CAMPAIGN LEGAL CENTER

11/09/26

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Political Contributions by Certain Investment Advisers (Release No. IA-6994, File No. S7-2026-31)

Dear Commissioners:

Campaign Legal Center ("CLC") respectfully submits this comment in opposition to the Securities and Exchange Commission's ("SEC" or "Commission") proposed rescission of Rule 206(4)-5 under the Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-5 (the "Rule"). *See* Political Contributions by Certain Investment Advisers, 91 Fed. Reg. 57,698, 17 C.F.R. pt. 275 (Sep. 10, 2026) (the "Proposed Rulemaking"). CLC is a nonpartisan, nonprofit organization that works in the areas of campaign finance and elections, as well as general government ethics and transparency, offering nonpartisan analyses of legal issues and representing the public interest in administrative, legislative, and legal proceedings. CLC regularly identifies, investigates, and litigates *quid pro quo* corruption schemes, and helps draft and defend vital legislation preventing these schemes from developing.

We submit this comment to emphasize the key role this Rule has played over the past sixteen years in keeping at bay corruption and fraud in the award of lucrative contracts to manage public money—public pension funds, public defined contribution retirement plans, and state 529 college savings plans that together serve millions of public employees, retirees, and families. Since 2010, the Rule has prohibited investment advisers from receiving compensation for advisory services to government entities for two years following certain political contributions by the adviser or its covered associates to an official of those entities who can influence the selection of advisers. The SEC adopted the Rule out of a particular concern about advisers making direct contributions or funneling contributions through solicitors and placement agents hired by advisers to secure a client relationship with, or an investment from, a public pension plan. *See* Political Contributions by Certain Investment Advisers, Advisers Act Release No. 3043, 75 Fed. Reg. 41,018, 41,019 (July 14, 2010). Evidence of schemes like these led the SEC to conclude that the selection of advisers had been influenced by political contributions, which it feared could serve to diminish the quality of management of public funds. *Id.* The Rule is carefully and appropriately tailored to address the specific harms the SEC identified in 2010, which provoked its enactment. Rescinding the Rule would invite a return to the kickback schemes that were the state of play before 2010—the very conditions that prompted the Rule's unanimous adoption by a full, bipartisan five-member Commission. The Rule is now poised to be rescinded by a Commission of just two members from the same party. A decision that momentous and consequential should rest on evidence that the facts and circumstances animating the 2010 Rule have changed—not on a mere shift in the Commission's composition.

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This comment makes four points. First, the Commission adopted the Rule to prevent well-documented pay-to-play corruption that is, by its nature, difficult to detect and prove. Second, participants in 529 plans and public defined contribution plans would suffer particular harm if the Rule were rescinded. Third, the Rule is appropriately tailored, and any legitimate concerns about its burden can be addressed through targeted amendments, not wholesale rescission. Fourth and finally, the supposed substitute protections the Commission now identifies—general antifraud provisions, compliance and code of ethics rules, and state law—cannot do the Rule's work, as the Commission itself found in 2010. The Commission has not supplied the reasoned explanation the Administrative Procedure Act ("APA") requires for abandoning those findings; it should withdraw the Proposed Rulemaking.

I. The Proposed Rulemaking would invite a return to the corruption and fraud that were prevalent prior to the Rule's enactment.

A. The SEC enacted the Rule to curb *quid pro quo* corruption in the awarding of public pension fund management contracts.

Private entities' contributions to candidates' campaigns raise particular concerns when they create the risk, or the appearance, that this financial support will be rewarded with eventual favors once the candidate is in office. The Supreme Court has long recognized that when entities engage in this kind of *quid pro quo*, the "integrity of our system of representative democracy is undermined." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). In fact, *quid pro quo* corruption poses so great a risk to our nation's democratic values, the Court concluded that countering it justifies restricting private individuals' and organizations' "speech" taking the form of monetary contributions. *See id.* at 26-29; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-97 (2000) (upholding state campaign contribution limits against First Amendment challenge); *FEC v. Beaumont*, 539 U.S. 146, 152-63 (2003) (upholding federal ban on corporate contributions against First Amendment challenge). The *Buckley* Court noted that "[o]f almost equal concern [is] . . . the appearance of corruption," which threatens "'confidence in the system of representative Government.'" 424 U.S. at 27 (quoting *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973)).

