ALERT MEMORANDUM

SEC Rescission of the Pay-to-Play Rule: How Much Better Off Are Investment Advisers?

September 22, 2026

The proposed rescission of Rule 206(4)-5 (the Pay-to-Play Rule) under the Investment Advisers Act of 1940 (the Advisers Act) by the Securities and Exchange Commission (the SEC) has generally been celebrated by industry participants and observers. However, the relief may not be as momentous as many are expecting and it's possible that very little will change for certain types of investment advisers, particularly advisers with multiple U.S. state or local government clients or investors in their private funds or other pooled investment vehicles.

First, in the Proposing Release, the SEC emphasizes that SEC-registered investment advisers will still be expected to maintain pay-to-play policies and procedures. Under the guidance in the Proposing Release, those pay-to-play policies could include (i) pre-clearance requirements, (ii) restrictions on solicitors, (iii) requirements to look through contributions to political action committees (PACs) and political parties, and (iv) monitoring burdens that look very similar to those under the current Pay-to-Play Rule. The effect may be to just ameliorate some of the worst elements of the Pay-to-Play Rule (e.g., with respect to small contributions to officials associated with existing investors, look backs for new or promoted employees), while maintaining the core requirements.

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Second, investment advisers will remain subject to a range of different pay-to-play restrictions imposed by the laws, regulations, or policies of the applicable state or local government entities as well as potential contractual restrictions, including those in side letters with government entity investors and in other contracts.

Further, the SEC provides little guidance on the scope of the pay-to-play activities that the advisers will be required to address, which, combined with the move to a principles-based approach, can lead to greater regulatory uncertainty that could make the lives of Chief Compliance Officers (CCOs) more difficult and increase the exposure of this regulatory area to the shifting winds of the SEC in examinations and enforcement.

Even with these caveats, the clear winners will be "exempt reporting advisers"[1] and "foreign private advisers,"[2] who will most likely be subject to fewer examinations and enforcement actions by the SEC based on the historical data.

1) Background on the Pay-to-Play Rule

Currently, the Pay-to-Play Rule has three components:[3]

1. *Two-Year Timeout*. The investment adviser is prohibited from receiving compensation with respect to a U.S. state or local government entity for two years following a prohibited political contribution by the investment adviser or one of its "covered associates" to certain government officials (generally persons in elected office with direct or indirect responsibility or influence over the hiring of an investment adviser with respect to the U.S. state or local government entity).
2. *Prohibition on Solicitation and Coordination*. The investment adviser is prohibited from coordinating or soliciting (i) any contribution to a government official of a government entity to which the adviser is providing or seeking to provide investment advisory services or (ii) any payment to a political party of a U.S. state or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity.
3. *Prohibition on Payments to Unregulated Persons*. The investment adviser is prohibited from paying any third party to solicit a U.S. state or local government entity unless the third party is a registered investment adviser, registered broker-dealer, or a registered municipal advisor subject to the applicable pay-to-play restrictions equivalent to the Pay-to-Play Rule.

The Pay-to-Play Rule also has an anti-evasion provision that prohibits "funneling" contributions through third parties, other indirect contributions or otherwise engaging indirectly in an activity that would be prohibited if done directly.

The Pay-to-Play Rule provided limited exceptions for de minimis contributions ($350 if entitled to vote for the official, $150 if not) and for returned contributions meeting certain limited criteria as well as an ability to apply for an exemption from the SEC.

Importantly, the Pay-to-Play Rule applied not just to registered investment advisers but also exempt reporting advisers and foreign private advisers.

As a result of the de facto strict liability associated with the Pay-to-Play Rule, it became a frequent basis for SEC enforcement actions. However, the facts of these enforcement actions indicated that they were more "foot faults" than either explicit or "stealth" *quid pro quo* arrangements. In the Proposing Release, the SEC noted that no enforcement actions were brought based on the pay-to-play practices that allegedly violated Section 206 of the Advisers Act in the absence of Rule 206(4)-5.[4]

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[1] An "exempt reporting adviser" is a venture capital fund adviser that relies on Section 203(l) of the Advisers Act or a private fund adviser that relies on Section 203(m) of the Advisers Act.

