January 20, 2016

Via Electronic Submission

Mr. Brent Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: MSRB and FINRA Pay-to-Play Rules,
File No. SR-MSRB-2015-14, File No. SR-FINRA-2015-056

To the Chairman and Commissioners:

This letter is submitted on behalf of the Center for Competitive Politics ("CCP"), a § 501(c)(3) organization founded to educate the public concerning the benefits of increased freedom and competition in the electoral process. Toward that end, CCP engages in research, scholarship, and outreach to protect and promote the First Amendment rights of speech, assembly, and petition. CCP also operates a pro bono law center that brings legal challenges to state and federal laws and regulations that unconstitutionally burden the exercise of these freedoms.

For the reasons discussed below, CCP urges the Commission to reject the MSRB and FINRA proposals under consideration here because they impermissibly restrict core political speech in violation of the First Amendment to the U.S. Constitution.[1] These proposed rules are parallel, although they differ in some significant respects discussed below. The MSRB proposal would expand the existing MSRB Rule G-37, which currently limits campaign contributions from municipal securities dealers and their affiliated persons, to cover municipal advisors and their affiliated persons (and would make conforming changes to MSRB Rules G-8 and G-9). The proposed amendments to Rule G-37 would generally forbid political contributions by municipal advisors and municipal advisor professionals ("MAPs") to an official of a municipal securities issuer. An exception to the MSRB rule allows MAPs to make de minimis contributions not in excess of $250 to issuer officials for whom a MAP is eligible to vote. However, the MSRB rule

[1] CCP submitted a comment to FINRA on December 15, 2014 in opposition to its proposal, and a copy of that letter is attached as Exhibit A to this letter. CCP also submitted a comment to the MSRB on October 1, 2014 in opposition to its proposal, and a copy of that letter is attached as Exhibit B to this letter. We will not repeat every argument in those letters here, but we believe those arguments remain valid, and we incorporate those arguments by reference here.

does not allow MAPs to make any contribution of any size to issuer officials for whom the MAP is not eligible to vote.

The FINRA proposal would adopt FINRA Rules 2030 and 4580, to apply the restrictions on campaign contributions currently imposed on investment advisers by SEC Rule 206(4)-5 to broker-dealers which engage in distribution or solicitation activities on behalf of investment advisers (and their "covered associates"). An exception to the FINRA Rules would allow "covered associates" to make de minimis contributions not in excess of $350 to issuer officials for whom a covered associate is eligible to vote, and to make contributions not in excess of $150 to issuer officials for whom the covered associate is not eligible to vote.

Under both rules, a municipal advisor or broker-dealer is barred for two years from doing business with any municipal entity to which it or a MAP or covered associate has made a political contribution (other than a permitted de minimis contribution). FINRA enforces both rules, and violation of the rules are subject to the full range of FINRA's sanctions, including expulsion from membership (for municipal advisors or broker-dealers) and permanent bars from working in the securities industry (for MAPs and covered associates), as well as draconian civil money penalties and other relief. All broker-dealers that do business with the public are required to join FINRA and be subject to its rules under Section 15(b)(8) of the Securities Exchange Act of 1934. Similarly, all municipal advisors are required to register with the MSRB and become subject to the MSRB's rules under Section 15B of the Exchange Act.

I. The Applicable Legal Standards

In 1995, the U.S. Court of Appeals for the D.C. Circuit held that the SEC's approval of an SRO rule constitutes "government action of the purest sort" and thus is subject to the First Amendment. *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995).[2] The First Amendment standard for review of restrictions on campaign contributions has been settled for 40 years: political contributions are a form of core political speech, restriction on which can be upheld only if they meet a rigorous test, achieve a compelling governmental interest, and lack any undue overbreadth or excessive vagueness. *Buckley v. Valeo*, 424 U.S. 1 (1976). The FINRA and MSRB proposals here are not narrowly tailored to achieve a compelling government interest, and therefore cannot survive First Amendment scrutiny.

Twenty years ago, the D.C. Circuit upheld a predecessor version of MSRB Rule G-37 against some similar challenges in *Blount*, but that portion of *Blount* is not controlling here for several reasons. First, subsequent Supreme Court decisions discussed below, including *Randall v. Sorrell*, 548 U.S. 230 (2006), *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *Citizens United v. FEC*, 540 U.S. 93 (2010), post-date *Blount* and undercut its analytical foundations. Second, in the 20 years since *Blount*, no other court of appeals has followed that decision in approving Rule G-37's limits on political speech. Some portions of the *Blount* opinion, such as its approval without any discussion of a $0 contribution limit to candidates for whom a covered person is not entitled to vote, are no longer defensible. Third, the SEC's own

[2] While, as discussed below, subsequent Supreme Court precedents have undercut the First Amendment conclusions in *Blount*, nothing has called into question its holding that SEC approval of an SRO rule constitutes "state action" and that the First Amendment applies with full force to an SEC rule approval.

conclusion, in 2010 when it adopted Rule 206(4)-5, that higher contribution limits than those contained in Rule G-37 are sufficient to combat corruption and the appearance of corruption, make it impossible to conclude now that the lower limits in Rule G-37 continue to be "narrowly tailored" to achieve a compelling government interest. In short, the Commission should examine the FINRA and MSRB rule proposals on their own merits, and should not take undue comfort from *Blount*.

II. Multiple Features of Both the FINRA and MSRB Rules Violate the First Amendment

A. The Proposed Contributions Limits Are Too Low

Both the FINRA and MSRB proposed rules are inconsistent with the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), because those limits are simply too low to allow citizens to exercise their constitutional right to participate in the political process. *Randall* holds that "contribution limits that are too low . . . harm the electoral process" in violation of the First Amendment. 548 U.S. at 249.[3] The Court applied this holding to invalidate a Vermont statute that limited state campaign contributions to $200. *See id*. at 249-53. The contribution limit contained in the proposed rules – for the MSRB, $250 for a candidate for which the MAP is permitted to vote, and $0 for all other candidates, and for FINRA, $350 for a candidate for which the covered associate is permitted to vote, and $150 for all other candidates, are constitutionally indistinguishable from the $200 limit held unconstitutional in *Randall*, and are far lower than the range of contribution limits the Court suggested might be constitutionally permissible. *Id*. (noting that the Supreme Court had never approved a contribution limit less than $1,000 and that no states other than Vermont have limits less than $500). Moreover, the contribution limits in the proposed rule have other features that the *Randall* court found to be constitutionally objectionable:

- First, the proposed rule applies the same low contribution limits to all states, including those in much larger states such as California and New York in which campaigns are substantially more expensive than in smaller states like Vermont. See *id*. at 251-52 (comparing unconstitutional contribution limits in Vermont with a higher contribution limit in Missouri approved in *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377 (2000)). The Court's ruling indicates that a $350 or $250 contribution limit would not be permissible if it applied to a larger state with higher election costs than Vermont.

- Second, the proposed rule bars contributions not only of cash, but also of "anything of value" such as yard signs, buttons, coffee, doughnuts and other materials essential to volunteering with a political campaign. Such a bar, according to the Court "impede[s] a campaign's ability effectively to use volunteers, thereby making it more difficult for

[3] The citations to *Randall* in this portion of the letter are to the controlling plurality opinion of Justices Breyer, Alito and Roberts. Justices Kennedy, Scalia and Thomas concurred separately – each of them would have held that all campaign contribution limits are unconstitutional in all circumstances. In sum, a six-vote majority of the Court would hold the contribution limits in the proposed rules to be unconstitutional violations of free speech.

individuals to associate in this way." *Id*. at 260. As such, this portion of the proposed rule also is unconstitutional under *Randall*.

- Third, the contribution limits in the MSRB and FINRA proposed rules are not indexed for inflation, with the result that the "limits decline in real value each year." *Id*. at 261. The failure to provide for inflation indexing renders the proposed rules unconstitutional as well.

