

# The Constitutionality of the SEC Pay to Play Rule: Why 206(4)-5 Survives the Deregulatory Trend in Campaign Finance

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*Campaign finance law seeks a balance between two frequently competing interests — protection of the individual's First Amendment right to political expression and prevention of the corrupting effects of money in politics. Recent campaign finance decisions from the Roberts Court have exhibited a markedly deregulatory approach, striking down a number of campaign contribution limits. In light of this, an SEC rule which limits the campaign contributions of investment advisers and their employees has been challenged. Rule 206(4)-5 is a prophylactic measure that seeks to prevent pay to play arrangements, in which investment advisers make campaign contributions to public officials in return for being selected for lucrative government contracts for the management of public funds. This Note argues that Rule 206(4)-5 should survive constitutional challenge, even under the most unfavorable existing Supreme Court decisions, because it counters direct quid pro quo corruption. Further, this Note contends that courts should look beyond traditional campaign finance analysis to recognize the SEC's unique, compelling interest in preserving the integrity of the markets and protecting the investments of public fund beneficiaries. The SEC's special anti-fraud interest and status as an independent agency call for deference to its choice of regulatory design in adopting Rule 206(4)-5.*

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## I. INTRODUCTION

Private investment advisers in the United States are entrusted with the responsible financial management of millions of dollars in public funds comprised of taxpayer and retiree contributions.<sup>1</sup> Most significantly, advisers realize important gains from the large asset base of government pension plans,<sup>2</sup> whose proper investment and stable growth is essential to the future economic sustainability of many Americans.<sup>3</sup> Under contracts with the government, advisers reap sizable profits from both flat fees and marginal returns.<sup>4</sup> In view of eye-catching profit-making opportunities, the interest in securing such contracts is compelling. Formally, such contracts are awarded on the merits of investment adviser proposals in competitive bidding processes.<sup>5</sup> In practice, the winning bid is selected by public officials who may secretly promise to select a particular adviser in return for money or other

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1. Moreover, the share of public funds invested with alternative asset managers has grown substantially over the past years, as U.S. public pension funds have sought higher yield and greater risk exposure. See INTERNATIONAL MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT, 29 (2013).

2. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE STATISTICAL RELEASE, 94-7 (Sept. 18, 2015), <http://www.federalreserve.gov/releases/z1/current/z1.pdf> [<http://perma.cc/LTG5-8F8Y>] (showing 2014 state and local public employee retirement funds with an asset base of over \$3 trillion and 2014 state and local government employee retirement funds with an asset base of over \$1 trillion); see also Louis A. Aguilar, Commissioner, SEC, Speech at the Latinos on Fast Track Investors Forum: Evaluating Pension Fund Investments through the Lens of Good Corporate Governance (June 27, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370542193403> [<http://perma.cc/BH67-RKSJ>] (documenting that by 2011 public pension assets grew to over \$4.3 trillion, the number of contributors to these funds grew to more than 32.7 million, and annual contributions grew to more than \$284 billion).

3. See KEITH P. AMBACHTSHEER & D. DON EZRA, PENSION FUND EXCELLENCE: CREATING VALUE FOR STOCKHOLDERS 108 (John Wiley & Sons eds., 1st ed. 1998) (for pension funds, there is a need to ensure predictable long-term returns with the appropriate amount of risk).

4. The industry standard for fees applied by hedge funds, private equity funds, and venture capital funds is a management fee of 2% and a performance fee of 20% on any profits made. DAVID STOWELL, AN INTRODUCTION TO INVESTMENT BANKS, HEDGE FUNDS, AND PRIVATE EQUITY 199 (Academic Press ed., 1st ed. 2010). This is commonly referred to as the “two and twenty” rule. Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 3 (2008).

5. See e.g., JOSEPH I. MARTIN, COMMONWEALTH OF MASSACHUSETTS, PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION, THE COMPETITIVE BID PROCESS (2002), <http://www.mass.gov/perac/training/competitivebidprocess.pdf> [<http://perma.cc/89S5-5BMW>] (outlining the bidding process held by the Massachusetts Public Employee Retirement Administration Commission).

inducements.<sup>6</sup> In so-called “pay to play” arrangements, investment advisers contribute to the election campaign of a public official who has or will likely have influence over investment adviser selection in exchange for a promise to be awarded or considered for a public fund management contract.<sup>7</sup> Courts have long recognized that such quid pro quo arrangements, in which dollars exchange for a political favor, are a clear form of corruption.<sup>8</sup>

In 2010, the Securities and Exchange Commission (SEC or Commission) adopted Rule 206(4)-5 to restrain pervasive pay to play activity in the investment adviser industry.<sup>9</sup> A prophylactic measure, Rule 206(4)-5 limits the ability of investment advisers and their employees to make campaign contributions to a public official who has legal control over an entity to which the investment adviser may provide services within the following two years.<sup>10</sup> The SEC adopted the rule pursuant to its authority under the Investment Advisers Act to prevent fraudulent and manipulative conduct.<sup>11</sup> Despite the SEC’s anti-fraud motivations, however, the rule effectively acts as a campaign finance restriction. In the 2016 presidential election, for instance, at least four candidates could not raise substantial funds from investment advisers or their employees because of Rule 206(4)-5.<sup>12</sup>

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6. Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41,018, 41,019 (July 14, 2010), <http://www.gpo.gov/fdsys/pkg/FR-2010-07-14/pdf/2010-16559.pdf> [<http://perma.cc/C47Z-U5XF>] [hereinafter Final Rule].

7. *Id.*

8. *See* Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”).

9. SEC Release, Investment Advisers Act Rel. No. 3043, *Political Contributions by Certain Investment Advisers* (July 1, 2010), <http://www.sec.gov/rules/final/2010/ia3043.pdf> [<http://perma.cc/UW57-RG9A>].

10. 17 C.F.R. § 275.206(4)-5 (2012).

11. Final Rule, *supra* note 6, at 41,021–22; *see also* 15 U.S.C. § 80b-6(4) (2012) (granting the Commission authority under the Investment Advisers Act to “define, and prescribe means reasonably designed to prevent . . . acts, practices, and courses of business as are fraudulent, deceptive or manipulative.”).

12. Individuals running for president that are also “covered officials” for the purposes of Rule 206(4)-5 include Wisconsin Governor Scott Walker, New Jersey Governor Chris Christie, Ohio Governor John Kasich, and Louisiana Governor Bobby Jindal. In the 2012 presidential election, Texas Governor Rick Perry was the only covered official. Individuals running for office in local and state elections are more likely to be covered by the rule, but the contribution limitations imposed by Rule 206(4)-5 have recently gathered broader attention because of their operation in the federal elections. *See, e.g.*, John A. Byrne, *Financiers eye SEC crackdown on political spending as 2016 nears*, N.Y. POST (May 31, 2015, 10:16 AM), <http://nypost.com/2015/05/31/financiers-eye-sec-crackdown-on-political-spending-as-2016-nears/> [<http://perma.cc/X2VV-R7SQ>].

Rule 206(4)-5 must be capable of withstanding constitutional scrutiny, because campaign contributions are protected under the First Amendment rights to engage in political speech and association.<sup>13</sup> Under a long-established test articulated in *Buckley v. Valeo*, restrictions on campaign contributions are only permissible if they serve a “sufficiently important government interest” and employ means “closely drawn” to avoid unnecessary abridgment of first amendment freedoms.<sup>14</sup> The appropriate level of scrutiny and courts’ tolerance of contribution restrictions have varied across time and jurisdictions.<sup>15</sup> Supreme Court decisions under the Roberts Court have exhibited a clear doctrinal shift toward campaign finance deregulation.<sup>16</sup> Recently, the Court struck down federal aggregate contribution limits in *McCutcheon v. FEC*,<sup>17</sup> and the plurality opinion hinted that the Court may have tightened the standard of review. Citing *McCutcheon* in support, dozens of challenges to campaign contribution limits across the country have been filed in anticipation that the courts will act to further deregulate campaign finance.<sup>18</sup>

Amidst the cases brought was a challenge to Rule 206(4)-5 in *New York Republican State Committee v. SEC*.<sup>19</sup> The plaintiffs,

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13. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

14. *Id.*

15. Allen Dickerson, *McCutcheon v. FEC and the Supreme Court’s Return to Buckley*, 2014 CATO SUP. CT. REV. 95, 105 (2014) (“In short, even sophisticated advocates and judges have struggled to answer this important question, with weighty constitutional implications: what is ‘exacting scrutiny?’”).

16. See RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS 160 (2014) (analyzing the repercussions of Supreme Court campaign finance decisions up to and including *McCutcheon v. FEC*).

17. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

18. See, e.g., *Wagner v. Fed. Election Comm’n*, 793 F.3d 1 (D.C. Cir. 2015) (striking down a provision in the Federal Elections Campaign Act that prohibits contributions made in connection with federal elections by federal government contractors); *Seaton et al v. Wiener et al*, No. 0:14-cv-01016 (D. Minn. Apr. 09, 2014) (challenging section 10A.27(11) of the Minnesota Statutes, the so-called “special sources” limit, which limits the total amount of money a candidate can raise from lobbyists, political action committees, and large donors); *Thompson et al. v. Dauphinis*, No. 3:2015-cv-00218 (D. Alaska, Nov. 10, 2015) (challenging \$500 limit on individual contributions to a candidate or a group, \$3,000 limit on out-of-state contributions, and limits on political party contribution); *Lair v. Bullcock*, No. 12-35809 (9th Cir. 2015) (remanding case challenging Montana individual contribution limits for reconsideration in light of tighter standard imposed by *Citizens United v. FEC* and *McCutcheon v. FEC*).

19. Complaint, *N.Y. Republican State Comm. v. SEC*, 14-1345 (D.D.C. Aug. 7, 2014), 2014 WL 3882978. The U.S. District Court for the District of Columbia dismissed the suit for lack of subject matter jurisdiction, concluding that courts of appeal have exclusive jurisdiction to hear challenges to rules under the Investment Advisers Act of 1940 *N.Y. Republican State Comm. v. SEC*, No. 14-01345 (D.D.C. Sept. 30, 2014). *N.Y. Republican*

the New York Republican State Committee and the Tennessee Republican Party, alleged that the SEC rule harms their ability to fundraise, impairs their members' ability to make political contributions, and disadvantages party members who are or who may become candidates for elected office.<sup>20</sup> Relying on *McCutcheon*, plaintiffs argued that Rule 206(4)-5 impermissibly targets the "general influence" of investment adviser contributions on electoral outcomes,<sup>21</sup> and favors incumbents by debilitating challengers in their fundraising abilities.<sup>22</sup> In light of these complaints, an evaluation of Rule 206(4)-5's ability to withstand constitutional scrutiny is timely.