[2] A "foreign private adviser" is a non-U.S. investment adviser who satisfies the limitations in Section 203(b)(3) of the Advisers Act (i.e., no place of business in the U.S., fewer than 15 U.S. clients and investors in private funds, and less than $25 million in assets under management attributable to U.S. clients and investors in private funds).

[3] See also Political Contributions by Certain Investment Advisers, SEC Release No. IA-3043 (July 1, 2010) (the "2010 Adopting Release").

[4] Proposing Release at p. 65.

2) Continuing Policy Requirements

Before moving into the technicalities of what type of behavior will still be prohibited under the Advisers Act, it will be useful to focus first on the most important element that is not changing—the SEC is expecting SEC-registered investment advisers to maintain policies and procedures to address the "pay-to-play" risks and, based on the SEC guidance in the Proposing Release, those policies may not be materially different from many advisers' current policies.

In the Proposing Release, the SEC explicitly relies on the continued applicability of Rule 206(4)-7 of the Advisers Act to require an SEC-registered investment adviser to adopt and maintain policies and procedures that are "reasonably designed to prevent fraudulent practices, including pay-to-play practices" and provides guidance on certain elements that they would expect to see in such pay-to-play policies in the Proposing Release. SEC-registered investment advisers will need to review their existing pay-to-play policies and procedures and tailor those policies and procedures for the particular pay-to-play risks of the adviser, taking into consideration the guidance provided by the SEC in the Proposing Release and eventually the adopting release of the final rule. While advisers should not revise their policies yet, we analyze the material guidance provided by the SEC in the Proposing Release for what might be staying the same and what might be changing in "pay-to-play" policies and procedures.

Universe of Employees Subject to the Pay-to-Play Policy

The SEC states that the policies and procedures should consider the nature of the position of any personnel making a contribution. The SEC distinguishes between "advisory, senior level decision makers, or business development personnel" (which the SEC apparently believes are riskier) and "back-office, administrative, or clerical employees" (which the SEC apparently believes are less risky). One immediate observation from this grouping is that the universe of "risky" personnel is broader than the scope of "covered associates," which, for example, does not pick up all advisory personnel, particularly if they are not soliciting investors. Although the SEC does not do so in the Proposing Release, it would make sense to use the current definition of "covered associate" to guide the assessment of employees who will be subject to the pay-to-play policies (*e.g.*, "active" owners and executive officers who have material economic interests in the adviser's business and who are often viewed to represent the firm as well as other personnel involved in the solicitation of investors, and their supervisors). However, this determination now will be a facts-and-circumstances analysis that each adviser's CCO will need to perform, which will provide greater flexibility (and potentially less compliance work later) at the cost of more upfront compliance work (*i.e.*, assessing who should be subject to the policy or certain parts of the policy).

Another factor that the SEC cites is the employee's history of contributions. This reference is difficult to interpret because it's not clear what exactly about an employee's history of contributions would create a risk—*i.e.*, is it more likely that an employee who regularly makes political contributions of all kinds is engaging in pay-to-play activities or an employee who makes fewer but more targeted political contributions? Regardless, because it is a factor that the adviser will need to consider in tailoring the adviser's policies and procedures, the CCO will need to know the employee's history of contributions in order to make this risk assessment and presumably monitor the employee's future contributions in order to update this risk assessment. This suggests an obligation to require reporting and review of employees' political contributions even where other aspects of the policies and procedures may not be required (*e.g.*, pre-clearance, discussed below).

Pre-Clearance

In the Proposing Release, the SEC sets an expectation that there should be a pre-clearance component to an adviser's pay-to-play policy if the facts and circumstances warrant it. The SEC states that "an electronic pre-clearance system for contributions similar to what typically is used for pre-clearing personal securities transactions" may be appropriate for a "large adviser with multiple advisory contracts with several public pension plans." The SEC does suggest that pre-clearance may not be necessary for an adviser that has only a small number of employees. Even then, it only says that a "formalized pre-clearance program" may not be necessary, which suggests that the SEC may expect a CCO to have awareness of the political activity of the employees even in the absence of formal pre-clearance and reporting. Taken together, the SEC examination staff could expect a formal pre-clearance requirement absent minimal solicitation of U.S. state and local government entities as investors or other mechanisms for monitoring the contributions of the key personnel.