For all of these reasons, the de minimis contribution limits in the proposed rules are too low to be consistent with *Randall v. Sorrell*. Moreover, FINRA and the MSRB have not provided any justification whatsoever for the very low individual contribution limits they impose. They do not explain why they seek to impose contribution limits so much lower than the $2,700 per election that the Federal Election Campaign Act ("FECA") finds sufficient for individuals. Nor do they explain why they have chosen limits so much lower than the limits imposed by nearly every state that imposes contribution limits (only Colorado and Montana have lower limits for some legislative races and the Montana limits are currently the subject of litigation. No state imposes such a low limit for a statewide race. Even Vermont, as discussed in *Randall*, has since raised its limits to no less than $1,000 for House races and $4,000 for statewide offices. FINRA and the MSRB cannot justify as "narrowly tailored" contribution limits so much lower than FECA and nearly every state find sufficient to prevent corruption or the appearance of corruption.

B. The Proposed Discrimination between Contributions to a Candidate for Whom an Individual Is Entitled to Vote and other Candidates, Is Impermissible

The distinction in both the FINRA and MSRB rules between candidates for whom an individual is entitled to vote, and candidates for whom an individual is not entitled to vote, cannot be squared with the Supreme Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). *McCutcheon*, which struck down aggregate contribution limits in the Federal Election Campaign Act, reiterated the importance of associational rights, and further recognized that those rights are not limited to associating with candidates in one's own district. After *McCutcheon*, discriminating against out-of-district contributions simply is impermissible. First Amendment law has always forbidden discrimination among different types of speech. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (striking down an ordinance discriminating between ideological or political yard signs and other yard signs). After *McCutcheon*, it is not permissible for the SEC to approve FINRA or MSRB Rules discriminating between contributions to candidates for whom an individual is entitled to vote, and contributions to candidates for whom an individual is not entitled to vote.[4]

The MSRB's proposed $250 limit for contributions to candidates for whom a MAP is entitled to vote, and complete ban on contributions to candidates for whom a MAP is not entitled

[4] We recognize that the SEC's own Rule 206(4)-5, adopted in 2010, distinguishes between candidates for whom an individual is entitled to vote, and candidates for whom an individual is not entitled to vote. In light of the Supreme Court decisions since 2010 in *McCutcheon* and *Town of Gilbert*, we believe this distinction can no longer be sustained.

to vote also cannot possibly survive review under the Supreme Court's recent jurisprudence. As the Supreme Court stated in *Randall*, 548 U.S. at 247 (*quoting Buckley v. Valeo*, 424 U.S. 1, 21 (1975)), the "symbolic expression of support evidenced by a contribution," has long been deemed to be constitutionally protected free speech, and the right to engage in that constitutionally protected expression is not conditioned on living in a candidate's district.

These limits also cannot survive scrutiny as "narrow tailored" in light of the SEC's adoption of its Investment Adviser "Pay-to-Play" Rule, Rule 206(4)-5. When the SEC first proposed this rule, in Advisers Act Rel. No. 2910 (Aug. 3, 2009) (available at https://www.sec.gov/rules/proposed/2009/ia-2910.pdf), the Commission originally proposed contribution limits that were substantively identical to those in proposed MSRB Rule G-37. The SEC explained that keeping these contribution limits identical would ease compliance for dual-registrant firms that were subject both to Rule 206(4)-5 and MSRB Rule G-37. However, as a result of the notice and comment process, the Commission substantially revised the final Rule 206(4)-5. Rather than the de minimis contribution limit of $250 per a candidate for whom a "covered associate" is entitled to vote, the SEC adopted a $350 contribution limit. And rather than forbidding "covered associates" from contributing at all to candidates for whom they are not entitled to vote, the SEC adopted a $150 contribution limit for these individuals. The Commission cannot reasonably find that the $250/$0 contribution limits in proposed Rule G-37 are "narrowly tailored," when the Commission, only a few years ago in Rule 206(4)-5, decided that higher, $350/$150 contribution limits were sufficient to prevent quid pro quo corruption. Both rules concern campaign contributions to exactly the same state and local government officials. Because the Commission has found that the higher $350/$150 contribution limits are sufficient to prevent corruption or the appearance of corruption for the purposes of Rule 206(4)-5, it could not reasonably conclude that lower contribution limits in proposed Rule G-37 are "narrowly tailored" for the purpose of preventing corruption involving exactly the same government officials. The MSRB has not even attempted to distinguish contributions from municipal advisors from contributions from investment advisers – nor could any such distinction be sustained. The MSRB's proposed $250/$0 contribution limits are not "narrowly tailored" and thus cannot be approved.

Moreover, we respectfully submit that the proposed absolute bar on contributions by entities – municipal advisors, municipal dealers and broker-dealers soliciting on behalf of investment advisers – is inconsistent with *Citizens United v. FEC*, 540 U.S. 93 (2010). *Citizens United* holds that corporations also have political speech rights. The proposed rules discriminate between de minimis contributions by "covered associates" and "MAPs," which the proposed rules permit, and contributions by the corporations employing those individuals, which are completely forbidden. Because no attempt has been made to justify this discrimination against corporate political speech, it is inconsistent with First Amendment principles. *See Giant Cab Co. v. Bailey*, No. 13-cv-00426 MCA/ACT (D.N.M. Sept. 4, 2013) (striking down ban on corporate political contributions as inconsistent with First Amendment when no evidence was provided for the ban).

C. The Proposed Rules Did Not Consider Less Restrictive Alternatives

McCutcheon also specifically held that in order to satisfy the "narrow tailoring" requirement, it is necessary to consider all of the available "alternatives" that would also serve the government's interest "while avoiding unnecessary abridgment of First Amendment rights."[5] Neither FINRA nor the MSRB proposals have met this standard here. There are many possible, and effective, alternatives to the draconian contribution restrictions proposed here. Neither FINRA nor the MSRB considered other, less restrictive alternatives. One possible approach would provide for tougher penalties for those who use pay-to-play arrangements to obtain contracts with municipal entities. The use of stronger investigative tools and additional examination resources to detect suspected pay-to-play activities could uncover bad actors who actually engage in quid pro quo corruption.[6] Whistleblower protections could protect those who report wrongdoing and (as the Commission has implemented successfully) whistleblowers could be given rewards based on the size of the ill-gotten contracts or the penalties imposed for violations. Neither FINRA nor the MSRB have explained why these less restrictive steps could not be successful in deterring pay-to-play activities, as required by *McCutcheon*. Nor did FINRA or the MSRB consider alternatives that would provide exemptions from the rule if contracts are put up for competitive bid in a transparent way that forecloses pay-to-play manipulation. Similarly, issuer officials could recuse themselves from decisions regarding potential contractors from whom they have accepted contributions. A contribution limit rule, if retained, should be limited to those circumstances where it is indeed needed, and only after alternative means of preventing pay-to-play practices have been considered.

D. The "Look-Back" Provisions are Unconstitutional

Both the FINRA and MSRB proposed rules include "look-back" provisions that trigger their respective two-year prohibitions a result of a covered contribution made by a person who becomes a covered associate within six months to two years of having made such a contribution, depending on the circumstances.

These look-back provisions are overbroad and insufficiently tailored to support the governmental interest claimed to be served by these rules, specifically preventing corruption in the relevant markets. Indeed, the look-backs may apply to contributions made up to two years prior to an individual becoming an employee of a firm covered by one of these rules. As a result, an individual could effectively be barred from certain types of employment as a result of having made a political contribution years prior to even applying for such a position. For example, a person making a contribution while working in a completely unrelated industry or while still a student could be restricted from certain future employment by operation of these rules of which they would have no reason to be aware at the time. As there is no instance contained in the relevant records of a covered firm hiring an individual who has a history of making political

[5] 134 S. Ct. at 1458 (citation and internal quotation marks omitted).

[6] FINRA has jurisdiction to conduct examinations of both broker-dealers subject to its rules and municipal advisors subject to the MSRB's rules. FINRA examines all entities subject to its jurisdiction on periodic cycles, generally on an annual basis or every two years for smaller firms.

contributions to certain officials in order to curry favor with those officials, there is no justification for applying such a sweepingly broad, punitive provision.

