



April 15, 2016

VIA ELECTRONIC MAIL

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: MSRB Pay-to-Play Amendments, File No. SR-MSRB-2015-14

To the Chair and Commissioners:

For the reasons discussed below, the Center for Competitive Politics (“CCP”)¹ urges the Commission to act on its own initiative, pursuant to 17 C.F.R. § 201.431(c), and order review of recent amendments to MSRB Rule G-37 that were deemed approved due to inaction by delegated authority. The concerns recently identified by the Commission in instituting proceedings regarding proposed FINRA Rules 2030 and 4580 apply with equal or greater force to these amendments and counsel in favor of their review by the Commission. *See* 81 Fed. Reg. 19260 (Apr. 4, 2016) (the “Order”),² File Number SR-FINRA-2015-056; 80 Fed. Reg. 81709 (Dec. 30, 2015),³ File No. SR-MSRB-2015-14.

In instituting proceedings regarding the FINRA proposal, the Commission stated, “Institution of proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal.” Order, 81 Fed. Reg. at 19268. It also noted that the Exchange Act forbids rules that impose unnecessary or inappropriate burdens on competition. *Id.*; *see* 15 U.S.C. § 78o-3(b)(9).

¹ The Center is a § 501(c)(3) organization founded to educate the public concerning the benefits of increased freedom and competition in the electoral process. Toward that end, CCP engages in research, scholarship, and outreach to protect and promote the First Amendment rights of speech, assembly, and petition. CCP also operates a pro bono law center that brings legal challenges to state and federal laws and regulations that unconstitutionally burden the exercise of these freedoms.

² Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Instituting Proceedings To Determine Whether to Approve or Disapprove Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 to Establish “Pay-To-Play” and Related Rules, 81 Fed. Reg. 19260 (Apr. 4, 2016).

³ Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to Rule G-37, on Political Contributions and Prohibitions on Municipal Securities Business, Rule G-8, on Books and Records, Rule G-9, on Preservation of Records, and Forms G-37 and G-37x, 80 Fed. Reg. 81709 (Dec. 30, 2015).

FINRA's proposal raises a host of legal and policy issues. As discussed in the Order, First Amendment infirmities include contribution limits that are so low as to unconstitutionally harm the electoral process; impermissible discrimination between the types of speakers contributors may support; overbreadth in the scope of look-back provisions and the rules' application to independent contractors; vagueness; and insufficient tailoring to satisfy constitutional scrutiny. In addition, FINRA's proposal raises concerns that the rules, if adopted, would be *ultra vires* because Congress has not empowered FINRA or the SEC to regulate federal political contributions, and because any such regulation would be preempted by the Federal Election Campaign Act, which creates a comprehensive system of campaign finance regulation and empowers only the Federal Election Commission to regulate federal campaigns.

The MSRB's recent amendments to Rule G-37 raise the same legal and policy issues, and the Exchange Act similarly forbids MSRB rules that create unnecessary and inappropriate regulatory burdens on small municipal advisors. *See* 15 U.S.C. 78o-4(b)(2)(L)(iv). As discussed in CCP's January 20, 2016 comments to both the FINRA and MSRB Pay-to-Play Rules, File Nos. SR-MSRB-2015-14 and SR-FINRA-2015-056 (the "Letter"), the MSRB's amendments suffer from the same constitutional infirmities. The contribution limits are unconstitutionally low and impede even volunteer work for campaigns. *See* Letter at 3-4. The MSRB amendments also discriminate unconstitutionally between the types of speakers contributors may support. *See id.* at 4-5. Indeed, the MSRB amendments raise greater concerns than the FINRA proposal because of the amendments' complete ban on contributions to certain candidates. *Id.* at 5.

Further, like the FINRA proposal, the look-back provisions and the independent contractor provisions in the MSRP amendments are overbroad and fall short of the narrow tailoring required by the First Amendment. *Id.* at 6-7, 9-10. And definitions in the MSRB amendments are likewise impermissibly vague, such that they would unconstitutionally chill protected speech. *Id.* at 7-9.⁴

Finally, the MSRB proposal similarly raises concerns that the amendments infringe upon matters that Congress explicitly regulated under FECA, not the Exchange Act, and delegated to the FEC, and not to any other organization. Letter at 7; State Letter at 2.

The Commission has authority to order review of the MSRB rulemaking at any time. The Commission delegated authority to review MSRB rulemaking to the Director of the Division of Trading and Markets. 17 C.F.R. § 200.30-3(a)(12). Because the Director failed to act on the MSRB amendments within 45 days, the amendments were deemed to have been approved by the Commission, 15 U.S.C. § 78s(b)(2)(D). Because the "Commission may, on its own initiative, order review of any action made pursuant to delegated authority at any time," 17 C.F.R. § 201.431(c), the Commission may review the Director's "approval" of the MSRB amendments.

⁴ Compare Comment by H. Christopher Bartolomucci, Bancroft PLLC, on behalf of the New York Republican State Committee and the Tennessee Republican Party in Opposition to Proposed FINRA Rules 2030 and 4580, at 2, File No. SR-FINRA-2015-056, Jan. 20, 2016, with Comment by H. Christopher Bartolomucci, Bancroft PLLC, on behalf of the New York Republican State Committee and the Tennessee Republican Party in Opposition to Proposed MSRB Amendments to Rule G-37 ("State Letter"), at 2, File No. SR-MSRB-2015-14, Jan. 20, 2016 (arguing that both the FINRA proposal and the MSRB amendments fail because they restrict "constitutionally protected conduct in a manner that is not sufficiently tailored to serve a sufficiently important government interest").

Moreover, “to bring [the] matter before the Commission for review” requires the vote of only “one member of the Commission.” *Id.*; 15 U.S.C. § 78d-1(b).⁵

Given the similar policy and legal issues raised by both the MSRB amendments and the proposed FINRA pay-to-play rules, we urge the Commission to exercise its authority to order review of the MSRB amendments in conjunction with the review it has ordered of the FINRA proposals.

Respectfully,



Allen Dickerson
Legal Director

⁵ Under 17 C.F.R. § 200.30-3(a)(12), two or more Commissioners must notify the Director within five business days of the Director’s disapproval of rulemaking if they intend to withdraw the Director’s authority to disapprove the proposed rule change. However, that provision states that it applies only to situations where the Director intends to disapprove the proposed rule change. Because 17 C.F.R. § 200.30-3(a)(12) does not govern situations where the Commission wishes to review *approval* of rulemaking—where such time and manner provisions are required by 15 U.S.C. § 78d-1(b)—review of the MSRB amendments must be governed by the general time and manner regulations at 17 C.F.R. § 201.431(c). Under the general time and manner regulations, a single Commissioner may order review of delegated authority at any time. *See* 17 C.F.R. § 201.431(c). Furthermore, the provision governing disapproval of proposed rule changes at 17 C.F.R. § 200.30-3(a)(12) is *ultra vires*, as it violates the governing statutory authority at 15 U.S.C. § 78d-1(b) by requiring the votes of two Commissioners rather than one to institute review.