Exceptions for Pre-Clearance

The SEC proposes two ways to avoid pre-clearance:

— Approved Windows. The SEC suggests that an adviser could have approved windows that present lower pay-to-play risk (presumably similar to permitted trading windows for persons subject to insider trading restrictions). The SEC does not provide any additional information on what windows of time present lower pay-to-play risks. For a private fund sponsor who is not fundraising for a fund all of the time, it may be that the approved windows could be the periods where the firm is not currently fundraising or soon to commence fundraising. For a private fund sponsor who almost always has a fund in the market, it may be more difficult to have approved windows, absent the ability to exclude the employees from the current fundraisings.

— De minimis thresholds. The SEC also suggests that the policy could permit contributions below certain thresholds without pre-clearance. It does not, however, provide guidance on what thresholds may be appropriate. One could look at the questions in the Proposing Release where the SEC ask whether, in the alternative approach of revising the Pay-to-Play Rule instead of rescinding it, they should consider raising the de minimis thresholds to $3,500. Setting a de minimis threshold that high would permit most personal political contributions since it is the "per election" limit set by the Federal Election Commission.

Other Policy Requirements

In addition, the SEC provides guidance that an adviser's pay-to-play policy will need to include a number of other different elements:

— Other Pay-to-Play Laws and Regulations. The SEC suggests that "[f]or purposes of efficiency and cohesiveness of internal policies," the adviser could consider including policies and procedures that address compliance with U.S. and non-U.S. federal, state, and local laws and regulations with respect to political contributions and corruption.

— Third Party Solicitors. The SEC suggests that engagements of third parties for the solicitation of government business should be subject to pre-approval by the CCO and also be limited to "a registered investment adviser, registered broker-dealer, security-based swap dealer, or registered municipal adviser who has not made a political contribution to the government entity it is soliciting." This policy requirement is similar to the existing requirement to limit such engagements to "regulated persons" who are subject to equivalent pay-to-play regulatory requirements. However, the addition of the "who has not made a political contribution to the government entity it is soliciting" is problematic since it both goes farther than the current rule (which allows contributions in compliance with the pay-to-play regulations applicable to the solicitor) and the guidance discussed above that will be applicable to the adviser itself (*e.g.*, with respect to de minimis contributions). Regardless, to address these issues, the CCO will likely need to condition his or her pre-approval of the engagement on receiving representations and covenants from the solicitor with respect to their political contribution activity.

— Indirect Conduct. The policies will also be required to address the risk associated with "indirect conduct"—*i.e.*, structuring a contribution or payment transaction through a third party (*e.g.*, consultants, attorneys, family members, friends, or affiliates). This requirement would track the existing restriction in the Pay-to-Play Rule that prohibits an adviser (or its covered associates) from doing indirectly that which it could not do directly and the language in the Proposing Release is lifted almost verbatim from the 2010 Adopting Release. This suggests that the pay-to-play policies will still need to address the potential for indirect contributions through spouses and other family members, through other employees, and/or through PACs or political parties. This process often involved performing due diligence on the PAC and potentially receiving confirmation from the PAC on the usage of the contribution.

— Monitoring. The SEC suggests that the policies and procedures should include monitoring that could incorporate "periodic audits" of (i) pre-clearance requests against the actual contributions that have been made and (ii) compliance with the other aspects of the policies and procedures. It is not mentioned but these audits could potentially include comparing the employee's reported contributions against the contributions reported in publicly available contributions.

— Remedial Steps and Disciplinary Actions. The SEC states the adviser "would *need* to include" (emphasis added) a framework for how to address contributions or other actions that violate the adviser's policies. The SEC suggests that this framework could include a return of a contribution within a specific timeframe or "potential disciplinary or other appropriate actions against employees that violate the policies and procedures."