E. As Applied to Federal Elections, the Proposed Rules Are Preempted by the Federal Election Campaign Act

Both the FINRA and MSRB proposed rules apply to contributions to state or municipal issuer officials who are currently running for federal office. The proposed rules are overbroad with respect to federal campaigns because the Federal Election Campaign Act provides comprehensive regulation of federal election campaigns, and does not leave any role for the SEC, FINRA or the MSRB to regulate in this area. FECA provides extensive, detailed regulation of federal election campaigns, including contribution limits and extensive disclosure regulations, and gives the Federal Election Commission ("FEC") exclusive rule-making authority concerning federal elections. Nothing in the FECA gives the SEC or any securities self-regulatory organization any authority to regulate federal election campaigns. FECA plainly "occupies the field" with respect to the regulation of federal election campaigns. *Cf. Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (ERISA preemption). Therefore, any attempt by the SEC, FINRA or the MSRB to regulate contributions in connection with federal election campaigns (as in the common situation in which a current state or local office holder runs for federal election), is preempted by FECA. Indeed, by setting contribution limits lower than those contained in FECA, the proposed rules are directly inconsistent with and contrary to FECA – so in addition to being subject to "field preemption," they are subject to "conflict preemption".[7] Because the proposed rules here fail to provide an exception for contributions in connection with federal election campaigns, they are inconsistent with FECA and must be struck down.

F. The Proposed Rules Are Impermissibly Vague and Overbroad

Moreover, the proposed rules are impermissibly overbroad and vague. When considering laws or regulations with the potential to chill protected First Amendment activity, the courts have demanded that the prohibitions be clear and unambiguous. The proposed rules do not meet this standard.

First, the definitions encompass all incumbents or candidates for an office which is "directly *or indirectly responsible for, or can influence* the outcome of" (emphasis added) the decision to hire a municipal securities dealer, municipal advisor, or investment adviser.[8] It also includes incumbents and candidates "for any elective office of a state or of any political subdivision, which office *has authority to appoint* any person who is *directly or indirectly responsible for, or can influence the outcome* of" such hiring (emphasis added). The breadth of this definition is staggering. The inherent vagueness of "indirect influence" and "indirect responsibility" should be self-evident. Moreover, there are no articulated standards sufficient to guide the regulated community in determining who is and is not a qualified officeholder (and

[7] We note that the *Blount* decision did not address the conflict between MSRB Rule G-37 and FECA in situations where a state or local official runs for federal office.

[8] Draft Rule G-37(g)(xvi)(A)-(B); FINRA Rule 2030 contains a parallel provision.

consequently, which contributions do and do not trigger the ban on business). This in and of itself stifles activity protected by the First Amendment. What is more, the definitions extend to *candidates* for office, prohibiting contributions simply because someone is running for office. Even a contribution to a losing candidate triggers sanctions under the proposed rules. So too do contributions to a candidate who is currently a municipal official but who is running for a federal office in which he or she will have no potential to influence municipal decisions. This lack of clarity will inevitably mean that some contributions that would otherwise be made, and which pose little to no danger of pay-to-play corruption, will not be made. That is itself a substantial First Amendment harm.[9]

Second, the definition of "solicit" under the proposed rules suffers from similar problems, arising from an effort to achieve comprehensive regulation through overbroad language. This definition includes "a direct or indirect communication with a municipal entity for the purposes of obtaining or retaining an engagement" regulated under the Rule.[10] The phrase "indirect communication" is undefined, and worse, uncabined. In fact, as the hallmark of a communication is the conveyance of information from one person to another, it is not clear what an "indirect communication" entails; either information is conveyed or it is not. Moreover, the proposed rules apply whether or not the entities at issue currently are engaged in business with the municipal entity at issue, or are currently seeking business from that municipal issuer. As a result, the proposed rules chill political contributions to candidates in any municipal issuer to which the municipal dealer, municipal adviser or investment adviser might seek business any time in the next two years – thereby chilling a substantial amount of political speech where there will be no actual risk of corruption. This prohibition is impermissibly overbroad to survive First Amendment scrutiny.

Finally, exacerbating these problems is the prohibition on persons "directly or indirectly, through or by any other person or means, do[ing] any act which would result in a violation" of the two-year ban on business or prohibition on solicitation or coordination.[11] This catchall provision – and the now familiar use of the word "indirectly" – is impermissibly overbroad. In practice, it will often be interpreted to reach nearly any behavior that could conceivably be covered by the proposed rules' already-overbroad provisions, a particularly troubling prospect

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[9] *Buckley*, 424 U.S. at 77-78, struck down a similar ban on "influencing" as unconstitutionally vague:

> Section 434(e) applies to "[e]very person. . . who makes contributions or expenditures." "Contributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems.
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> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U. S. 612, 617 (1954). *See also Papachristou v. City of Jacksonville*, 405 U. S. 156 (1972). Where First Amendment rights are involved, an even "greater degree of specificity" is required. *Smith v. Goguen*, 415 U.S. at 573. *See Grayned v. City of Rockford*, 408 U. S. 104, 109 (1972); *Kunz v. New York*, 340 U. S. 290 (1951). . . . Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness. *United States v. Harriss, supra* 347 U. S. at 618; *United States v. Rumely*, 345 U.S. at 45.

[10] Draft Rule G-37(g)(xix); again, FINRA Rule 2030 contains a parallel provision.

[11] Draft Rule G-37(d); FINRA Rule 2030 contains a parallel provision.

given the penalties involved. Again: how does one "indirectly" perform an act? This is insufficient tailoring under the First Amendment. In short, the Draft Amendments attempt to obtain universal coverage by employing terms that are both vague and overbroad. This is an approach to regulation the United States Supreme Court has long held is inconsistent with the protections of the First Amendment when dealing with protected speech.[12]

G. The Proposed Rules Are Impermissibly Overbroad as Applied to Independent Broker-Dealer Model Firms

The proposed rules are overbroad as applied to independent broker-dealers ("IBDs") and their registered representatives who operate as independent contractors. In the United States, there are approximately 167,000 independent financial advisors, which account for a majority of all producing registered representatives. An IBD often has a broad network of registered representatives who are not employees, but rather independent contractors. These financial advisers are self-employed independent contractors, rather than employees of the IBD firms. IBDs typically maintain dual registrations: registration as broker-dealers and registration as investment advisers with the SEC. They are called "independent" because the individuals who utilize those registrations to deliver financial services to clients are not employees of the firm but rather are independent contractors with whom the firm has a business to business relationship. Advisory services may be provided under the brand of the IBD firm or may also be provided through the financial advisor's separately registered independent investment advisory firm. If any associated person of the IBD firm offers municipal advisory services, then the entire firm must register as a municipal advisor; similarly, all IBD firms are required to be registered as broker-dealers with FINRA.

Neither the FINRA nor the MSRB proposed rules are tailored to the manner in which services are provided by financial advisors in the IBD model. Instead of recognizing that services can be offered under one roof but through various independent entities, the proposed rules contemplate that all services offered through a single IBD firm are necessarily inter-related. Under the proposed rules, a contribution by either the IBD firm itself or any of the firm's "covered associates" or "MAPs" will trigger the proposed rules' two-year ban. The proposed rules define covered associate and MAP to include any employee who solicits a government entity and any person who supervises, directly or indirectly, such employee. FINRA and the MSRB interpret the term "employee" to include independent contractors. As a result, the Rule treats independent contractors as employees and therefore as "covered associates" or "MAPs" to the extent that they solicit a government entity. The proposed rules are intended to prevent a firm from improperly influencing a governmental entity's choice of investment managers or municipal advisors through the concerted use of campaign contributions made by that firm's personnel to public officials in a position to influence that choice. However, the proposed rules do not account for the manifest differences in the way IBD firms and non-IBD firms provide their services. In the IBD firm, the independence of one representative from another means that

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[12] *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms") (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Schneider v. Irvington*, 308 U.S. 147, 162 (1939)).

their activities are unconnected to one another and their political contributions are also unconnected and uncoordinated. However, the proposed rules, as firms will be forced to apply them, treat all of these separate businesses as interchangeable. It may be appropriate that the proposed rules prevent a particular financial advisor from using political contributions to induce a public officer to retain those services of that particular financial advisor. But the proposed rules force IBD firms to prevent *all* financial advisors of the IBD – no matter how independent they may be from one another – from making contributions to a public official whose governmental entity is served by *some other* financial advisor licensed through that IBD. As a practical matter, IBDs will be forced to treat all financial advisers as covered associates instead of making case-by-case determinations regarding whether a financial adviser is covered by virtue of their seeking to solicit a governmental entity. This will result in IBDs imposing broad prohibitions on financial advisor contributions in excess of the de minimis limits set forth in the rule and also prohibiting contributions to PACs.

