determination has been the most frequently litigated initiative issue in the District.<sup>10</sup> In making its subject matter determination, the Board may consider only whether the measure meets subject matter requirements.<sup>11</sup>

### 3. Process for Placing an Initiative on the Ballot

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<sup>6</sup> Initiative, Referendum, and Recall Procedures Act of 1979, D.C. Law 3-1, 25 D.C. REG. 9454 (effective June 6, 1979), *codified as amended at* D.C. CODE § 1-1001.16 (2001).

<sup>7</sup> *See* Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics, 441 A.2d 871, 872 (D.C. 1980), *aff'd en banc*, 441 A.2d 889 (D.C. 1981) (discussing the delayed effective date of the initiative power).

<sup>8</sup> D.C. CODE § 1-204.101(a) (2001).

<sup>9</sup> *See id.* § 1-1001.16(b)(1).

<sup>10</sup> *See, e.g.,* Dorsey v. District of Columbia Bd. of Elections & Ethics, 648 A.2d 675 (D.C. 1994); Hessey v. Burden, 615 A.2d 562 (D.C. 1992); Hessey v. District of Columbia Bd. of Elections & Ethics, 601 A.2d 3 (D.C. 1991); Hessey v. Burden, 584 A.2d 1 (D.C. 1990); District of Columbia Bd. of Elections & Ethics v. District of Columbia, 520 A.2d 671 (D.C. 1986); District of Columbia Bd. of Elections & Ethics v. Jones, 481 A.2d 456 (D.C. 1984). Other court cases in the initiative and referendum context have involved challenges to petition and signature requirements and recovery of attorneys' fees.

<sup>11</sup> *See* D.C. CODE § 1-1001.16(b) (2001).

The initiative process begins when a registered voter submits a proposed measure to the Board of Elections and Ethics. The proponent must submit the legislative text of the proposed law, a proposed short title for the measure, and a proposed summary statement to explain the effect of the legislation. Following this submission, the Board of Elections and Ethics holds a public hearing to determine whether the legislation is a proper subject for an initiative, as described above. If the Board of Elections and Ethics deems the subject matter of an initiative to be proper, the Board prepares the official short title and summary statement, and approves the petition form that is then circulated by the proponents to gather signatures. To be placed on the ballot, an initiative petition must be signed by at least five percent of the District's registered voters, including at least five percent of the registered voters in each of five or more of the city's eight wards.<sup>12</sup>

After the Board of Elections determines that an initiative has qualified for the ballot, the measure is placed on the ballot at the next regular citywide election scheduled at least 90 days later. If legislation is passed by the voters by initiative, the legislation is deemed an act of the Council when the Board of Elections and Ethics certifies the vote. As with legislation enacted by the Council, the measure becomes law upon the expiration of a 30-calendar-day congressional review period, unless Congress adopts a joint resolution of disapproval.

### C. Voter-Initiated Referendum Power in the District of Columbia

#### 1. The Power to Reject Laws

Referenda allow voters the opportunity to review and overturn legislation that has already been approved by the Council. The Charter Amendments Act defines a referendum as “the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.”<sup>13</sup>

#### 2. Limits on the Power

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<sup>12</sup> According to the voter registration lists maintained by the Board of Elections and Ethics, as of September 2001 there are 332,358 registered voters in the District of Columbia, the largest number (48,246) in Ward 3, and the smallest number (29,334) in Ward 8.

<sup>13</sup> *Id.* § 1-204.101(b).



As noted above, the Charter Amendment Act prohibits referenda on certain types of Council acts: emergency acts, acts levying taxes, and appropriations acts. In addition to these restrictions, under the Initiative Procedures Act the same subject matter limitations that apply to initiatives apply to voter-initiated referenda.<sup>14</sup>

### 3. Process for Placing a Voter-Initiated Referendum on the Ballot

The time frame for a voter to place a referendum placed on the ballot is limited to the period between when an act of the Council has been signed by the Mayor (or when the Council overrides a Mayoral veto) and the expiration of the 30-legislative-day congressional review period required of all Council legislation. A referendum may not be held after a Council act has become law upon expiration of the Congressional review period.

In order to get a referendum placed on the ballot, a proposer must submit the legislative text of the proposed referendum, a proposed short title for the measure, and a proposed summary statement to explain the effect of the referendum. Following submission, the Board of Elections and Ethics holds a public hearing to determine whether the act is a proper subject for a referendum, as described above. If the Board of Elections and Ethics deems the subject matter of a referendum proper, the Board then prepares the official short title and summary statement, and approves the petition form that is circulated by the proponents to gather signatures. As with initiatives, to be placed on the ballot, a referendum petition must be signed by at least five percent of the District's registered voters, including at least five percent of the registered voters in each of at least five the city's eight wards.

After the Board of Elections and Ethics certifies that a referendum petition contains enough valid signatures, a special election is held for the purpose of giving voters the opportunity to approve or reject the act. At the special election, voters are asked "Shall the registered voters of the District of Columbia approve or reject Act (insert Act number)?"<sup>15</sup>

If a majority of the voters – through the referendum election – reject the act passed by the Council (or that portion of the act addressed in the referendum measure), the act does not become law and the Council may not take action with regard to the matter for one year.<sup>16</sup> If the voters approve Council legislation by referendum, the measure becomes law upon the expiration of the 30-calendar-day congressional review period, unless Congress adopts a joint resolution of disapproval. If the voters reject Council legislation by referendum, the measure is not referred to Congress.

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<sup>14</sup> See *id.* §1-1001.16(b).

<sup>15</sup> *Id.* § 1-1001.16(q)(2)(A).

<sup>16</sup> See *id.* § 1-204.104.

## D. Charter Amendment Referendum Power in the District of Columbia

### 1. The Council's Power to Initiate Amendments to the District's Charter

The procedures for amending the District's Charter are set forth in the Home Rule Act (the "Act"). Pursuant to that Act, the District's Charter may be amended by an act passed by the Council and "ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification."<sup>17</sup> The only other way the District's Charter may be amended is by an act of Congress.

### 2. Limits on the Power

The Council may not employ the charter amending procedures to enact any law or affect any law with respect to which the Council may not enact by legislation, such as an act imposing a tax on property of the United States, or an act to otherwise amend or repeal an act of Congress.<sup>18</sup>

### 3. Process for Submitting a Proposed Charter Amendment for a Voter Referendum

While a charter amendment initiated by the Council must ultimately be presented to the voters for approval or rejection, the process that precedes the measure's being placed on the ballot follows the traditional legislative process. Such bill must be introduced by a member of the Council. The bill is then referred to the Council committee with jurisdiction over the subject matter of the referendum. The Committee must hold a public hearing on the bill, and may amend the bill before voting to send the bill to the full Council. The Council considers the bill at a legislative meeting. At the first legislative meeting, Councilmembers may debate the bill, offer amendments, and vote to approve the bill. If the bill is approved on first reading, it is then considered again at a second legislative meeting. A bill that receives approval at the second legislative meeting is sent to the Mayor for approval, at which point the bill becomes an act of the Council. The Council may overturn a Mayoral veto with the approval of two-thirds of the Councilmembers present and voting.

Once a bill that proposes to amend the charter becomes an act, the Council transmits the act to the Board of Elections and Ethics. At a public hearing, the Board of Elections and Ethics formulates and adopts the official short title and summary statement of the proposed charter

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<sup>17</sup> *Id.* § 1-203.03(a).

<sup>18</sup> *See id.* § 1-203.03(d) (referring to sections 1-206.01, 1-206.03).

amendment. After the Board of Elections and Ethics certifies the charter amendment referendum, it is placed on the ballot at a regular or special citywide election held within 54 days.

If a charter amendment is approved by the voters, the adopted charter amendment becomes law only upon the expiration of a 35-legislative-day (rather than a 30-legislative-day) congressional review period, unless Congress adopts a joint resolution of disapproval.

#### E. The District's Experience with Ballot Measures

Sixteen initiatives and three voter-initiated referenda have appeared on the ballot in the District. In addition, 106 proposed initiatives and three proposed voter-initiated referenda filed with the Board of Elections and Ethics failed to reach the ballot. The following table summarizes the outcome of all ballot measures filed with the Board of Elections and Ethics in the District since initiative and referendum procedures became available to District voters.

**Summary of Ballot Measures in the District of Columbia**  
1977 – Present

<b>INITIATIVES</b>	
<b><i>Presented on the ballot</i></b> <sup>19</sup>	<b>16</b>
<i>Passed by voters</i>	12
Overtaken by D.C. Council	4
Congress prevented law's effectiveness	1
<i>Rejected by voters</i>	4
<b><i>Failed to reach the ballot</i></b> <sup>20</sup>	<b>106</b>

<b>VOTER-INITIATED REFERENDA</b>	
<b><i>Presented on the ballot</i></b>	<b>3</b>
<i>Passed by voters</i>	2
<i>Rejected by voters</i>	1
<b><i>Failed to reach the ballot</i></b>	<b>3</b>

<b>CHARTER AMENDMENT REFERENDA</b>	
<b><i>Presented on the ballot</i></b>	<b>3</b>
<i>Passed by voters</i>	3
<i>Rejected by voters</i>	0

**Source:** DC Appleseed summary of Board of Elections documents and files.

For a chronological listing of initiatives, referenda, and charter amendment referenda accepted by the Board of Elections and Ethics to date (including the title, date filed, year of election, outcome, and status), please refer to Attachment 1 of this report.

