SECURITIES AND EXCHANGE COMMISSION

Investment Advisers Act Release No. 5475; File No. 803-00253

D.B. Fitzpatrick & Co., Inc.

April 9, 2020

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice.

Notice of application for an exemptive order under Section 206A of the Investment Advisers Act of 1940 (the "Act") and rule 206(4)-5(e) under the Act.

Applicant: D.B. Fitzpatrick & Co., Inc. ("Applicant").

Summary of Application: Applicant requests that the Commission issue an order under Section 206A of the Act and rule 206(4)-5(e) under the Act exempting it from rule 206(4)-5(a)(1) under the Act to permit Applicant to receive compensation from a government entity for investment advisory services provided to the government entity within the two-year period following contributions by a covered associate of the Applicant to an official of the government entity.

Filing Dates: The application was filed on January 22, 2020, and amended on March 23, 2020.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by e-mailing the Commission's Secretary at Secretarys-Office@sec.gov and serving Applicant with a copy of the request by e-mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 4, 2020, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of

a hearing on the matter, the reason for the request, and the issues contested. Persons may request notification of a hearing by e-mailing the Commission's Secretary.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicant: D.B. Fitzpatrick & Co., Inc. dbfitzpatrick@dbfitzpatrick.com.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551-6811 or Kaitlin C. Bottock, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website at http://www.sec.gov/rules/iareleases.shtml or by calling (202) 551-8090.

Applicant's Representations:

1. Applicant is an Idaho corporation registered with the Commission as an investment adviser under the Act. Applicant provides discretionary and non-discretionary investment advisory services to individuals and institutions.

2. The individual who made the two campaign contributions that triggered the two-year compensation ban (each, a "Contribution" and together, the "Contributions") is Dennis Fitzpatrick (the "Contributor"). At the time of the Contributions, the Contributor was the Chief Executive Officer of the Applicant. The Contributor resigned as Chief Executive Officer of the Applicant and relinquished all management functions effective June 30, 2019. In his former role as Chief Executive Officer of the Applicant, the Contributor helped to formulate the Applicant's capital market expectations and supervised the Applicant's portfolio managers. The Contributor was, at the time of the Contributions, an executive officer of the Applicant and thus, by definition, was at all relevant times a covered associate pursuant to rule 206(4)-5(f)(2).

3. The Public Employee Retirement System of Idaho (the "Client"), one of the Applicant's clients, is a government entity in the State of Idaho. The Client is a state pension fund with a board that consists of five members ("Retirement Board Members"), each appointed by the Idaho Governor to fulfill a five-year term. The Applicant is an investment adviser to the Client. The Client is a "government entity" as defined in rule 206(4)-5(f)(5)(i).

4. The recipient of the Contributions was Brad Little (the "Official"), who, at the time of each Contribution, was the Lieutenant Governor of the State of Idaho and candidate for Idaho Governor, and currently is Idaho's Governor. The Idaho Governor is the chief executive of the state and has appointment authority with respect to Retirement Board Members, who are directly and indirectly responsible for, or can influence the outcome of, the Client's hiring of an investment adviser. Because he was seeking the office of Governor at the time of the Contributions, the Official was an "official" of the Client within the meaning of rule 206(4)-5(f)(6)(ii). The Contributions were recorded on March 10, 2017, and December 27, 2017, for $500 and $100, respectively. Because the Contributor was a "covered associate" of the Applicant, the Client is a "government entity," and the Official is an "official" of the Client, the Contributions triggered rule 206(4)-5's prohibition on compensation under rule 206(4)-5(a)(1). The reason for the Contributions was personal and wholly unrelated to the investment advisory services provided to the Client by the Applicant. The Contributor's decision to make each Contribution was spontaneous and motivated by the Official's support of the environment and acknowledgement of the existence and impact of climate change and the threat it poses to the State of Idaho. In addition to being permitted to vote in the Idaho gubernatorial elections, the Contributor had a legitimate personal interest in the outcome of such elections given that he has

lived and worked in Idaho since 1972. Moreover, the Contributions are consistent with other contributions made by the Contributor dating back to 1998.

5. Applicant has been providing advisory services to the Client continuously since 1989 under the same mandate and there has been no material increase in the amount of the Client's investment advisory business with the Applicant outside the original mandate since the Contributions. Outside of the current 30-year-old mandate, the Client has not sought to deviate from its allocation of assets under the original mandate, initiated new investment mandates, or opened new accounts with the Applicant since the Contributions were made. Applicants state that the Contributor did not have any intention to seek, and no action was taken by the Contributor or the Applicant to obtain, any direct or indirect influence from the Official or any other person. Further, neither the Contributor nor anyone whom he supervised has solicited any additional investment advisory business from the Client since 1989.