IBD firms will be forced to apply the proposed rules in an overbroad way. To illustrate, a single IBD firm might have three financial advisors that are affiliated with three separate independent investment adviser representatives called Alpha Advisors, Beta Advisors and Charlie Advisors in, say, Ohio. Alpha Advisors solicit the contract to manage the public employee pension funds for the state of Ohio. Its "covered persons" (general partners, managing members or officers) would perhaps properly be restricted from making contributions to Ohio politicians in a position to influence the state's choice of investment managers. But the proposed rules in effect would force IBD firms to treat all of its financial advisors as covered and to connect the activities of the three advisory firms and prohibit the officers of Beta Advisors and Charlie Advisors from making political contributions to those Ohio politicians *even though their firms do no business with Ohio and any advisory business they do is separate from Alpha Advisors.* As written, therefore, the proposed rules would have an unintentionally overbroad *in terrorem* application to IBD firms. They would be forced to adopt restrictions on their independent representatives to prevent facial violations of the proposed rules, even though the practical problem sought to be resolved by the rules is entirely absent.

III. The MSRB Proposal Should Clarify that Independent Expenditures Are Not Regulated Contributions

As discussed above, the MSRB's proposal defines "contribution" in Rule G-37(g)(vi)(A)(i) to include any payment "for the purpose of influencing" an election. The rule should clearly indicate that contributions in support of independent expenditures are exempt from the regulation. Any implied or indirect restriction on independent expenditures is flatly inconsistent with *Citizens United v. FEC*, 540 U.S. 93 (2010). *Citizens United* squarely held that there is no governmental interest that justifies limits on independent expenditures. *See also Buckley v. Valeo*, 424 U.S. at 47-48 ("While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression.") The Commission itself recognized this clear holding in its adopting release for Rule 206(4)-5, Investment Advisers Rel. No. 3013 at n.71 (July 1, 2010) (available at https://www.sec.gov/rules/final/2010/ia-3043.pdf). The Commission cannot approve an MSRB proposal imposing an independent expenditure limit the SEC itself has already recognized is

inconsistent with the First Amendment and unnecessary to prevent corruption or the appearance of corruption.

* * *

CCP respectfully requests that the Commission require FINRA and the MSRB to revise the proposed rules so that they are consistent with the constitutional considerations discussed above. If FINRA and the MSRB are unwilling to do so, then the Commission must reject the proposed rules as contrary to law under Section 19(b) of the Exchange Act. We thank the Commission for the opportunity to comment. Should you have any questions or desire CCP's assistance, please contact me.

Very truly yours,

David Keating
President

EXHIBIT A

December 15, 2014

Via Electronic Submission

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: Regulatory Notice 14-50, Comment on Proposal to Establish a "Pay-to-Play" Rule (Proposed Rules 2271, 2390, and 4580).

Dear Ms. Asquith,

I write on behalf of the Center for Competitive Politics ("CCP"), a § 501(c)(3) organization dedicated to educating the public concerning the benefits of increased freedom and competition in the electoral process. Toward that end, CCP engages in research, scholarship, and outreach to protect and promote the First Amendment political rights of speech, assembly, and petition. CCP also operates a *pro bono* law center that brings legal challenges to state and federal laws and regulations that impose unconstitutional burdens on the exercise of those freedoms.

The Proposed Rules are of particular importance to CCP because, *inter alia*, they limit the ability of covered individuals to make contributions to candidates for public office. The right to financially support candidates is a fundamental liberty secured by the First Amendment.[1]

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[1] *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (right to make contributions to candidates for office "lies at the foundation of a free society").
CCP understands that the First Amendment's protection of political rights serves as a limit on government action. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Com.*, 412 U.S. 94, 114 (1973) (First Amendment "is a restraint on government action, not that of private persons"). Nonetheless, the Securities and Exchange Commission will have to ratify and approve FINRA's rules, thus implicating constitutional liberties. FINRA, FINRA RULEMAKING PROCESS (*available at*: http://www.finra.org/Industry/Regulation/FINRARules/RulemakingProcess/). Accordingly,

We have no doubt that the Proposed Rules are a well-intentioned effort to prevent pay-to-play practices at the state and local levels. And we understand that FINRA is simply making a good faith effort to synchronize its regulations with Rule 206(4)-5, as promulgated by the Securities and Exchange Commission in 2011. Moreover, CCP agrees that "establishing requirements for member firms that are modeled on the SEC's Pay-to-Play Rule is a more effective response…than an outright ban on such activity."[2] Limits on political freedoms are certainly preferable to extinguishing them altogether.[3]

Nonetheless, the Proposed Rules remain vague in important particulars, and cover a wider range of activity than is necessary for the prevention of actual or perceived pay-to-play corruption. We believe that FINRA should more carefully consider recent Supreme Court decisions that impact the justification for campaign contribution limits and revise the Proposed Rules accordingly.

Vagueness Concerns with Proposed Rule 2390

The Supreme Court has explained why laws much at times be struck down as "void for vagueness [because]…[a provision's] prohibitions are not clearly defined."[4]

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
>
> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them…
>
> Third…where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead

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FINRA should take this early opportunity to consider constitutional questions as part of its deliberations.

[2] Regulatory Notice 14-50 at 3 (Nov. 2014).

[3] *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (striking down ban on contributions by individuals 17 years of age or under).

[4] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

> citizens to steer far wider of the unlawful zone, than if the boundaries of the forbidden areas were clearly marked.[5]

Unfortunately, a number of provisions in Rule 2390 and the accompanying Regulatory Notice pose fundamental vagueness concerns, which are troubling given the associational liberties implicated.

Under Proposed Rule 2390(a), covered members are barred from "engag[ing] in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to such government entity" for two years "after a contribution to an official of the government entity." Proposed Rule 2390(a). This languages mirrors similarly language in SEC Rule 206(4)-5[6], which is presently being challenged in federal court.[7]

This provision is vague, and the Regulatory Notice's description provides little additional precision. According to the Notice, "[a]n official of a government entity would include an incumbent, candidate[,] or successful candidate for elective office of a government entity if the office is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser or has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment advisor."[8]

The breadth of this definition is, on its face, excessive. The inherent vagueness of "indirect influence" and "indirect responsibility" is self-evident. Moreover, there are no articulated standards sufficient to guide the covered community in determining who is and is not a qualified officeholder (and consequently, which contributions do and do not trigger the ban on business). This vagueness *itself* stifles First Amendment activity by deterring covered members and covered associates from making political contributions.

What is more, the definitions, per the Regulatory Notice, extend to candidates for office—prohibiting contributions simply because someone is running for an office that may not, in fact, have any connection to investment

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[5] *Grayned*, 408 U.S. at 108-109 (punctuation altered, citations omitted).
[6] "[I]t shall be unlawful…[f]or any investment advisor…to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate within two years after the contribution is made…" 11 C.F.R 275.206(4)-5 (2014).
[7] *New York State Republican Comm., et. al v. SEC*, No. 14-012345 (D.D.C. 2014).
[8] Regulatory Notice at 5. This language is presumably taken verbatim from the SEC's guidance regarding Rule 206(4)-5. 75 Fed. Reg. 41018, 41029 (July 14, 2010).

adviser selection.[9] Even a contribution to a candidate who goes on to lose the election nonetheless triggers sanctions under Rule 2390.

This lack of clarity will inevitably mean that some contributions which would otherwise be made, and which pose little or no risk of pay-to-play corruption, will not be made. This, in and of itself, is a First Amendment harm. The Supreme Court has long held that the freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence."[10]

The definition of "solicit" under Proposed Rule 2390 suffers from similar problems. This definition includes efforts to "communicate, directly or indirectly, for the purpose of obtaining or retaining a client for…an investment adviser" and "communicat[ing], directly or indirectly, for the purpose of obtaining or arranging a contribution or payment."[11] The spirit of this definition is easily understood—it is intended to avoid *quid pro quo* arrangements for investment advisory contracts. But the concept of an "indirect communication" is nebulous, and worse, uncabined. Indeed, as the hallmark of a communication is the conveyance of information from one person to another, it is not clear what could constitute an "indirect communication."