— Code of Ethics. The SEC states that an adviser who provides or seeks to provide advisory services to a U.S. state or local government should adjust their standard of business conduct in their Code of Ethics to reflect any restrictions on political contributions set forth in their pay-to-play policy and amend their description of their Form ADV Part 2A (Item 11) that describes their Code of Ethics. Currently, not all investment advisers include their pay-to-play policy requirements in the Code of Ethics (although they reside elsewhere in the adviser's compliance manual) and so not all investment advisers are describing their pay-to-play policies in Form ADV Part 2A or making their pay-to-play policies available to their clients.

What May Not Be Changing From Current Pay-to-Play Policies

Taken together, an SEC-registered investment adviser with multiple government clients or investors in their private funds or other investment products may need to maintain a pay-to-play policy that (i) requires reporting of political contributions by a broad base of employees (to assist in assessing their risk), (ii) requires pre-clearance by a smaller group of employees, (iii) restricts the use of unregistered solicitors (and requires the pre-clearance of placement agent and solicitor agreements and certain "pay-to-play" provisions in those agreements), (iv) addresses the potential for indirect contributions through spouses, other family members, and other employees and through PACs and political parties, (v) requires the CCO (or other compliance personnel) to regularly monitor the pre-clearance and reporting of the employee's political contributions and compare those to public databases, and (vi) provides a framework for remediating violations (in addition to potential disciplinary steps).

In broad strokes, one could be forgiven for thinking that such a policy would look remarkably like the policies that many advisers currently have. In some ways, a policy crafted based on the SEC's guidance in the Proposing Release would be broader (and potentially more burdensome) than those many investment advisers have currently implemented. For example, the Proposing Release cites a study that finds that a majority of investment advisers do not have political contribution pre-clearance requirements.

It is notable that the SEC does not appear to fully appreciate the burdens of the policy guidance they are providing since their economic analysis is based simply on updating the economic costs that the 2010 Adopting Release estimated from the Pay-to-Play Rule and claiming that those costs would be eliminated. However, as noted above, much of the compliance framework that has been implemented to ensure compliance with the SEC Pay-to-Play Rule would likely need to stay in place for many investment advisers, so those advisers are unlikely to realize the cost savings estimated by the SEC.

In proposing the rescission of the Pay-to-Play Rule, the SEC declined to replace the Pay-to-Play Rule with a "new, more particularized rule specifically requiring that investment advisers adopt and implement policies and procedures reasonably designed to detect and prevent pay-to-play activities." However, as discussed above, the SEC provides specific guidance on the policies and procedures they expect investment advisers to adopt to comply with Rule 206(4)-7 under the Advisers Act. Therefore, many investment advisers may not see a material practical difference between a new pay-to-play policies and procedures rule on one hand and, on the other hand, a requirement to adopt pay-to-play policies and procedures under the existing Rule 206(4)-7 of the Advisers Act, shaped by the guidance in the Proposing Release and the adopting release of the eventual final rescission, as well as, further down the line, by public and private guidance from the SEC examination and enforcement staff.

What Could Change from Current Pay-to-Play Policies

Even though it appears that for many investment advisers the pay-to-play policies will be largely the same, the likely potential areas of reduced burden could include:

— Higher *De Minimis* Thresholds. As noted above, the SEC suggests that the policy can include an exception for certain *de minimis* contributions and it may be that an adviser could set that a threshold high enough to permit substantially all personal contributions.

— Tailoring for Types of Government Officials. An adviser could include that a contribution to certain types of government officials would need to be quite high in order to create a potential for "pay-to-play" risks. For example, a state governor who raises a significant amount in contributions may be less likely to be influenced than a town or city official. Another possibility would be to permit contributions for sitting state officials pursuing federal office, since, if successful, the state official will no longer be able to influence the state government entity in favor of the adviser. In addition, an adviser may adjust its risk assessment based on how close a government official is to the investment decision making process, so an official with only indirect and infrequent influence over the persons making the decisions (*e.g.*, having only the ability to appoint replacement trustees or appoint trustees for a set term) may not present the same pay-to-play risks as an official who directly makes the decision. However, making such an assessment may involve the difficult type of fact gathering concerning the governance structure of the applicable pension plans that the SEC is seeking in part to alleviate under proposed rescission (given the uncertainties concerning the definition of "official" under the current Pay-to-Play Rule).

