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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[RELEASE NO. IA-4511; File No. S7-16-16]

**Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation;
Notice of Order with respect to FINRA Rule 2030**

AGENCY: Securities and Exchange Commission.

ACTION: Notice of intent to issue order.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) intends to issue an order pursuant to section 206 of the Investment Advisers Act of 1940 (the “Advisers Act”) and rule 206(4)-5 thereunder (the “SEC Pay to Play Rule”) finding that Financial Industry Regulatory Authority (“FINRA”) rule 2030 (the “FINRA Pay to Play Rule”), which was approved by the Commission on August 25, 2016, imposes substantially equivalent or more stringent restrictions on brokers-dealers than the SEC Pay to Play Rule imposes on investment advisers and is consistent with the objectives of the SEC Pay to Play Rule.

DATES: Hearing requests should be received by the Commission by 5:30 p.m. on September 19, 2016.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

FOR FURTHER INFORMATION CONTACT: Sirimal R. Mukerjee, Senior Counsel, Melissa Roverts Harke, Senior Special Counsel, or Sara Cortes, Assistant Director, at (202) 551-6787 or IArules@sec.gov, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION:

Hearing or Notification of Hearing

An order will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary. Hearing requests should be received by the Commission by 5:30 p.m. on September 19, 2016. Pursuant to rule 0-5 under the Advisers Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

The Commission intends to issue an order under the Advisers Act.¹

I. Background

The Commission adopted the SEC Pay to Play Rule [17 CFR 275.206(4)-5] under the Advisers Act [15 U.S.C. 80b] to prohibit an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees ("covered associates") make a contribution to certain elected officials or candidates.² Rule 206(4)-5 also prohibits an adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any third-party for a solicitation of advisory business from any government entity on behalf of such adviser, unless such third-party is a "regulated person" ("third-party solicitor ban").³ Rule 206(4)-5 defines a "regulated person"

¹ 15 U.S.C. 80b. Unless otherwise noted, all references to statutory sections are to the Advisers Act, and all references to rules under the Advisers Act, including rule 206(4)-5, are to Title 17, Part 275 of the Code of Federal Regulations [17 CFR part 275].

² *Political Contributions by Certain Investment Advisers*, Investment Advisers Act Rel. No. 3043 (July 1, 2010) [75 FR 41018 (July 14, 2010)] ("SEC Pay to Play Rule Release").

³ *See id.* at section II.B.2.(b). *See also* 17 CFR 275.206(4)-5(a)(2)(i)(A).

as an SEC-registered investment adviser,⁴ a registered broker or dealer subject to pay to play restrictions adopted by a registered national securities association that prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made,⁵ or a registered municipal advisor subject to pay to play restrictions adopted by the Municipal Securities Rulemaking Board (the “MSRB”) that prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made.⁶ In addition, in order for a broker-dealer or municipal advisor to be a regulated person under rule 206(4)-5, the Commission must find, by order, that these pay to play rules: (i) impose substantially equivalent or more stringent restrictions on broker-dealers or municipal advisors than the SEC Pay to Play Rule imposes on investment advisers; and (ii) are consistent with the objectives of the SEC Pay to Play Rule.⁷

Rule 206(4)-5 became effective on September 13, 2010 and the compliance date for the third-party solicitor ban was set to September 13, 2011.⁸ When the Commission added municipal advisors to the definition of regulated person, the Commission also extended the third-party solicitor ban’s compliance date to June 13, 2012.⁹ In the absence of a final municipal advisor registration rule, the Commission extended the third-party solicitor ban’s compliance

⁴ See 17 CFR 275.206(4)-5(f)(9)(i).

⁵ See 17 CFR 275.206(4)-5(f)(9)(ii). While rule 206(4)-5 applies to any registered national securities association, FINRA is currently the only registered national securities association under section 19(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78s(b)] (the “Exchange Act”). As such, for convenience, we will refer directly to FINRA in this Notice when describing the exception for certain broker-dealers from the third-party solicitor ban.

⁶ See 17 CFR 275.206(4)-5(f)(9)(iii).

⁷ See 17 CFR 275.206(4)-5(f)(9).

⁸ See SEC Pay to Play Rule Release, *supra* footnote 2, at section III.

