



## **Nonprofit Gag Provision: Impact of the Affiliation Restrictions**

October 20, 2005

A dangerous and far-reaching provision will likely be introduced on the House floor on October 26 as a manager's amendment to alter the Affordable Housing Fund (AHF) in the Federal Housing Finance Reform Act (H.R. 1461). The provision would disqualify recipients from receiving money under a new AHF if the organization engaged in any one of a variety of advocacy activities with its private funds for the preceding 12 months prior to applying for AHF funds and during the grant period. It would also disqualify the organization if the organization affiliates with another entity that engages in the prohibited activities. This paper describes the affiliation section of the provision.<sup>1</sup>

### **What the Provision Restricts**

The provision restricts nonprofit entities – restrictions do not apply to for-profit entities – from receiving AHF grants if the organization:

- Engages in partisan or *even nonpartisan* voter registration, voter identification, or get-out-the-vote activities;
- Publicly “promotes,” “supports,” “attacks,” or “opposes” a candidate for federal office, which could be interpreted to include criticism of elected officials who may be seeking reelection;
- Broadcasts any ads – public service announcements, grassroots issue advocacy, anything – that refer to federal candidates within 60 days of a general election or 30 days of a primary; or
- Lobbies, except if the group is a 501(c)(3) organization it may lobby within permissible limits.

Affiliation with any entity that engages in any of the above activities during the same time period – 12 months before applying for a grant or during the grant period – will also disqualify the group from receiving money from the AHF.

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<sup>1</sup> The authors of this provision, Rep. Michael Oxley (R-OH) and the conservative House Republican Study Committee, have been unwilling to share the actual language. The nonprofit community received some of the language through a source on October 13, but it did not have the definition of “affiliation.” On October 19, we received another leak that provided the definition of “affiliation.” This analysis is based on that language, which is dated October 19.



## Definition of Affiliation

The sweeping affiliation provision raises substantial constitutional questions about restrictions on the rights of groups to associate. Moreover, it raises many practical problems.

Under this provision, two organizations are “affiliated” if:

- The two entities have overlapping board members, officers, executives, or staff;
- The two entities share *any* “office space, staff members, supplies, resources, or marketing materials, including Internet and other forms of public communication;” or
- One of the entities receives more than 20 percent of its budget from the other entity.

Additionally, the provision would allow future regulations to create even more ways to demonstrate that two organizations are “affiliated.”

“Affiliation,” under the proposal, is contagious: If one organization is “affiliated” with two other organizations, the provision would treat those two other organizations as “affiliated” with each other.

## Discussion of the Affiliation Definition

This proposal defines “affiliation” far more broadly than the way the word is used elsewhere in federal statute. Under the federal tax code, for example, two organizations are affiliated only if one of them can control the decisions of the other (e.g., through voting control of the other’s board).<sup>2</sup> Contrast this narrow definition with the one offered by the provision, the elements of which are discussed below:

Overlapping boards and staff. Under the provision, two organizations would be affiliated if there were “individuals” who “serve in a similar capacity” for the two organizations. Thus, if an individual serves on the boards of Organization A and Organization B, it would automatically affiliate the two groups. (Since the word in the provision is “individuals” it may require more than one such overlapping person.) If an individual (or perhaps two individuals) were working part-time for two organizations in a “similar capacity,” the two organizations would automatically be affiliated. Needless to say, this is much broader than the tax law’s definition which deals with voting control.

Shared resources. Under the provision, sharing any resources – no matter how small – between two organizations would create an affiliation. Thus, if Organization A shares a pen with

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<sup>2</sup> See 26 U.S.C 4911(f): “[T]wo organizations are members of an affiliated group of organizations but only if-

(A) the governing instrument of one such organization requires it to be bound by decisions of the other organization on legislative issues, or

(B) the governing board of one such organization includes persons who--

(i) are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and

(ii) by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.”

Organization B, it would automatically affiliate the two groups. The language is so broad as to be nonsensical.

Funding. Under the provision, a grant from a foundation or government agency that is greater than 20 percent of Organization A's budget would automatically affiliate Organization A with the foundation or the government agency. Additionally, the provision says the affiliation occurs if the entity "controls, is controlled by, or is under *common control*..." Under the above scenario, when the foundation or government agency gives grants constituting more than 20% of their respective budgets to Organizations B, C, and D, it follows that Organization A is now affiliated with Organizations B, C, and D because of the common control language.

The breadth of this language is both substantial and significant. Under this language, virtually all organizations that do any work together run the risk of becoming affiliated.