The Proposed Rule states that "[n]o covered member shall engage in distribution or solicitation activities with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services" to that government entity "within two years after a [prohibited] contribution."[12] But it is unclear how the Authority would determine whether an actor is "seeking" to engagement in such activities. Even if this provision were decipherable, it would certainly present significant difficulties of proof. Worse yet, it will deprive regulators of a clear and consistent definition of covered members and associates, a circumstance that may ultimately lead to the perception or reality of selective enforcement.

Similarly, the Regulatory Notice's explanation as to what constitutes a "contribution" poses significant vagueness problems. Under the Proposed Rule, "[a] contribution would include a gift, subscription, loan, advance, deposit of money, or anything of value made the purpose of influencing the election."[13] This seems somewhat at odds with the direct text of the Proposed

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[9] Regulatory Notice at 5 ("An official of a government entity would include an incumbent, candidate or successful candidate for elective office…").
[10] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1958).
[11] Propsoed Rule 2390(h).
[12] Proposed Rule 2390(a).
[13] Regulatory Notice at 5. This provision accords with the Proposed Rule's definition of payment, at 2390(h)(8), with the exception of the use of the Oxford comma. That definition

Rule, which seems to only anticipate contributions "to an official of the government entity."

Similar language existed in the Federal Election Campaign Act, which was facially challenged in the seminal case of *Buckley v. Valeo*.[14] The *Buckley* Court noted that the vagueness of this definition was mitigated by the Court's decision to limit its application solely to candidates for office and federal political committees—entities whose "major purpose" was express candidate advocacy.[15]

However, the Proposed Rule is not so limited, and it is unclear what FINRA believes might "influence" an election—especially as the Proposed Rule already regulates a good deal of "indirect" activity. In the past, government agencies have interpreted a variety of protected speech as being speech designed to "influence an election." Indeed, the first prosecution brought under the Federal Election Campaign Act—before the narrowing construction to "contribution" was applied by *Buckley*—was brought by the Nixon Justice Department against an organization which, during an election year, advocated the impeachment of the President for, among other things, the expansion of the Vietnam War into Cambodia and Laos.[16] The government argued that the war was a "principal campaign issue", and therefore any discussion of it constituted election activity.

The Regulatory Notice seems to suggest that the Authority reads the Proposed Rule in a similar fashion. If a covered associate or member gave money to an advocacy group that happened to support a similar position to the one held by an "official of a government entity" it could well be interpreted as "influencing" an election. "Such a result would, we think, be abhorrent…[a]ny [covered member or associate] would be wary of" contributing to *any* group which "express[es] any viewpoint" lest it trigger the two-year ban on business.[17] It would be well for the Authority to define contributions more narrowly—to only political contributions made to covered candidates. As the *McCutcheon* Court noted just last Term, regulations that limit contributions "must…target what we have called "*quid pro quo*" corruption or its appearance…the notion of a *direct* exchange of an official act

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reads "any gift, subscription, loan, advance or deposit of money or anything of value." In the interest of providing full precision and clarity to the regulated community, CCP recommends the consistent use of the Oxford comma in both the Proposed Rules and accompanying explanations.

[14] 424 U.S. 1 (1976).

[15] *Buckley*, 424 U.S. at 24, n. 24 (noting that "[o]ther courts have given that phrase a narrow meaning to alleviate various problems in other contexts").

[16] *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (1972).

[17] *Nat'l Comm. for Impeachment*, 469 F.2d at 1142. This is not an unusual reading. *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 44 (1st Cir. 2011) (applying narrowing construction to "influencing" in Maine campaign finance statute).

for money."[18] Contributions to social welfare groups, which interact with the public on issues of import, should be encouraged, not chilled.

Exacerbating these problems is the Proposed Rule's prohibition on "any covered member or any of its covered associates [doing] anything indirectly that, if done directly, would result in a violation of the Rule."[19] While it is certainly appropriate to prohibit circumvention of otherwise-constitutional rules targeting corruption, this catchall provision—with its now all-too-familiar use of the word "indirectly"—could be read extremely broadly. In practice, it will inevitably be interpreted to reach practically any behavior that could conceivably be covered by the Rule's provisions, a troubling prospect given the penalties involved. Again: how, precisely, does one "indirectly" perform an act?[20]

The vagueness and overbreadth of Proposed Rule 2390 is also compounded by the extensive disclosure and recordkeeping requirements in Proposed Rules 2271 and 4580. Attaching extensive "strings" to the enjoyment of First Amendment liberties can, in practice, squelch them altogether, as Justice O'Connor observed in *FEC v. Massachusetts Citizens for Life*.[21]

In short, Proposed Rule 2390 attempts to obtain universal coverage by employing terms that are both vague and overbroad. This is an approach to regulation that the United States Supreme Court has long decried,[22] and a practice that leaves the present construction of the Proposed Rule suspect to inevitable constitutional challenge.

Proposed Rule 2390(c) Bars Fundamental Political Association

Proposed Rule 2390(c) appears to be an anti-circumvention measure, and flatly prohibits "a covered member or covered associate from coordinating or soliciting any person or PAC to make any payment[23] to a political party of a state or locality of a government entity with which the covered member is

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[18] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (emphasis supplied).
[19] Proposed Rule 2390(f).
[20] *See* Tr. of Oral Argument, *New York State Republican Comm. v. SEC*, *supra* note 7 ("What do you say about the very troubling demonstration that I've had in this case that nobody understands the scope of the SEC's rule because of Subsection (D)'s catch-all language that bars everything under the rule, anything indirectly which, if done directly, would result in a violation of this section…?").
[21] 479 U.S. 238, 265-266 (1986) (observing the "significant burden" imposed on the petitioner comes "from the additional organizational restraints imposed upon it").
[22] *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free express are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms") (citations omitted).
[23] Which is defined similarly to "contribution", as discussed *supra*.

engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser."[24]

Unlike the contribution limits, which generally seem to be targeted at specific individuals who may be able to enter into *quid pro quo* bargains, Proposed Rule 2390(c) bars individuals from simply associating with a political party—even if the political party is not the same as the official's. This is a grave infringement of the basic "right to associate for the purpose of speaking."[25]

This Rule proscribes quite a large amount of political behavior. For example, may a covered associate attend a PAC event—perhaps by buying a $50 ticket—where contributions are solicited by speakers? Would that constitute "coordination"?

How involved may covered associates be with the local branch of their preferred political party under this Rule? May they not pass out literature for other, non-covered official candidates—while happening to also note that the local party could use monetary support? May she help set up for local party events where donations may or may not be solicited by a speaker? What if she does not know if contributions will be solicited? May she suggest that a friend who has maxed out his or her financial support to a local city council candidate also give money to that candidate's party?

Surely there are narrower means of preventing circumvention of the Proposed Rule's contribution limits that do not threaten to quash a covered associate's ability to suggest to a friend that she should, broadly, support the candidates of a particular political party.

The Contribution Limits are Unreasonably Low and Have Not Been Justified

At the outset, CCP notes that the Proposed Rule's contribution limit mirrors the limits impose by SEC Rule 206(4)-5, and does not, as the Municipal Securities Rulemaking Board's recent changes to Rule G-37 did, altogether bar a class of contributions from natural persons.

However, the contribution limit remains notably and unnecessarily low, at just $350 for candidates that a covered associate may vote for, and $150 for other candidates. These two contribution limits apply whether the candidate is running for office in California—which has a population of nearly 40 million—or in the town of New Hope, Pennsylvania—which has a population of 2,518. Such limits evince no effort to tailor the rule to concerns about

[24] Regulatory Notice at 7.
[25] *Rumsfeld v. FAIR*, 547 U.S. 47, 68 (2006); *Buckley*, 424 U.S. at 24 (right to associate is "fundamental").

corruption. The words of Judge Beryl Howell of the United States District Court for the District of Columbia, when speaking of SEC Rule 206(4)-5, are relevant: "the $350 seems like it came out of thin air."[26]

Despite the lack of a record justifying its new contribution limits, the Authority appears to have substituted its judgment for the more considered deliberations of state legislatures. Most of the states have crafted contribution limits in an effort to limit corruption or the appearance of corruption. Some states, such as Oregon or Virginia, do not limit contributions to candidates at all. There is no evidence that states without contribution limits are any more corrupt than states with such limits. FINRA has failed to explain why the campaign finance regulations crafted by state governments to meet the specific circumstances of each state are nevertheless inadequate to address "pay-to-play" concerns.