— Timing of Contributions. An adviser would likely have more flexibility to permit contributions to government officials with respect to existing investors. For example, currently the Pay-to-Play Rule has harsh consequences for contributions with respect to existing investors of an adviser's private fund even if the investor is not going to participate in future funds of the adviser. To this end, the vast majority of settled SEC enforcement actions with respect to the Pay-to-Play Rule involved contributions made after the original investment or advisory contract (and, in many circumstances, many years after).

— Smaller Universe of "Solicitors". The Pay-to-Play Rule has a very broad definition of "solicit," which has led some advisers to include a number of persons as "covered associates" even though they only perform a limited role in the overall solicitation of investors, including, for example, certain senior advisors, operating consultants and similar persons (*e.g.*, if they are meeting investors at annual meetings or other places) as well as, for certain investment strategies, certain operations persons, such as a property manager who gives tours for investors of a real estate investment owned by an existing fund. Under the new framework, the adviser could be more flexible to exclude such persons from the coverage of their pay-to-play policies based on their limited role.

— Hiring and Promotions. The current Pay-to-Play Rule requires certain "look backs" for new covered associates, whether the person is a new hire or promotion. The new ability to tailor policies would permit more flexibility to hire or promote a person even where there is an otherwise prohibited contribution if the CCO finds that the facts and circumstances do not suggest the existence of material pay-to-play risks.

— Remedial Options for Foot Faults. The current Pay-to-Play Rule is notorious for creating "foot faults" where persons make prohibited contributions and it is very difficult to remedy due to the limitations on the exception for returned contributions and the lengthy process of seeking an exemptive order from the SEC. The CCO will now have more flexibility to engage in other remedial steps that could include returning larger and/or older contributions, limiting the employee's involvement in the solicitation of the government entity, and/or taking other steps that are reasonable or necessary under the facts and circumstances.

3) Other Pay-to-Play Restrictions and Reviews of Side Letters, Placement Agreements, and Other Contracts

As noted above, even with the rescission of the Pay-to-Play Rule, investment advisers will still be subject to the patchwork of restrictions imposed by various states and localities whether by law, regulation, or policy of the particular government entity. It is also possible that certain governments or government entities may respond to rescission of the Pay-to-Play Rule with new laws, regulations, policies, or contractual requirements that seek to fill its void.

Furthermore, investment advisers will need to review their contracts to see to what contractual provisions require ongoing compliance beyond the rescission of the Pay-to-Play Rule. For example, certain side letters with state or local government pension plans include specific representations that may or may not track the language of the Pay-to-Play Rule and, in addition, these representations may not go away if the Pay-to-Play Rule is rescinded. Similarly, certain placement agreements may require representations from the investment adviser with respect to compliance with the Pay-to-Play Rule or otherwise place restrictions on political contributions.

4) The Scope of Prohibited Pay-to-Play Practices

Although the scope of what types of pay-to-play practices will be a key component in developing and tailoring the pay-to-play policies discussed above, the SEC spends very little time in the Proposing Release providing guidance on the scope of what is a prohibited pay-to-play practice.

In the Proposing Release, the SEC states that *quid pro quo* for obtaining advisory business and "other forms" of pay-to-play practices would violate the anti-fraud provisions of the Advisers Act, specifically, Section 206 of the Advisers Act. Similarly, when the SEC defines "pay-to-play practices," they discuss both (i) the potential of a contribution being a prerequisite for the advisory business and (ii) the ability of the contribution to influence the awarding of the advisory contract. However, in the Proposing Release, the SEC does not provide examples of the "other forms" of pay-to-play practices (outside of *quid pro quo* situations) or discuss what type of influence over a government official would create a violation of the anti-fraud provisions in Section 206 of the Advisers Act.