⁹ See *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Rel. No. 3221 (June 22, 2011) [76 FR 42950 (July 19, 2011)], at section II.D.1.

date from June 13, 2012 to nine months after the compliance date of the final rule,¹⁰ which was July 31, 2015.¹¹ On June 25, 2015, the Commission issued notice of the July 31, 2015 compliance date.¹²

On December 16, 2015, FINRA filed with the Commission the proposed rule change relating to the FINRA Pay to Play Rule, which the Commission published for notice and comment in the *Federal Register* on December 30, 2015 pursuant to section 19(b)(1) of the Exchange Act and rule 19b-4 thereunder.¹³ The Commission received ten comment letters, from nine different commenters, in response to the FINRA Pay to Play Rule Notice. On February 8, 2016, FINRA extended the time period by which the Commission must approve or disapprove the FINRA Pay to Play Rule or institute proceedings to determine whether to approve or disapprove the rule change to March 29, 2016. On March 28, 2016, FINRA filed a letter with the Commission stating that it had considered the comments received by the Commission in response to the FINRA Pay to Play Rule Notice and that FINRA is not intending to make changes to the proposed rule text in response to comments received. On March 29, 2016, pursuant to delegated authority, the Commission published an order instituting proceedings

¹⁰ See *Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Extension of Compliance Date*, Investment Advisers Act Rel. No. 3418 (June 8, 2012) [77 FR 35263 (June 13, 2012)].

¹¹ The final date on which a municipal advisor must file a complete application for registration was October 31, 2014. See *Registration of Municipal Advisors*, Exchange Act Rel. No. 70462 (Sept. 20, 2013) [78 FR 67468 (Nov. 12, 2013)], at section V.

¹² See *Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Notice of Compliance Date*, Investment Advisers Act Rel. No. 4129 (June 25, 2015) [80 FR 37538 (July 2, 2015)]. On June 25, 2015, the Division of Investment Management published an FAQ that provides that the Division would not recommend enforcement action to the Commission against any investment adviser or its covered associates for the payment to any third person to solicit a government entity for investment advisory services until the later of (i) the effective date of the FINRA Pay to Play Rule or (ii) the effective date of a pay to play rule adopted by the MSRB. See <http://www.sec.gov/divisions/investment/pay-to-play-faq.htm#1.4>.

¹³ See *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 To Establish “Pay-To-Play” and Related Rules*, Exchange Act Rel. No. 76767 (Dec. 24, 2015) [80 FR 81650 (Dec. 30, 2015)] (the “FINRA Pay to Play Rule Notice”).

under section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the FINRA Pay to Play Rule, and solicited additional comment. The Commission received an additional four comments in response to the order instituting proceedings. On July 6, 2016, FINRA submitted a letter responding to all comments and to the order instituting proceedings. After considering the proposed rule change, the comments received and FINRA's responses to the comments, the Commission issued an order on August 25, 2016, approving the proposed rule change pursuant to section 19(b)(2) of the Exchange Act.¹⁴

II. Discussion of Order

Pursuant to section 206 of the Advisers Act and rule 206(4)-5(f)(9)(ii)(B) thereunder, the Commission is providing notice¹⁵ that the Commission intends to issue an order finding that the FINRA Pay to Play Rule (i) imposes substantially equivalent or more stringent restrictions on brokers-dealers than the SEC Pay to Play Rule imposes on investment advisers and (ii) is consistent with the objectives of the SEC Pay to Play Rule. The FINRA Pay to Play Rule imposes substantially similar requirements for its member firms as the SEC Pay to Play Rule imposes on investment advisers. For example, the FINRA Pay to Play Rule:

- Prohibits a covered member from engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to such government entity within two years after a contribution to an official of the government entity is made by the covered member or a covered associate (including a person who

¹⁴ See *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Adopt FINRA Rule 2030 and FINRA Rule 4580 to Establish "Pay-To-Play" and Related Rules*, Exchange Act Rel. No. 78683 (Aug. 25, 2016).

¹⁵ See section 211(c) of the Advisers Act (requiring the Commission to provide appropriate notice and opportunity for hearing for orders issued under the Advisers Act).

becomes a covered associate within two years or, under certain circumstances, six months after the contribution is made);¹⁶

- Prohibits a covered member or covered associate from coordinating or soliciting any person or political action committee to make any (i) contribution to an official of a government entity in respect of which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser or (ii) payment to a political party of a state or locality of a government entity with which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser;¹⁷
- Provides that it shall be a violation of the rules for any covered member or any of its covered associates to do anything indirectly that, if done directly, would result in a violation of the rule;¹⁸
- Provides that a covered member that engages in distribution or solicitation activities with a government entity on behalf of a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though the covered member was engaging in or seeking to engage in distribution or solicitation activities with the government entity on behalf of the investment adviser to the covered investment pool directly; and¹⁹

¹⁶ See FINRA Pay to Play Rule Notice, *supra* footnote 13, at 81651.

¹⁷ See *id.* at 81653.

¹⁸ See *id.* at 81654.

¹⁹ See *id.*

- Provides exceptions under, and an exemption provision in respect of, the rule similar to those in rule 206(4)-5.²⁰

The Commission believes that the rule imposes substantially equivalent or more stringent restrictions on broker-dealers than rule 206(4)-5 imposes on investment advisers and would be consistent with the objectives of rule 206(4)-5.

By the Commission.

Dated: August 25, 2016.

Brent J. Fields,
Secretary

²⁰ *See id.* In addition, FINRA adopted rule 4580 that requires covered members to maintain books and records related to the FINRA Pay to Play Rule.