<sup>19</sup> Does not include one measure placed on the ballot by Congress in 1992 that was defeated by the voters.

<sup>20</sup> According to the Board of Elections and Ethics, initiatives and voter-initiated referenda failed to reach the ballot for a variety of reasons, including when: filed in improper legislative form, or without proper campaign finance documentation; withdrawn by proponents prior to or after the subject matter hearing; determined to be improper subject matter for an initiative or referendum by the Board of Elections and Ethics or a court; or proponents were unable to gather enough signatures to qualify for the ballot.

F. Overview of the Roles of the Board of Elections and Ethics and Office of Campaign Finance in the Initiative and Referendum Process

1. District of Columbia Board of Elections and Ethics

The Board of Elections and Ethics is an independent three-member government agency responsible for the administration of elections, ballot access, and voter registration. The Board consists of three Board members, an Executive Director, a General Counsel, and support staff. The District of Columbia Election Code of 1955 limits to two the number of seats held by members from the same political party.<sup>21</sup> The Election Code requires the Board and its staff to “maintain a position of strict impartiality” and limits the involvement of Board of Elections and Ethics’ and staff in political activities.<sup>22</sup>

2. District of Columbia Office of Campaign Finance

The Board oversees the District of Columbia Office of Campaign Finance (“Office of Campaign Finance”). The Office of Campaign Finance was established pursuant to the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974 (the “Campaign Finance Act”).<sup>23</sup> The Office of Campaign Finance is established within the Board of Elections and Ethics, and is responsible for the administration and enforcement of District laws governing campaign finance, lobbying, conflict of interest of public officials, and financial disclosure.<sup>24</sup> The Office of Campaign Finance issues interpretative opinions clarifying the statutory and regulatory restrictions on the conduct of public officials, issues orders to offending parties to cease and desist violations of the Campaign Finance Act or applicable regulations, conducts educational seminars on financial disclosure requirements governing campaign activity, and participates in ethics seminars on employee conduct.

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<sup>21</sup> See District of Columbia Election Code of 1955, 69 Stat. 699, Ch. 862 (effective August 12, 1955), *codified at* D.C. CODE § 1-1001.01 *et seq.* (2001).

<sup>22</sup> D.C. CODE § 1-1001.05(f)(1) (2001).

<sup>23</sup> 88 Stat. 447, Pub. L. No. 93-376 (approved August 14, 1974), *codified at* D.C. CODE §§ 1-1101 *et seq.* (2001).

<sup>24</sup> See District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974 § 301, Pub. L. No. 93-376, 88 Stat. 454, (effective August 14, 1974), *codified at* D.C. CODE §§ 1-1103 *et seq.*, 1-1101 *et seq.* (2001).

The Board of Elections and Ethics and the Office of Campaign Finance play important roles in helping interested parties navigate through the initiative and referendum process. The Board has easy-to-read fact sheets describing the process.<sup>25</sup> These materials are available at the Board's office and on the Board's web site ([www.dcboee.org](http://www.dcboee.org)). The Board's web site also contains its initiative and referendum regulations, voter registration information, and details regarding hearings and appeals, as well as a link to the Office of Campaign Finance's website ([www.dcofc.org](http://www.dcofc.org)). Several people interviewed for this report – including more than one member of the Council, and one former initiative proponent – commended the Board of Elections and Ethics and the Office of Campaign Finance for maintaining user-friendly and informative websites.

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<sup>25</sup> The comprehensive statutory and regulatory framework and specific procedural requirements for placing an initiative or referendum on the ballot may be found in the D.C. Code §§ 1-204.102 through 1-204.106 and 1-1001.16, as well as in Chapter 10 of the Board's Regulations (D.C. MUN. REGS. Title 3: Elections and Ethics).



## X. EDUCATING THE PUBLIC ON INITIATIVES AND REFERENDA

Government agencies around the country use a variety of methods to educate the public about proposed initiatives and referenda. While some states place significant burdens on citizens to educate themselves about initiatives and referenda, other jurisdictions provide the public with easily accessible information throughout the initiatives and referenda election processes. This section describes how the District of Columbia Board of Election and Ethics educates the public, how other states engage in public education, and recommends several ways to improve the method through which District voters are informed about initiatives, referenda, and charter amendment referenda in the District.

### A. Public Education in the District of Columbia

The initiative and voter-initiated referendum public education process begins when a registered voter first files the proposed measure in the Board of Elections and Ethics' Voter Services Office. After receiving the submission, the Board of Elections and Ethics publishes a notice in the *D.C. Register* announcing that the Board will hold a public hearing to determine whether the proposed measure is a proper subject for an initiative or referendum.<sup>26</sup> Members of the public are invited to submit written testimony on the appropriateness of the proposed subject matter and to testify before the Board of Elections and Ethics at the public hearing.<sup>27</sup> If, after the hearing, the Board of Elections and Ethics approves the measure as proper subject matter, the Board adopts the short title, summary statement, and legislative form of the initiative or referendum during a public meeting of the Board.

If a proposer submits completed petitions to the Board of Elections and Ethics, the Board will post copies of the initiative or referendum petitions and make them available for ten days for public inspection and challenge at the office of the Board.<sup>28</sup> The Board must resolve any challenges and certify the number and validity of the signatures gathered within 30 calendar days after the petition has been accepted. The Board then publishes the legislative text of the initiative or referendum in the *D.C. Register* and at least two newspapers of general circulation, makes copies available in its office, and distributes copies to the city's public libraries.<sup>29</sup>

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<sup>26</sup> See D.C. MUN. REGS. §1001.2 (2001).

<sup>27</sup> See District of Columbia Board of Elections and Ethics, <<http://www.dcboee.org>>.

<sup>28</sup> See D.C. CODE §1-1001.16(o)(1) (2001).

<sup>29</sup> See *id.* §1-1001.16(p)(2) (2001); see also D.C. MUN. REGS. § 1002.8 (2001).



The public education process for charter amendment referenda commences when a Councilmember introduces a bill to amend the District's Charter. As with all permanent forms of legislation enacted by the Council, the Council publishes hearing notices in the *D.C. Register* and on the Council's calendar (published in the *Washington Post*, as well as on the Council's website), a public hearing must be held by one of the Council's committees, and the bill must be publicly voted on in Committee and twice by the full Council. After the Mayor signs an act that proposes to amend the District's Charter (or the Council overrides a Mayoral veto) the act is transmitted to the Board of Elections and Ethics. After receiving the transmitted act, the Board publishes a notice in the *D.C. Register* announcing that the Board will hold a public hearing to formulate the proposed ballot language for the charter amendment.<sup>30</sup> After the proposed language is adopted by the Board, the Board must publish the proposed charter amendment act, the proposed short title, and the proposed summary statement in the *D.C. Register* and makes copies available in its office.<sup>31</sup> At a second hearing, the Board certifies the ballot language and announces that the proposed charter amendment will be brought before the voters in an election. After the Board certifies the ballot language, the Board must publish in the *D.C. Register* and at least two newspapers of general circulation the proposed charter amendment act, short title, summary statement, and statement that the proposed charter amendment will be presented to the voters.<sup>32</sup>

#### 1. Information on the Pros and Cons of Proposed Ballot Measures

Currently, the Board of Elections and Ethics does not distribute (or make available) any information commenting on the merits, or pros and cons, of an initiative, referendum, or charter amendment referendum prior to the election on the measure. Although the Board of Elections and Ethics is the government entity charged by statute with the primary responsibility for administering the election process, there is a concern that publishing and disseminating information to the public on both sides of ballot measures might hinder the Board's ability to be perceived as completely impartial in all elections. Therefore, educating the public on the pros and cons of ballot measures, in the District of Columbia, has become the primary responsibility of individuals and private organizations.

#### 2. Fiscal Impact of Proposed Ballot Measures

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<sup>30</sup> See Title 3, D.C. MUN. REGS., ch. 18, § 1801 (2001). DC Appleseed recommends that the regulations governing the charter amendment process be added to the Board of Elections and Ethics' website.

<sup>31</sup> See *id.* § 1802.

<sup>32</sup> See *id.* § 1804.

Under current District law, there is no requirement that an initiative or voter-initiated referendum be accompanied by a fiscal impact statement prior to being certified for the ballot, or at any time thereafter.<sup>33</sup> When the Board of Elections and Ethics makes a subject matter determination that a proposed measure does not violate the “laws appropriating funds” exception to the initiative and voter-initiated referendum powers, that decision is based primarily on a finding that the proposed measure merely authorizes – rather than obligates – the government to expend funds. Even so, the future costs to be borne by District taxpayers – or expended by the government – if the proposed measure is implemented, is important information that voters should have when they consider a proposed initiative or referendum.