The Proposing Release repeatedly cites the 2010 Adopting Release in discussing pay-to-play practices and in the 2010 Adopting Release, the SEC is much more expansive in discussing what types of practices it is seeking to prohibit. In particular, it focuses on how the pay-to-play practices it was seeking to restrict included practices that did not include a *quid pro quo* component since such arrangements are sometimes "hidden" and "often hard to prove."[5] In addition, one of the theories on which the 2010 Adopting Release based its justification for the Pay-to-Play Rule was that it was a violation of the adviser's fiduciary duty under the Advisers Act. The SEC stated that it was a violation of the adviser's fiduciary duty to the pension plans to seek to influence the decision makers of such pension plans through political contributions or other payments.[6] Furthermore, the SEC stated that it believed that pay-to-play practices were "inconsistent with the high standards of ethical conduct of fiduciaries under the Advisers Act."[7] This expansive theory of the adviser's fiduciary duty under the Advisers Act was somewhat novel at the time, particularly when then applying it with respect to the solicitation of a pension plan investor into a pooled investment vehicle, since the investment adviser does not have a fiduciary duty under the Advisers Act to the pension plan in that scenario. Taken together, it would suggest that an investment adviser would need to be quite cautious with respect to a wide range of political contributions or other activity even in the absence of a material risk of a *quid pro quo*.

However, this more expansive vision of the types of prohibited practices described under the 2010 Adopting Release conflict with the statement in the Proposing Release that "[c]ontributions made to a candidate for political office are a form of speech that is protected by the First Amendment, and the prevention of *quid pro quo* corruption or its appearance is the only permissible ground for restricting or limiting such speech," citing FEC v. Ted Cruz for Senate, 596 U.S. 289, 305 (2022). Based on this citation to FEC v. Ted Cruz, the SEC may be expecting investment advisers to more narrowly interpret the scope of pay-to-play practices that they are seeking to address.

The Proposing Release does not address this tension of whether an investment adviser is required to adopt policies and procedures that seek to reduce the risk of pay-to-play policies that go beyond *quid pro quo* payments (or other situations where the contribution or payment is a prerequisite). Furthermore, the Proposing Release does not provide guidance on whether an adviser should seek to address the hidden or less explicit pay-to-play practices (as envisioned in the 2010 Adopting Release) or narrow its scope to be more in line with more recent court guidance on political contributions (including FEC v. Ted Cruz).

5) Disclosures of Conflicts of Interest

The SEC also stated that there are disclosure obligations with respect to the conflicts of interest presented by pay-to-play practices. Citing back to the theory set forth in the 2010 Adopting Release discussed above, the SEC stated that an adviser is violating the Advisers Act where it fails to disclose the existence of a contribution (or other political activity) that induces or influences a government official to make an investment decision that he or she would not otherwise make.

It is not clear whether the disclosure is only triggered by an otherwise prohibited pay-to-play practice (as discussed above) or can be triggered by other types of political contributions or other political activity. In other words, is an investment adviser obligated to disclose (either in general or with specifics) the political contributions or other activity of itself and its related persons and employees even where the adviser has made the determination that such contributions or activity are not the type of pay-to-play practice prohibited by Section 206 of the Advisers Act?

The second significant question is to whom the adviser should be making any such disclosure. Where there are multiple decision makers for the government entity and at least one of the decision makers is not subject to

5 Adopting Release at p. 7.

6 See 2010 Adopting Release at fn. 10 and the accompanying paragraph ("Similarly, investment advisers that seek to influence government officials' awards of advisory contracts by making or soliciting political contributions to those officials compromise their fiduciary duties to the pension plans they advise and defraud prospective clients.")

7 See 2010 Adopting Release at 16 and 179.

the same conflict of interest, the adviser could potentially disclose to the unconflicted decision maker. However, in many circumstances, there might be a single decision maker (*e.g.*, a state or city treasurer) or all of the decision makers are subject to the influence of the same government official (*e.g.*, trustees appointed by a governor or mayor). In such circumstances, it is not clear to whom the adviser could make a disclosure that could satisfy its obligations under the Advisers Act.

