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.

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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

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[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

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[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

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[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.

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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