The Rule is a carefully tailored response to the acute and well-documented risk of *quid pro quo* corruption—and its appearance—in the awarding of government contracts to manage public pension plans, a risk that would be substantially heightened absent meaningful regulations on investment advisers' ability to make contributions to elected officials and their campaigns. The SEC explained that public pension plans are "particularly vulnerable" to pay-to-play practices because decisions about the administration of these funds are made by a fund's trustee—generally either a public official or someone appointed by a public official—who is then involved in, if not wholly responsible for, selecting advisers to manage the fund's assets. 75 Fed. Reg. at 41,019. The SEC was especially concerned that these contributions could be "funneled through 'solicitors' and 'placement agents' that advisers engage (or believe they must engage) in order to secure a client relationship with a public pension plan or an investment from one." *Id.* As the SEC acknowledged, when investment advisers seeking government contracts make or are implicitly expected to make contributions to candidates, "the process by which government officials select investment advisers can be transformed into one in which contributions to a government entity official, rather than the competence and cost of investment advisers, drive the award of contracts." Proposed Rulemaking

at 57,699-700. This creates a conflict of interest with respect to public pension plans and other public funds, which can ultimately result in these plans being managed by ill-equipped, under-qualified, or cost-ineffective advisers. *Id.*

This is exactly the type of harm the Commission identified during its enactment of the Rule in 2010, when it noted that "'pay to play' arrangements are inconsistent with an adviser's fiduciary obligations, distort the process by which investment advisers are selected, can harm advisers' public pension plan clients and the beneficiaries of those plans, and can have detrimental effects on the market for investment advisory services." 75 Fed. Reg. at 41,023. The Commission made clear that these harms extend beyond defined benefit pensions to "plans that allow families to invest money for college (commonly known as '529 plans')," which, it warned, "may receive inferior advisory services and pay higher fees" as a result of pay-to-play practices.[1] These concerns were grounded in real-world examples. The SEC cited numerous instances of "funneling" as well as direct contributions to officials or their campaigns resulting in the award of contracts. 75 Fed. Reg. at 41,044 n.339. It referenced a then-recent SEC enforcement action against investment advisers who paid "sham" placement agent fees, portions of which were funneled to public officials in New York to secure public pension fund investments in the funds those advisers managed. *Id.* at 41,019 n.16 (citing *SEC v. Henry Morris, et al.*, Litigation Release No. 20,963 (Mar. 19, 2009)). In fact, in the decade leading up to enactment of the Rule, the SEC brought enforcement actions against investment advisers, their placement agents, and public officials alike for their role in similar schemes in Connecticut, New Mexico, Illinois, Ohio, and Florida. 75 Fed. Reg. at 41,020.

Despite the extensive evidence of corruption in the awarding of these contracts, the SEC recognized that the *quid pro quo* arrangements underlying such transactions are "rarely explicit and often hard to prove." *Id.* at 41,022. Thus, the SEC crafted this Rule to respond to exactly that obstacle. The SEC now argues that these grave concerns are addressed in other provisions of federal and state law, but the SEC itself previously identified a clear gap in these other provisions when it enacted the Rule in 2010. This gap continues to exist today and would be exploited if the Rule were rescinded. *See infra* Part II.A. By prohibiting kickback schemes, the Rule is critical to preventing corruption that would otherwise be difficult to detect after the fact.

B. The Proposed Rulemaking would work particular harm on 529 plan and public defined contribution plan participants.

Americans participating in 529 plans to save for their children's education and public servants using defined contribution plans to save for retirement directly bear the cost of pay-to-play corruption. The Rule protects more than defined benefit pension plans. It applies to advisers to any "government entity," a term that includes plans and programs established by state and local governments, and to advisers to "covered investment pool[s]" that serve as investment options in government-sponsored plans such as 529 plans and participant-directed retirement plans. 17 C.F.R. § 275.206(4)-5(f)(3), (f)(5). In adopting the Rule, the Commission expressly identified 529 plans among the programs pay-to-play dynamics can harm. 75 Fed. Reg. at 41,045-46 (recognizing that

[1] Press Release, SEC, SEC Adopts New Measures to Curtail Pay to Play Practices by Investment Advisers, No. 2010-116 (June 30, 2010), https://perma.cc/7VA3-DAW2.

omitting these plans from the Rule would "encourage the use of covered investment pools as a means of avoiding [its] application").

For these participants, the cost of a distorted selection process is not abstract. In a defined benefit plan, a participant receives a fixed benefit regardless of the plan's investment performance. In a 529 college savings plan or a participant-directed defined contribution plan, by contrast, each participant's account balance rises and falls based on investment performance, and program management and asset management fees are deducted from participants' accounts.[2] Every basis point of excess fees, and every dollar of underperformance attributable to a manager selected for reasons other than merit, comes directly out of a family's college savings or a public employee's retirement account.

These plans are also structurally vulnerable to pay-to-play. Most state 529 savings plans are administered by a private program manager selected through periodic procurement, and in many states the selection is made by an elected state treasurer or a board whose members are appointed by elected officials.[3] A single decision by a single official can thus determine the manager and the fee structure for hundreds of thousands of accounts. That is precisely the sort of concentrated, official-controlled selection process the Commission found "particularly vulnerable" to pay-to-play practices in 2010. 75 Fed. Reg. at 41,019.