This Note argues that Rule 206(4)-5 should survive constitutional review despite *McCutcheon* and the climate of campaign finance deregulation. Part II surveys the purpose and provisions of the rule and introduces relevant campaign finance law. Part III analyzes the implications of Roberts Court decisions for the level of scrutiny applied to contribution limits, considers the SEC's unique and compelling interest in placing the contribution limit, and discusses possible challenges to the narrow tailoring of the rule. Part IV demonstrates why Rule 206(4)-5 should be held constitutional under existing jurisprudence and proposes that courts should acknowledge the special case of the Commission's independence and anti-fraud interest.

## II. RULE 206(4)-5 AND THE CONSTITUTIONAL REVIEW OF CONTRIBUTION LIMITS

Pay to play practices in the investment adviser industry threaten the integrity of the market and run contrary to the financial interest of fund beneficiaries. Being in a position to protect against fraud, deception, and manipulation, in 2010 the SEC imposed a prophylactic measure in the form of a campaign contribution limit. Part II.A presents an overview of the pay to play concerns which motivated and continue to justify Rule 206(4)-5.

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State Comm. v. SEC, Nos. 14-1194, 14-5242 (D.C. Cir. Aug. 25, 2015). The United States Court of Appeals for the District of Columbia dismissed the case on administrative grounds because the challenge was not brought within sixty days of promulgation of the rule, as required by Section 213 of the Investment Advisers Act of 1940. N.Y. Republican State Comm. v. SEC, Nos. 14-1194, 14-5242 (D.C. Cir. Aug. 25, 2015).

20. Complaint, *supra* note 19.

21. *Id.*

22. *Id.*

Part II.B summarizes the provisions of the rule and discusses its basis in MSRB Rule G-37, which regulates pay to play in the municipal bonds market. Part II.C broadly introduces the constitutional framework and important precedential cases under which Rule 206(4)-5 must be evaluated.

#### A. THE PAY TO PLAY PROBLEM

In the decade leading up to 2010, a number of highly publicized scandals revealed that the selection of investment advisers for public pension fund management had been manipulated as a result of political contributions to public officials in charge of the funds.<sup>23</sup> A myriad of actions were brought against investment advisers who had made contributions with the intent of influencing the selection of advisers for the New York State Common Retirement Fund.<sup>24</sup> Investigations into the pay to play activities in New York resulted in eight criminal convictions, among which the convictions of former New York State Comptroller General Alan Hevesi and his political adviser Henry “Hank” Morris.<sup>25</sup> Illicit pay to play arrangements took place across the country,

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23. The SEC’s awareness of and involvement in the associated investigations is well-documented in Rule 206(4)-5’s adopting release. *See* Final Rule, *supra* note 6, 41,019–20 & nn.18–26.

24. *See id.* at 41,019 n.18 (identifying investigations into pay to play practices, including: SEC v. Henry Morris, Litigation Release No. 21036 (May 12, 2009); In the Matter of Quadrangle Group LLC, AGNY Investigation No. 2010-044 (Apr. 15, 2010); In the Matter of GKM Newport Generation Capital Servs., LLC, AGNY Investigation No. 2010-017 (Apr. 14, 2010); In the Matter of Kevin McCabe, AGNY Investigation No. 2009-152 (Apr. 14, 2010); In the Matter of Darius Anderson Platinum Advisors LLC, AGNY Investigation No. 2009-153 (Apr. 14, 2010); In the Matter of Global Strategy Group, AGNY Investigation No. 2009-161 (Apr. 14, 2010); In the Matter of Freeman Spogli & Co., AGNY Investigation No. 2009-174 (Feb. 1, 2010); In the Matter of Falconhead Capital, LLC, AGNY Investigation No. 2009-125 (Sept. 17, 2009); In the Matter of HM Capital Partners I, LP, AGNY Investigation No. 2009-117 (Sept. 17, 2009); In the Matter of Ares Management LLC, AGNY Investigation No. 2009-173 (Feb. 17, 2010); In the Matter of Levine Leichtman Capital Partners, AGNY Investigation No. 2009-124 (Sept. 17, 2009); In the Matter of Access Capital Partners, AGNY Investigation No. 09-135 (Sept. 17, 2009); In the Matter of The Markstone Group, AGNY Investigation No. 10-012 (Feb. 28, 2010); In the Matter of Wetherly Capital Group, LLC and DAV/Wetherly Financial, L.P., AGNY Investigation No. 2009-172 (Feb. 8, 2010)).

25. Att’y Gen. of N.Y., Former Comptroller Alan Hevesi Sentenced to up to Four Years in Prison for Role in Pay-to-Play Pension Fund Kickback Scheme, April 15, 2011, <http://www.ag.ny.gov/press-release/former-comptroller-alan-hevesisentenced-four-years-prison-role-pay-play-pension-fund> [<http://perma.cc/NFH8-RR27>] (New York Comptroller Alan Hevesi pled guilty to taking \$1 million in gifts and campaign contributions, in exchange for granting \$250 million in pension assets to a California money manager); *People v. Henry “Hank” Morris And David Loglisci, Defendants, Indictment No. 25/2009* (Mar. 19, 2009).

including in Connecticut,<sup>26</sup> Illinois,<sup>27</sup> and Ohio,<sup>28</sup> among other states.<sup>29</sup> Further investigations revealed that backroom deals were widespread.<sup>30</sup> Often these deals were accomplished with the intermediation of placement agents, whose main role is typically to be matchmakers between funds and advisers.<sup>31</sup>

In a typical pay to play arrangement, an investment adviser makes a campaign contribution to a candidate for public office in return for a promise to be selected or considered for a contract for the management of a public fund over which the candidate has or may have influence.<sup>32</sup> The stealthy arrangement can be beneficial to both parties. The investment adviser buys the opportunity to collect the lucrative fees associated with public fund management,<sup>33</sup> while the public official raises campaign funds for the costly political race and may even receive kickbacks from the in-

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26. See SEC v. Paul J. Silvester, Litigation Release No. 16759, 73 SEC Docket 1255 (Oct. 10, 2000), <https://www.sec.gov/litigation/litreleases/lr16759.htm> [<https://perma.cc/GA5Z-GF5R>] (reporting a pay to play scheme involving Connecticut State Pension Fund and noting that Connecticut Treasurer Paul Silvester admitted to collecting campaign contributions in exchange for placing pension money within certain funds).

27. Christine Williamson, *Illinois Teachers Chief to Get Boot*, PENSIONS & INVESTMENTS (Apr. 9, 2009), <http://www.pionline.com/article/20090406/PRINT/304069975/illinois-teachers-chief-to-get-boot> [<http://perma.cc/X7UJ-CXD9>] (reporting a three-year-long pay to play scandal involving the Teacher Retirement System of the State of Illinois, which culminated in five felony indictments, including that of former state governor Rod R. Blagojevich).

28. See Reginald Fields, *Four More Convicted in Pension Case: Ex-Board Members Took Gifts from Firm*, CLEVELAND PLAIN DEALER, Sept. 20, 2006 (discussing pay to play activities of members of the Ohio Teachers Retirement System).

29. See Final Rule, *supra* note 6, at 41,109 nn.19–26.

30. See Imogen Rose-Smith & Ed Leefeldt, *Shadow Lands*, INSTITUTIONAL INVESTOR (Oct. 2009) (documenting a six-month investigation into backroom deals between investment advisers, placement agents, and public officials).

31. Harry Campbell, *After Scandals, Evaluating Pension Funds' Middleman*, DEALBOOK, NYTIMES.COM (May 12, 2015), <http://www.nytimes.com/2015/05/13/business/dealbook/after-pay-to-play-scandals-evaluating-pension-funds-middleman.html>; *Calpers Disclosure of Placement Fees Paid to Ex-board Members*, BLOOMBERG (Oct. 15, 2009), <http://www.bloomberg.com/apps/news?pid=21070001&sid=a2MI8a3PJ.jk> [<http://perma.cc/RHC7-ES6M>] (describing concerns about the role of placement agents in perpetuating pay to play); see also *New York v. Henry "Hank" Morris and David Loglisci*, Indictment No. 25/2009 (N.Y. Mar. 19, 2009) (alleging that a "placement agent" sold access to management of public funds in return for kickbacks and other payments for personal and political gain).

32. In politics, the term "pay to play" broadly refers to a system by which a payer makes a campaign contribution in exchange for the explicit or implicit promise of a direct pecuniary or political benefit. Contributions may take the form of money or gifts and may be made to public officials, party officials, or parties themselves. The benefit sought in most "pay to play" arrangements is the award of a public contract, although it may also include specific legislative reform, political appointments or nominations, or other favors.

33. See *supra* notes 1–5 and accompanying text (suggesting the magnitude of the possible gains from public fund investment management).

vestment adviser.<sup>34</sup> This is a classic quid pro quo arrangement and a clear example of corruption.<sup>35</sup>

As the name “pay to play” suggests, the contribution-for-contract exchange can become so pervasive, and so institutionally ingrained, that an investment adviser’s bid will not even be considered in the absence of an associated contribution.<sup>36</sup> Indeed, a system of pay to play creates a collective action problem. No individual candidate or adviser has a sufficient incentive to desist, since advisers may lose business if they do not contribute and candidates may lose elections if they do not take the funds that their opponents readily accept. Corruption thus becomes the only way of doing business, and even engages actors who would otherwise prefer to refrain from participating.

While participants in any quid pro quo can be prosecuted for bribery, ultimately the threat of legal action is slight. Bribery laws only cover specific and outright acts,<sup>37</sup> whereas most investment advisers are able to structure their arrangements covertly and indirectly.<sup>38</sup> Investment adviser pay to play approaches may be undetectable, while promises by public officials may be implicit. Furthermore, investigative and enforcement efforts may suffer from collective action problems where multiple agencies and government bodies all have the authority to bring action, and in any given situation, it could be that ethics agencies, election agencies, the SEC, or other government bodies simultaneously have such authority. Thus, absent preventative checks on cam-

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34. See, e.g., Press Release, *SEC Charges Former Connecticut Treasurer and Ten Others Involved in Fraudulent Scheme in Connection With Investment of State Pension Fund Money; Three Defendants Agree To Settle Charges*, Litigation Release No. 16759 (Oct. 10, 2000) (action against an investment adviser who allegedly engaged third-party solicitors who kicked back money to the former Connecticut State Treasurer in order to obtain public pension fund investments in a hedge fund managed by the adviser).