6) The Downsides of a Principles-Based Approach

The overall goal of the rescission of the Pay-to-Play Rule is to move towards a "principles-based" approach to pay-to-play risks, so that investment advisers have "the flexibility to design tailored compliance policies and procedures and codes of ethics in accordance with their own business models and risk profiles."[8] There are, however, challenges with principles-based frameworks, particularly when there are significant uncertainties as to the principles and the potential that SEC's view on those principles will change over time.

First, a principles-based approach can lead to "rulemaking by enforcement" and "rulemaking by examination," as the SEC's enforcement and examination staff apply their own view of the principles with respect to pay-to-play risks. In recent years, the style of SEC examinations has shifted to where deficiency letters at the end of SEC exams more often provide recommendations on policies and procedures that the SEC examination staff expects the adviser to adopt even where not required by any section or rule of the Adviser Act and even in the absence of evidence of violations. This type of approach could be particularly problematic in the pay-to-play area since, while proving the existence of a *quid pro quo* can be hard, it can be equally hard to conclude with complete certainty that no such arrangement exists, particularly if a contribution is followed by the awarding of an investment contract or a commitment to invest. Furthermore, the existence of a potential policies and procedures violation of Rule 206(4)-7 under the Advisers Act means that the SEC could potentially bring enforcement actions even in the absence of proving the actual *quid pro quo* if they can prove that the policies and procedures were not sufficient. These shifting sands for SEC examinations and enforcement will be amplified by shifting priorities of the overall SEC, which itself has increased in recent years.

These uncertainties would be exacerbated by the nature of the market. Certain advisers will make a different assessment of what types of pay-to-play activities are prohibited and/or will be willing to take on a different amount of risk with respect to their occurrence. The result will be that the other investment advisers competing for same advisory business or soliciting investments from the same government investors may be subject to pressure to fall in line with the more aggressive elements in the market and permit similar types of contributions or other political activity in certain circumstances. In the Proposing Release, the SEC notes that it is uncertain whether the absence of SEC enforcement actions of pay-to-play violations outside of the Pay-to-Play Rule were the result of the effectiveness of the Pay-to-Play Rule or "[c]hanges to the technological, political, and legal landscape" since 2010. Loosening the regulatory constraints on this market pressure could result in more questionable pay-to-play activity. Regardless, CCOs are likely to face the difficulties of navigating the business pressures to engage in certain political activities that competitors are engaging in with the uncertainties of what pay-to-play activities are restricted under the Advisers Act.

7) Impact on Exempt Reporting Advisers and Foreign Private Advisers

While some of the uncertainties that apply to SEC-registered investment advisers also apply to exempt reporting advisers and foreign private advisers, there are clear benefits to these populations resulting from the rescission of the Pay-to-Play Rule.

8 Proposing Release at p. 6 – 7.

Neither exempt reporting advisers nor foreign private advisers are subject to the policies and procedures requirements under Rule 206(4)-7 of the Advisers Act, so their liability would be more primarily focused on the violation of Section 206 of the Advisers Act, which applies to all investment advisers, both registered and unregistered.

Violations of the Pay-to-Play Rule is the largest category of settled SEC enforcement actions against exempt reporting advisers. Approximately one third of the settled SEC enforcement actions involving exempt reporting advisers related to violations of the Pay-to-Play Rule. Almost half of the SEC enforcement actions alleging a violation of the Pay-to-Play Rule were with respect to exempt reporting advisers. Although there is no publicly available data, numerous SEC examinations involving exempt reporting advisers were spurred in part by publicly reported information on political contributions.

Without the strict liability standard under existing Pay-to-Play Rule and without the hook for a violation for inadequate policies and procedures under Rule 206(4)-7 of the Advisers Act (which applies only to SEC-registered advisers), it will be much more difficult (and, thus, much rarer) for the SEC to bring enforcement actions against exempt reporting advisers with respect to pay-to-play practices that violate the Advisers Act.

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We will continue to monitor whether the Pay-to-Play Rule is ultimately rescinded (or whether the SEC changes course and either amends the Rule or replaces it with a policies and procedures rule) and also whether the SEC provides additional guidance that clarifies some of the many questions and uncertainties we raise above.

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