The Proposed Rulemaking plainly does not grapple with these harms. It does not identify the number of 529 plans or public defined contribution plans whose managers or investment options are selected by covered officials, the assets and participants in those plans, or the likely effect of renewed pay-to-play practices on the fees and performance those participants experience. Nor does its economic analysis weigh the cost of forgoing these benefits against the compliance-cost savings it attributes to rescinding the Rule. Before taking any final action, the Commission should (1) quantify the 529 plan and public defined contribution plan assets and participants subject to the Rule; (2) assess how a return to contribution-influenced selection would affect participants' fees and returns; (3) explain why its 2010 finding that pay-to-play can cause 529 plans to "receive inferior advisory services and pay higher fees," *supra* note 1, no longer holds; and (4) consider, at a minimum, retaining the Rule as applied to the selection of managers and investment options for 529 and public defined contribution plans. *See* Advisers Act 202(c), 15 U.S.C. § 80b-2(c); *cf. Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

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[2] *See* SEC Off. of Inv. Educ. & Assistance, Investor Bulletin: An Introduction to 529 Plans (Jan. 28, 2026), https://perma.cc/X59K-H977 (explaining that 529 education savings plans may charge "ongoing program management fees, and ongoing asset management fees," and that fees "lower your returns").

[3] *See, e.g.*, Mich. Comp. Laws § 390.1473 (directing state treasurer to solicit proposals from, select, and contract with program managers); Press Release, Kan. State Treasurer, Kansas Treasurer Announces New 529 Program Manager and March 2026 Rebranding, https://perma.cc/5LYF-KWS4 (last visited Nov. 5, 2026) (treasurer selected new manager for programs serving more than 228,000 families and approximately $14.5 billion in assets); Press Release, Conn. Off. of the Treasurer, State Treasurer Shawn Wooden Announces Fidelity Investments as New CHET 529 Manager for State of Connecticut (Dec. 2, 2020), https://perma.cc/9E4P-54W8.

C. The 2010 Rule is appropriately tailored to prevent pay-to-play corruption, and any legitimate concerns can be addressed without rescission.

Contrary to the SEC's assertion that the Rule is "burdensome," it is properly tailored to address the serious threat of corruption in the award of pension plan management contracts. The SEC points to the low monetary threshold for triggering the Rule, the two-year "look-back" period, and the alleged complexity of the Rule as sources of confusion and unnecessary encumbrance for those entities subject to it. Proposed Rulemaking at 57,701-03. The SEC argues that given the Rule's complexities, many advisers apply the Rule more broadly than its provisions actually require, leading them to refrain from engaging in political activity in which they are free to engage. Proposed Rulemaking at 57,702. However, even assuming *arguendo* these concerns are valid, the SEC's proposed remedy—eliminating the Rule entirely—sweeps much too broadly relative to the purported "problems" that the SEC raises. Indeed, it is telling that the Proposed Rulemaking requests comment on narrower alternatives, including raising the *de minimis* thresholds, shortening the look-back and time-out periods, narrowing the definitions of "official" and "covered associate," and expanding exemptive relief. Proposed Rulemaking at 57,718. Without endorsing any particular change, CLC notes that *each* of these alternatives would directly respond to the burdens the Commission identifies while preserving the Rule's core protection against pay-to-play corruption. If the Commission nonetheless rescinds the Rule in full, it must explain why none of these less drastic alternatives—nor a rule retained for contexts in which the harm falls directly on individual savers, such as the selection of managers and investment options for 529 and public defined contribution plans—would suffice to address the SEC's identified concerns. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-51 (1983) (finding that agency could not abandon rule without first giving due consideration to modifications and alternatives that are "within the ambit of the existing [policy]").

In fact, the Rule already includes numerous exceptions and exemptions which prevent it from being overly burdensome. The *de minimis* exception permits covered associates who are natural persons to contribute up to $350 per election to an official for whom they are entitled to vote. 17 C.F.R. § 206(4)-5(b)(1). More fundamentally, the Rule never prohibits anyone from making a contribution; it bars only compensated advisory services to a particular government entity for a discrete period of time—two years after a covered contribution to one of its officials. *Id.* § 275.206(4)-5(a)(1). These provisions allow advisers and their associates to exercise their right to make certain political contributions while targeting only those contributions most likely to corrupt or appear to corrupt.

