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By Email to comments@sec.gov

The Commissioners
U.S. Securities and Exchange Commission
100 F. St. NE
Washington, DC 20549

Re: Political Contributions by Certain Investment Advisers, File No. S7-18-09

To the Commissioners:

I submit this comment letter concerning the Commission's proposed rule concerning "pay to play" practices by investment advisers, as a follow-up to my prior comment letter dated Aug. 3, 2009.[1] I write to bring the Commission's attention to the U.S. Supreme Court's decision today in *Citizens United v. FEC*, No. 08-205 (Jan. 21, 2010), which holds that corporations have a constitutionally protected right to political speech. The *Citizens United* decision indicates that the SEC's proposed rule, as it is currently written, would violate the right to free political speech as guaranteed by the First Amendment to the U.S. Constitution.[2]

The proposed rule generally forbids political contributions by an investment adviser who seeks to provide advice to state and local governments, in connection with the campaign of an elected official who in a position to influence the selection of an adviser for those state and local governments, or to a political party in that jurisdiction. An individual associated with an investment adviser (a "covered associate") may make contributions not in excess of $250 to state or local officials for whom the individual is eligible to vote. However, a covered associate may not make a political contribution to an elected official

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[1] My prior comment letter, in which I argued that aspects of the proposed rule are inconsistent with *Randall v. Sorrell*, 548 U.S. 230 (2006), is posted on the Commission's website at http://www.sec.gov/comments/s7-18-09/s71809-2.pdf.

[2] I am a partner in the broker-dealer group at Bingham McCutchen LLP, where I advise investment advisers and other financial services firms on compliance with the federal securities laws and rules. I was formerly General Counsel of Charles Schwab & Co., Inc., and previously was Assistant General Counsel for Market Regulation at the SEC. I am currently chair of the ABA Business Law Section's Subcommittee on Trading and Markets. I submit this comment solely in my personal capacity.

for whom he or she is not entitled to vote, and may not make contributions to state or local political parties.

In *Citizens United*, the Supreme Court held that "Prohibited, too, are restrictions on speech distinguishing among different speakers." *Slip op*. at 24. As the Court explained:

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id. As a result, the Court held that "We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 50. The clear and unavoidable holding of *Citizens United* requires the Commission to allow investment advisory firms (and not merely some of their covered associates) to make political contributions. As the Court stated, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers." *Id.* at 25.

Moreover, after *Citizens United*, the bar in the proposed rule on contributions by covered associates to issuer officials for whom they cannot vote, or to political parties, cannot stand. The dissent attempted to distinguish corporations from individuals on the basis that corporations "cannot vote or run for office." *Id.* (Stevens, J., dissenting, *slip op*. at 2). As discussed above, the *Citizens United* majority rejected this distinction, and insisted on a strict non-discrimination principle, whether or not a person or entity can vote for the candidate at issue. The same non-discrimination principle would require the SEC to allow every covered associate (not merely those who are able to vote for a given candidate) to contribute to the candidate of their choice. Moreover, as one of the concurrences points out, "the individual person's right to speak includes the right to speak *in association with other individual persons*" (Scalia, J., concurring, *slip op*. at 7, emphasis in original), and specifically cites political parties as the paradigmatic example of that right. *Id.* at 8. The bar in the proposed rule on contributions to political parties (either by investment advisers, or covered associates), cannot survive *Citizens United.*

Finally, it has been suggested that the proposed rule could be defended on the ground that it does not absolutely bar political contributions; it merely bars seeking investment advisory work from state or local governments after having made those political contributions. Once again, this argument cannot survive *Citizens United.* Similarly, in that case, the government argued that the corporation could speak by organizing a political action committee, or by speaking at times other than the 30 days prior to an election. The Court majority rejected these arguments, stating that "As a 'restriction on

the amount of money a person or group can spend on political communication during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Slip op*. at 22 (*quoting Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) (*per curiam*)). As the Court went on to hold, "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 23. In short, the fact that proposed rule discourages and burdens political speech by imposing onerous consequences upon the exercise of the free speech right, rather than outright banning political speech, does not change the First Amendment analysis. After *Citizens United,* the imposition of a burden on political free speech triggers First Amendment scrutiny.

I recognize that *Citizens United* involved independent expenditures, while the proposed rule addresses contributions, broadly defined.[3] However, the issues necessarily addressed in reaching the Court's holdings are directly applicable to contributions as well - no one could reasonably interpret *Citizens United* to permit the government to bar corporate contributions directly to political campaigns. For the reasons expressed here and in my previous comment letter, the proposed rule as currently written would need to be substantially altered to be consistent with *Citizens United* and *Randall v. Sorrrell.* To survive First Amendment scrutiny, the Commission would have to: (1) raise the contribution limit in the proposed rule to at least $1000, (2) amend the proposed rule to allow for contributions of at least $1000 to political parties, (3) allow investment advisers to make such contributions as well as covered associates; (4) eliminate the restriction on contributions to candidates for which a person is not entitled to vote; (5) eliminate the "anything of value" restriction on contributions in kind; (6) eliminate the prohibition on

[3] The definition of "contribution" in the proposed rule is "any gift, subscription, loan, advance, or deposit of money or anything of value made for: (i) The purpose of influencing any election for federal, state or local office[.]" As such, the definition of "contribution" appears broad enough to include independent expenditures - nothing in the definition requires that the contribution be made directly to the candidate or the candidate's campaign committee. We note that the MSRB has interpreted its parallel language to apply, at a minimum to contributions to non-political housekeeping, conference and overhead accounts of political organizations. See MSRB, Interpretative Letters to Rule G-37 (available at http://www.msrb.org/msrb1/rules/interpg37.htm). The MSRB does not appear to have addressed whether an independent expenditure on behalf of a candidate would constitute a "contribution" under its definition. If the Commission means to permit independent expenditures, it should clarify the definition of "contribution" in the proposed rule.

campaign volunteers soliciting contributions; and (7) index its contribution limits to inflation.[4]

With the changes I have outlined above, it is possible that a revised proposed rule, with higher, indexed contribution limits available to both investment advisory firms and covered associates and without many of the accompanying restrictions, could survive constitutional scrutiny. That being said, I would suggest the Commission seriously evaluate a disclosure-based approach to pay-to-play as a substitute for the absolute prohibitions contained in the proposed rule. I would be happy to discuss this issue with the Commission or its Staff.

Sincerely yours,

W. Hardy Callcott

[4] As I did in my earlier letter, I suggest the Commission direct the MSRB to reconsider Rule G-37 in light of *Citizens United* and *Randall.* Otherwise, any cases brought under that rule also will be vulnerable to challenge.