### **Examples of Impact**

*Scenario:* Organization A is a charity – a 501(c)(3) organization – and is affiliated with Organization B, a 501(c)(4) social welfare group, as permitted under both the federal tax code and constitutional law. Organization B regularly lobbies at the state level on poverty issues, including concerns about low-income housing. Organization A would be disqualified from receiving AHF money.

*Discussion:* Congress has already restricted 501(c)(4) organizations that lobby from receiving federal grants (see 2 U.S.C. 1611, passed in 1995). There was bipartisan support for this restriction on the condition that 501(c)(4) organizations would be allowed to establish a separate 501(c)(4) that does not lobby or a 501(c)(3) organization, in order to receive federal funds.

At that time, Sen. Carl Levin (D-MI) said to the amendment's sponsor Sen. Alan Simpson (R-WY):

"[I]n fact, this amendment does not preclude, as the Senator from Wyoming phrased it, the splitting of an organization and the creation of another organization which could do the lobbying effort while organization No. 1 receives the Federal grants." (141 Cong. Rec. S10540-02, pg. S10549)

Simpson concurred with Levin's assessment and added later in the debate after concern was raised about constitutional implications: "What we are saying is ... they can go become a 501(c)(3) [and they can do] \$1 million limiting activity of lobbying. They can give up lobbying or they can go into a separate split-off. They can split into two, a lobbying organization or a grant organization."

Under this new provision, there would no longer be any option to create a separate organization to receive federal funds.

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*Scenario:* Individuals 1 and 2 serve on the boards of both Organizations A and B. Organization B is a for-profit firm that provides financial and in-kind support to Organization A, and that is why Individuals 1 and 2 serve on the board. Organization B lobbies for its business interest and provides campaign contributions to federal candidates for elected office.

*Discussion:* Organizations A and B are affiliated because of the fact that Individuals 1 and 2 serve on both boards. Additionally, they are affiliated because Organization B shares in-kind support with Organization A. Since Organization B engages in restricted activities, Organization A would be disqualified from receiving AHF grants.

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*Scenario:* A state government agency provides a grant to Organization A comprising more than 20 percent of the organization's budget. The state government is required under the National Voter Registration Act to give individuals obtaining driving licenses an opportunity to register to vote (commonly called Motor Voter requirements).

*Discussion:* Organization A is affiliated with the state government because of the grant it received. Since the state government is engaged in voter registration activities, Organization A is disqualified from receiving AHF grants.

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*Scenario:* A private foundation provides a grant to Organization A that comprises more than 20 percent of the organization's budget. The foundation also gives Organization B, C, and D grants to engage in nonpartisan voter participation activities.

*Discussion:* Organization A is affiliated with the foundation because of the grant it received. Because of the "common control" language, Organization A is also affiliated with Organizations B, C, and D. Since Organizations B, C, and D engage in nonpartisan voter registration activities, Organization A would be disqualified from receiving AHF grants.

It is quite conceivable that this provision would lead some foundations to implement a policy to never give a grant greater than 20 percent of an organization's budget. For some foundations, it may also create enough of a chill that they may stop giving grants for the types of activities restricted in the provision.

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*Scenario:* Organization A works closely with a neighborhood group. The group has no offices and has only volunteer staff. Organization A allows the neighborhood group to use its fax machine and Internet access. The neighborhood group is not organized under 501(c)(3) of the tax code, but lobbies the city council on a range of community issues.

*Discussion:* Organization A and the neighborhood group are now affiliated because of the shared resources. Organization A is disqualified from receiving AHF grants because the neighborhood group, which is not a charity, lobbies.

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*Scenario:* A law firm based in St. Louis donates office space and support services to a community housing group. The law firm's Washington office sometimes lobbies Congress on behalf of the firm's clients.

*Discussion:* The community housing group and the law firm are now affiliated because of the shared resources. The community housing group is disqualified from receiving AHF grants because the law firm lobbies, even though the lobbying is not on the firm's own behalf and not in the office shared with the housing group.

## Final Comments

The affiliation language in this provision is astonishingly sweeping. It would have a chilling effect on the free speech and association rights of nonprofit organizations protected by the First Amendment. Even when the Supreme Court has restricted nonprofit speech, it expressly noted that nonprofits can conduct the restricted speech through an affiliated organization.<sup>3</sup> This provision vitiates that standard.

More to the point, in this country we strive to encourage civic participation. Through laws, such as the Help America Vote Act and the National Voter Registration Act, our nation has placed an understandable premium on encouraging all citizens to vote. Our country has always prided itself on its robust nonprofit sector that helps elevate civic participation and public discourse. By undermining the ability of our country's charities to carry out this work, which requires active advocacy, the provision would undermine the quality of our democracy.

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<sup>3</sup> See, e.g., *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).