FINRA Ought to Consider Alternatives to the Proposed Rules

In the case of *McCutcheon v. FEC*, the Supreme Court ruled that aggregate limits on contributions to candidates are unconstitutional.[27] In the opinion, the Court specifically noted that Congress had failed in its duty to consider any of the available "alternatives" that would also serve the government's interest "while avoiding 'unnecessary abridgment' of First Amendment rights."[28]

There are many possible, and effective, alternatives to the draconian contribution restrictions proposed by the Draft Amendments. There is no evidence that the Board considered these other, less restrictive alternatives.

One possible approach would provide for tougher penalties for those who use pay-to-play arrangements to obtain contracts. Stronger investigative tools to audit suspected pay-to-play activities could focus resources on the bad actors in the system. Whistleblower protections could be written to protect those who report wrongdoing and whistleblowers could also be given rewards based on the size of the ill-gotten contracts or the penalties imposed for violations.

FINRA also appears not to have considered alternatives that would provide exemptions from the rule if contracts are put up for bid in a transparent way that forecloses pay-to-play manipulation. Similarly, certain contracting procedures might be imposed, or certain officials may be required to recuse themselves from decisions regarding certain contractors. A contribution limit

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[26] Josh Gerstein, *Judge Mulls SEC Limits on Political Donations*, POLITICO (Sept. 12, 2014), http://www.politico.com/blogs/under-the-radar/2014/09/judge-mulls-sec-limits-on-political-donations-195402.html.
[27] 134 S. Ct. at 1462.
[28] 134 S. Ct. at 1458 (quoting *Buckley*, 424 U.S. at 25)/

rule, if retained, should be limited to those circumstances where it is indeed needed, and only after alternative means of preventing pay-to-play practices have been considered.

FINRA Should Clearly Exempt Contributions in Support of Independent Expenditures from the Proposed Rules

In adopting Rule 206(4)-5, the SEC explained that "the rule does not in any way impinge on a wide range of expressive conduct in connection with elections. For example, the rule imposes no restrictions on activities such as making independent expenditures to express support for candidates, volunteering, making speeches, and other conduct."[29] This reasoning tracks that of *Citizens United*, where the Court ruled that "independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption."[30]

Clearly, particularly given the Authority's stated intention to closely hew to the path blazed by the SEC when it promulgated Rule 206(4)-5, the Proposed Rules likely do permit contributions in support of independent expenditures. Nevertheless, FINRA ought to make that point explicit.

* * *

CCP respectfully requests that FINA reconsider these elements of the Draft Amendments, and thanks the Authority for the opportunity to comment. Should you have any questions or desire CCP's assistance in modifying the Draft Amendments further, please contact me at 703-894-6800 or adickerson@campaignfreedom.org.

Very truly yours,

Allen Dickerson
Legal Director

[29] Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41018, 41024 (July 14, 2010).
[30] 558 U.S. at 360 (internal citation omitted).

EXHIBIT B

CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

October 1, 2014

Via Electronic Submission

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: Comment on Draft Amendments to MSRB Rule G-37 to Extend its Provisions to Municipal Advisors

Dear Mr. Smith,

I write on behalf of the Center for Competitive Politics ("CCP"), a § 501(c)(3) organization founded to educate the public concerning the benefits of increased freedom and competition in the electoral process. Toward that end, CCP engages in research, scholarship, and outreach to protect and promote the First Amendment rights of speech, assembly, and petition. CCP also operates a *pro bono* law center that brings legal challenges to state and federal laws and regulations that unconstitutionally burden the exercise of these freedoms.

MSRB Rule G-37 is of particular importance to CCP because it limits the ability of covered individuals to make contributions to candidates for public office. The right to support candidates in this way, regardless of occupation, is a central liberty secured by the First Amendment.

We have no doubt that Rule G-37 and the Draft Amendments are a well-intentioned effort to prevent pay-to-play practices at the state and local levels. However, both the current Rule and the Draft Amendments are vague on important particulars, or cover a wider range of activity than is necessary for the prevention of actual or perceived pay-to-play corruption. Pay-to-play practices could be prevented by alternative approaches that would lessen or eliminate any impact on First Amendment rights. Additionally, we believe the Board should more carefully consider recent Supreme Court decisions that impact the justification for campaign contribution limits and revise Rule G-37 and the Draft Amendments accordingly.

The vagueness and overbreadth of Rule G-37 and the Draft Amendments present serious constitutional concerns, in particular because the scope of covered persons and covered candidates will often be unclear, and consequently the Rule will chill activity that the MSRB likely does not intend to cover. The MSRB appears aware of this difficulty, and CCP applauds the Board's attempts to provide greater clarity in some portions of the Draft Amendment than what currently exists in the present Rule. Nevertheless, because the Draft Amendments largely preserve the existing vagueness and overbreadth problems of Rule G-37, while expanding the regulatory scope of the Rule, CCP writes to express concerns with the present Draft.

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Below, I highlight CCP's most pressing and specific concerns. Before I address these issues, I begin by noting two areas where the Amendments do recognize constitutional issues or increase Rule G-37's clarity and precision, and urge the Board to build much more substantially on those elements if it proceeds to amend Rule G-37.

I. The Draft Amendments recognize that restrictions on First Amendment rights must be tailored to prevent *quid pro quo* corruption.

CCP commends the MSRB for recognizing that it must incorporate the United States Supreme Court's constitutional precedents into Rule G-37. In particular, the MSRB has taken the important step of recognizing that "corruption," in a legal sense, is limited to *quid pro quo* or "dollars for favors" transactions. Since its landmark campaign finance ruling in *Buckley v. Valeo*, the Supreme Court has recognized that, in order to be consistent with the First Amendment, restrictions on political contributions must be tailored to target actual or apparent corruption, meaning *quid pro quo* arrangements.[1] The Court's recent rulings in *Citizens United v. FEC*[2] and *McCutcheon v. FEC*[3] provide a strong signal that such restrictions will be carefully scrutinized.

The Regulatory Notice incorporates this understanding by reiterating from the outset that "'pay to play' practices typically involve a person making cash or in-kind political contributions (or soliciting or coordinating others to make such contributions) to help finance the election campaigns of state or local officials or bond ballot initiatives as a *quid pro quo* for the receipt of government contracts."[4] Constitutionally permissible regulations, as the Regulatory Notice recognizes, must be appropriately tailored to further this end, without unnecessarily stifling the exercise of First Amendment rights.[5] It is laudable that the Board has preserved this understanding of corruption in the Draft Amendments to Rule G-37, as misunderstanding the permissible scope of "corruption" is a common error. The Board's recognition[6] of *Buckley*'s requirements should guide any amendments it ultimately adopts.

Unfortunately, while the Board recognizes that the regulation should be tailored so as to address *quid pro quo* transactions, the Draft Amendments fall short of the tailoring needed under the First Amendment.

II. The Draft Amendments add several new definitions that increase precision and clarity in Rule G-37.

The Draft Amendments bring some welcome, albeit limited, clarity to Rule G-37 by defining previously ambiguous terms. Substituting the term "municipal entity"—as defined in the

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[1] 424 U.S. 1 (1976).
[2] 558 U.S. 310 (2010).
[3] 134 S. Ct. 1434 (2014).
[4] MUNICIPAL SECURITIES RULEMAKING BOARD, REGULATORY NOTICE 2014-15, REQUEST FOR COMMENT ON DRAFT AMENDMENTS TO MSRB RULE G-37 TO EXTEND ITS PROVISIONS TO MUNICIPAL ADVISORS (2014) ("Regulatory Notice") at 3
[5] *See, e.g., Id.*
[6] *See, e.g., Id.*

Exchange Act[7]—for the term "issuer" throughout the Rule is one such instance. This is commendable as it makes it easier for the regulated community to know who, exactly, is subject to the Rule without having to negotiate various definitions and standards.