35. This latin phrase translates directly to “something for something,” but in campaign finance is associated specifically with an exchange of money for an official act. See *McCormick v. United States*, 500 U.S. 257, 257 (1991) (defining “quid pro quo” as “a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act”).

36. *Blount v. SEC*, 61 F.3d 938, 945 (1995).

37. *Buckley v. Valeo*, 424 U.S. 1, at 27–28 (“[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.”).

38. *Blount*, 61 F.3d at 945 (“[A]ctors in this field are presumably shrewd enough to structure their relations rather indirectly . . .”).



paign contributions by investment advisers, a pay to play system is woefully self-perpetuating.<sup>39</sup>

Pay to play practices can be injurious to the economic interests of fund beneficiaries,<sup>40</sup> who are taxpayers, retirees, and workers contributing to public pension plans.<sup>41</sup> Competitive processes for advisory services contracting are designed to help identify the best bid, based on some desirable balance of reasonable fees, favorable terms, and adviser expertise. However, under a manipulated selection process, business is allocated not to the most suitable advisers, but to those who make the most generous campaign contributions and have the political connections to arrange that a favor be returned.<sup>42</sup>

Over the long term, pay to play reduces productive competition. Advisers who cannot afford to participate in pay to play schemes are disadvantaged regardless of their ability to offer quality management.<sup>43</sup> In turn, advisers who are able to secure contracts through campaign contributions may have less incentive to improve their services, as their past practices and future plans do not come under rigorous scrutiny. Overall, a process rigged with pay to play leads to “inferior management, diminished returns or greater losses.”<sup>44</sup>

The lack of arm’s length negotiation inherent in pay to play can also raise costs to beneficiaries on a contract-by-contract basis by way of more unfavorable terms and higher fees.<sup>45</sup> Alt-

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39. See Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt?*, 2 J.L. ECON. & POL’Y 145, 147 (2006) (providing evidence that untreated corruption is self-entrenching).

40. Nicholas Reade Everett, Note, *Kicking Back Corruption in the Public Fund Advisory Selection Process: The SEC’s Proposed Rule to Curtail Pay-to-Play Practices by Investment Advisers*, 29 REV. BANKING & FIN. L. 557 (2010).

41. Christopher J. Dodd, Comment Letter on Political Contributions by Certain Investment Advisers (Feb. 2, 2010), <http://www.sec.gov/comments/s7-18-09/s71809-256.pdf> [<http://perma.cc/HD3P-7MBC>].

42. Samantha Cohen, Note, *“Paying-to-Play” Is the New Rule of the Game: A Practical Implication of the Private Securities Litigation Reform Act of 1995*, 99 U. ILL. L. REV. 1331 (1999) (arguing that pay to play activity results in inferior management because it distorts the competitive process by cutting incentives for managers to achieve superior management practices).

43. These advisers may be discouraged from participation even by virtue of the appearance of a rigged process. See Press Release, SEC, *SEC Proposes Measures to Curtail Pay to Play Practices by Investment Advisers* (June 30, 2010), <http://www.sec.gov/news/press/2010/2010-116.htm> [<http://perma.cc/D44N-BJCG>] (highlighting that pay to play fosters the perception of unequal access to management contracts).

44. Final Rule, *supra* note 6, at 41,065.

45. *Id.*, at 41,022; see also Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103 (2002) (arguing

though most investment managers apply a familiar two-and-twenty industry standard for fees, multiple negotiated terms determine aspects of fee structure and any ancillary benefits to the adviser. Where pay to play exists, these terms may not be as heavily negotiated, leading to higher cost of service. Payments to “middlemen” who arrange the quid pro quo can further raise the manager’s transaction costs, which may also lead to higher fees.<sup>46</sup> Suboptimal management and higher fees result in lower net earnings, chipping away at the wealth of fund beneficiaries.<sup>47</sup> As a result, states or municipalities may be legally obligated to make up for any shortfall in pension fund assets to secure the full payment of pension benefits.<sup>48</sup> For this reason, the cost of inferior terms in investment advisory contracts may be borne by taxpayers generally.

Both government officials and investment advisers violate legal duties owed to fund beneficiaries when they engage in pay to play schemes. Some of these duties are specific to the administration and investment management of public funds; others are not. Government officials in charge of administering public funds violate their duties as designated trustees of citizens’ pension savings or tax dollars when they participate in pay to play. As a separate matter, not particular to the investment adviser context, corruption in the electoral process betrays the public trust and diminishes the electorate’s faith in representative democracy. In turn, investment advisers violate their fiduciary duty to disclose conflicts of interest, which they owe under the Investment Advis-

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that pay to play practices lead to political extortion that results in increased fee structures in a variety of industries).

46. Suzanne R. Weber, Comment Letter Re. File No. S7-18-09 (Oct. 6, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-200.htm> [<https://perma.cc/NH2K-S6ZS>] (“I have seen money managers awarded contracts with our fund which involved payments to individuals who served as middlemen, creating needless expense for the fund. These middlemen were political contributors to the campaigns of board members who voted to contract for money management services with the companies who paid them as middlemen.”); see also David R. Pondhorf, Comment Letter Re. File No. S7-18-09 (Aug. 4, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-3.htm> [<https://perma.cc/ZKW3-SZ9Y>] (noting that when the sole trustee of a major pension fund changed several years ago, a firm managing some of the fund’s assets “began to receive invitations to fundraising events for the new trustee with suggested donation amounts”).

47. See Comment Letter of New York City Mayor Michael R. Bloomberg (Sept. 9, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-87.pdf> [<https://perma.cc/A37A-SH74>] (“[W]hen lucrative investment contracts are awarded to those who pay to play, public pension funds may end up receiving substandard services and higher fees, resulting in lower earnings.”).

48. *Id.*

ers Act of 1940.<sup>49</sup> Specifically, investment advisers violate the duty to deal fairly with current and prospective clients and the duty to disclose any material or potential conflicts.<sup>50</sup>

Beyond posing a clear conflict-of-interest problem, pay to play arrangements arguably constitute fraudulent, manipulative, or deceitful conduct in another sense: it threatens the integrity of the market. But the fraud that the investment advisers perpetrate in this sense is not easily cognizable in the context of any specific client. An adviser to whom a contract is awarded will in all likelihood carry out its fiduciary obligations in managing the money; indeed it will try to do the best it can in order to get other business. Thus, the fraud is not fraud against the funds or their owners but more generally fraud that affects the integrity of the markets.

### B. RULE 206(4)-5

In 2010, the SEC used its rulemaking authority to curb pay to play conduct.<sup>51</sup> Under the Investment Advisers Act of 1940, the Commission has the authority to enact rules that prevent “acts, practices, and courses of business [by investment advisers under the SEC’s regulatory umbrella] that are fraudulent, deceptive or manipulative.”<sup>52</sup> These rules may be prophylactic and may prohibit acts that are not fraudulent in themselves.<sup>53</sup> The prophylactic regulatory approach of Rule 206(4)-5 promised to prove more effective at preventing pay to play than the threat of punitive measures imposed in rare bribery proceedings.

Rule 206(4)-5 makes it unlawful for any investment adviser or “covered associate” to receive compensation for advisory services

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49. See *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 191–92 (1963) (the Investment Advisers Act reflects “the congressional intent to eliminate, or at least expose, all conflicts of interest” between an adviser and its clients).

50. *Id.*; see also, 15 U.S.C. § 80b-(6)(1) (2012) (preventing an investment adviser from “employ[ing] any device, scheme or artifice to defraud any client or prospective client.”); 15 U.S.C. § 80b-6(2) (2012) (prohibiting any investment adviser from engaging in any transaction, practice, or course of business which operates as fraud or deceit upon any client or prospective client).

51. 17 C.F.R. § 275.206(4)-5. See generally Final Rule, *supra* note 6.

52. 15 U.S.C. § 80b-6(4).

53. Indeed, such rules have been adopted to address custodial arrangements, the use of solicitors, and abusive advertising, among other activities which are not in themselves fraudulent. 17 C.F.R. 275.206(4)-2; 275.206(4)-3; 275.206(4)-1. For more on the SEC’s rulemaking authority with respect to prophylactic measures, see Final Rule, *supra* note 6, 41,022 & nn.51–52.

from a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or the covered associate.<sup>54</sup> Rather than banning contributions outright, the rule creates a two-year timeout, or “cooling off period,” after which the effects of the contribution are unlikely to linger.<sup>55</sup> As such, the rule presents the investment adviser and covered associates with a choice, instead of a flat prohibition. They may choose between making a campaign contribution and soliciting business in any given situation.

In addition, the rule includes a de minimis exception, available only to covered associates and not to the investment adviser itself, for contributions of up to \$350 to a candidate in any election in which that covered person is entitled to vote and contributions of up to \$150 to a candidate in any election in which the covered associate is not entitled to vote.<sup>56</sup> The de minimis exception allows for symbolic expression of support for a candidate.

The rule applies to all partners, managers and executives, any employees who solicit business for the adviser or supervisors of such employees, and any political action committee controlled by the investment adviser or by any of its covered associates.<sup>57</sup> Importantly, the SEC determines whether an individual falls within the definition of “covered associate” based on the person’s function, and not on their title.<sup>58</sup> The “covered officials” to whom contributions are restricted include incumbents and candidates for office at the state or local level,<sup>59</sup> but do not include any candidate who does not and will not have the responsibility to select investment advisers or to influence the outcome of selection. Nota-

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54. 17 C.F.R. § 275.206(4)-5(a)(1). Investment advisers to certain pooled investment vehicles in which a government entity invests or is solicited to invest are treated as though the adviser were providing or seeking to provide investment advisory services directly to the government entity. 7 C.F.R. § 275.206(4)-5(c).

55. Final Rule, *supra* note 6, at 41,026.

56. 17 C.F.R. § 275.206(4)-5(b)(1); The de minimis contribution allowance permits a symbolic expression of support for a candidate, but not contributions of such value as can distort the choices of government officials. The SEC justified the lower, \$150, limit by noting that a covered associate has a more remote interest in contributing to a candidate for whom he or she is not entitled to vote. *See* Final Rule, *supra* note 6, at 41,035.

57. 17 C.F.R. § 275.206(4)-5(f)(2).

