Components of Effective Officeholder-Controlled Nonprofit Regulation

The recent explosion in election advertising by super PACs and other groups that raise and spend funds without limit is well known. But during this same period, a less noticed yet potentially more pernicious trend has also emerged. Similar groups are also cropping up across the country to boost politicians *after* Election Day — once a candidate has attained government power. Yet these post-election vehicles operate with even less oversight than that required during elections.

Created by elected officials or their top aides to raise unlimited, undisclosed funds — including from donors with government business — these "officeholder-controlled nonprofits" are used to promote officeholders and their agendas, including through TV, radio, and digital ads. Much of their spending would qualify as campaign advertising if it happened during an election cycle, but because it occurs after an elected official takes office, it is subject to less regulation.[1] The result is a loophole that can create serious risks of conflicting loyalties and corruption.

The problem likely will spread. Just as buddy PACs supporting single candidates became a must-have accessory for politicians in recent years, officeholder-controlled nonprofits have proliferated at every level of government. President Trump's former White House and campaign advisors run America First Policies, a 501(c)(4) social welfare nonprofit that spent millions on ads featuring the president to promote passage of his tax plan.[2] Top aides to President Obama created Organizing for America, also as a 501(c)(4) nonprofit, to raise nearly $50 million to promote what the group embraced as "Obamacare," among other signature policies.[3]

This phenomenon does not occur at just the federal level. In Missouri, for example, Governor Eric Greitens's campaign treasurer founded a nonprofit called A New Missouri to promote the governor and his agenda through advertisements, events, and social media.[4] One senior advisor announced that he would work for the governor's office, his reelection campaign, and A New Missouri simultaneously, noting that there would be "coordination" among the three operations.[5] A New Missouri has its headquarters in a building that a major campaign donor owns, and it hired Greitens's campaign finance director and Greitens's sister-in-law to join the team.[6] Other governors and mayors have also formed such promotional nonprofits.[7] Even the very limited records of these groups' activity show they have raised at least $150 million since 2010.[8]

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1 The anti-coordination and transparency laws that apply to election spenders are mostly time-limited, kicking in for a relatively short stretch before Election Day. *See, e.g.*, 11 C.F.R. § 100.29 (2014). The short time periods apply to issue ads that mention a candidate but do not expressly call for the candidate's election or defeat. While the relevant provisions could be read more broadly, the Federal Election Commission has deadlocked on whether to do so. *See* Fed. Election Comm'n, Statement on Advisory Opinion Request 2011-23 (American Crossroads), Dec. 1, 2011, https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/AO_2011-23_American_Crossroads_CLB_ELW_Statement.pdf. For express advocacy, limitations may apply if there is a clearly identified candidate for office, which may be long before Election Day. *See* 11 C.F.R. §§ 100.3, 100.22 (2014).

2 John McCormick, *Lewandowski Stars in Pro-Trump Ad Blitz for GOP Tax Plan*, Bloomberg (Nov. 3, 2017), https://www.bloomberg.com/news/articles/2017-11-03/lewandowski-stars-in-pro-trump-ad-blitz-backing-gop-tax-plan. Nothing in this toolkit implies that America First Policies or any other organization would not also be subject to existing campaign finance laws to the extent it is seeking to influence a federal election. Indeed, the good government group Common Cause recently filed a complaint against America First Policies with the Federal Election Commission alleging numerous violations of the Bipartisan Campaign Reform Act (BCRA) and other federal campaign finance laws. See Common Cause v. Donald Trump (before the Federal Election Commission), last accessed April 20, 2018, http:// www.commoncause.org/policy-and-litigation/litigation/cc-v-trump-fec-3-5-18.pdf.

3 Chisun Lee et al., Elected Officials, Secret Cash 2 (2018), https://www.brennancenter.org/sites/default/files/publications/EO%20Secret%20Cash.%20Foreword.%20March%2023.pdf.

4 *Id.* at 6.