## B. Public Education in Other Jurisdictions

Other jurisdictions provide the public with partisan and non-partisan information about initiatives and referenda. Generally, these jurisdictions disseminate such information to the voters through the use of pamphlets, newspapers, public hearings, or through a combination of all three.

### 1. Distribution of Voters’ Pamphlets

Several states publish pamphlets that are distributed prior to election day concerning proposed initiatives or referenda. For example, in the state of Washington, the Secretary of State publishes a voters’ pamphlet which is distributed to all households, public libraries, and other locations.<sup>34</sup> The pamphlet includes the title and full text of the measure, summarizes the current law, and explains how the proposed measure will alter current law.<sup>35</sup> The pamphlet also includes arguments supporting and opposing the measure that have been submitted by interested parties.<sup>36</sup> In addition, Washington requires that the ballot language include a brief summary of the measure. The brief summary is written by the state attorney general.<sup>37</sup> The practice of educating the public through the distribution of a pamphlet before the election in addition to providing specific explanations in the polling booth is followed in Arizona, California, Idaho, Maine, Maryland, Montana and Oregon.

### 2. Use of Public Newspapers

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<sup>33</sup> Because charter amendment referenda proceed through the traditional legislative process prior to being submitted to the voters for approval or rejection, charter amendment referenda are accompanied by a fiscal impact statement.

<sup>34</sup> See WASH. REV. CODE § 29.81.210 (2001).

<sup>35</sup> See WASH. REV. CODE § 29.81.250(3)-(4) (2001).

<sup>36</sup> These parties who draft comments about the measures are required to disclose their names or affiliations.

<sup>37</sup> See WASH. REV. CODE § 29.79.040 (2001).

Many state governments attempt to educate the public about proposed initiatives and referenda through publications in local newspapers. States requiring newspaper publication include Arkansas, Ohio, Michigan, Missouri, South Dakota and Utah. These states solicit arguments supporting and opposing the ballot measure at issue, and then distribute these comments to local newspapers. However, states that employ this procedure follow different guidelines. For example, in Missouri, each proposed statewide ballot measure must be published once a week for two consecutive weeks in two newspapers of different “political faith” in each county. In Utah, the lieutenant governor must publish the full text of the amendment, and the question or statute that would be changed by the initiative or referendum, in at least one newspaper in every county of the state where a newspaper is published.

### 3. Distribution of Material on Election Day

Some states educate the public about initiatives and referenda at the polling place on election day. Nevada and Wyoming, for example, require their Secretaries of State to prepare a summary of the initiative or referendum that appears on the ballot. The Nevada Secretary of State must also prepare a condensed form of the ballot question; an explanation of the effect of the question; an explanation of the effect of a “yes” or a “no” vote; and arguments for and against the ballot question. Nevada permits interested parties to submit suggestions for the language employed on the ballot, but these submissions may or may not be incorporated into the text of the ballot. Wyoming requires that the Secretary of State prepare a “true and impartial summary” of the measure for the ballot, which must include the estimated fiscal impact of the proposed law.<sup>38</sup>

### 4. States that Use Multiple Media to Educate

The states of Mississippi, Nebraska, and Colorado use public hearings, pamphlets and newspaper publications to educate the public about the pros and cons of initiatives and referenda. For example, in Mississippi and Nebraska, the Secretary of State is required to publish a pamphlet that contains ballot titles, along with arguments supporting and opposing the measure. Furthermore, in Mississippi, the sponsor of the initiative may draft the argument or explanation of the measure, while in Nebraska both supporters and opponents of the measure may submit information to be included in the pamphlet. The Secretary of State decides which information to include in the pamphlet.

Pamphlet distribution methods vary from state to state. For example, in Colorado, information pamphlets are distributed to all registered voters’ households. In contrast, Nebraska provides information pamphlets through local election officials at least six weeks before the election. While each of these states offers the public an opportunity to comment on initiatives or referenda during public hearings, state public hearing procedures vary. In Colorado, for example, public hearings are held on ballot questions before the collection of signatures begins, but after the proposal has been presented to the state. In Mississippi and Nebraska, the Secretary

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<sup>38</sup> See WYO. STAT. ANN. §§ 22-24-117(a); 22-24-105(c) (2001).

of State conducts hearings in each congressional district. All three states also publish the entire text of the ballot in newspapers before the election. Mississippi also publishes arguments for and against the measure.

### C. American Bar Association (ABA) Guidelines on Voter Pamphlets

Two of the ABA Report's model guidelines specifically relate to improving voters' comprehension of ballot measures and the legal implications of their passage:

**“Guideline 7:** Any state in which an initiative or referendum election is scheduled should provide voters a pamphlet that contains information about the issues and arguments for and against. This information should be made available not less than 30 days prior to the election at least to each household in which one or more registered voter resides. Copies should also be readily available to persons who register to vote between the period when distribution is made to previously registered voters and the election to which the voter information relates.

**Guideline 8:** The voters' pamphlet should contain at least the following:

- (1) The ballot title drafted or accepted by the appropriate state official.
- (2) An explanation of the effect of the proposal and the effect of an affirmative and of a negative vote. This explanation should be drafted in a neutral, objective manner by a public official not directly affected by the proposal.
- (3) Advocacy statements by proponents and opponents of the proposition. The state should limit the statements to a number and length that is (sic) consistent with the number and complexity of propositions to be voted on at any given election.”<sup>39</sup>

### D. Recommendations for Reform

Individuals with whom we spoke and who have had experience with the District's initiative, referendum, and charter amendment referendum processes overwhelmingly believe that the District government makes insufficient effort to educate voters on the pros and cons of ballot measures. Several people interviewed for this report stated that greater public education on both sides of ballot issues, administered by the government, would result in a better informed

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<sup>39</sup> INTERSECTIONAL TASK FORCE, SECTION ON TORT & INS, PRACTICE, AMERICAN BAR ASSOCIATION, THE CHALLENGE OF DIRECT DEMOCRACY IN A REPUBLIC: REPORT AND GUIDELINES OF THE TASK FORCE ON INITIATIVES AND REFERENDA 665 (1993) [hereinafter ABA REPORT].

electorate. While not everyone agreed on the specific tasks that the government should perform, nearly everyone interviewed observed that there was a need to improve the “political marketplace for discussion.”

## 1. Distribution of Voters’ Pamphlets

The publication and distribution of voters’ pamphlets are clearly an important channel through which the public could be more effectively educated about the pros and cons of ballot measures and implications of their passage. For this reason, DC Appleseed supports Bill 14-271, the “Voter Information and Education Act of 2001”. This legislation, if enacted, would require the Board of Elections and Ethics to prepare, print, and mail voters’ pamphlets to each registered voter before each primary and general election, as well as to post the pamphlet on the Board’s website.<sup>40</sup> The legislation would also require that voters’ pamphlets include the short title and summary statement of any initiative or referendum to be placed on the ballot.

DC Appleseed strongly recommends that in addition to general election information and neutral summary statements on ballot measures, the voters’ pamphlet also include a neutral explanation of the effect of both “yes” and “no” votes, pro and con arguments, and a fiscal impact statement on the proposed ballot measure. Nearly everyone interviewed for this report expressed support for increasing the role for the Board of Elections and Ethics in producing such elections pamphlets.

### a. Neutral Explanation of the Effect of a “Yes” or a “No” Vote

DC Appleseed believes that the Board of Elections and Ethics is the most appropriate government entity for drafting objective explanations of the effect of proposed ballot measures and the effect of affirmative and negative votes. The Board of Elections and Ethics already fulfills a similar role in preparing summary statements for neutral content.

### b. Pro and Con Statements

DC Appleseed also recommends that the Board of Elections and Ethics develop rules governing submission and approval of pro and con statements for inclusion in a voters’ pamphlet. These statements should be brief summaries, of approximately equal length, describing both sides of proposed ballot measures. The pro statement should be drafted by the Board of Elections and Ethics, or original proponent of the ballot measure, and submitted to the Board of Elections and Ethics for approval prior to its publication in the pamphlet. Construction of the con statement, on the other hand, could be accomplished by the Board of Elections and Ethics designating an “official” opponent, based on Office of Campaign Finance filings, and authorizing that person or entity to draft the con statement for inclusion in the pamphlet. In the

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<sup>40</sup> Bill 14-271 would also require the Board of Elections and Ethics to prepare, print, and mail voters’ pamphlets to registered voters in languages other than English.

case of inconsistent arguments against a proposition – *e.g.*, that it either goes too far or not far enough – brief separate paragraphs could accommodate both positions.