58. For example, even an employee without an executive title or one employed with an affiliate entity may be considered a “covered associate,” provided that the person in some way engages in solicitation or policymaking for the adviser. *See* Final Rule, *supra* note 6, 41,031 n.177 (“Whether a person is a covered associate ultimately depends on the activities of the individual and not his or her title.”).

59. 17 C.F.R. § 275.206(4)-5(f)(1).

bly, whether someone is a “covered official” depends on the “scope of authority of the particular office of an official, not the influence actually exercised by the individual” over investment adviser selection. There is no clear list of officials who fall under the rule’s purview, especially since the actors who bear legal authority may differ based on differences in the administrative structure of states and municipalities.

The rule intends to capture not only direct political contributions by advisers, but also other ways that advisers may engage in pay to play arrangements. The rule also places a “third party solicitor ban,” prohibiting an adviser from engaging a third party to solicit government entities for advisory business, unless the third party is a “regulated person.”<sup>60</sup> After this provision came into effect in 2015, following extensions to the compliance date, so-called “placement agents” became covered by the ambit of the 206(4)-5.<sup>61</sup> Advisers or covered associates are also prohibited from soliciting or coordinating contributions to a covered official or payments to a political party of a state or locality where the investment adviser is providing or seeking to provide investment advisory services.<sup>62</sup> The rule also includes a catchall provision making it unlawful for the adviser or covered associates to take any indirect action which, if taken directly, would violate the rule,<sup>63</sup> thus assuring coverage of any scheme or conduit that the Commission failed to consider.

Although Rule 206(4)-5 is a strict liability rule, the SEC has established a discretionary relief process.<sup>64</sup> This provision allows investment advisers to appeal to the Commission with the argument that an exemption should be made, because the ban was

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60. 17 C.F.R. § 275.206(4)-5(a)(2)(i). Regulated persons are defined in 206(4)-5(f)(9) and include registered broker-dealers, registered investment advisers, or registered municipal advisers, in each case themselves subject to pay to play restrictions having at least equivalent strength and similar goals as Rule 206(4)-5. In 2014, the Financial Industry Regulatory Authority (FINRA) issued three proposed rules, harmonized with SEC Rule 206(4)-5, to establish a pay to play rule in the broker-dealer industry. See FINRA, FINRA REQUESTS COMMENT ON A PROPOSAL TO ESTABLISH A “PAY-TO-PLAY” RULE, REGULATORY NOTICE 14-50 (2014), [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/14-50.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/14-50.pdf) [<http://perma.cc/4YZM-GKYQ>].

61. See SEC Release, *Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Notice of Compliance Date*, Investment Advisers Act No. 4129 (July 31, 2015) <https://www.sec.gov/rules/other/2015/ia-4129.pdf> [<https://perma.cc/FAK6-94FL>].

62. 17 C.F.R. § 275.206(4)-5(a)(2)(ii).

63. 17 C.F.R. § 275.206(4)-5(d).

64. 17 C.F.R. § 275.206(4)-5(e).

triggered unintentionally or because allowing the contribution would be consistent with protections for investors.<sup>65</sup>

The adoption of Rule 206(4)-5 did not mark the first occasion on which the SEC created a pay to play rule. In 1994 the Municipal Securities Rulemaking Board (MSRB), a self-regulatory organization which supervises the municipal securities industry,<sup>66</sup> enacted pay to play-targeted Rule G-37.<sup>67</sup> The MSRB adopted the rule under the Commission's authority "to prevent fraudulent and manipulative acts and practices," "to promote just and equitable principles of trade," and to prevent "unfair discrimination between . . . municipal securities brokers, or municipal securities dealers . . ."<sup>68</sup> Rule G-37 was adopted in 1994, sixteen years before Rule 206(4)-5, and is widely believed to have been one of the most effective rules combating pay to play in the municipal bond industry.<sup>69</sup> The MSRB supplemented G-37 with Rule G-38 in 2005, adding a third party solicitation ban to the political contribution restrictions already in place.

Rule 206(4)-5 intentionally and substantially mirrors the provisions of Rule G-37 and G-38. Both place a two-year ban on relevant industry actors who have made political contributions to an elected official that has influence over government contracting from providing services to the relevant governmental entity.<sup>70</sup> Both provide for a de minimis exception for small contributions to an official for whom an employee is entitled to vote.<sup>71</sup>

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65. *Id.*

66. 15 U.S.C. § 78o-4(b)(1) (2000).

67. See *In the Matter of Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business and Notice of Filing and Order Approving on an Accelerated Basis Amendment No. 1 Relating to the Effective Date and Contribution Date of the Proposed Rule*, Exchange Act Release No. 33868 (Apr. 7, 1994).

68. 15 U.S.C. § 78o-4(b)(2)(C)(2000).

69. See Final Rule, *supra* note 6, at 41,021 ("We modeled our proposed rule on those adopted by the Municipal Securities Rulemaking Board . . . We believe these rules have significantly curbed pay to play practices in the municipal securities market."); Nicholas Reade Everett, Note, *Kicking Back Corruption in the Public Fund Advisory Selection Process: The SEC's Proposed Rule to Curtail Pay-to-Play Practices by Investment Advisers*, 29 REV. BANKING & FIN. L. 557, 560–65 (2010) (showing that the success of MSRB Rule G-37 motivated the SEC to mirror this rule in creating 206(4)-5). But see Kevin Opp, Comment, *Ending Pay-to-Play in the Municipal Securities Business: MSRB Rule G-37*, 76 U. COLO. L. REV. 243 (2006) (arguing that the MSRB rule has been ineffective in regulating pay to play and has unnecessarily burdened political speech).

70. See MSRB Rule G-37(b)(i).

71. *Id.*

In accordance with the SEC's standard notice-and-comment rulemaking procedures, a formal proposal for Rule 206(4)-5 was submitted to the public for commentary prior to enactment.<sup>72</sup> The SEC received the opinion of industry actors in the form of comment letters, which reflected opposition or support.<sup>73</sup> First Amendment concerns were prevalent in comment letters responding to the proposal for 206(4)-5.<sup>74</sup> The SEC addressed these concerns squarely and as a priority in the opening chapter to the adopting release for Rule 206(4)-5.<sup>75</sup> However, campaign finance law underwent great deregulation since Rule G-37's enactment in 1994 until Rule 206(4)-5's enactment in 2010, and arguably even further deregulation since then, giving reason to reevaluate Rule 206(4)-5's constitutional footing.

### C. CONSTITUTIONAL REVIEW OF CONTRIBUTION LIMITS

In the 1975 case *Buckley v. Valeo*, the Supreme Court held that all campaign finance regulations implicate "fundamental First Amendment interests" of political speech and association.<sup>76</sup> The Court drew a distinction between limits on contributions and

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72. SEC Release, *Political Contributions by Certain Investment Advisers*, Investment Advisers Act Rel. No. 2910, 74 Fed. Reg. 39,840, 39,840–41 (proposed Aug. 7, 2009).

73. Comments on the proposed rule can be accessed at Comments on Proposed Rule: Political Contributions by Certain Investment Advisers, Release No. IA-2910; File No. S7-18-09, SEC, <https://www.sec.gov/comments/s7-18-09/s71809.shtml> [<https://perma.cc/QE6S-LCDW>].

74. See, e.g., W. Hardy Calcott, Comment Letter Re. File No. S7-18-09 (Aug. 3, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-255.pdf> [<https://perma.cc/BTD3-SYZ9>]; Elizabeth M. Murphy, Comment Letter Re. File No. S7-18-09 (Oct. 6, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-216.pdf> [<https://perma.cc/XZG2-MG6Z>]. See also Final Rule, *supra* note 6, at 41,023 n.61 (providing a sample list of comment letters raising First Amendment concerns).

75. See Final Rule, *supra* note 6, at 41,923–24. (summarizing the SEC's review of First Amendment considerations in adopting Rule 206(4)-5).

76. 424 U.S. 1, 23 (1976). This assertion has been popularized since the case under the simpler banner "money is speech" and has been contentious since its conception. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005–06 (1976) (arguing limits on contributions and expenditures do not restrain speech directly, but rather restrain conduct that affects the quantity and diversity of speech); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1055–60 (1985) (presenting arguments that campaign finance limitations do not impinge on the First Amendment because they do not regulate speech directly); see also Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo is Wrong*, 47 U. Rich. L. Rev. 881, 881 (2013) ("Had the Court not subjected restrictions on political spending to the same scrutiny as restrictions on political speech under the mistaken theory that the two are the same, nearly every aspect of our electoral, political, and governmental processes could be different.").

limits on expenditures, stating that the latter impose a greater burden on the freedom of speech.<sup>77</sup> Since communication and popularization of ideas in mass society inevitably require the spending of money, restrictions on expenditures “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>78</sup> In contrast, as a contribution, money “serves as a general expression of support for the candidate and his views.”<sup>79</sup> The act of contributing symbolizes association with a candidate, but the contribution itself does not directly increase the quantity or diversity of expression before the voting public.<sup>80</sup> Thus, even a small contribution can achieve the symbolic purpose of contributions generally. Further, the Court in *Buckley* reasoned that where contribution limits constrain fundraising, candidates need only to appeal to a broader section of the electorate to raise funds.<sup>81</sup>

The *Buckley* contribution-expenditure dichotomy corresponds to a dichotomy in the appropriate standards of review. *Buckley* established that limits on contributions are permissible if the government can present a “sufficiently important interest” underlying the restriction, as well as “means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>82</sup> Indeed, even a “significant interference with protected rights of political association may be sustained” if this test is met.<sup>83</sup> This level of scrutiny has been variably referred to as the “closely drawn test” or “intermediate scrutiny,” and for decades courts have struggled with delineating the scope of this “lesser but still rigorous stand-

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77. *Buckley*, 424 U.S. at 23 (“[E]xpenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”).

78. The Court emphasized that the expenditure limitations involve “substantial rather than theoretical restraints on the quantity and diversity of political speech.” *Id.* at 19.

79. *Id.* at 21.

80. *Id.* (“[T]he transformation of contributions into political debate involves speech by someone other than the contributor.”). Furthermore, the *Buckley* Court argued that, provided that independent expenditures are an available means of political expression, contribution limits do not hinder individuals and groups from “spend[ing] unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters.” *Id.* at 26 n.26.

81. *Id.* at 21–22 (“[T]he effect of the . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons.”).

82. *Id.* at 25.