5 *Id.*

6 *Id.*

7 Laura Nahmias, *Campaign for One New York, Disbanded and Under Investigation, Raised Money through February*, Politico (July 15, 2016), http://www.politico.com/states/new-york/city-hall/story/2016/07/campaign-for-one-new-york-raised-from-real-estate-through-february-this-year-103899; David Weigel & John Wagner, *Bernie Sanders Launches 'Our Revolution' with Electoral Targets – and a Few Critics Left Behind*, Wash. Post (Aug. 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/08/24/bernie-sanders-launches-our-revolution-with-electoral-targets-and-a-few-critics-left-behind/?utm_term=.a0c9e64bc81e; Jason Hancock, *Nonprofit linked to Missouri governor raises new questions about 'dark money,' ethics,* Kansas City Star (Mar. 8, 2017), http://www.kansascity.com/news/politics-government/article137209643.html.

8 Lee et al., *supra* note 3, at 3.

One city is already working to combat the threats that officeholder-controlled nonprofits pose. New York City Mayor Bill de Blasio drew scrutiny for partnering with a nonprofit that his campaign manager launched after his election in 2013.[9] De Blasio appeared at the organization's fundraisers (the group raised at least $4 million), and key advisors to de Blasio went to work there.[10] The ensuing controversy led city lawmakers to recognize that existing rules were inadequate to deal with potential conflicts of interest posed by officeholder-controlled entities.[11] In December 2016, the New York City Council passed a law requiring these groups to disclose their donors and capped donations from any donor with business before the city at $400.[12]

Effective laws regulating officeholder-controlled nonprofits would do the following:

1. **Establish a threshold test to identify entities subject to the law.** The law should identify a threshold for when an entity is so closely affiliated with an elected official that it poses a serious risk of corruption.[13] An entity should fall under the new rules for officeholder-controlled entities if it (1) is structurally so closely affiliated with an elected official as to be subject to direction by the official and (2) spends significant resources publicly promoting the official.[14]

   ***Structural affiliation*:** Under any of the following circumstances, an entity is structurally affiliated with an official such that it is eligible for regulation:

   The elected official, or a current or recent employee or advisor of the official, or a family member of the official, established the organization.[15]

   Any of the above individuals participates in directing the work of the organization.[16]

   Any of the above individuals solicits for the organization.[17] In Minnesota, for example, a candidate's fundraising for, or even "promotion" of an outside group "destroys the independence of any subsequent expenditure" of that group.[18] In New York and California, a candidate's mere appearance at a fundraiser for an outside group that supports the candidate leads to a presumption that the group is not independent from the candidate.[19]

   The organization shares resources, including non-public information or strategy, personnel, or a consultant, with the elected official. For example, in New York, sharing office space can serve as proof that a group is not operating independently.[20] And in California, a group's spending is presumed not to be independent if a candidate uses the same political consultant as the group.[21]

   ***Activity of affiliation*:** If an entity that is structurally affiliated with an elected official also spends a significant portion of its resources on public communications containing the name or image of that elected official, then it should be subject to officeholder-controlled entity rules.[22] Jurisdictions should at least address the activity of explicitly promoting an elected official, applying new rules to any entity that spends above a

9 *Id.* at 8.
10 *Id.*
11 *Id.*
12 *Id.*
13 *See id.* at 13.
14 *Id.*
15 *Id.* at 12.
16 *Id.*
17 *Id.*
18 Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 437, 5 (2014).
19 N.Y. Elec. Law § 14-107(1)(d)(ii); Cal. Code. Regs. tit. 2, § 18225.7(d)(5).
20 See N.Y. Elec. Law § 14-107(1)(d)(vi) (coordination presumed when "[t]he candidate or the candidate's authorized committee, or an agent of the candidate or the candidate's authorized committee, shares or rents space for a campaign-related purpose with or from the independent expenditure committee, or its agent, making the payment or expenditure benefitting the candidate").
21 Cal. Code. Regs. tit. 2, § 18225.7(d)(3).
22 Lee et al., *supra* note 3, at 14.

certain monetary threshold.[23] The amount should be tailored to the particular market.[24]

Take cues from other jurisdictions. New York City's definition of "elected official communications" provides one sensible model. Such communications include radio, television, print, internet, or telephone advertisements that contain the "name, voice, or likeness" of the affiliated officeholder and imposes certain contribution caps on entities that spend 10 percent or more of their budgets on such communications.[25]

2. Require entities meeting the threshold definition of an officeholder-controlled nonprofit to abide by key anti-corruption safeguards.