DC Appleseed believes that the Board of Elections and Ethics’ review and approval of supporting and opposing statements for accuracy is essential to ensuring that pro and con statements fairly inform the public concerning the merits of the issues.

c. Fiscal Impact Statements

DC Appleseed recommends further that the voters’ pamphlet include independent fiscal impact statements on all ballot measures. The fiscal impact statement should project the expected cost of the ballot measure, if implemented. All legislation considered by the Council, including charter amendment referenda, must be accompanied by a fiscal impact statement prior to passage. DC Appleseed believes this is sound fiscal management. Assuming, as we do, that the initiative and voter-initiated referendum power is generally coextensive with the legislature’s power, fiscal impact statements should likewise be a requirement for all initiatives and referenda.

District voters, and the elected officials charged with managing our fiscal affairs, should be knowledgeable about the projected fiscal impact of a proposed ballot measure prior to an election on the measure. As the ABA Task Force concluded in its report, “[t]he decision about what activities to fund with limited resources is best made through a legislative process that can examine and balance the interests of all claimants simultaneously.”<sup>41</sup> Accordingly, DC Appleseed specifically recommends that upon certification of any initiative or voter-initiated referendum for the ballot, the Board of Elections and Ethics submit the certified measure to the Office of the Chief Financial Officer for preparation of a fiscal impact statement. Once prepared, the Board of Elections and Ethics should first make the fiscal impact statement available to the designated drafters of pro and con statements, and then to the public at large by including the statement in a voters’ pamphlet and posting the statement on the Board’s website.

d. Voters’ Pamphlet Distribution

DC Appleseed further recommends that voters’ pamphlets be mailed to each District household containing a registered voter, and distributed to public libraries and other locations accessible to the public at least thirty days prior to an election on a ballot measure. As noted, the pamphlet should also be posted on the Board of Elections and Ethics website.

2. Expanded Media Coverage

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<sup>41</sup> *Id.* at 707.

Many individuals interviewed for this report stated that the press could do more to cover the substance of ballot issues. While there appears to be a fair amount of coverage concerning campaign controversies involving ballot measures, former proponents and opponents expressed an interest in expanded press coverage on the pros and cons of ballot measures.<sup>42</sup> DC Appleseed encourages the Board of Elections and Ethics and media organizations to use their respective powers to disseminate as much information as possible on the substance of ballot measures well in advance of an election.

One way to improve coverage on ballot issues would be for the Board of Elections and Ethics to solicit arguments, drafted by impartial parties, supporting and opposing the ballot measure at issue, and distributing these comments to local newspapers.

### 3. Education and Advocacy by Individuals and Private Organizations

Former proponents and opponents interviewed for this report stated that, with improved media coverage, private organizations (proponents, opponents, and other interested parties, such as civic organizations) could be more effective in sponsoring, or participating in, pre-election forums and debates on the pros and cons of ballot measures. DC Appleseed supports this outcome.

### 4. Additional Cost of Education Efforts.

According to the Board of Elections and Ethics, it budgets approximately \$370,000 to conduct a special election on a referendum. The costs associated with such an election include printing the ballots, rent for private facilities (where necessary), newspaper publication, and payment of poll workers. When an initiative is added to the ballot for an already scheduled general election, the Board budgets between \$50,000 - \$60,000. In both cases, the cost of an election on a ballot measure varies depending on the length of the legislative text printed in the newspaper advertisement.

DC Appleseed recognizes that a number of recommendations in this section are likely to require additional appropriated funds for the Board of Elections and Ethics. Nevertheless, the value of informed electorate, made fully aware of the initiative and referendum processes and the merits of ballot measures warrant such additional funding.

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<sup>42</sup> An October 17, 1998 article in *The Washington Post* provides a good example of the type of reporting recommended here. See Julie Makinen Bowles, *D.C. to Decide on Marijuana Legalization; Initiative 59 Would Allow Use for Medical Purposes*, WASH. POST, Oct. 17, 1998, at B01, available at 1998 WL 16562814.

### III. CONDUCT OF ELECTED OFFICIALS DURING INITIATIVE, REFERENDUM AND CHARTER AMENDMENT REFERENDUM CAMPAIGNS

One issue that has arisen frequently in the District's consideration of initiative, referendum, and charter amendment ballot measures is the extent to which elected public officials – namely the Mayor and members of the Council – may actively participate either in support of, or in opposition to, specific ballot measures. There is no question that elected officials have a First Amendment right to voice their views on all matters of public policy – including initiative, referendum, and charter amendment referendum measures. There is debate, however, on the extent to which elected officials may expend public funds or use public resources to promote or oppose ballot measures. This issue has complex constitutional, statutory, and public policy dimensions, and it has been widely debated in the District of Columbia and elsewhere in the United States.

In the District of Columbia, the debate on this question was originally framed in part by the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *District of Columbia Common Cause v. The District of Columbia*,<sup>43</sup> which held that District law, and then-applicable federal appropriation laws, prohibited the expenditure of appropriated funds for electioneering purposes. Since that time, the general understanding in the District of Columbia has been that elected public officials may not expend public funds for the purpose of encouraging the electorate to support or oppose an initiative or referendum.

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<sup>43</sup> 1986 U.S. Dist. LEXIS 18841 (D.D.C. 1986).



The conduct of public officials during a referendum or initiative campaign was also raised most recently in the context of an ethics inquiry concerning the use of District government employees and resources for activities in support of the School Governance Referendum. In interpreting Chapter 18 of the District of Columbia Personnel Manual, which governs the standards of conduct for District employees (including public officials), the Office of Campaign Finance opined, on June 16, 2000,<sup>44</sup> that public officials are precluded from engaging in conduct “which might result in, or create the appearance of affecting adversely the confidence of the public in the integrity of government’.” The activities at issue, and set forth in the complaint, involved “Mayor Williams’ use of government employees, supplies and facilities in preparation for and during the June 8, 2000 press conference to launch the ‘Yes on June 27<sup>th</sup>’ Campaign at the J.O. Wilson Elementary School, in support of the Charter Amendment.”<sup>45</sup> Specifically, the Office of Campaign Finance determined that the Mayor’s efforts to encourage voters to vote “yes” at the June 27<sup>th</sup> special election on the charter amendment referendum “ran afoul of the Standards of Conduct because the efforts adversely affected the confidence of the public in the integrity of Government where Government was one-sided in its presentation of a ballot issue to be decided by the electorate.”<sup>46</sup> In reaching its determination, the Office of Campaign Finance did, however, state that [i]t should be emphasized that Mayor Williams and other public officials may properly express their views on the Charter Amendment, take steps to educate and inform the electorate of the purpose of the measure, and urge the electorate to vote.”<sup>47</sup>

In its Order directing Mayor Williams to immediately terminate the use of District of Columbia government employees and resources to influence the outcome of the election on the charter amendment referendum, the Office of Campaign Finance stated that its decision was reached based upon an analysis as to whether Mayor Williams violated the District of Columbia Personnel Manual’s Standards of Conduct, and not the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, as amended. On September 6, 2000, the Board of Elections and Ethics affirmed the June 16, 2000 Order of the Office of Campaign Finance.<sup>48</sup>

#### **A. Current Law and Regulations in the District of Columbia**

On October 13, 2001, the “Campaign Finance Amendment Act of 2001,”<sup>49</sup> became law. As a result, the law in the District of Columbia is now reasonably clear. Neither the Mayor,

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<sup>44</sup> Office of Campaign Finance Opinion in the Matter of Anthony A. Williams, Mayor, June 16, 2000.

<sup>45</sup> *Id.* at p.1.

<sup>46</sup> *Id.* at p.2.

<sup>47</sup> *Id.*

<sup>48</sup> Board of Elections and Ethics’ Order No. 00-025, September 6, 2000.

<sup>49</sup> D.C. CODE§§ 1-1106.51(2001).

members of the Council, nor members of their respective staffs, may expend taxpayer funds or use public resources for the purpose of advocating the passage or defeat of an initiative, referendum, or charter amendment referendum.

The Campaign Finance Amendment Act of 2001 has three key provisions:

Section 651(a) of the Act, which subjects violators to civil and criminal penalties, provides, in pertinent part, that:

“No resources of the District of Columbia government, including, the expenditure of funds, the personal services of employees during their hours of work, and nonpersonal services, including supplies, materials, equipment, office space, facilities, telephones and other utilities, . . . shall be used . . . to support or oppose any initiative, referendum, or recall measure, including a charter amendment referendum. . . .”<sup>50</sup>

Section 651(b) of the Act contains two subsections. Subsection 651(b)(1) of the Act provides that:

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<sup>50</sup> *Id.* § 1-1106.51(a).