83. *Id.*



ard of review.”<sup>84</sup> The *Buckley* Court established that a comparatively more rigorous standard of “exacting” or “strict” scrutiny accompanies the greater burden that expenditure limits impose on freedom of speech. To pass strict scrutiny, a limit on expenditure must be narrowly tailored, as opposed to closely drawn, and must meet a compelling government interest, as opposed to a sufficiently important one.<sup>85</sup> As with the application of the closely drawn test, the strict scrutiny standard has been applied with seemingly different rigor across time and courts.<sup>86</sup>

The Court has recognized since *Buckley* that the interest in preventing corruption or the appearance of corruption is both sufficiently important and compelling.<sup>87</sup> De facto corruption is equally important as “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”<sup>88</sup> Additionally, despite courts’ repeated references to the above-stated “interest,” this “interest” actually involves two distinct interests, and preventing the appearance of corruption can be a sufficient interest even in the absence of actual corruption.<sup>89</sup>

The definition that the Court has accorded the word “corruption” has been a key variable in campaign finance decisions over the last four decades.<sup>90</sup> Arguably, the Court in *Buckley* suggested a narrow definition of “corruption,” encompassing only corruption arising from the hazard of quid pro quo arrangements between donors and candidates.<sup>91</sup> This is the narrow reading that was

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84. *Id.* at 29.

85. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (stating that a restriction can only withstand “exacting scrutiny” if it is “narrowly tailored to serve an overriding state interest”).

86. *Compare* *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (2013) (reasoning that exacting scrutiny is little more than rational basis review) *with* *Riddle v. Hickenlooper*, 742 F.3d 922, 930 (2014) (holding that the appropriate scrutiny to be applied to contribution limits is just shy of strict scrutiny).

87. *Buckley*, 424 U.S. at 18–25.

88. *Id.* at 27.

89. *Id.* at 26–27; *see also* *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440–41 (2001).

90. *See* Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the Corruption Rationale*, 10 STAN. L. & POL’Y REV. 11 (1998) (arguing that the weakness of *Buckley* lies in the difficult implementation of the inflexible “corruption” test).

91. *See* *Citizens United*, 558 US 310, 359 (2010) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption . . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . .”).

retained for the subsequent decade and revived during the Roberts Court.<sup>92</sup> Nonetheless, the Court in *Buckley* also referred to preventing “influence,” suggesting that the Court was only pointing to quid pro quo arrangements as an example of corruption rather than as a unique definition.<sup>93</sup>

For many years, the Court endorsed broader definitions of corruption, even while retaining the main holdings of *Buckley*.<sup>94</sup> In *Austin v. Michigan Chamber of Commerce*, the Court upheld a ban on independent expenditures by corporations which served the interest of preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>95</sup> Similarly, in *Nixon v. Shrink Missouri Government PAC*, the Court stated that corruption included “the broader threat” posed by “politicians too compliant with the wishes of large contributors”<sup>96</sup> — a threat less concrete than direct quid pro quo. In *McConnell v. Federal Election Commission*, the Court reasoned that the very fact of a large donation can give rise to the appearance of corruption. “Corruption” was defined to include “undue influence” by wealthy contributors who could effectively buy access with large donations.<sup>97</sup> The decision marked the culmination of more than a decade of expansive interpretations of “corruption,” under which the Court accorded deference to legislative judgment in restricting campaign finance. The Court’s deferential standard was ac-

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92. See *id.*; see also Richard L. Hasen, *Buckley is Dead, Long Live Buckley*, 153 U. Pa. L. Rev. 31, 39 (“While we may debate in hindsight whether Buckley struck more of a tone of deference or skepticism, there is little doubt that the immediate post-Buckley Supreme Court jurisprudence came down firmly on the side of skepticism.”).

93. See *McConnell v. Fed. Elections Comm’n*, 540 U.S. 93, 294 (2003), *overruled in part by Citizens United v. Fed. Elections Comm’n*, 588 U.S. 310, 365 (2010) (“The very aim of *Buckley*’s standard, however, was to define undue influence by reference to the presence of *quid pro quo* involving the officeholder.”).

94. See Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1730 (2001) (describing how the Court departed from *Buckley*’s jurisprudence while retaining the case’s key holdings).

95. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990), *overruled by Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 365 (2010) (“[T]he corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”).

96. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

97. *McConnell*, 540 U.S. at 150 (citing *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

companied by a lax evidentiary burden for proving an interest in preventing actual or apparent corruption.<sup>98</sup>

The ambiguity of the standard of review to be applied to contribution limits, coupled with ambiguity in the definition of the anti-corruption interest, was obvious in the 1995 decision in *Blount v. SEC*.<sup>99</sup> In this case, the D.C. Circuit evaluated a facial challenge to MSRB Rule G-37 on First Amendment grounds.<sup>100</sup> With this case, a court had the first and, thus far, only occasion to evaluate a pay to play rule with anti-fraud motivations. The court chose to bypass the issue of whether strict scrutiny or the closely drawn test should apply and found that the Commission had served an anti-corruption interest and the rule employed narrowly tailored means.<sup>101</sup> However, the case was decided at a time when the anti-corruption interest was broadly construed by the Supreme Court to encompass “undue influence.” Indeed, the *Blount* court found that the compelling interest lies in “reduc[ing] the indirect impact of wealth on the electoral process, including the persuasive impact on both candidates and the public at large of messages communicated by the wealthy in that process.”<sup>102</sup> The court concluded that the legislature’s interest in clean elections in *Austin* was no less compelling than the interest in clean bond markets, as the two are merely opposite sides of the same coin.<sup>103</sup> In keeping with *Austin*’s deference to legislative judgment, the *Blount* court was arguably lenient in its demand for evidence of the harm the SEC was aiming to prevent.<sup>104</sup>

*Blount* is a case which stands as relevant precedent to any constitutional review of Rule 206(4)-5, because MSRB Rule G-37 is similarly motivated and construed. Indeed, the SEC relied on

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98. Hasen, *supra* note 92, at 37–38.

99. *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

100. *Id.*

101. *Id.* 946–47.

102. *Id.* at 943.

103. *Id.* at 944 (“As we see it, however, one of the primary reasons people object to bought elections is that a bought politician tends to make distorted choices, and the public’s concern about a particular type of distorted choice (the choice of bond underwriter) does not logically stand on a lower plane than its concern about bought politicians generally.”).

104. *Id.* at 945 (“[N]o smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic); see also Kevin Opp, *supra* note 6969, at 284 (“G-37 was justified on thin evidence. The MSRB and the SEC stated that it could not point to specific instances of bond deals failing and harming investors because of pay-to-play.”).

*Blount* in its attempt to quell First Amendment concerns in the adopting release to the rule.<sup>105</sup> Nonetheless, the Court of Appeals for the D.C. Circuit decided the question without clarifying the standard of review and referenced cases which had established an expansive definition of corruption as controlling. The court came to its conclusions before the deregulatory trend of campaign finance under the Roberts Court began. It stands to be examined whether the *Blount* reasoning is transferable to the investment adviser context and Rule 206(4)-5 and whether Rule 206(4)-5 remains good law in light of recent decisions.

### III. CHANGING CLIMATE: THE DEREGULATORY TREND

Shortly after the Supreme Court struck down aggregate federal contribution limits in *McCutcheon v. FEC*,<sup>106</sup> the New York Republican State Committee and the Tennessee Republican Party filed a complaint against the SEC, claiming the unconstitutionality of Rule 206(4)-5.<sup>107</sup> Relying on the language of *McCutcheon*, plaintiffs argued that Rule 206(4)-5 impermissibly targets the “general influence” of investment adviser contributions on electoral outcomes, imposes “prophylaxis upon prophylaxis,” and serves only a “speculative” anti-corruption interest.<sup>108</sup> The District Court for the District of Columbia dismissed the suit for lack of subject matter jurisdiction,<sup>109</sup> and the Court of Appeals dismissed the case on administrative grounds,<sup>110</sup> so case was never considered on its merits. However, the case could be revived, by these or other challengers, in several ways: the complaint could be brought in another jurisdiction or the parties could file for certiorari,<sup>111</sup> the case could arise after an enforcement action by the SEC,<sup>112</sup> or parties could petition the SEC for revision of the

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105. See Final Rule, *supra* note 6, at 41,023–24.

106. 134 S. Ct. 1434 (2014).

107. Complaint, *supra* note 19.

108. *Id.*

109. N.Y. Republican State Comm. v. SEC, No. 14-01345 (D.D.C. Sept. 30, 2014).

110. N.Y. Republican State Comm. v. SEC, Nos. 14-1194, 14-5242 (D.C. Cir. Aug. 25, 2015) (finding that the challenge was not brought within sixty days of promulgation of the rule, as required by Section 213 of the Investment Advisers Act of 1940.).

111. The potential for success in having the case heard on the merits in these ways is not large. Other jurisdictions will treat the determinations of the D.C. Circuit as persuasive, while the probability of the case being selected for Supreme Court review is small.

112. However, in this context it is particularly unlikely that any covered individual would seek to violate the rule to spur enforcement and subsequent litigation. The poten-

rule and subsequently appeal the SEC's determination on the petition.<sup>113</sup>

If the case comes under review, courts will need to consider the appropriate standard of review and whether Rule 206(4)-5 is appropriately tailored to fulfill an appropriate government interest. These will not be easy questions for two main reasons. First, the arrival of the Roberts Court marked the beginning of a de-regulatory trend in campaign finance.<sup>114</sup> The decision in *McCutcheon v. FEC* especially seemed to suggest that the Court is silently tightening the standard of review of contribution limits. Second, the particular anti-fraud interest and means chosen by the SEC are not ones that have been considered by the Supreme Court in the past and present heretofore unexamined arguments for upholding a pay to play restriction.

Part III.A explores the implications of the *McCutcheon* decision for future review of contribution limits. Part III.B explores whether courts should recognize an interest in preventing fraud, deception, and manipulation<sup>115</sup> as separate from the interest in preventing corruption to which the Court has traditionally adhered in campaign finance decisions. Part III.C considers the burden that the SEC bears in proving that Rule 206(4)-5 is closely drawn, or perhaps narrowly tailored.

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tial penalties are too large for individuals to risk the consequences of enforcement action that is not subsequently overturned.