Similarly, Draft Rule G-37(b)(ii)(B) contains a safe harbor for contributions made before the contributor becomes a dealer solicitor or municipal advisor. This would appropriately require that there be a real opportunity for actual or apparent *quid pro quo* corruption before First Amendment activity is stifled. The same is true for the similar exclusion under Draft Rule G-37(b)(ii)(C), applicable to contributions made more than six months before becoming a municipal finance professional or municipal advisor professional. Both provisions improve upon the existing Rule.

Finally, replacing "the term 'official of an issuer' with the new defined term 'official of a municipal entity' takes into account the possibility that an official may have the ability to influence the selection of a dealer but not a municipal advisor, or vice versa."[8] This tailoring is welcome, as is the MSRB's judicious notation that "these separate categories are created to ensure that there is a nexus between the contribution and the awarding of business that gives rise to a sufficient risk of corruption or the appearance of corruption to warrant a two-year ban."[9] This, indeed, is the fundamental idea behind the constitutional tailoring that the Supreme Court has required.

III. The Draft Amendments preserve, and in some cases exacerbate, existing vagueness and overbreadth.

Regrettably, the Draft Amendments, while providing some additional clarity in certain areas, are confusing in many others. One example is the proposed definition of the term "official of a municipal entity." This phrase denotes two types of officials, based upon the type of selection influence they exercise: an "official with dealer selection influence"[10] and an "official with

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[7] *See* Exchange Act Rule 15Ba1-1(g),17 C.F.R. 240.15Ba1-1(g) (2014). which defines municipal entity to mean "any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including: (1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (2) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (3) Any other issuer of municipal securities." The term includes both issuers of municipal securities as well as certain non-issuer entities. Examples of non-issuer municipal entities include public pension funds, local government investment pools ("LGIPs"), other state and local governmental entities or funds, and participant-directed investment programs or plans, such as 529 and 403(b) plans.

[8] Regulatory Notice at 11.

[9] *Id.* at 11-12.

[10] Draft Rule G-37(g)(xvi)(A) ("'Official with dealer selection influence' means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (1) for elective office of the municipal entity which office is directly or indirectly responsible for, or can influence the outcome of, the hiring by the municipal entity of a dealer for municipal securities business or (2) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence

municipal advisor selection influence."[11] The decision to replace the term "official of an issuer" with the term 'official of a municipal entity' is, as noted previously, itself a positive development. These definitions, however, worsen existing overbreadth and vagueness problems in several important ways.

First, the definitions encompass all incumbents or candidates for an office which is "directly *or indirectly responsible for, or can influence* the outcome of" the decision to hire a dealer for municipal securities business or an advisor for municipal advisory business.[12] It also includes incumbents and candidates "for any elective office of a state or of any political subdivision, which office *has authority to appoint* any person who is *directly or indirectly responsible for, or can influence the outcome* of" such hiring.[13]

The breadth of this definition is staggering. The inherent vagueness of "indirect influence" and "indirect responsibility" is self-evident. Moreover, there are no articulated standards sufficient to guide the regulated community in determining who is and is not a qualified officeholder (and consequently, which contributions do and do not trigger the ban on business). This in and of itself stifles activity protected by the First Amendment. What is more, the definitions extend to *candidates* for office, prohibiting contributions simply because someone is running for an office that may not, in fact, have any connection to any municipal dealer or advisor selection. Even a contribution to a losing candidate would appear to trigger sanctions under the Draft Amendments.

This lack of clarity will inevitably mean that some contributions that would otherwise be made, and which pose little to no danger of pay-to-play corruption, will not be made. That is itself a substantial First Amendment harm.

The definition of "solicit" under Draft Rule G-37(g)(xix) suffers from similar problems, arising from an effort to achieve comprehensive regulation through overbroad language. This definition includes "a direct or indirect communication with a municipal entity for the purposes of obtaining or retaining an engagement" for dealer or adviser regulated under the Rule.[14] The spirit of this rule is easily understood—to avoid a *quid pro quo* of dollars for municipal business. But the phrase "indirect communications" is undefined, and worse, uncabined. In fact, as the hallmark of a communication is the conveyance of information from one person to another, it is not clear what an "indirect communication" entails; either information is conveyed or it is not.

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the outcome of, the hiring by a municipal entity of a dealer for municipal securities business by an issuer.")

[11] Draft Rule G-37(g)(xvi)(B) ("'Official with municipal advisor selection influence' means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (1) for elective office of the municipal entity which office is directly or indirectly responsible for, or can influence the outcome of, the hiring by the municipal entity of a municipal advisor for municipal advisory business; or (2) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring by a municipal entity of a municipal advisor for municipal advisory business.")

[12] Draft Rule G-37(g)(xvi)(A)-(B).

[13] *Id.*

[14] Draft Rule G-37(g)(xix).

Draft Rule G-37(c)(i) and (ii) prohibit solicitation (though under a different definition of "solicit" than applies elsewhere in the Rule) and coordination of contributions. This portion of the Draft Rule is overbroad because it applies to dealers or municipal advisors that are "engaging or seeking to engage in municipal securities business or municipal advisory business."[15] How can a regulated person determine whether such actors are "seeking" to engage in this type of business? Even if this provision were decipherable, it would surely present significant difficulties of proof. Perhaps more importantly, it will deprive regulators of a clear and consistent definition of covered persons, a circumstance that may ultimately lead to the perception or reality of selective enforcement.

Exacerbating these problems is current Rule G-37(d)'s prohibition on persons "directly or indirectly, through or by any other person or means, do[ing] any act which would result in a violation" of the two-year ban on business or prohibition on solicitation or coordination. While it is appropriate to prohibit circumvention of otherwise-constitutional rules that target *quid pro quo* corruption or its appearance, this catchall provision—and the now familiar use of the word "indirectly"—could be read broadly. In practice, it will often be interpreted to reach nearly any behavior that could conceivably be covered by the Rule's already-overbroad provisions, a particularly troubling prospect given the penalties involved. Again: how does one "indirectly" perform an act?[16] This is insufficient tailoring under the First Amendment.

In short, the Draft Amendments attempt to obtain universal coverage by employing terms that are both vague and overbroad. This is an approach to regulation the United States Supreme Court has long decried,[17] and a practice that leaves the present Draft Amendments open to eventual constitutional challenge.

IV. By creating new categories of regulated entities—collectively, the MAP categories—the Draft Amendments make the rule less clear.

The draft rule proposes to add five categories of Municipal Advisor Professionals ("MAP"), which are analogous to the existing categories of Municipal Finance Professionals. While likely a commendable attempt to clarify the scope of the Rule, these new definitions exacerbate rather than reduce constitutional problems. Under the current Rule, it can be difficult to determine what constitutes a sufficient "control" relationship for purposes of establishing vicarious liability when working as or with a Municipal Finance Professional, under one of the five categories. The

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[15] Draft Rule G-37(c)(i)-(ii).

[16] Similarly, Draft Amended Rule G-37(g)(x) includes those performing these services for "indirect compensation" within the definition of a "municipal advisor third-party solicitor." The lack of a limit to what could constitute such "indirect compensation" is further troubling. Absent guidance on this matter, roughly anything of any subjective value to an individual could be construed as "indirect compensation" by officials seeking to zealously enforce the Rule.

[17] *See, e.g, NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms") (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Schneider v. Irvington*, 308 U.S. 147, 162 (1939)).