“This title shall not prohibit the Mayor, the Chairman and members of the Council, or the President and members of the Board of Education from expressing their views on a District of Columbia election as part of their official duties.”<sup>51</sup>

Subsection 651(b)(2) of the Act, which prohibits specific activities on the part of staff members employed by these elected officials, provides, in pertinent part:

“This subsection shall not be construed to authorize any member of the staff of the Mayor, the Chairman and members of the Council, or the President and members of the Board of Education, or any other employee of the executive or legislative branch to engage in any activity to support or oppose . . . an initiative, referendum or recall measure during their hours of work, or the use of any nonpersonal services including supplies, materials, equipment, office space, facilities, telephones and other utilities to support or oppose an initiative, referendum, or recall matter.”<sup>52</sup>

No provision of the Act purports to limit the right of any public official, elected or appointed, to express his or her views on an initiative, referendum, or charter amendment referendum or to use his or her own resources in doing so. The central purpose of the Act was to codify existing case law, as expressed in rulings of the U.S. District Court and the Court of Appeals for the District of Columbia Circuit in the *District of Columbia Common Cause v. District of Columbia*,<sup>53</sup> as well the recent orders of the Board of Elections and Ethics and Office of Campaign Finance requiring the Mayor to cease the use of public resources to disseminate his views on a charter amendment referendum.

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<sup>51</sup> *Id.* § 1-1106.51(b)(1).

<sup>52</sup> *Id.* § 1-1106.51(b)(2).

<sup>53</sup> 1986 U.S. Dist. LEXIS 18841 (D.D.C. 1986), *aff'd*, 858 F.2d 1 (D.C. Cir. 1988).

The District Court in *Common Cause* held that District law, particularly the Home Rule Act and then-applicable federal appropriations laws, prohibited the expenditure of appropriated funds for electioneering purposes, concluding that “[t]he government has an obligation to remain neutral and not spend public funds advocating or opposing an initiative on the ballot.”<sup>54</sup> The District Court also observed that the “government’s use of public funds to influence the outcome of an initiative election is not a proper municipal function since such expenditures infringe upon the First Amendment rights of District of Columbia voters and violate the fundamental tenet that the government remain neutral in the political process.”<sup>55</sup>

The Court of Appeals affirmed the District Court’s decision in *Common Cause*, but did so on narrow grounds. Without commenting on the District Court’s First Amendment analysis, the Court of Appeals affirmed solely on the basis that the expenditure of funds was forbidden by statutory law. The Court noted that, contrary to the requirement in District law that only authorized expenditures may be made, the congressional appropriations statute for the 1985 fiscal year expressly prohibited the expenditure of funds “for publicity or propaganda purposes” or for any activity “to support or defeat legislation.”<sup>56</sup> In the view of the Court, the efforts of District officials to defeat an initiative plainly violated those prohibitions.

Following the rulings of the District Court and Court of Appeals in *Common Cause*, the general understanding in the District has been that elected officials may not expend public funds or use public resources for the purpose of supporting or opposing an initiative or referendum. However, the limited ruling by the Court of Appeals in *Common Cause* leaves two open questions. First, the Court of Appeals ruling leaves the status of the District Court’s First Amendment analysis open to question, especially because it made no mention of arguably controlling, contrary U.S. Supreme Court precedent discussed later in this section. Second, because the Court of Appeals’ opinion gave primary emphasis to the language of the 1985 appropriations act, it is not clear whether a differently worded appropriations act would have precluded the District’s expenditures.

## **B. Law and Regulations in Other Jurisdictions**

The vast majority of statutes are silent concerning the expenditure of funds by public office-holders.<sup>57</sup> Indeed, only a handful of states have laws that directly address this issue at all.

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<sup>54</sup>1986 U.S. Dist. LEXIS 18841, at \*8 (D.D.C. 1986), *aff’d*, 858 F.2d 8 (D.C. Cir. 1988).

<sup>55</sup>1986 U.S. Dist. LEXIS 18841, at \*9 (D.D.C. 1986).

<sup>56</sup> 858 F.2d at 11.

<sup>57</sup> Those state laws that are silent on the subject include Arizona, Colorado, Florida, Idaho, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, and New Hampshire. California law is also silent on the question; however, the California Supreme Court held in *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1 (1976) that, in the absence of a specific authorization to expend monies for political purposes, such expenditures are unlawful.

A few states affirmatively permit elected officials to expend public funds,<sup>58</sup> while, on the other end of the spectrum, at least one state has a law similar to the District's that broadly restricts state officials from using the facilities of public office (including, for example, stationery, office space, vehicles, postage, and so forth) for promoting or opposing any ballot proposition.<sup>59</sup>

Those jurisdictions prohibiting expenditures by government officials related to ballot measures appear to adopt the "strict government neutrality" theory advanced in *Common Cause*.<sup>60</sup> For example, in *Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, the Federal District Court in Colorado stated in dicta that a school board's expenditure of funds in opposition to a citizen initiative infringed on the voters' right to petition their government.<sup>61</sup> The theory articulated by the *Mountain States* court is that "public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint."<sup>62</sup> Although cast in somewhat different terms, the theory underlying the decision in *Common Cause* is the same: namely, that the government has an obligation under the First Amendment to remain strictly neutral in ballot matters.<sup>63</sup>

### C. Supreme Court Precedent

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<sup>58</sup> See, e.g., Arkansas: ARK. STAT. ANN. §§ 7-9-412 (requiring expenditures of state funds over \$100 on a ballot question shall be reported to Legislative Council); § 7-9-414 (exempting elected officials from requirements in section 412) Cf. Alaska: ALASKA STAT. 15.13.145 (permitting use of state funds, but only if the funds have been appropriated).

<sup>59</sup> WASH. REV. CODE §§ 42.17.180(1).

<sup>60</sup> 1986 U.S. Dist. LEXIS 18841 (D.D.C. 1986).

<sup>61</sup> 459 F. Supp. 357, 360 (D. Colo. 1978). The principal basis for the court's ruling was a Colorado statute that generally prohibited the use of taxpayer funds in political contests, but permitted the use of funds in campaigns involving issues in which they have an official concern. *Id.* (Citing Colo. Rev. Stat. 1-45-116 1973) (current version as amended at Col. Rev. Stat. 1-45-117 (1997)). See generally Comment, *Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. City of Las Cruces*, 27 N.M. L. Rev. 517 (1997).

<sup>62</sup> 459 F. Supp. at 360 (quotation omitted).

<sup>63</sup> This theory has some academic support as well. See Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104 (1979).

The United States Supreme Court has issued a ruling, although in the context of stay litigation, that appears to reject (or at least question) the “strict government-neutrality theory” advanced in *Common Cause* and a similar line of cases. In *City of Boston v. Anderson*, the Supreme Judicial Court of Massachusetts had adopted the government neutrality argument and entered an order barring Boston from expending funds to support a referendum proposal that would change the Massachusetts’ real estate tax system in a way that would favor Boston. Relying in part on a Massachusetts statute forbidding corporations and municipalities from expending money to influence election results, the Supreme Judicial Court had held that even if Boston had a constitutional right “to speak militantly about a referendum of admitted public importance,” there were nonetheless “demonstrated, compelling interests of the Commonwealth which justify the ‘restraint’ which the Commonwealth has placed on the city, namely, [the] Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree.”<sup>64</sup>

In an opinion in Chambers, Justice Brennan stayed the Massachusetts court’s ruling. Justice Brennan first noted that the Court in *First Nat. Bank of Boston v. Bellotti*,<sup>65</sup> had recently struck down on First Amendment grounds the application of the same Massachusetts law to a private corporation that sought to express its views on a referendum question. Justice Brennan then observed that, in “light of *Bellotti*, corporate industrial and commercial opponents of the referendum are free to finance their opposition. On the other hand, unless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interest of all taxpayers, including residential voters.”<sup>66</sup> Two weeks later, the U.S. Supreme Court denied the Commonwealth’s motion to vacate the stay, thus effectively reversing the order of the Supreme Judicial Court of Massachusetts.<sup>67</sup>

#### **D. ABA Guideline on Public Debates**

To the extent that government resources should be employed to educate voters on either side of a ballot issue, the ABA recommends the following:

**Guideline 11:** Prior to each election in which a vote will be held on a ballot proposition, the state should sponsor and moderate

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<sup>64</sup> *City of Boston v. Anderson*, 439 U.S. 1389, 1390 (1978) (Brennan, J., in chambers) (quoting the Massachusetts Supreme Judicial Court in the case below, 380 N.E.2d 628, 629 (1978)). *See also* *Cook v. Baca*, 95 F. Supp. 2d 1215, 1227-30 (D. N.M. 2000) (rejecting constitutional challenge to the use of municipalities water bill to urge passage of a voting initiative); *Alabama Liberterian Party v. City of Birmingham*, 694 F. Supp. 814 (N.D. Ala. 1986) (rejecting constitutional challenge to a municipality spending money in support of referendum).

<sup>65</sup> 435 U.S. 765 (1978).

<sup>66</sup> *Id.*

<sup>67</sup> 439 U.S. 951 (1978).

debates or hearings involving representatives of proponents and opponents of each proposition. Questions of frequency, location, and selection of participants should be decided on a state-by-state basis.<sup>68</sup>

Presumably, the ABA's guideline to states to conduct government-sponsored debates envisioned using the "the personal services of employees during their work hours, and nonpersonal services, including supplies, materials, equipment, office space, facilities, telephones and other utilities" of the government official or entity sponsoring or monitoring the debate or forum. Furthermore, it is very difficult to imagine an elected official's not being allowed to express his or her view on a ballot measure, in the government-sponsored debate or forum.