6. On December 20, 2017, the Applicant's then-chief compliance officer learned of rule 206(4)-5 and brought it to the attention of the Contributor. Applicant learned of the $100 Contribution on that same date, after the Contributor self-reported the $100 Contribution to the Applicant's then-chief compliance officer. Applicant's then-chief compliance officer determined that the $100 Contribution fell under the rule's *de minimis* exception, so no further action was taken. In December 2018, Applicant's then-chief compliance officer conducted a comprehensive search of federal and state campaign contribution databases dating back to the implementation of rule 206(4)-5 to determine whether any other contributions had been made by any covered associate. During this search, it was discovered that the Contributor made the $500 Contribution. After consulting outside counsel, Applicant determined that the Contributions violated rule 206(4)-5 and the then-chief compliance officer informed the Contributor. The

Contributor requested a refund of the Contributions, which was received on August 1, 2019. Applicant established an escrow account to custody advisory and servicing fees from the Client's investments and all advisory and servicing fees that accrue from the Client's investments have been placed in escrow pending the outcome of the application.

7. Since 2010 the Applicant has had a general policy prohibiting the giving of gifts or payment of any consideration prohibited by any federal, state or local law (the "Policy"). The Policy specifically prohibits gifts and payments that might reasonably be expected to interfere with the business decisions of the Applicant or parties with whom the Applicant deals. The Policy, however, did not incorporate rule 206(4)-5 and the Applicant did not have an explicit pay-to-play policy in place to ensure compliance with the rule. On December 29, 2017, the Applicant implemented a new policy (the "New Policy") into the Adviser's Code of Ethics, which specifically incorporated the requirements of rule 206(4)-5. Applicant states that the New Policy was more restrictive than rule 206(4)-5 in that: (1) the New Policy required that all political contributions be precleared by the chief compliance officer with no *de minimis* exemption from pre-clearance for small contributions and (2) it was not limited to covered associates, but applied to all employees and members of their immediate family. Further, the New Policy requires that employees annually disclose all political contributions made within the previous calendar year. In December 2018, the Applicant amended the New Policy to prohibit all employees and their spouses from making any political contributions and to require employees to certify quarterly that they and their spouses did not make any political contributions during the previous quarter. In April 2019, Applicant further amended its compliance manual to implement procedures to monitor if there were any political contributions

of covered associates, that includes a quarterly review and an online contribution search for its employees and their spouses.

8. Applicant conducted training for all employees about the New Policy and rule 206(4)-5 when the New Policy was adopted in December 2017 and when the New Policy was amended in December 2018. In addition, Applicant will engage a compliance consultant to annually review and test its compliance program and compliance systems, which will include the New Policy, to ensure that they are reasonably designed to prevent violations of the Act and the rules thereunder. Further, Applicant has engaged outside counsel to perform a comprehensive review of the Applicant's compliance program, make recommendations and implement changes and conduct training for its employees on rule 206(4)-5 and the New Policy. In addition, Applicant removed the employee who was the chief compliance officer at the time of the Contributions from her role as chief compliance officer and hired a new chief compliance officer who started on November 4, 2019.

Applicant's Legal Analysis:

1. Rule 206(4)-5(a)(1) under the Act prohibits a registered investment adviser from providing 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 of the investment adviser. The Client is a "government entity," as defined in rule 206(4)-5(f)(5), the Contributor is a "covered associate" as defined in rule 206(4)-5(f)(2), and the Official is an "official" as defined in rule 206(4)-5(f)(6).

2. Section 206A of the Act authorizes the Commission to "conditionally or unconditionally exempt any person or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary

or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act]."

3. Rule 206(4)-5(e) provides that the Commission may conditionally or unconditionally grant an exemption to an investment adviser from the prohibition under rule 206(4)-5(a)(1) upon consideration of the factors listed below, among others:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act;

(2) Whether the investment adviser: (i) before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of the rule; (ii) prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and (iii) after learning of the contribution: (A) has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and (B) has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (e.g., federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

4. Applicant requests an order pursuant to Section 206A and rule 206(4)-5(e), exempting it from the two-year prohibition on compensation imposed by rule 206(4)-5(a)(1) with respect to investment advisory services provided to the Client within the two-year period following the Contributions.

5. Applicant submits that the exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant further submits that the other factors set forth in rule 206(4)-5(e) similarly weigh in favor of granting an exemption to the Applicant to avoid consequences disproportionate to the violation.