Amendments preserve this imprecision. For example, a triggering contribution may be made, in the case of the Draft Amendments, by any associated person of a municipal advisor who "is a supervisor of any municipal advisor principal up through and including the Chief Executive Officer or similarly situated official"[18] or "is a member of the executive or management committee (or similarly situated official)."[19]

This stands in stark contrast to the organizational and accountability structure of PACs, which both the current and Draft Rule G-37 reference multiple times. An entire regulatory regime has developed solely for the purpose of determining who is legally responsible for a PAC's activity, including its organization,[20] registration,[21] reporting[22], and other obligations. This system exists within a decades-old and comprehensive regime that is continually fine-tuned administratively,[23] legislatively[24] and judicially[25] to ensure that it does, in fact, limit its regulatory scope to activity that is properly tailored to preventing *quid pro quo* corruption. The complexity, specificity, and careful drafting of PAC rules are consistent with the importance of the First Amendment rights that PAC status implicates. Imprecise or overbroad regulation in this context violates the Constitution. Nevertheless, the MAP categories attempt to impose arguably greater burdens, but lack such a structure. What's more, such structure would be insulated from all of the avenues of judicial and administrative review that PACs enjoy.

Finally, the Regulatory Notice asserts that "[t]he regime established by Rule G-37 is widely recognized as having significantly curbed 'pay to play' practices and the appearance of such practices in the municipal securities market."[26] CCP would caution the Board, however, in relying too heavily on this assertion. The evidence on this point is far from conclusive, as the citations in the Regulatory Notice are primarily internal. They do not provide adequate grounds to enact and retain rules that are already constitutionally problematic.

It is also worth noting that, once the MSRB finalizes any rule amendments and submits them to the SEC, the Commission must publish them in the Federal Register for public comment before

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[18] Draft Rule 37-G(g)(iii)(D).
[19] Draft Rule 37-G(g)(iii)(E).
[20] 52 U.S.C. § 30102 (2014).
[21] 52 U.S.C. § 30103.
[22] 52 U.S.C. § 30104.
[23] *See, e.g.*, Pub. L. 93-443 (codified as amended at 52 U.S.C. § 30106) (Federal Election Commission's enabling statute, noting that "The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of the Internal Revenue Code…[and] shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.")
[24] *See, e.g.,* Federal Election Campaign Act of 1971 (Pub. L. 92-225) ("FECA"); Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155).
[25] *See, e.g, Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating certain FECA provisions, including the scope of its definition of a political committee, under the First Amendment).
[26] Regulatory Notice at 4 (citing "*See* Release No. IA-3043 (Jul. 1, 2010), 75 FR 41018, at 41020, 41026-41027 (Jul. 14, 2010) ('IA Pay to Play Approval Order') (discussing the rationale for adopting the SEC's "pay to play" rule for investment advisers and modeling major components of SEC Rule 206(4)-5 on Rule G-37); *see also id.* at n. 101 and accompanying text.")

they become law.[27] If incorporated into the final rule, the constitutional and practical problems identified in this letter will continue to draw criticism for the reasons just described.

V. The contribution limits are unreasonably low and have no justification.

Virtually all highway fatalities could be eliminated if the speed limit were reduced to 20 mph. Yet few, if any, people would favor such a change. The draft amendments likewise take a radical approach to limiting contributions to certain candidates by barring them altogether. While eliminating political contributions completely in such cases will prevent "pay-to-play" arrangements, they also stifle protected First Amendment activity. Under the Draft Rule, if a covered advisor cannot vote for the covered candidate, no contribution is permitted, not even a dollar.[28]

The proposed rule's $250 contribution limit for officials for whom one can vote, and its ban on contributions for candidates for whom one cannot, is not narrowly tailored.[29] This is clear where the SEC, in 2010, found that a $150 contribution limit for investment advisers who could not vote for the candidate was sufficient to achieve its pay-to-play objectives.[30] The MSRB has provided no explanation as to why the higher SEC limits are insufficient, and CCP remains skeptical that even those limits are constitutional absent a strong evidentiary record on that point.

Moreover, the ban on contributions to candidates for whom one cannot vote is likely unconstitutional: the Supreme Court's 2014 decision in *McCutcheon v. FEC* reiterated the importance of associational rights, which are not limited to associating with candidates in one's own district.[31] The *McCutcheon* ruling would make little sense if bans on out-of-district contributions were constitutional. Similarly, the Supreme Court has never "allowed the exclusion of a class of speakers from the general public dialogue,"[32] which is exactly what the Draft Rule would do.

Even where the covered advisor may vote for the covered candidate, the contribution limit is $250. The same contribution limit would apply whether the candidate is running for office in a city with millions of residents or a town with just a few thousand citizens. A uniform $250 contribution limit covering a wide variety of municipalities evinces no effort to tailor the rule to concerns about corruption. The words of U.S. District Court Judge Beryl Howell, speaking of

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[27] *See, e.g.*, MUNICIPAL SECURITIES RULEMAKING BOARD, MARKET REGULATION—RULEMAKING PROCESS, http://www.msrb.org/About-MSRB/Programs/Market-Regulation.aspx (last accessed October 1, 2014).

[28] Draft Rule G-37(b)(ii).

[29] *Id.*

[30] 17 C.F.R. 275.206(4)-5(b) (2014).

[31] 134 S. Ct. at 1449 ("To require one person to contribute at lower levels than others … is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights.") (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

[32] *Citizens United v FEC*, 558 U.S. at 341.

SEC Rule 206(4)-5, are relevant here: "the $350 seems like it came out of thin air."[33] In the absence of a reasoned and empirically sound rationale for the Board's $250 figure, it appears to have been pulled from thin air.

Despite the lack of a record justifying its new contribution limits, the MSRB appears to have substituted its judgment for the more considered deliberations of state legislatures. Most of the states have crafted contribution limits in an attempt to limit corruption or the appearance of corruption. Some states do not limit contributions to candidates. There is no evidence that states without contribution limits are more corrupt than states with such limits. The Board has failed to explain why the campaign finance regulations crafted by state governments for the specific circumstances of each state are nevertheless inadequate to address "pay-to-play" concerns.

VI. The MSRB should consider alternatives to the proposed Draft Amendments.

In the case of *McCutcheon v. FEC*, the Supreme Court ruled that aggregate limits on contributions to candidates are unconstitutional.[34] In the opinion, the Court specifically noted that Congress had failed in its duty to consider any of the available "alternatives" that would also serve the government's interest "while avoiding unnecessary abridgment of First Amendment rights."[35]

There are many possible, and effective, alternatives to the draconian contribution restrictions proposed by the Draft Amendments. There is no evidence that the Board considered these other, less restrictive alternatives.

One possible approach would provide for tougher penalties for those who use pay-to-play arrangements to obtain contracts. Stronger investigative tools to audit suspected pay-to-play activities could focus resources on the bad actors in the system. Whistleblower protections could be written to protect those who report wrongdoing and whistleblowers could also be given rewards based on the size of the ill-gotten contracts or the penalties imposed for violations.

The Board also appears not to have considered alternatives that would provide exemptions from the rule if contracts are put up for bid in a transparent way that forecloses pay-to-play manipulation. Similarly, certain contracting procedures might be imposed, or certain officials may be required to recuse themselves from decisions regarding certain contractors. A contribution limit rule, if retained, should be limited to those circumstances where it is indeed needed, and only after alternative means of preventing pay-to-play practices have been considered.

VII. The MSRB should clearly exempt contributions in support of independent expenditures from the proposed Draft Amendments and current rule.

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[33] Josh Gerstein, *Judge Mulls SEC Limits on Political Donations*, POLITICO (Sept. 12, 2014), http://www.politico.com/blogs/under-the-radar/2014/09/judge-mulls-sec-limits-on-political-donations-195402.html

[34] 134 S. Ct. at 1462.

[35] *Id.* at 1458 (citation and internal quotation marks omitted).

In adopting Rule 206(4)-5, the SEC explained that "the rule does not in any way impinge on a wide range of expressive conduct in connection with elections. For example, the rule imposes no restrictions on activities such as making independent expenditures to express support for candidates, volunteering, making speeches, and other conduct."[36] This reasoning tracks that of *Citizens United*, where the Court ruled that "independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption."[37]

Clearly, the proposed Draft Amendments and current rule must explicitly permit contributions in support of independent expenditures.

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CCP respectfully requests that the Board reconsider these elements of the Draft Amendments, and thanks for Board for the opportunity to comment. Should you have any questions or desire CCP's assistance in modifying the Draft Amendments further, please contact me at [redacted] or [redacted].

Very truly yours,

Allen Dickerson
Legal Director

[36] Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41018, 41024 (July 14, 2010).
[37] 558 U.S. at 360 (internal citation omitted).