Courts have upheld similar restrictions on pay-to-play activities, recognizing their tailored approach to addressing corruption concerns. In *Blount v. SEC*, the D.C. Circuit upheld the constitutionality of Rule G-37, a provision that is in many respects functionally equivalent to the Rule, but which regulates contributions made by municipal finance professionals rather than investment advisers. 61 F.3d 938, 947 (D.C. Cir. 1995). Rule G-37 included a *de minimis* exception lower than this Rule's—$250—and similarly prohibited these professionals from engaging in business with municipal entities within two years of making a contribution. Rule G-37 at (b)(i), (b)(ii). The court concluded that the regulation was "closely drawn" and "'avoid[ed] unnecessary abridgement' of First Amendment rights," given that "the rule restricts a narrow range of [] activities for a relatively short period of time." *Blount*, 61 F. 3d 938, 947 (D.C. Cir. 1995) (quoting *Buckley*, 424 U.S. at 25). The court noted that the professionals regulated by Rule G-37 were free

to engage in the vast majority of political activities, including making other expenditures to express their views, giving speeches, writing books, soliciting votes, or appearing at fundraising events; it *only* prohibited political support in the form of certain contributions. *Id.* More recently, the D.C. Circuit upheld FINRA Rule 2030, which imposes a similar two-year timeout on broker-dealers acting as placement agents, holding that "[t]he SEC acted within its authority in adopting Rule 2030; doing so was not arbitrary and capricious because the SEC had sufficient evidence it was needed; and the rule does not violate the First Amendment." *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 501 (D.C. Cir. 2019). Here, too, the Rule applies only to "contributions," a term narrowly defined to cover the transfer of money, gifts, loans, advances, or anything of value. 17 C.F.R. § 275.206(4)-5(f)(1). Thus, like these other rules that are appropriately targeted to address serious pay-to-play concerns in the securities industry, the Rule is appropriately tailored to achieve its goals while safeguarding advisers' constitutional rights.

Contrary to the SEC's suggestion, *see* Proposed Rulemaking at 57,701, the Rule does not prevent advisers from hiring or promoting anyone. Rather, it attributes to an adviser contributions made by a person within a look-back period before that person becomes a covered associate, so that an adviser cannot evade the timeout by hiring someone who has already made the contribution. And for a new covered associate who will not solicit clients for the adviser, the look-back period is only six months rather than two years. *See* 17 C.F.R. § 275.206(4)-5(b)(2). The SEC argues that the inclusion of advisers' recently hired associates could prevent advisers from hiring a "top candidate" if that candidate's past contributions could trigger the two-year time out period. Proposed Rulemaking at 57,701. However, without including these associates as regulated parties, there would be nothing to prevent advisers from circumventing the Rule by hiring associates whose contributions to particular candidates or officials would give the advisers a competitive advantage in procuring lucrative contracts. The SEC specifically declined to include additional persons within its definitions despite calls from some commenters to broaden the scope of the Rule—to include, for example, *all* employees of advisers, or all those parties who own or solicit business on behalf of advisers. 75 Fed. Reg. at 41,033. The Commission rejected such invitations to expand the Rule because the "incremental benefits" of doing so were outweighed by the additional burden it would impose. *Id.* The Rule thus reflects the SEC's careful balance of preventing circumvention without excessively burdening advisers, and the Commission provides no reasoned basis for abandoning that balance now.

Further, the Rule allows an investment adviser to cure certain inadvertent contributions by its covered associates. 17 C.F.R. § 275.206(4)-5(b)(3). To be excepted from the Rule, the investment adviser must discover a contribution not exceeding $350 within four months of the contribution, and the contribution must be returned within 60 days of this discovery. *Id.* This gives investment advisers whose covered associates have made otherwise unlawful contributions an opportunity to avoid sanctions or penalties, and protects those who may have set up automatic or recurring contributions to candidates. The SEC speculates that return of these contributions may not be feasible if the funds have already been spent or if the recipient of the contribution is not cooperative in returning them. Proposed Rulemaking at 57,702. However, given that the contributions eligible for return cannot exceed $350, it seems unlikely that a recipient would be unable or unwilling to return such a contribution in order to bring the contributor in line with the law. Tellingly, the SEC does not point to any real-world examples in which advisers sought and were unable to obtain return of their contributions; in fact, in numerous cases, the respondents in

SEC enforcement actions *were* able to receive return of their contributions.[4] Available evidence thus suggests that the exception functions as intended, allowing advisers to remedy inadvertent violations without undermining the Rule's objectives.

Federal law imposes analogous restrictions on those who seek government business. For instance, the Federal Election Campaign Act ("FECA") makes it unlawful for federal contractors to make contributions to candidates, political parties, or other committees—including groups like super PACs that are legally required to remain independent of candidates and political parties. *See* 52 U.S.C. § 30119. Five years after the Supreme Court's decision in *Citizens United v. FEC*, the D.C. Circuit, sitting en banc, upheld this provision against constitutional challenges, finding that the statute "does advance, albeit imperfectly, the government's important interests in protecting against quid pro quo corruption and its appearance, and in protecting merit-based public administration." *Wagner v. FEC*, 793 F.3d 1, 28, 34 (D.C. Cir. 2015) (en banc). The ban on contributions from federal contractors later provided one of several bases for holding accountable the defense contractors at the center of the Navatek scandal, after they created a shell company through which the contractor, Navatek, made contributions to a super PAC supporting a U.S. Senate candidate—whose support was crucial in Navatek's continued procurement of federal contracts.[5] As the Navatek example clearly illustrates, prophylactic restrictions on contributions by government contractors are a necessary, effective, and judicially approved means of preventing actual and apparent corruption in the process of seeking and awarding government contracts. The Rule at issue here serves a similar anticorruption purpose and the SEC offers no persuasive reason why it should be treated any differently.

