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Testimony Before the Council of the District of Columbia

Committee of the Whole, Chairman Phil Mendelson

Bill 26-0048: The Review of Agency Action Clarification Amendment Act of 2025

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DC KinCare Alliance respectfully submits this testimony regarding Bill 26-0048, the Review of Agency Action Clarification Amendment Act of 2025. As reflected in the advocacy group letter of March 24, 2024, to which DC KinCare Alliance is a signatory, we have serious concerns that the language of the bill not does achieve its stated purposes as set forth in the Chairman's request to agendize the temporary bill dated November 6, 2025. As we understand it, the purpose is to retain the D.C. Court of Appeals' standard of review of agency interpretations of ambiguous statutes and regulations, which is "substantially similar to the approach adopted by the United States Supreme Court in *Chevron, US.A., Inc. v. Natural Resources Defense. Council, Inc.,* 467 U.S. 837, 842-44 (1984), and its progeny." However, the bill, as drafted, substantially expands deference to agency interpretation by skipping over step one of the *Chevron* analysis. Bill 26-0048 appears to permit deference to agency interpretation, even when the statutory language is unambiguous in its meaning. Under *Chevron*, deference to agency interpretation only applies when the statutory language is ambiguous or silent on its face. If the statute is clear, then the statute should be applied as written, without deference to agency interpretation.

One other area addressed in the advocates' letter to which we want to draw particular attention is deference in the context of informal agency action. The D.C. Court of Appeals has adopted an analysis similar to that in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) for informal agency actions, a standard that is less-deferential to agency interpretation than the deference afforded to the agency in *Chevron*. In *Skidmore*, the U.S. Supreme Court announced a deference standard for nonbinding agency actions, such as guidance memoranda, policy statements, and enforcement guidelines. This deference standard, later termed *Skidmore* deference, invites courts to consider an agency's interpretation as persuasive but not controlling. *Id.* at 140. Under *Skidmore* deference, a court considers the body of experience and informed judgment held by agencies, the thoroughness of the agency's consideration, the validity of the agency's reasoning, and the consistency of the agency's earlier pronouncements—all of which give the agency the power to persuade, but not the power to control. *Id.*

For informal agency actions such as the publication of internal guidance memoranda, operating manuals, other informal publications, and informal rulings, the D.C. Court of Appeals has similarly afforded the relevant D.C. agencies a *Skidmore*-like deference. In *Nunnally v. D.C. Metro. Police Dept.*, the D.C. Court of Appeals described the distinction in deference standards between formal and informal agency actions, noting that "longstanding agency interpretation, such as those enacted in regulations, merit the most deference . . . [O]n the other hand, agency guidance manuals and other internal documents receive much less deference." 80 A.3d 1004, 1012 (D.C. 2013) (citing *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (applying *Skidmore* deference)). In *1303 Clifton St. LLC v. D.C.*, 39 A.3d 25, 31 (D.C. 2012), the Court of Appeals wrote:

> Not all agency determinations, however, are deserving of a heightened level of deference. In particular we have recognized that informal agency action is generally not entitled to such deference . . . When an agency informs the public what it thinks a statute means (as in program guidelines or informal rulings)

without purporting to exercise law-making authority[,] the least deferential standard of review is applied.

39 A.3d at 31 (emphasis added) (internal citation omitted).[1]

Currently, new section (c) in Bill 26-0048 does not distinguish between agency deference standards when an agency decision is based on informal guidance versus formal rulemaking. We agree with the U.S. Supreme Court in *Skidmore*, that if an agency decision is based on an interpretation authorized by informal means, the decision should not be granted the same level of deference as an interpretation that has been tested by the formal rulemaking process. For example, at issue in *Nunnally*, *supra*, was the deference owed to the Metropolitan Police Department's (MPD's) decision to deny Lt. Nunnally's request for non-chargeable sick leave based on its interpretation of the sick leave statute set forth in an internal operating manual. 80 A.3d at 1012. The Court of Appeals determined that a lower standard of deference was owed because the manual did not have the force or effect of a statute or an administrative regulation. *Id.*

We do not believe the D.C. Council intended Bill 26-0048 to be interpreted in a way that would upend longstanding U.S. Supreme Court and D.C. Court of Appeals precedent. Indeed, to do so would be particularly concerning, in that it would effectively permit D.C. agencies to act in a self-serving, rather than public-serving manner, without transparency or accountability. D.C. agencies typically do not issue published rules, preferring to operate pursuant to informal policies and guidance, that are not always publicly available and are often changed without any public notice or input.

To ensure D.C. agencies are carrying out their duties in a way that respects and upholds the rights of D.C. residents, the D.C. Council should ensure that Bill 26-0048 faithfully enacts both parts of the *Chevron* analysis for formal agency statutory interpretations and *Skidmore* deference when agencies make decision based on informal policies that are not subject to notice and comment rulemaking.

We concur with Legal Aid that a change to D.C. law is not necessary at this time, and the D.C. Court of Appeals should be allowed to develop the law in accordance with its own precedent and the careful balancing of interests. If the D.C. Council decides to move forward with a revision to the statute, we believe that the language proposed by Legal Aid in Option One

[1] See also *Oshinaike v. Oshinaike*, 140 A.3d 1206, 1209 (D.C. 2016) ("[T]he cited materials do not reflect formal agency action, and are thus not entitled to the substantial deference that in some circumstances is accorded to formal agency action[.]"); *Estenos v. PAHO/WHO-FCU*, , 952 A.2d 878, 892 n.15 ("The same deference is not necessarily owed to the EEOC's Compliance Manual. The EEOC's interpretive guidelines do not receive *Chevron* deference, and are only useful in Title VII cases, to the extent that those interpretations have the power to persuade.") (internal citation and quotation marks omitted); *Reichley v. D.C. Dept. of Emp't Servs.*, 531 A.2d 244, 248, n.4 (D.C. 1987) (noting that "[t]raditionally, the least deferential standard of review has been applicable to so-called interpretive rules, whereby an agency informs the public what it thinks a statute means (as in program guidelines or informal rulings) without purporting to exercise law-making authority").

of its attachment to its written testimony adequately addresses the concerns we have raised here. We have included the proposed language of Option One below for ease of reference.

Alternative One: Jayapal-Warren Stop Corporate Capture Act

If a statute that an agency administers is silent or ambiguous as to the proper construction of a particular term or provision or set of terms or provisions, and an agency has followed the applicable procedures of Title 2, Chapter 5, Subchapter I, has otherwise lawfully adjudicated a matter, or has followed the corresponding procedural provisions of the relevant statute, as applicable, a reviewing court shall defer to the agency's reasonable or permissible interpretation of that statute, regardless of the significance of the related agency action or a possible future agency action.