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]

---

[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

---

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

---

[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

---

[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

---

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

---

[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

---

[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).