Indeed, many of the SEC's criticisms of the Rule rely on mere conjecture. But unsubstantiated fear that the Rule may someday be misapplied in a manner inconsistent with the First Amendment is not a reasonable basis for repealing it. It is insufficient to assert, as grounds for rescission, that the Rule covers some activities that carry a "relatively low risk of leading to pay-to-play practices." Proposed Rulemaking at 57,702. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). This tenet is true in the agency rulemaking context, too. In a suit challenging an FCC regulation under the First Amendment, the D.C. Circuit recently upheld a rule mandating disclosure of programming paid for by foreign governmental entities, noting that "a regulation need not be necessary in every conceivable application to be valid." *Nat'l Ass'n of Broads. v. FCC*, 147 F.4th 978, 1004 (D.C. Cir. 2025) (citing *Carlton & Harris Chiropractic, Inc.*

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[4] *See, e.g.*, Obra Cap. Mgmt., LLC, Investment Advisers Act Release No. 6662, 2024 WL 3875998 (Aug. 19, 2024); Canaan Mgmt., LLC, Investment Advisers Act Release No. 6126, 2022 WL 4288955 (Sep. 15, 2022); Blucora, Inc., Definitive Additional Materials (Schedule 14A) (Apr. 12, 2021), https://perma.cc/66T3-EKS3.

[5] *See* William Turton, *et al.*, *The FBI Anti-Corruption Squad Was Circling Susan Collins — Until Trump Got in the Way*, ProPublica (Sep. 22, 2026), https://perma.cc/GC7S-PU7J ("[Navatek CEO Martin] Kao and his close associates had donated nearly $900,000 to dozens of politicians, allowing Navatek to establish operations in half a dozen states with over $40 million a year in government funding. Most damningly, Kao told FBI agents and prosecutors, the company's work for the government was of no real value."); Shanna Ports, *Major Victory: CLC Complaint Delivers Rare Accountability for Maine Voters*, Campaign Legal Ctr. (May 5, 2025), https://perma.cc/5UAH-LMPZ.

v. PDR Network, LLC, 883 F.3d 459, 467-68 (4th Cir. 2018), for the proposition that "the mere fact that a regulation operates overbroadly does not render it invalid"). The court explained that creating "carveouts" for every broadcast lacking evidence of foreign interference would "cripple the efficacy of the [r]ule." *Id.* In upholding the FECA restriction on contributions by government contractors, the D.C. Circuit similarly noted that "a contribution ban need not be a perfect fit to be constitutional" and that "courts give substantial deference to the government's predictions of harm concerning its own employees and contractors." *Wagner*, 793 F.3d at 25 (citation omitted). The same principles apply here: the possibility that the Rule covers *some* conduct unlikely to implicate *quid pro quo* corruption does not justify rescinding it altogether.

II. The Commission fails to justify rescinding the Rule.

A. Rescinding the Rule would eliminate a vital safeguard against corruption and its appearance, and the remaining protections are insufficient to fill the gap.

The Rule has proved effective in identifying and deterring the kinds of contributions that provoked its enactment, and the SEC has not provided adequate reasons to abandon it—essentially opening the door to conduct that is either actually or apparently corrupt, and thus is presently subject to sanctions under the Rule. In 2024, the SEC enforced the Rule against a capital management company after an individual made a campaign contribution to a state official who had influence over hiring investment advisers for a state public pension fund and was then hired as a covered associate of the company, which provided advisory services to the pension fund.[6] In 2022, a covered associate of a venture capital fund in which the Regents of the University of California regularly invest made a contribution to a gubernatorial candidate.[7] Since the California Governor sits on the board of Regents and appoints other members of the board, the SEC found this fell within the purview of the Rule and subjected the venture capital fund to sanctions and penalties.[8] In 2018, covered associates of an asset management company donated more than $47,000 to candidates for Ohio state office who had influence over selecting advisers for a public pension system and a public university in Ohio.[9] Within two years, the company provided compensated advisory services for both.[10] The SEC found this violated the Rule and ordered the respondent to pay a $100,000 penalty.[11]

These enforcement actions are only the visible part of the Rule's effect. Because the Rule removes the financial payoff from contributions, it deters pay-to-play arrangements before they form, and it has prompted the implementation of valuable compliance infrastructure across the financial advisory industry. That schemes of the kind the Commission documented in 2010 appear to have become less common since the Rule was adopted indicates that the Rule is working as intended, not that it is no longer needed. And the underlying corruption risk has not disappeared. In 2015, Pennsylvania's elected State Treasurer, who oversaw the investment of state funds, resigned and pleaded guilty to attempted extortion for threatening to use the power of his office