6. Applicant contends that the nature of the Contributions and the lack of any evidence that the Applicant or the Contributor intended to, or actually did, interfere with the Client's process for the selection or retention of advisory services, considered in light of the nature of the Client's longstanding arrangement with the Applicant, demonstrate the unlikelihood that the Contributions were a part of, or were intended to be part of, any quid pro quo arrangement with respect to the Client. Applicant states that causing the Applicant to serve without compensation for a two-year period would result in a financial loss of between $4,800,000 and $5,000,000, or approximately 8,333 times the amount of the Contributions. Applicant suggests that the policy underlying rule 206(4)-5 is served by ensuring that no improper influence is exercised over investment decisions by governmental entities as a result of campaign contributions, and not by withholding compensation as a result of unintentional violations.

7. Applicant represents that, before the Contributions occurred, the Applicant had a Policy in place specifically prohibiting gifts and payments that might reasonably be expected to

interfere with the business decision of the Applicant or parties with whom the Applicant dealt. Applicant further represents that its New Policy conforms to the requirements of rule 206(4)-5 and is more rigorous and restrictive than the requirements of rule 206(4)-5. Applicant's chief compliance officer will perform a quarterly review of online campaign databases. Applicant will engage an independent compliance consultant to annually review and test its compliance program and compliance systems, which will include the New Policy, to ensure that they are reasonably designed to prevent violations of the Act and the rules thereunder. Further, Applicant has engaged outside counsel to perform a comprehensive review of the Applicant's compliance program, make recommendations and implement changes, as appropriate, and conduct training for the employees on rule 206(4)-5, its New Policy and other compliance topics, as needed.

8. Applicant asserts that aside from the Contributor, no employees or covered associates of the Applicant, knew of the $100 Contribution until the Contributor reported it to the then-chief compliance officer. Further, at no time did any employee or covered associate of the Applicant other than the Contributor know of the $500 Contribution until the then-chief compliance office discovered it.

9. Applicant asserts that after learning of the Contributions, the Applicant and the Contributor caused the Contributor to obtain a full refund of the Contributions. Applicant submits that Applicant conducted training for all employees about its New Policy and rule 206(4)-5 when the New Policy was adopted in December 2017 and again in December 2018 when the New Policy was amended. Applicant has also revised its compliance manual to require employees to make quarterly certifications that they and their spouses have not made political contributions in the previous quarter and implemented quarterly contribution searches. Applicant also represents that it will engage an independent compliance consultant to annually

review and test its compliance program and compliance systems, which will include the New Policy, to ensure that they are reasonably designed to prevent violations of the Act and the rules. In addition, Applicant terminated the chief compliance officer at the time of Contributions and hired a new chief compliance officer.

10. Applicant states the Contributor was at the time of each Contribution a covered associate. Applicant notes that neither the Contributor nor anyone whom he supervised solicited any additional investment advisory business from the Client since 1989.

11. Applicant states that the Client's investments with the Applicant substantially pre-date the Contribution. The relationship was formed and the investments were on an arm's length basis, and neither the Contributor nor the Applicant took any action to obtain any direct or indirect influence from the Official. Applicant also submits that the apparent intent in making the Contribution was not to influence the selection or retention of the Applicant. Applicant represents that the Contributor and the Official were only acquaintances by virtue of their memberships to the same clubs where they had periodic social interactions over the years. Applicant states that the Contributor was an Idaho resident and voter, was eligible to vote in the Official's election, and had a legitimate personal interest in supporting the Official because of the Official's support for the environment, position on climate change and focus on protecting Idaho's natural resources.

12. Applicant submits that neither the Applicant nor the Contributor sought to interfere with the Client's selection or retention process for advisory services, nor did they seek to negotiate higher fees or greater ancillary benefits. Applicant further submits that there was no violation of the Applicant's fiduciary duty to deal fairly or disclose material conflicts given the absence of any intent or action by the Applicant or the Contributor to influence the selection

process. Applicant contends that in the case of the Contributions, the imposition of the two-year prohibition on compensation does not achieve rule 206(4)-5's purposes and would result in consequences disproportionate to the mistake that was made.

Applicant's Condition:

The Applicant agrees that any order of the Commission granting the requested relief will be subject to the following condition:

The Applicant will appoint an independent compliance consultant to annually review and test it compliance program and compliance systems, including the Applicant's New Policy to ensure that they are reasonably designed to prevent violations of the Act and the rules thereunder. The Applicant will maintain records regarding such review and testing, which will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Applicant, and be available for inspection by the staff of the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier
Assistant Secretary