113. The Court of Appeals stated that this was the appropriate way for petitioners to seek review on the merits. N.Y. Republican State Comm. v. SEC, Nos. 14-1194, 14-5242 (D.C. Cir. Aug. 25, 2015). The SEC is not likely to recognize the petitioners' claims and, as this Note argues, the SEC should choose not to. Petitioners must hope that they can appeal the eventual determination, but the SEC is likely to "sit" on the petition for a prolonged period of time before announcing its decision. This would substantially delay petitioners' efforts and review will almost certainly not be complete in time to be relevant to the nearing 2016 federal presidential elections.

114. See Richard Briffault, WRTL and Randall: *The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L. J. 807, 807 (2007) ("The first term of the Roberts Court was a potentially pivotal moment in campaign finance law. The Court both broke its pattern of deference to federal and state regulations that had marked the last half-dozen years and began to take a more critical approach to campaign finance restrictions.").

115. This is not only the interest that the SEC stated in its adoption of the rule, but is also the interest with which it defended the recent constitutional challenge in *New York Republican State Committee*. See SEC's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, N.Y. Republican State Comm. v. SEC, 70 F. Supp. 3d 362 (D.D.C. 2014) (No. 1:14-cv-01345 (BAH)), 2014 WL 10156750.

### A. *MCCUTCHEON'S* EFFECT ON CONTRIBUTION LIMITS

In *McCutcheon*, the Court held unconstitutional the aggregate contribution limitations imposed by the Federal Election Campaign Act, which restricted the amount of money a donor could contribute in total to all candidates for federal office and committees.<sup>116</sup> The Court was not asked to review the constitutionality of the federal base contribution limits or base contributions generally,<sup>117</sup> which restrict the amount of money that a donor is allowed to contribute to a particular candidate or committee.<sup>118</sup> Given the limited scope of the challenge presented in *McCutcheon*, the case should have been “a relatively modest as-applied challenge to a single restriction.”<sup>119</sup> Yet several strands of Justice Roberts’s plurality opinion, replete with mysterious phrases, inspired dozens of challenges to contribution limits across the country.<sup>120</sup> Three main suspicions underlie these challenges: the court is less likely to find anti-corruption motives to be valid, the court implicitly raised the level of scrutiny of contribution limits, and the court is likely to view a legislature’s motives for enacting contribution limits with skepticism.

#### 1. *Quid Pro Quo Versus “General Influence”*

The plurality opinion in *McCutcheon* stated that “corruption” encompasses “quid pro quo arrangements” only and not “general influence.”<sup>121</sup> In *Citizens United v. FEC*, a case often cited alongside *McCutcheon*, the Supreme Court had already nullified the previously acceptable governmental interests in maintaining a clean electoral process, limiting the influence of corporate money in politics, and preventing the special access of the wealthy.<sup>122</sup>

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116. *McCutcheon*, 134 S. Ct. 1434, 1442 (2014) (citing 2 U.S.C. § 441a(a) (2012)).

117. *Id.*

118. These continue to exist and are currently at \$2,700 per candidate. FEDERAL ELECTION COMMISSION, CONTRIBUTION LIMITS [CHART], <http://www.fec.gov/pages/brochures/fecfeca.shtml> [<http://perma.cc/SJ67-MN8U>] (last visited Nov. 8, 2015).

119. Dickerson, *supra* note 15, at 95.

120. See *supra* note 18; see also David Henry, *Campaign Finance Lawsuits in Minnesota and Other States Take Aim at Contribution Limits*, MINN. POST (Apr. 2, 2014), <http://www.minnpost.com/effective-democracy/2014/04/campaign-finance-lawsuits-minnesota-and-other-states-take-aim-contributi> [<http://perma.cc/EY69-UPTV>] (reporting lawsuits motivated by the announcement of the *McCutcheon* decision).

121. *McCutcheon*, 134 S. Ct. at 1438.

122. See *supra* notes 94 to 98 and accompanying text (describing the more deferential, pre-Roberts Court definitions of corruption).

The *McCutcheon* plurality wrote that “[i]ngratiation and access” are not “corruption,” but instead “embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”<sup>123</sup> Some believe that the Court reestablished the original *Buckley* focus on quid pro quo in taking a narrow and concrete view of corruption.<sup>124</sup> Some commentators find this to be a long-awaited and positive determination to imbue campaign finance with certainty and precision,<sup>125</sup> while others lament that the narrow definition provides a basis for striking down many campaign finance restrictions which maintain the integrity of the electoral process.<sup>126</sup> In fact, both commentaries may be accurate.<sup>127</sup>

In *New York Republican State Committee*, plaintiffs argued that Rule 206(4)-5 targets the “general influence” of money in politics, rather than direct quid pro quo corruption.<sup>128</sup> How the Court would differentiate between the existence of a quid pro quo threat and mere influence, especially where a law is designed to carry out the compelling interest in preventing the appearance of corruption, is indeed thought-provoking. Recognizing the difficulty in making such a distinction, the *McCutcheon* Court wrote that it would “err on the side of protecting political speech rather than suppressing it” in close cases.<sup>129</sup> As was demonstrated in *McCutcheon*, although reasonable people may disagree about the existence of a quid pro quo threat, the Court may single-handedly find the danger of corruption in a particular context to be merely speculative.<sup>130</sup> Without reference to any evidentiary record re-

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123. *McCutcheon*, 134 S. Ct. at 1441.

124. See Dickerson, *supra* note 15 (arguing that *McCutcheon* restored the jurisprudence of *Buckley* by reviving the “quid pro quo” standard).

125. *Id.* (“Ultimately, the controlling opinion marked a decisive step toward straightforward and predictable constitutional analysis . . . . In doing so, the Court made campaign finance law a simpler, if no less controversial, discipline”); Robert Abraham, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078 (2010) (arguing for the stabilization of campaign finance jurisprudence by a “return to first principles”).

126. See Hasen, *supra* note 92.

127. Jonathan S. Berkon and Marc. E. Elia, *After McCutcheon*, 127 Harv. L. Rev. F. 373 (2014) (“the Court has steadied the tree, but pruned its branches significantly.”).

128. Plaintiff’s Brief, *N.Y. Republican State Comm. v. SEC*, 70 F. Supp. 3d 362 (D.D.C. 2014) (No. 1:14-cv-01345 (BAH)).

129. *McCutcheon*, 134 S. Ct. at 1439 (citing *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007)).

130. *Id.*

garding the possibility of quid pro quo by aggregating contributions to many candidates, in *McCutcheon* the Court found that no danger of corruption existed.<sup>131</sup>

Almost all challenges to contribution limits arising after *McCutcheon* claim that the limits impermissibly target “general influence,” yet differentiating between a de facto threat of corruption and general influence is a very complicated endeavor. Corruption is generally covert, and paradoxically, any successful prophylactic measure will remove the very corruption that could be evidence for the need for the prophylactic measure.<sup>132</sup> Indeed, in the context of Rule 206(4)-5, if evidence of corruption in the investment adviser industry persistently displayed itself despite the operation of Rule 206(4)-5, one may be likely to conclude that the rule is not well-tailored to serve the purpose for which it was intended. Perhaps the Court has had this evidentiary paradox in mind, since no Supreme Court decision has articulated particular evidentiary requirements for sustaining or defending an anti-corruption claim.

The Court has never required a showing of real harm to defend contribution limits based on an assertion of existing corruption or appearance of corruption.<sup>133</sup> In the pre-Roberts Court case of *Nixon v. Shrink Missouri Government PAC*, the Court wrote that empirical evidence of actual corrupt practices or of the perception of corruption is not always necessary.<sup>134</sup> The govern-

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131. *Id.* at 1479 (Breyer, dissenting) (clarifying that such evidentiary records contain testimony from Members of Congress (or state legislators) explaining why Congress (or the legislature) acted as it did) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 147–54 (upholding federal restrictions on soft money by drawing on an extensive District Court record that contained declarations from current and former Members of Congress); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457–465 (2001) (upholding federal limits on coordinated expenditures between parties and candidates on the basis of a summary judgment record that contained declarations from party operatives, fundraisers, and Members of Congress); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (upholding Missouri’s contribution limits on the basis of the lower court record, which contained similar declarations)).

132. See *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (noting the difficulty in finding current evidence to support long-enforced statutes).

133. Although this is accepted, some commenters argue that a real harm standard should be imposed to accord sufficient protection to the exercise of First Amendment freedoms. See D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fear about “Big Money” and Protecting Incumbents*, 52 ADMIN. L. REV. 687 (2000).

134. 528 U.S. 377, 390–91 (2000) (Missouri did not have to justify its “invocation” of the state’s interest in preventing corruption or the appearance of corruption “with empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence”); see also *McConnell*, 540 U.S. at 150 (“It is not necessary to produce evidence of actual corrup-



ment's claims were to be evaluated under a "plausibility" standard, where the "quantum of empirical evidence" necessary to establish that the government's proposition is plausible "will vary up or down with the novelty and plausibility of the justification raised."<sup>135</sup> In the foundational campaign finance case itself, *Buckley*, the Court had assessed the credibility of the anti-corruption rationale on legal argument only. For some, *Buckley* read through the lens of its progeny allows "government to regulate campaign contributions on the basis of speculation, conjecture, and simplistic assertions that money corrupts."<sup>136</sup> Attacking court findings of anti-corruption interest as merely speculative is in some sense an argument for adding a real harm evidentiary requirement.<sup>137</sup>

Indeed, it is difficult to understand how a court should differentiate between real harm and mere speculation, as *McCutcheon* insists it must, without adding or increasing evidentiary requirements. If the Court is in fact increasing the evidentiary burden, even implicitly, the SEC will bear the additional burden of proving that the rule targets real harm.

## 2. *Increasing the Level of Scrutiny*

While the Court in *McCutcheon* swept aside uncertainties regarding the scope of the definition of "corruption," it introduced doubts regarding the level of scrutiny it applied or will apply to future cases. The Court declined to decide whether to apply strict scrutiny or the less demanding "closely drawn test." The controlling plurality instead concluded that the aggregate limits failed both under strict scrutiny or the closely drawn test because of the "substantial mismatch" between means and ends.<sup>138</sup> Notably, *McCutcheon* is the most recent of a line of six campaign finance decisions that the Court has issued, all of which have struck down campaign finance restrictions.<sup>139</sup> Pervading these cases is

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tion to demonstrate the sufficiently important interest in preventing the appearance of corruption.").

135. *Shrink Missouri*, 528 U.S. at 378.

136. See *La Pierre*, *supra* note 133, at 690.

137. *Id.*

138. *McCutcheon*, 134 S. Ct. at 1446.

139. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (striking down a law regulating television advertisements that clearly target specific candidates for office); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (striking down the so-called "Millionaire's Amendment," which permitted congressional candidates facing wealthy

the apparent application of strict scrutiny to contribution restrictions by “measuring the burdens [campaign finance laws] impose on candidates, parties and groups, carefully probing in great detail the weight of the justifications offered for the mechanism at issue and showing a deep distrust and a severe skepticism of those justifications.”<sup>140</sup> Some believe that the Court will reconsider the contribution-expenditure distinction and will remove contribution limits altogether.<sup>141</sup> While these claims are merely speculative, the Court’s choice to implicitly apply strict scrutiny in place of a more relaxed “closely drawn” test seems close to certain.

In practice, the closely drawn test applied to contribution limits as a permissive standard that allowed courts to uphold a large number of contribution limits based on little evidence, by deferring to legislative judgment.<sup>142</sup> As discussed below, the Court’s move toward strict scrutiny is a potential threat to SEC Rule 206(4)-5.

### 3. *Minimized Deference to Legislative Judgment*

In the past, the Court has emphasized deference to legislative judgment when evaluating the appropriateness of any campaign finance restriction, reasoning that the legislature is better equipped to assess the need for the restriction.<sup>143</sup> In contrast, *McCutcheon*’s silence on this point may indicate a lack of deference.<sup>144</sup> Lack of deference may also be evident in the fact that the

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opponents who spent more than \$350,000 of their own money on the race to raise larger contributions until they achieved parity with their wealthy opponents); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (removing limits on spending of unions and corporations on elections, as long as that money is not given directly to or used in coordination with a candidate); *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (striking down a Montana ban on corporate political spending, rejecting evidence that outside spending can cause corruption or the appearance of corruption).

140. Joel Gora, *Symposium: McCutcheon v. FEC and the Fork in the Road*, SCOTUSBLOG (Aug. 15, 2013, 10:18 AM), <http://www.scotusblog.com/2013/08/symposium-mccutcheon-v-fec-and-the-fork-in-the-road> [<http://perma.cc/9DUY-WAPM>].

141. See RONALD COLLINS & DAVID SKOVER, *WHEN MONEY SPEAKS* 160 (2014) (“[T]he *Buckley* wall between contributions and expenditures . . . has been breached.”).

142. *Id.*

143. *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155 (2003) (finding that “deference to legislative choice is warranted” in the examination of contribution limitations).

144. The dissent in *McCutcheon* argued that the Court does not apply the deference to the legislature traditionally present in opinions regarding contribution limits. The *McCutcheon* dissent further argued that the Court failed to take account of “facts and circumstances set forth in an evidentiary record” and thus its “conclusion rests upon its

Court in *McCutcheon* ultimately struck down the aggregate contribution limitation provision that *Buckley* had sustained and the government had defended.<sup>145</sup> Skepticism regarding a legislature's motives in instituting contribution limits also seems to underlie the rationale behind narrowing the definition of corruption to quid pro quo. The plurality wrote that "those who govern should be the *last* people to help decide who *should* govern."<sup>146</sup> This line recalls an oft-raised concern that incumbents may attempt to self-perpetuate in office through campaign finance legislation which imposes greater burdens on their challengers, who have access to fewer resources.<sup>147</sup> Indeed, this concern was raised by the plaintiffs in *New York State Republican Committee*, who argued that Rule 206(4)-5 was designed to perpetuate incumbents in office.<sup>148</sup>

The lack of legislative deference may mean that a court would not value the SEC's own choice in placing a campaign finance restriction and choosing its tailoring. Yet whatever concerns may arise from legislators acting to self-perpetuate through campaign contribution limits, these concerns are unsuitable to the SEC context. For courts to recognize this, however, they must look beyond the confines of established campaign finance law and recog-

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own, not a record-based, view of the facts." *McCutcheon*, 134 S. Ct. at 1465 (Kennedy, J., dissenting). Additionally, the dissent argued that "these kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than are judges." *Id.* at 1480.

145. The *McCutcheon* Court recognized this, noting that "this case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue." *Id.* at 1447.

146. *Id.* at 1441–42. This may be a very misunderstood line in public commentary. Taking the line out of context distorts its meaning. The Court does not suggest that Congress may never be trusted with respect to its objectives, but that objectives beyond the prevention of quid pro quo corruption are impermissible for the reason that incumbents may attempt to place restrictions on the abilities of challengers to run for office. The full text reads: "The hallmark of corruption is the financial *quid pro quo*: 'dollars for political favors.' Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern." *Id.* (internal citations omitted).

147. *E.g.*, Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685–87 (1997) (observing that "[c]ampaign finance limits themselves may help to entrench incumbents in office"); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 CAL. L. REV. 1045, 1076, 1080 (1985) (asserting that campaign finance limitations often "impose far more serious strictures on challengers than on incumbents").

148. Complaint, *supra* note 19.

nize the special position of the SEC as an independent agency with a special anti-fraud interest.

## B. THE ARGUMENT FOR ANOTHER COMPELLING GOVERNMENT INTEREST

There is only one interest that the Supreme Court has recognized outweighs a campaign contribution limit's burden on the exercise of First Amendment rights: the prevention of corruption or the appearance of corruption.<sup>149</sup> Yet the SEC's stated purpose in adopting Rule 206(4)-5 was not phrased as an anti-corruption interest; rather, the Commission defended the rule in the rule's release by invoking the authority to prevent fraudulent and manipulative conduct.<sup>150</sup> The Commission also explicitly asserted that the rule is "not a restriction on contributions that is applicable to the public and is not intended to eliminate corruption in the electoral process."<sup>151</sup> The difference between an anti-corruption and an anti-fraud interest as justification for a contribution limit may not be a matter of mere formalism.

The SEC has prompted recognition of its anti-fraud interest before. In *Blount v. SEC*, in which municipal securities issuer pay to play rule G-37 was challenged, the SEC defended the rule with the following argument: "Unlike general campaign financing restrictions, . . . which seek to combat unspecified forms of undue influence and political corruption, [these] conflict of interest provisions . . . are tied to a contributor's business relationship with governmental entities and are intended to prevent *fraud* and *manipulation*" (italics added).<sup>152</sup> The *Blount* court did not find this distinction relevant,<sup>153</sup> likely because it decided the case at a time when the more expansive definition of corruption as "undue

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149. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 692 (D.C. Cir. 2010) (citing *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm'n.*, 470 U.S. 480, 496–97 (1985); *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2773 (2008)). Note, however, that the so-called "interest" really encompasses two distinct and equally valid interests. See Part III.A.

150. See Final Rule, *supra* note 6 at 41,021–22; see also SEC's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, *N.Y. Republican State Comm. v. SEC*, No. 1:14-1345, 70 F. Supp. 3d 362 (D.D.C. 2014), 2014 WL 10156750.

151. Final Rule, *supra* note 6, at 25.

152. 61 F.3d 938, at 943.

153. *Id.* ("We are uncertain how much to make of this distinction . . . . At no point did the Court suggest that it saw a great divide between efforts to foreclose corruption disguised as campaign contributions and more general efforts to limit the influence of wealth.").

influence” in *Austin v. Michigan Chamber of Commerce* was controlling.<sup>154</sup> As such, the rationale that a pay to play rule specific to an industry under the SEC’s purview by its nature targets quid pro quo exchanges, and not influence generally, has not been tested in the courts.

Further, the court in *Blount* declined to recognize the MSRB’s focus on the allocation of commercial benefits as distinct from the focus on electoral outcomes, reasoning that “in every case where a quid in the electoral process is being exchanged for a quo in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption.”<sup>155</sup> The court also concluded that “although the purpose of preventing corrupt bond markets might logically be considered unrelated to the suppression of speech” it had “difficulty in distinguishing the purposes of this rule from those animating the rules at issue in *Buckley* and *Austin*.”<sup>156</sup> For this reason, the court proceeded to apply strict scrutiny in a *Buckley* fashion — even though the appropriate standard was arguably the more permissive “closely drawn” test for contribution limits — and concluded that the rule was narrowly tailored to serve an anti-corruption interest.<sup>157</sup>

After *McCutcheon*, the distinction between the anti-corruption and anti-fraud interest has gained in relevance. A focus on the SEC’s anti-fraud objective would emphasize that Rule 206(4)-5’s restriction on campaign finance is no more than a necessary means of securing the integrity of the markets and providing investor protection. Securing the integrity of the electoral process is a tool for achieving the SEC’s purpose, rather than a purpose in itself. Although the end result is the same restriction, logically some of the concerns of the Roberts Court are extinguished. The SEC did not make the rule with the intent to place a campaign finance restriction, but only found it had to do so in order to effectively execute action in pursuit of its actual purpose. A focus on an anti-fraud interest highlights the fact that the SEC’s governmental interest is distinct from that of legislators in state and local government, who are personally involved in the very electoral processes that campaign finance limits affect.

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154. *See id.* 943–45.

155. *Id.* at 943.

156. *Id.*

157. *Id.*

Furthermore, the SEC's interest is in protecting a third party — the fund beneficiaries — who are not otherwise afforded the protection on their investments that they deserve. Indeed, it is the SEC's mandate to ensure this protection, and it is not tasked with maintaining the integrity of the electoral process. The SEC's aim, then, is not to interfere with the electoral process, but to ensure investment advisers do not engage in conduct that constitutes fraud under the Investment Advisers Act.

Courts have previously recognized that prevention of fraud is an important government interest that may justify an abridgment of speech.<sup>158</sup> Actions for fraud have been permitted where fraud was perpetrated through charitable solicitations,<sup>159</sup> ballot initiatives,<sup>160</sup> commercial speech,<sup>161</sup> the provision of identifying personal information,<sup>162</sup> and false advertising.<sup>163</sup> Although no court has applied the prevention of fraud rationale to the context of campaign finance,<sup>164</sup> the occasion to do so has not arisen. Courts therefore should consider the special SEC context and whether recognition of this interest is indeed necessary to evaluating the SEC's claims.

Although actions for fraud have been held permissible even where speech is abridged, the extent to which prophylactic measures which raise First Amendment concerns can be adopted to prevent possible fraud is uncertain. For instance, in cases where fraudulent charitable solicitations are a concern, the Court held unconstitutional prophylactic laws aimed at combating the fraud by imposing prior restraints on solicitation of funds where

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158. Market manipulation has also been raised as an important governmental interest permitting abridgment of speech, but only in the context of free broadcast television. See *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994).

159. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 613 (2003).