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[6] *Supra* note 4, Obra Cap. Mgmt., LLC, 2024 WL 3875998.
[7] *Supra* note 4, Canaan Mgmt., LLC, 2022 WL 4288955.
[8] *Id.*
[9] *Supra* note 4, Blucora, Inc., Definitive Additional Materials, https://perma.cc/66T3-EKS3.
[10] *Id.*
[11] *Id.*

against firms doing business with the state unless they contributed to his campaign.[12] In sworn testimony, he acknowledged awarding a $50 million investment contract to a campaign donor who concealed the contribution by routing it through a third party.[13] That the related bribery prosecution of the investment adviser did not end in a conviction[14] is further confirmation of the Commission's 2010 finding that pay-to-play arrangements are "rarely explicit and often hard to prove." 75 Fed. Reg. 41,018, 41,022. The Proposed Rulemaking does not explain why the Commission now believes this risk has abated.

In its Proposed Rulemaking, the SEC makes no mention of the numerous instances of the Rule operating exactly as intended, and now suggests that other provisions already in place, including certain anti-fraud provisions of the Advisers Act and federal securities laws, will prevent investment advisers from using political contributions as a means of procuring lucrative public contracts should the SEC rescind the Rule. Proposed Rulemaking at 57,703. However, the provisions cited by the SEC either fail to provide advisers with adequate notice of prohibited conduct or rely on advisers to assess and regulate their own conduct for adherence to vaguely defined principles. Moreover, the "collective action problem" that the SEC aptly identified in 2010—namely, that left largely unregulated, investment advisers are incentivized to make political contributions for fear of being disadvantaged by being the only one *not* making contributions, 75 Fed. Reg. at 41,022—would once again present a major problem should the SEC rescind the Rule.

Specifically, the SEC points to Sections 206(1) and 206(2) of the Advisers Act, which make it unlawful for investment advisers to "employ any device, scheme, or artifice to defraud any client or prospective client" to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client" or "engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." Proposed Rulemaking at 57,703-04 (citing 15 U.S.C. § 80b-6). The SEC also notes that the Advisers Act's compliance rule, 17 C.F.R. 275.206(4)-7, and the code of ethics rule, 17 C.F.R. § 275.204A-1—by which registered investment advisers must abide—will remain in place if the Rule is rescinded. Proposed Rulemaking at 57,699. For reasons discussed below, even taken together, these provisions are inadequate to prevent the type of harm the SEC identified and confronted in enacting the Rule.

Prior to the Rule's enactment, the SEC relied on these provisions and other general anti-fraud provisions to combat pay-to-play schemes.[15] However, as the SEC noted in 2010, pay-to-play practices, while rampant, are exceedingly difficult to prove. 75 Fed. Reg. at 41,022. This is the complication which necessitated the Rule in the first place. *See supra* Part I.A. To establish a

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[12] *See* Press Release, U.S. Att'y's Off., M.D. Pa., Former Pennsylvania Treasurer Robert M. McCord Pleads Guilty to Two Counts of Attempted Extortion (Feb. 17, 2015), https://www.justice.gov/usao-mdpa/pr/former-pennsylvania-treasurer-robert-m-mccord-pleads-guilty-two-counts-attempted.

[13] Marc Levy, *Ex-state treasurer forced to acknowledge more abuse of power*, AP (Mar. 20, 2017), https://apnews.com/article/2bf23322a6dc4c1b95635d9b50f8d4a1.

[14] *Ex-Pennsylvania treasurer sentenced to 2 1/2 years in prison*, FOX29 Phila. (Aug. 29, 2018), https://perma.cc/ZMH7-D56S.

[15] *See, e.g.*, Third Am. Compl., *SEC v. Morris*, 09-CV-2518(CM) (S.D.N.Y. May 12, 2009), ECF No. 22.

violation of Section 206(1) or 206(2), the SEC must prove that fraud or deception actually occurred, along with the requisite mental state.[16] Specifically, courts have determined that establishing a violation of Section 206(1) requires a showing of scienter and a violation of Section 206(2) requires a showing of negligence. *See, e.g.*, *Steadman v. SEC*, 603 F.2d 1126, 1129-34 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981); *SEC v. Steadman*, 967 F.2d 636, 643, 647 (D.C. Cir. 1992). Scienter, which is a "mental state embracing intent to deceive, manipulate, or defraud," *see Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011), or can otherwise be established by a "showing of knowing misconduct or severe recklessness," *see SEC v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014), is a high bar to clear. Negligence requires less—only a showing that an investment adviser failed to exercise "reasonable care," *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963). Establishing the requisite mental state has proven difficult in cases where the key evidence is a financial contribution and a contract subsequently awarded to the contributor or someone associated with them. Thus, the practical difficulties of meeting these standards of proof limited their effectiveness, such that the Rule was specifically designed to overcome this evidentiary obstacle to enforcement. The Rule, in contrast to Section 206(1) or 206(2), turns on objective facts—a contribution, a covered official, and compensated advisory services within the two-year window—and requires no proof of a *quid pro quo* or of any intent to influence. That is precisely what allows the Rule to reach conduct that general anti-fraud provisions, in practice, cannot reach.