Require transparency about finances. Mandatory public disclosure about the source and amount of donations to an officeholder-controlled entity will enable detection of improper official favors for donors, deter such improper behavior, and inform constituents about where their elected representatives' interests really lie.[26]

Cap contributions by donors with business before the elected official in question. Donors with specific business before government that could be affected by the officeholder should face donation limits.[27] Many jurisdictions outright ban these "doing-business" entities from contributing to political campaigns.[28]

Extend contribution limits to donors seeking business with the affiliated elected official. The capacity to grant government business is a powerful official function. It should be shielded from corruption. Other jurisdictions provide examples for how to do so: In New Jersey, for example, government agencies may not award large contracts to any business that contributed more than $300 to a campaign for governor or lieutenant governor, or to any state or county political party, in the last 18 months or at *any* point during the term of a gubernatorial contribution recipient.[29] In New York City, officeholder-controlled entities must return donations from anyone who is added to the city's database of doing-business entities within 180 days of making a donation.[30]

Require recusal under certain circumstances. For any doing-business donations that predate new anti-corruption restrictions on officeholder-controlled entities, jurisdictions should require the affiliated officials to recuse themselves from decisions affecting donors.[31]

3. Include reasonable accommodations and exceptions.

Set an appropriate donation amount below which disclosure is not required. Disclosure rules could exempt small donations, which are less likely to pose a corruption risk.[32] Appropriate thresholds will vary by jurisdiction.[33] For example, in California, elected officials must report charitable contributions made at their "behest."[34] This requirement applies to any gift above $5,000 that a donor made "at the request, suggestion, or solicitation of, or made in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express prior consent" of the public official.[35] And in New York City,

23 *Id.*
24 *Id.*
25 N.Y.C. Admin. Code §§ 3-901, 3-903; Lee et al., *supra* note 3, at 15.
26 Lee et al., *supra* note 3, at 12.
27 *Id.* at 12.
28 *Id.* at 12, 16.
29 N.J. Stat. Ann. § 19:44a-20.14 (2009); In re Earle Asphalt Co., 198 N.J. 143 (2009) (upholding the law); Lee et al., *supra* note 3, at 17.
30 N.Y.C. Admin. Code § 3-903(b); Lee et al., *supra* note 3, at 17.
31 Lee et al., *supra* note 3, at 17.
32 *Id.* at 12.
33 *Id.*
34 Cal. Code Regs. tit. 2, § 18215.3; Lee et al., *supra* note 3, at 16.
35 Cal. Gov't Code § 82015(b)(3)(B); Cal. Code Regs. tit. 2 §18215.3(a); California Fair Political Practices Commission, *Behested Payments*, http://www.fppc.ca.gov/transparency/form-700-filed-by-public-officials/behested-payments.html; Lee et al., *supra* note 3, at 16.

any group affiliated with an elected official must disclose every donation from a person or entity doing business with the city and all other donations of $1,000 or more.[36]

Allow segregated accounts. Jurisdictions should consider permitting entities to maintain a separate segregated fund from which they may exclusively fund communications promoting the affiliated elected official.[37] Only contributions to, and spending from, the segregated fund would be subject to new anti-corruption rules.[38]

Other protections. An entity should be able to rebut a presumption that it is an officeholder-controlled entity for purposes of regulation by making an adequate showing that it is not sufficiently affiliated (for example, by demonstrating that the elected official and associates are not actually involved in directing the entity's work).[39]

For More Information on Officeholder-Controlled Nonprofits

Chisun Lee, Douglas Keith, & Ava Mehta, Elected Officials, Secret Cash (2018) https://www.brennancenter.org/sites/default/files/publications/EO%20Secret%20Cash.%20Foreword.%20March%2023.pdf

36 N.Y.C. Admin. Code § 3-902(a)(7); Lee et al., *supra* note 3, at 16.
37 Lee et al., *supra* note 3, at 15.
38 *Id.*
39 *Id.*