DC Appleseed seriously considered whether to recommend the adoption of Guideline 11 in the District of Columbia. However, we recommend a middle ground. First, private organizations should continue to have the primary responsibility for holding public forums and debates on the pros and cons of an initiative, referendum, or charter amendment referendum. We believe that, with improved media coverage, public forums and debates sponsored by private organizations can be even more effective in educating the voters on the substance of the ballot measure at issue. Second, less stringent restrictions should apply to an elected official who uses incidental public resources to express his or her views on ballot measures.

#### **E. Recommendations for Reform: A Middle Ground**

DC Appleseed supports the general intent underlying the Campaign Finance Act of 2001. For example, we agree with the Council and the Mayor that neither the government, nor our elected officials, should be able to marshal considerable public resources to tip the balance decidedly in an initiative, referendum, or charter amendment referendum campaign. DC Appleseed has serious reservations, however, about the wisdom of categorically forbidding an elected official from ever using incidental appropriated funds to express his or her views on a ballot measure. This is especially true given the Supreme Court's apparent disagreement with the strict government neutrality theory.

DC Appleseed sees no reason, therefore, to treat initiatives, referenda, and charter amendment referenda as fundamentally different from other forms of legislation, in terms of the extent to which an elected official may employ public resources to express his or her views on the matter.

As a general rule, voters of the District of Columbia entrust enormous power to elected officials. We trust them to wrestle with and resolve difficult policy questions on our behalf. To enable them to do their job, elected officials are provided appropriated funds annually to support

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<sup>68</sup> ABA REPORT at 666.

their work, including efforts to communicate their positions on matters of public importance to their constituents.

It appears that District law currently draws a line between efforts by elected officials to educate the public about ballot measures on the one hand, and efforts to advocate passage or defeat on the other. After the elected official's statements cross the line from education to advocacy, the normal rules are suspended, and the elected official is precluded from using public resources – including any incidental use of supplies, materials, office equipment, phones or other utilities – to make the elected official's views known.<sup>69</sup>

We have three concerns about the line that has been drawn. First, it is often hard to determine where education ends and advocacy begins. Second, a strong argument can be made that our public officials are uniquely well qualified to assess the merits of ballot measures, and that their views contribute to the debate on these issues. Third, an elected official is never really “off-duty.” DC Appleseed sees no reason why an elected representative, acting in his or her official capacity, should be categorically precluded from the incidental use of public funds – that have already been appropriated to educate the public on legislative matters – to express his or her views on ballot measures.

Accordingly, we specifically recommend limiting the activities and resources of public officials during initiative, referendum, and charter amendment referendum campaigns to those incidental uses already available to the public official expressing his or her views, within the budget appropriated to the official for educating his or her constituents. DC Appleseed makes this recommendation not because the answer is clear cut, but because we are concerned that the “bright line” rule that has prevailed in the District since *Common Cause* might be unduly restrictive. There is no reason not to attempt a less strict “bright line.”

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<sup>69</sup> See Campaign Finance Amendment Act of 2001, section 651(b)(1) and (2), to be codified at D.C. CODE §§ 1-1106.51 (2001).



#### IV. REGISTRATION AND REPORTING REQUIREMENTS FOR INDIVIDUALS AND PRIVATE ORGANIZATIONS ENGAGED IN ADVOCACY ON BALLOT MEASURES

In the District, individuals and private organizations engaged in advocacy on ballot measures are required to disclose campaign financial activity. Disclosure provides valuable information to voters and greater transparency to the process.<sup>70</sup> Other jurisdictions regulate initiative and referendum campaign activity by limiting or prohibiting certain campaign activities, but this type of regulation has faced criticism due to concerns that it infringes on individuals' First Amendment rights. Requiring political committee registration and financial reporting generally does not raise the same constitutional concerns that cash or in-kind contribution limits do.<sup>71</sup> Thus, we believe that the District's basic structure for regulating initiative and referendum campaign activity is properly oriented. However, one of the greatest challenges faced by individuals and private organizations engaged in advocacy efforts on ballot measures is determining whether their advocacy activities trigger the registration and reporting requirements established in District law.

##### A. Current Practice in the District of Columbia

District campaign finance law and regulations establish two categories of individuals and private organizations engaged in initiative and referendum campaigns: "political committees" and "other than political committees."<sup>72</sup> Political committees are required to file financial statements with the Office of Campaign Finance and to periodically report their contributions and expenditures. Individuals or private organizations deemed to be "other than political committees," but engaged in advocacy on ballot measures, are subject to less burdensome requirements, but are required to make similar periodic reports of financial activities. Since the statutory definition of political committee is very broad, it is unclear when an individual or private organization might be subject to the requirements applicable to political committees. Arguably, all individuals and private organizations engaged in any way in initiative and referendum campaign activity could be expected to register as political committees and report financial activity to the Office of Campaign Finance. Although DC Appleseed believes that the law could be reasonably interpreted in a way that does not reach organizations and individuals with *de minimis* campaign activities, the law should be clarified.

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<sup>70</sup> See ABA REPORT at 715.

<sup>71</sup> See *id.* The ABA report also notes that valuing in-kind contributions (such as donations of time which are common in initiative and referendum) would be especially problematic. Contribution limits also raise concerns over the infringement of First Amendment rights of contributors. See *id.* at 712-15.

<sup>72</sup> D.C. CODE §§ 1-1101(5), 1-1102.07 (2001).

## 1. Political Committees

District law defines a political committee required to register and file to include:

[A]ny proposer, individual, committee (including a principal campaign committee), club, association, organization, or other group of individuals organized for the purpose of, or engaged in: . . . promoting or opposing any initiative, referendum or recall.<sup>73</sup>

This broad definition conceivably encompasses every person or organization that takes a public position on, or seeks to influence, an initiative or referendum election.

## 2. Other than Political Committees

However, District law provides for a separate reporting scheme for individuals or private organizations “other than political committees” that engage in initiative and referendum campaign activities. Individuals and private organizations deemed to be “other than political committees,” but which contribute, or expend, \$50 or more on a campaign during a calendar year appear to fall within this category. Individuals and private organizations reporting under this scheme are still required to file periodic receipt and expenditure reports, but need not comply with more stringent registration and record-keeping required of political committees.<sup>74</sup>

### B. Practice in Other States

As in the District, the majority of states allowing initiatives and referenda typically require private organizations engaged in initiative and referendum campaigns to register with the state and periodically disclose their financial activities. However, political committees are defined in many different ways in different jurisdictions. Most states require both political committees and individuals to submit financial reports if either receive contributions or make expenditures above a certain monetary threshold.

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<sup>73</sup> D.C. CODE § 1-1101(5) (2001) (defining “political committee”).

<sup>74</sup> D.C. CODE § 1-1102.07 (2001).

California, for example, requires committees that receive contributions for political activity in the amount of \$1,000 or more in a calendar year to register with the state.<sup>75</sup> In Florida, political committees are limited to “a combination of two or more individuals” the purpose of which is to support or oppose a candidate or issue and which accept aggregate contributions or make aggregate expenditures of greater than \$500 in a calendar year.<sup>76</sup>

Other states link the definition of political committee (and thus the triggering of filing and reporting requirements) to some sort of campaign activity such as accepting contributions or making campaign expenditures. The state of Washington defines a political committee as “any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, . . . any ballot proposition.”<sup>77</sup> This definition is broad, like the District’s, but it limits political committees to those that expect to receive contributions or make expenditures in an initiative or referendum campaign. Other states have similar registration and reporting requirements.<sup>78</sup>

### C. ABA Guideline on Required Reporting of Contributions

The ABA Report concludes that reporting requirements for initiative and referendum campaigns adequately address one of the major criticisms of initiatives and referenda, namely the capacity of well-funded organizations to invest heavily in campaigns.<sup>79</sup> Accordingly, Guideline 20 recommends the following:

**“Guideline 20:** Although states cannot limit contributions that can be made by an individual or entity to an initiative or referendum campaign, states should require reporting of contributions to initiative and referendum campaigns and should enforce these requirements through criminal sanctions. Reporting should be made to an appropriate state official and should be made at time

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<sup>75</sup> See CAL. GOV'T CODE §§ 82013(a), 84101(a), 84200(a). Note that persons who independently make expenditures of \$1,000 or greater or contributions of \$10,000 or more are also defined as “committees” under California law, but are not required to file a statement of registration with the state. See *id.* §§ 82013(b), 82013(c), 84101(a). Committees under Sections 82013(b) and 82013(c) must also file semi-annual statements of their financial activities. See *id.* § 84200(b).

<sup>76</sup> See FLA. STAT. ch. 106.011(1) (2001) (defining political committee).

<sup>77</sup> WASH. REV. CODE § 42.17.20.