Rule 204A-1, the code of ethics rule, likewise constitutes an inadequate substitute for the Rule because it grants investment advisers broad discretion in defining for themselves the ethical standards governing their conduct. This rule provides that those registered or required to register as an investment adviser must establish and maintain codes of ethics that include standards of business conduct, provisions requiring adherence to federal securities laws, and various other reporting requirements. 17 C.F.R. § 275.204A-1. But it was evident to the SEC in 2010 that advisers cannot be left to regulate themselves; that is why the Rule was adopted. *See* 75 Fed. Reg. 41,018, 41,022 ("Pay to play practices . . . will not stop through voluntary efforts."). Rule 204A-1 provides no specific guidance about what advisers' codes of ethics must contain, nor does it mandate that they include anything at all with respect to political contributions—giving advisers wide latitude to devise and implement guidelines that they subjectively believe align with their fiduciary obligations. Rescinding the Rule would recreate the deeply problematic, pre-2010 environment in which companies have little or no incentive to design their codes of ethics to prohibit their agents or affiliates from making financial contributions to potentially influential elected officials or candidates. Opting to do so would, after all, likely make them less competitive in the marketplace for government contracts relative to firms that allow their agents and affiliates to make political contributions. Additionally, these codes of ethics impose constraints only on the advisers subject to them—they do not reach any officials explicitly or implicitly demanding donations in exchange for a government contract. Because Rule 204A-1 does not impose meaningful, substantive limitations on advisers' ability to enter into *quid pro quo* arrangements by

[16] *See* Douglas Paul, Ashley Akapo & Alyaa Chace, *SEC Proposal to Ax Pay-to-Play Rule Leaves Many Risks Untouched*, Bloomberg L. (Oct. 13, 2026), https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/sec-proposal-to-ax-pay-to-play-rule-leaves-many-risks-untouched.

making political contributions, it is an ill-suited substitute for the Rule to deter pay-to-play practices.

A third problem is that the compliance rule and the code of ethics rule apply only to investment advisers *registered* (or required to be registered) with the SEC, while the Rule more broadly applies to registration-exempt reporting advisers and foreign private advisers. The SEC waves off this problem by pointing to the fact that "registered investment advisers manage a significant amount of public pension plan assets or other public funds and, therefore, represent the highest risk of engaging in pay-to-play practices." Proposed Rulemaking at 57,705. But a "significant amount" does not mean all. In fact, several of the enforcement actions the SEC has brought under the Rule have been against unregistered advisers who still fall within the purview of the Rule,[17] demonstrating that these schemes are not confined to registered advisers. The compliance and code of ethics rules thus fail to regulate a class of advisers who engage in precisely the type of pay-to-play misconduct targeted by both the Rule and these other measures, underscoring the Rule's indispensability.

Finally, the SEC's argument that state regulations will act as a safeguard *against quid pro quo* contributions is similarly faulty. Some states and localities have enacted pay-to-play restrictions, but they form a patchwork: many predate the Rule, many reach only particular offices or contracts, and the Proposed Rulemaking does not identify which states restrict contributions by advisers to the officials who select managers for public pension, defined contribution, and 529 plans, or what those laws cover.[18] More fundamentally, leaving the regulation of pay-to-play practices to state law places the decision of whether to restrict contributions in the hands of the very officials who receive them—an untenable situation. A uniform federal rule is necessary precisely because the elected officials who select advisers (and who benefit from advisers' contributions) cannot be relied upon to enact and comply with meaningful restrictions on themselves. And in states without such laws, advisers that wish to compete on merit will again face the collective action problem that the Commission identified in 2010. Thus, the SEC's reliance on state legislation as a stopgap is misguided: the SEC cannot assume state regulations will provide a stable or effective substitute for a uniform federal rule.

B. The Commission has not supplied a reasoned explanation for abandoning its 2010 findings.

An agency changing course must "display awareness that it is changing position" and show "good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

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[17] *See, e.g.*, Starvest Mgmt., Inc., Investment Advisers Act Release No. 6129, 2022 WL 4288959 (Sep. 15, 2022).

[18] For example, in 2023, New Jersey elected to restrict business entities from entering into contracts for $17,500 or more requiring approval by a presiding officer if the entity has made a contribution to the officer's candidate committee. N.J.S.A. 19:44A-20.3. Connecticut's campaign finance laws provide that no principal of an investment services firm shall make a contribution to a committee or candidate for the office of state treasurer if the treasurer pays compensation, expenses or fees, or issues a contract to such firm. Conn. Gen. Stat. § 9-612(e)(2). In 2018, New York codified a ban on the use of placement agents or intermediaries in assisting investment managers to obtain investments by the state retirement fund. N.Y. Retire & Soc. Sec. Law § 424-a.

Where the "new policy rests upon factual findings that contradict those which underlay its prior policy," or the prior policy "has engendered serious reliance interests," the agency must provide "a more detailed justification." *Id.* "Unexplained inconsistency" is a reason to hold a policy change arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). And a rescission is reviewed under the same standard as the adoption of a rule in the first instance. *State Farm*, 463 U.S. at 41-42.

The 2010 Adopting Release, which explained the SEC's basis for adopting the Rule, rests on findings that the Proposed Rulemaking contradicts but does not refute: that pay-to-play practices were widespread; that they distort adviser selection and harm plans and their beneficiaries, including 529 plans; that the arrangements are "rarely explicit and often hard to prove"; and that the general antifraud provisions had proven inadequate to address them. *See supra* Part I.A. The Proposed Rulemaking's central premise—that existing antifraud provisions, compliance obligations, and state law are now sufficient—is the very same proposition the Commission rejected in 2010. If the Commission now changes course to embrace that premise, it must identify what has changed, such as through evidence that pay-to-play practices have abated for reasons other than the Rule itself, that the antifraud provisions now reach this conduct, or that its 2010 findings were mistaken. A rule's success in deterring the conduct it targets is evidence of its effectiveness—not its obsolescence. The Proposed Rulemaking does not provide any such evidence.

Rescission would also leave a gap the Proposed Rulemaking fails to acknowledge, as discussed above. Most states have no pay-to-play restriction on investment advisers at all, and the Proposed Rulemaking does not identify what rules would govern adviser contributions in those states, once the Rule is removed. *See supra* Part II.A. Indeed, for most of the country, because the Rule is the only such restriction, rescinding it would leave nothing in its place. An agency that eliminates a safeguard without determining what, if anything, remains has failed to consider "an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Rescission would also disturb the reliance interests of the advisers themselves. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-33 (2020). Since 2010, the Commission has required advisers with government clients to maintain written pay-to-play policies and contribution records, 17 C.F.R. §§ 275.204-2(a)(18), 275.206(4)-7, and advisers have built the preclearance, screening, and training systems those rules require.[19] These are the very compliance costs the Proposed Rulemaking now counts as savings. *See* Proposed Rulemaking at 57,712-13 (burden estimates); *id.* at 57,713 (acknowledging that some firms may appropriately retain existing controls and that transition costs will be higher for advisers in states with their own restrictions); *see also* 75 Fed. Reg. at 41,054 (2010 burden estimates). Rescission would not relieve those advisers of a burden so much as penalize them—having built compliance programs and competed on merit, they would now face rivals free to buy an advantage through contributions, reviving the collective-action pressure the Commission identified in 2010. *See* 75 Fed. Reg. at

[19] *See, e.g.*, Benjamin Neaderland, *et al.*, *SEC Proposes Rescinding Investment Adviser Pay-to-Play Rule, but Compliance Risks Remain*, WilmerHale (Sep. 14, 2026), https://perma.cc/64DY-B48U (advising advisers to "continue to apply existing preclearance, screening, training, certification, monitoring, escalation, and recordkeeping protocols" pending final action).

41,022. As a result, rescission is likely to impose *greater* costs by requiring advisers to develop and implement policies that address the renewed potential for pay-to-play conduct.

Finally, if the proposed rescission rests in any part on the view that the Rule is constitutionally suspect (a view expressed in statements accompanying the Proposed Rulemaking) that legal premise is mistaken. The D.C. Circuit has upheld materially identical timeout rules against a First Amendment challenge. *See Blount*, 61 F.3d at 944-48; *N.Y. Republican State Comm*., 927 F.3d 499. Agency action premised on a legal error cannot stand, even if the agency might reach the same result on a correct understanding of the law. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985). The Commission should state whether its action depends on constitutional concerns and, if it does not, should rest its decision on a policy rationale that engages with the record.

Conclusion

For the foregoing reasons, the SEC should withdraw this Proposed Rulemaking, which would invite a return to the corruption and fraud in the government contracting process that existed prior to the Rule's enactment. Such a move would harm the millions of Americans reliant on the faithful administration of public pension plans, and particularly those who participate in 529 plans and public defined contribution plans. The Rule is appropriately tailored to respond to the specific pay-to-play schemes the SEC identified as particularly difficult to detect and prove. The Commission should preserve this framework that has successfully protected the integrity of the public investment regime for more than fifteen years.

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Respectfully submitted,

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