<sup>78</sup> For example, Mississippi also defines “political committee” in terms of contribution and expenditure activities. See MISS. CODE ANN. §§ 23-17-47(c). Mississippi requires political committees to file statements of organization with the state only if they receive, in the aggregate, contributions in excess of \$200. See *id.* § 23-17-49(1). Mississippi also requires political committees which receive contributions or make expenditures of greater than \$200 to file financial reports with the state. See *id.* § 23-17-51(1). Similarly, individuals who expend greater than \$200 must also file financial statements. See *id.* § 23-17-51(2).

<sup>79</sup> ABA REPORT at 712.

intervals prior to the election on the proposition for which contributions have been made. These time intervals should provide ample opportunity to permit pre-election disclosure to the electorate of the names of contributors. Reporting should be consistent with the following principles.

- (1) The threshold dollar amount that requires reporting should be no lower than the state requires for reporting monetary contributions (cash or its equivalent) to campaigns for candidates for elective office.
- (2) In-kind contributions should be disclosed by reporting the nature of the in-kind activity and its approximate monetary equivalent. The threshold dollar equivalent that requires reporting may be higher than the threshold amount that requires reporting of monetary contributions.”<sup>80</sup>

#### D. Recommendations for Reforms

DC Appleseed wholeheartedly supports the adoption of ABA Guideline 20 in the District of Columbia. In addition, we recommend that District law require disclosure of indirect contributions to initiative and referendum political committees.

### **1. Threshold for Required Registration and Reporting**

#### a. Monetary Contributions

Based on thresholds used in other jurisdictions, DC Appleseed strongly recommends that the District adopt monetary thresholds for campaign receipts and expenditures, above which an individual or private organization would be required to register as a political committee and be subject to disclosure rules.

DC Appleseed specifically recommends that, if an individual or organization accepts contributions or makes expenditures of greater than \$500 (or, separately, \$1000 of in-kind value) in a calendar year for activities related to initiative and referendum campaigns, the individual or organization should be deemed a political committee under District law. Except as discussed below, DC Appleseed recommends that all other individuals and organizations which accept contributions or make expenditures greater than \$200 (or, separately, \$400 of in-kind value) in a calendar year for activities related to initiative and referendum campaigns, continue to be required to report these financial activities as persons “other than political committees.” By way of comparison in other election contexts, District law currently exempts candidates who spend

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<sup>80</sup> *Id.* at 667.

less than \$500 in an election for office (and who do not maintain a campaign committee) from certain reporting and record-keeping requirements.<sup>81</sup>

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<sup>81</sup> See D.C. CODE § 1-1102.09 (2001); See 3 D.C. MUN. REGS. § 3003 (1998) (setting forth the exemption but also setting the reporting threshold at \$250).

Furthermore, DC Appleseed recommends that a similar exemption from registration and reporting requirements should exist for nonprofit organizations that are engaged in advocacy efforts on ballot measures as an incidental or non-substantial part of their normal course of business. DC Appleseed notes that exempting certain individuals and organizations from financial registration and reporting requirements is not an entirely new approach for the District. Nonprofit organizations are already exempt from lobbying registration and reporting requirements.<sup>82</sup> The DC Appleseed Center itself would benefit from the exemption recommended here, as would many other organizations with differing points of view.

#### b. In-kind Contributions

As noted above, we suggest that the threshold triggering registration and reporting requirements for in-kind contributions and activity (such as staff time, mailings, forums etc.) should be higher than the recommended normal reporting thresholds for monetary contributions and expenditures. We make this recommendation because in-kind contributions and expenditures are inherently difficult to value and often of less utility than money in campaigns. However, based on the threshold amounts adopted in other jurisdictions, DC Appleseed recommends that the threshold amount for in-kind contributions not be less than \$1,000.

## 2. Require Disclosure of Indirect Contributions for Initiative and Referendum Political Committees

Several individuals interviewed for this report expressed concern that indirect contributions, which are not permitted in candidate campaigns, are allowed in initiative and referendum campaigns.<sup>83</sup> Specifically, these individuals were worried that large monied interests or national political groups could use “shell” or “front” organizations to channel money into initiative and referendum campaigns, while concealing the funder’s identity. The identity of political contributors is valuable information to a voter evaluating both sides of the issue presented by a ballot measure.<sup>84</sup> Accordingly, DC Appleseed recommends that the District extend the prohibition on contributions “in the name of another person” to initiatives and referenda, and not limit this prohibition to candidate elections.<sup>85</sup>

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<sup>82</sup> Chapter 31, “Lobbying,” 3 D.C. MUN. REGS. §§ 3101 *et seq.*

<sup>83</sup> The District prohibits the making or acceptance of contributions for *candidates* by one person “in the name of another.” See D.C. CODE § 1-1131.01(e) (2001). This prohibition, like other campaign spending limits, does not, however, apply to initiative and referendum activities. See *id.* § 1-1131.01(i). Additionally, contributions made to a candidate “indirectly” or “directed through an intermediary” are counted toward the candidate’s contribution limitations. See *id.* § 1-1131.01(g). Again, initiative and referendum activities are exempt from such limits. See *id.* § 1-1131.01(i).

<sup>84</sup> See *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993).

<sup>85</sup> See D.C. Code § 1-1131.01(e) (2001) (applying to candidate campaigns).



## V. COUNCIL'S POWER TO AMEND OR REPEAL LAWS PASSED BY THE VOTERS

Since initiative and referendum power was granted to District voters in 1979, the Council has repealed four laws passed by the voters by initiative – one-third of all laws passed by initiative.<sup>86</sup> The Council's willingness to overturn legislation that has been enacted by the majority of District voters raises the question whether greater restrictions should be imposed on the power of the Council to overturn or amend laws passed by the voters through initiatives and referenda. Consider, for example, the following headlines: "District Term Limits Tossed, Council Reverses Voters' Decision in Referendum," *The Washington Post*, June 6, 2001 and "Council Hit for Overturning Term-Limits Law," *The Washington Times*, June 7, 2001.

### A. Power of the Council to Amend or Repeal Laws Passed by the Voters in the District of Columbia

#### 1. Initiatives and Referenda

As we have maintained throughout this report, it is well established in the District of Columbia that the power of initiative is generally coextensive with the power of the legislative branch to enact legislation.<sup>87</sup> Consistent with this view, the Council has the general power to repeal or amend any law passed by initiative or referendum by the voters, just as it does with any law passed by the Council. In fact, an initiative or referendum passed by the majority of the voters in the District is deemed "an act of the Council" by statute.<sup>88</sup> However, in the case of a voter-initiated referendum, the Council's power is limited by statute – the Council is prohibited from taking action on a matter that was the subject of legislation rejected by referenda, for a period of one year after the election.<sup>89</sup>

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<sup>86</sup> See Robert E. Pierre and Sewell Chan, *District Term Limits Tossed: Council Reverses Voters' Decision in Referendum* [sic], WASH. POST, June 6, 2001, at A1; Brian DeBose & Matthew Cella, *Council Hit for Overturning Term-Limits Law Voters OK'd*, WASH. TIMES, June 7, 2001, Section C.1) District of Columbia Mandatory-Minimum Sentences Initiative of 1981, enacted as D.C. LAW 4-166, 30 D.C. REG. 1082, repealed in part by Sentencing Reform Emergency Amendment Act of 2000, D.C. ACT 13-410 (Aug. 11, 2000); 2) District of Columbia Right to Overnight Shelter Initiative of 1984, D.C. LAW 5-146, 31 D.C. REG. 6088 (enacted March 14, 1985), amended and repealed in part by D.C. LAW 8-197, 37 D.C. REG. 4815 (Mar. 6, 1991); 3) District of Columbia Campaign Contribution Limitation Initiative of 1992, D.C. ACT 9-330, 40 D.C. REG. 1, enacted as D.C. LAW 9-204, 40 D.C. REG. 2051, amended and repealed in part by D.C. LAW 11-144, 43 D.C. REG. 2174; and 4) District of Columbia Term Limits Initiative of 1994, enacted as D.C. LAW 10-254, 42 D.C. REG. 758, repealed by The Consecutive Term Limit Amendment Act of 2001, D.C. ACT 14-79, 48 D.C. REG. 6344-35, enacted as D.C. LAW 14-79, 48 D.C. REG. 6344-35.

<sup>87</sup> See *Convention Center Referendum Comm. v. District of Columbia Bd. Of Elections and Ethics*, 441 A.2d 889, 897 (D.C. 1981) (noting that the power of the electorate to adopt initiatives was "coextensive" with the power of the legislature to adopt legislation).

<sup>88</sup> D.C. CODE § 1-204.105 (2001) (making such acts also subject to the Congressional review procedures of § 1-206.02(c)(1)).

<sup>89</sup> D.C. CODE § 1-1001.16(r)(2)(2001).



## **2. Charter Amendment Referenda**

Any law passed by a charter amendment referendum would of course require an amendment to the District's Charter in order to amend or repeal. As such, in order for the Council to amend or repeal a law passed by a charter amendment referendum, the Council would have to initiate the charter amendment referendum process.

### **B. Power of the Legislature to Amend or Repeal Initiatives and Referenda in Other States**

Generally speaking, there are three views concerning the relationship between laws passed by legislatures and laws passed by initiative or referendum.

#### **1. Co-Equal View**

Most jurisdictions are silent on the power of the legislature to repeal or amend laws passed by initiative or referendum.<sup>90</sup> These states generally treat laws passed by initiatives and referenda on equal footing with laws passed by the legislature.<sup>91</sup> Thus, in these states, the legislature may repeal or amend an initiative at will.

#### **2. Super-Law View**

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<sup>90</sup> See ABA REPORT at 710. There are no readily available statistics on the incidence in other jurisdictions of legislatures repealing or amending initiatives and referenda and the ABA found "little empirical evidence of legislative attempts to overturn laws enacted through the initiative." See *id.* at 711.

<sup>91</sup> See *id.* at 710, where the ABA Task Force noted that "[a]s a general rule of state constitutional law, one legislature cannot bind another."

Other jurisdictions, however, treat laws passed by initiatives and referenda as “super-legislation,” and greatly restrict the authority of the legislature to repeal or amend a law passed by the voters. For instance, Arizona’s constitution flatly denies the legislature the power to repeal an initiative approved by the majority of the voters, unless such amendment “furthers the purposes of [the voter approved] measure” and is approved by 3/4 of the members of each house of the legislature.<sup>92</sup> Other states require super-majorities in order for the legislature to amend or repeal an initiative or referendum.<sup>93</sup> These states also prohibit the governor from vetoing laws passed by initiative or referendum.<sup>94</sup>

### 3. Compromise View

At least one jurisdiction has adopted a compromise view that laws passed by the voters may not be amended or repealed for a specific period of time, unless a super-majority of the legislature votes to approve the amendment or repeal during that time frame. Nevada has adopted this intermediate position.<sup>95</sup>

#### C. ABA Guideline on Amendment and Repeal of Laws Enacted Through Initiatives and Referenda

The ABA applicable guideline recommends the compromise position, that laws passed by initiatives or referenda be immune from repeal or amendment by the legislature for a “reasonable period of time,” except by a super-majority 2/3 vote of the legislature. After the expiration of that period of time, the legislature is allowed to amend or repeal with a simple majority. Guideline 17 specifically provides as follows:

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<sup>92</sup> ARIZ. CONST. Art. IV § 6(B)&(C).

<sup>93</sup> See MICH. CONST. art. II § 9 (prohibiting amendment or repeal of initiatives, except by 3/4 vote of each house); ArkRK. [ConstConstCONST. amend. 9 \(prohibiting amendment or repeal of measures approved directly by the voters, except by 2/3 vote of each house\)](#).

<sup>94</sup> See ARK. CONST. amend. IX; [ArizArizARIZ. ConstConstCONST. art. IV § 6\(A\)](#); [MichMichMICH. ConstConstCONST. art. II § 9](#); [Ohio ConstConstOHIO CONST. § 2.01b](#).

<sup>95</sup> See NEV. CONST. art. XIX § 2(3). Notably, if Nevada’s voters approve a law through referendum, that law may not be repealed or amended except by the direct vote of the people. See *id.* art. XIX § 1(3).

**“Guideline 17:** Following a reasonable period of time, to be determined by each jurisdiction, after the effective date of any law passed through the initiative or referendum, such law may be amended or repealed by the legislature by the process that applies to other legislation. Within such reasonable period of time after such a law becomes effective, amendment or repeal should be amended only on passage by a two-thirds super-majority of each house of the legislature. At the very least, technical amendments should be permissible within such reasonable period of time after such a law becomes effective on passage by a two-thirds super-majority of each house of the legislature if an appropriate state official certifies that the proposed amendment is only technical in nature. Any limitation on the process of amendment or repeal more restrictive than the forgoing should not be enforceable.”<sup>96</sup>

#### **D. Recommendation for Reform**

DC Appleseed recommends the compromise position and believes it is in line with our underlying premise that the voters’ power to enact legislation by initiative and reject acts of the Council by referendum should be generally coextensive with the Council’s legislative powers. Specifically, we believe the Council should be permitted to amend or repeal laws passed by initiatives and referenda at any time, just as the Council can amend or repeal, at any time, laws passed through the traditional legislative process. However, DC Appleseed is also cognizant of the concern expressed by some of those interviewed for this report about the Council’s willingness to disregard the voters’ will by amending or repealing laws passed by initiatives or referenda. While we recognize that the voters already have a check on members of the legislature via the electoral process, DC Appleseed believes that it is also necessary to include minimum standards on the power of the Council to overturn voter-passed laws.

Given the extended amount of time required for voters to enact legislation through initiatives or reject Council legislation through referenda, DC Appleseed recommends that the Council be precluded from amending or repealing laws passed by initiatives or referenda by simple majority for a period of one year after the election. During this period, the Council should be allowed to overturn the voters’ actions with a 2/3 majority vote of the full Council. A 2/3 super-majority requirement should ensure that amendment or repeal of a law passed by initiative or referendum enjoys broad representative support, and that the Council not act lightly on the matter. After the expiration of this one year period, the Council could amend or repeal a law passed by the voters by a simple majority.

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<sup>96</sup> ABA REPORT at 667.

While the Council is already prohibited from taking action for one year on a matter that is the subject of legislation rejected by referenda, we believe it is appropriate to treat initiatives and referenda in the same manner because they both reflect the popular will of the voters. Thus DC Appleseed recommends that the Council consider initiating an amendment to the District's Charter to place initiatives and referenda on the same footing such that both initiatives and referenda are subject to amendment or repeal by the Council during the first year following enactment only by a 2/3 vote of the full Council.

## **VI. CONCLUSION**

For more than 20 years, voters of the District of Columbia have had the power to legislate directly and establish important public policy on a variety of issues. After conducting extensive research and interviews for this report, DC Appleseed has no reason to believe that this important power will be withdrawn in the near future. DC Appleseed instead has presented a number of recommendations for reform that we believe, if implemented, would improve the political marketplace for discussion on ballot measures.



## VII. WORKS CONSULTED

### Reports

American Bar Association, Intersectional Task Force Under the Auspices of the Section of Tort and Insurance Practice, The Challenge of Direct Democracy in a Republic: Report and Guidelines of the Task Force on Initiatives and Referenda (Washington, D.C.: American Bar Association) August 1993 (the “ABA Report”).

Initiative and Referendum Institute, M. Dane Waters, ed., Initiative and Referendum in the United States: A Primer (Washington, D.C.: Citizen Lawmaker Press) undated.

D.C. Board of Elections and Ethics, Evolution of the Electoral Process in the District of Columbia (Washington, D.C.: D.C. Board of Elections and Ethics) undated.

D.C. Board of Elections and Ethics, Guide to Initiative and Referendum Process (Washington, D.C.: D.C. Board of Elections and Ethics) undated.

D.C. Board of Elections and Ethics, Voter Registration Mailer (Washington, D.C.: D.C. Board of Elections and Ethics) undated.

D.C. Office of Campaign Finance, Campaign Finance Guide (Washington, D.C.: D.C. Office of Campaign Finance) June 2000.

### Internet Resources

The Council of the District of Columbia, <http://www.dccouncil.washington.dc.us/>

D.C. Board of Elections and Ethics, <http://www.dcboee.org/>

D.C. Office of Campaign Finance, <http://www.dcof.org/>

D.C. Watch, <http://www.dcwatch.com/>

Initiative & Referendum Institute, <http://www.iandrinstute.org/>

## **ATTACHMENT 2: REPORT METHODOLOGY**

### E. Introduction

In April 2001 DC Appleaseed assembled an 11-member Project Team to evaluate the law governing initiatives and referenda in the District of Columbia and to make recommendations for improvements. The members of the Project Team, whose names are listed on the second page of this report, (1) conducted the research outlined in this appendix, (2) developed findings and recommendations, and (3) prepared this report. This report was unanimously approved by the DC Appleaseed Center Board of Directors at a regularly scheduled meeting on September 17<sup>th</sup>, 2001.

The Project Team conducted research using two methods: (1) interviews with government officials, an expert on the initiative and referendum process nationally, and proponents and opponents of past initiative and referendum measures in the District; and (2) legal research and document review. Each research method is described below.

### A. Interviews

Members of the Project Team conducted interviews with numerous individuals from non-profit and government organizations who have had experience with initiatives and referenda in the District. Among those interviewed were representatives of the D.C. Board of Elections and Ethics, the D.C. Office of Campaign Finance, the Initiative and Referendum Institute, several members of the Council of the District of Columbia, former elected officials, and civic leaders involved in past initiative and referendum campaigns.

### B. Legal Research and Document Review

Members of the Project Team reviewed the statutes, regulations, and case law that apply to initiative and referendum measures in the District, and reviewed the law that governs initiative and referendum campaigns in other jurisdictions. The Project Team collected and reviewed a number of public documents made available by the D.C. Board of Elections and Ethics and the D.C. Office of Campaign Finance. The team also collected and reviewed reports about initiatives and referenda in the press and on the Internet.