160. *Doe v. Reed*, 561 U.S. 186 (2010) (holding that disclosure requirements are sufficiently related to the State's interest in protecting the integrity of the electoral process to satisfy the exacting scrutiny standard applicable to First Amendment challenges).

161. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that the prevention of fraudulent commercial speech is constitutional).

162. *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that requiring applicants to a benefit programs to provide a social security number is not unconstitutional under the First Amendment).

163. *Donaldson v. Read Magazine*, 333 U.S. 178 (1948) (reaffirming the power to prevent against fraud from false advertising).

164. The SEC raised the argument that courts should accept the government's interest in "halting fraud and manipulation" in its response to the plaintiffs' motion for a preliminary injunction. SEC's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, *N.Y. Republican State Comm. v. SEC*, 1:14-cv-01345 (D.D.C. 2014), 2014 WL 10156750.

fundraising exceeds a specified level.<sup>165</sup> The Court has found that “there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high.”<sup>166</sup>

### C. NARROW TAILORING: PROVING NO ALTERNATIVE MEANS

A major issue that the Court found in *McCutcheon* was the so-called “prophylaxis-upon-prophylaxis” approach of Congress in enacting aggregate limits that were “layered on top, ostensibly to prevent circumvention of the base limits.”<sup>167</sup> These were found to have imposed an unnecessary burden on First Amendment rights, especially because reasonable alternatives to achieve the purpose of the limits existed, such as by greater clarification of the base limits or by earmarking rules.<sup>168</sup> The argument that the SEC has taken a prophylaxis-upon-prophylaxis approach by enacting Rule 206(4)-5 has also been raised.<sup>169</sup> The prophylactic approach of the rule may be alleged on the grounds that federal contribution limits, applicable to all contributors and all contribution recipients, already cap contributions at a reasonable amount. Additionally, there are numerous pay to play rules across the country which cover investment adviser contributions. With these other protections in place, the SEC bears the burden of proving that Rule 206(4)-5 does not pile prophylaxis upon prophylaxis.

Meeting this burden involves answering the broader, necessary inquiry of whether the rule is closely drawn or — if the Court is indeed tightening the standard of review of contribution limits after *McCutcheon* to strict scrutiny — narrowly tailored to its purpose. As the permissive closely-drawn standard in campaign finance cases erodes, a standard closer to strict scrutiny may require a showing that no less restrictive means are possible. This is a high burden of proof, under which prophylactic

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165. See, e.g., *Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *Sec’y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Riley v. Nat’l Fed’n of the Blind of N. C., Inc.*, 487 U.S. 781 (1988).

166. *Illinois*, 538 U.S. at 613.

167. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1458 (2014).

168. *Id.*

169. Complaint, *supra* note 19.

measures like Rule 206(4)-5 are not impermissible, but need adequate justification.

The SEC will need to answer why its contribution limit was placed when there are other, similar protections in place across the country. Indeed, there are many pay to play rules currently in operation in the United States. Pay to play schemes are not unique to the investment adviser context.<sup>170</sup> The risk of pay to play in a variety of industries has provoked regulatory responses by federal,<sup>171</sup> state,<sup>172</sup> and local governments.<sup>173</sup> Investment adviser pay to play can be targeted through legislation instead of, or in addition to, SEC rulemaking. Indeed, some existing pay to play laws target pay to play activity in the investment adviser industry specifically.<sup>174</sup>

However, as the SEC should argue, these laws are not uniform and are found in relatively few jurisdictions. The SEC regulation is thus necessary to ensure nation-wide investor protection. After all, an investment adviser has equal fiduciary duties to beneficiaries everywhere in the United States. Importantly, it cannot be appropriately alleged that the SEC rule piles prophylaxis-

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170. The danger of pay to play exists in any context in which government officials exercise the authority to award contracts. See CRAIG HOLMAN & MICHAEL LEWIS, PUBLIC CITIZEN, PAY TO PLAY LAWS IN GOVERNMENT CONTRACTING AND THE SCANDALS THAT CREATED THEM (2012), <http://www.citizen.org/documents/wagner-case-record.pdf> [<http://perma.cc/658E-D9HS>] (documenting existing pay to play statutes).

171. For the past forty years, the Federal Election Campaign Act has prohibited “any person from making or promising certain political contributions if that person is a signatory to or is negotiating for a federal contract to provide material, equipment services or supplies to the United States Government.” 2 U.S.C. § 441(c)(a)(1).

172. Sixteen states having adopted pay to play statutes to date. These states include Connecticut, New Jersey, California, Hawaii, Illinois, Kentucky, Louisiana, New Mexico, Ohio, Vermont, Virginia, West Virginia, and Colorado. See KARL J. SANDSTROM & MICHAEL T. LIBURDI, PERKINS COIE LLP, OVERVIEW OF STATE PAY-TO-PLAY STATUTES 2–13 (2010), <https://www.perkinscoie.com/images/content/2/1/v2/21769/wp-10-05-pay-to-play.pdf> [<https://perma.cc/LQW6-JD2E>] (discussing each state’s restrictions on political contributions by government contractors).

173. *Id.*

174. For example, the New York City “doing business rule” generally states that any member of a hedge fund or private equity fund may contribute no more than \$400 per year to a mayoral candidate. N.Y.C. LOCAL LAW 2007/34 (2007), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=447250&GUID=BD75E2DB-8F51-4C9E-A88C-5AD3EFDAA26B> [<http://perma.cc/5WXL-BB27>]. A California state statute establishes that the California Public Employees Retirement System Board is prohibited from considering any matter involving a government contractor unless the contractor has disclosed campaign contributions over \$250 or gifts over \$50 made to a board member or employee of the funds over the course of the previous calendar year. CAL. GOV’T CODE § 20152.5 (1998), <http://law.onecle.com/california/government/20152.5.html> [<http://perma.cc/3J98-VPZY>].



upon-prophylaxis, because it is not layered on top of other contribution limits as an addition preclusion, but rather acts to equalize the applicability of contribution limits and standardize practices against all jurisdictions. Although as many as three pay to play laws may be in operation in any one location, they do not add to each other but simply all repeat the prohibition on investment advisers and their employees. Of course, different pay to play rules may define a different level of de minimis allowance of contributions. Determining the appropriate level of the de minimis allowance involves determining whether less restrictive means exist to achieve the limits' purpose. The answer has no chance of being clear-cut.

When *Buckley* established the closely drawn test, the Court made no mention of a lower bound to permissible contribution limits.<sup>175</sup> The Court upheld a \$1000 limit on contributions, implying that amount was at least a permissible lower bound.<sup>176</sup> Observing that “a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000,” the Court in *Buckley* held that “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.”<sup>177</sup> The Court emphasized that the protected expression lies in the symbolic act of contributing rather than in the dollar amount contributed.<sup>178</sup> Nonetheless, the Court recognized that “contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.”<sup>179</sup>

Operating under the permissive closely drawn test, courts rarely questioned the chosen contribution limits imposed until the arrival of the Roberts Court. The Supreme Court decision in *Randall v. Sorrell* is especially relevant.<sup>180</sup> This was the first

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175. Presumably, the Court felt that a contribution limit that was at least as large as the then-current FECA limits was appropriate.

176. Deborah Goldberg & Brenda Wright, *Defending Campaign Contribution Limits after Randall v. Sorrell*, 63 N.Y.U. ANN. SURV. AM. L. 661, 664 (2007).

177. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

178. *Id.* (stating that “[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues”).

179. *Id.*

180. 548 U.S. 230 (2007).

case in which the Court struck down a contribution limit for being too low.<sup>181</sup> The Vermont law in question capped individual contributions at \$400 for statewide office elections, \$300 for state senate elections, and \$200 for state representative elections.<sup>182</sup> However, it is a common misconception that the Court struck down the contribution on the basis of low dollar value.<sup>183</sup> The Court did not find the amount to be determinative. The decision clarified that the contribution limits were unconstitutional because they had the effect of “magnify[ing] the advantages of incumbency to the point where they put challengers at a significant disadvantage.”<sup>184</sup> The Vermont contribution limits were anti-competitive and favored incumbents,<sup>185</sup> due to a distinct interplay of factors. These included “the low absolute level of the dollar ceilings, the application of one limit to the entire election cycle rather than separate limits for the primary and general elections; the application of limits to volunteers’ out-of-pocket expenses; the failure to index; the low party limits; and Vermont’s failure to provide specific evidence of a corruption danger that would justify such low limits.”<sup>186</sup>

The question of whether the SEC rule favors incumbents, which would be the main worry under *Randall*, has yet to be fully examined. The argument that incumbents can be somehow advantaged by a contribution limit because of their starting position was flatly rejected in *Buckley*.<sup>187</sup> Thus, insofar as the rule applies to both challengers and incumbents running for state or local office, the rule does not discriminate between the two. But Rule 206(4)-5 may disadvantage covered state officials who run for federal office, because the rule limits contributions to those officials, but not to other candidates competing for the same federal office.<sup>188</sup> In this context, then, Rule 206(4)-5 may operate to ad-

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181. See Briffault, *supra* note 114.

182. *Id.*

183. *Randall v. Sorrell*, 548 U.S. 230 (2007).

184. *Id.*; see also *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 738 (“We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.”).

185. *Id.*

186. See Briffault, *supra* note 114, at 812.

187. *Buckley*, 424 U.S. at 32 (“There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents.”).

188. A candidate for federal office is only affected by Rule 206(4)-5 if the candidate is currently a “covered official,” having the authority to influence investor adviser selection.

vantage incumbents. Whether the rule really does interfere with the campaign fundraising abilities of such candidates remains doubtful, however, given the limited number of covered investment advisers both contributing and fundraising. It is implausible that at the federal campaign level Rule 206(4)-5 can have any considerable effect on the perpetuation of incumbents in office. Nonetheless, this issue may require a response from the Commission.

The most important burden of proof that the SEC will have to bear in defending Rule 206(4)-5 will be why the *de minimis* limit it chose, which currently stands at more than \$1,300 below the federal contribution limits imposed by the Federal Election Commission, is defensible. In doing so, the SEC will have to make a showing that the contribution limits of the Federal Election Commission are not sufficient to preclude pay to play conduct.

#### IV. ARGUING FOR THE CONSTITUTIONALITY OF RULE 206(4)-5 TODAY

Rule 206(4)-5 should survive constitutional review, even under the heightened judicial scrutiny seemingly present in Roberts Court campaign finance decisions. To find otherwise would be to seriously undermine the possibility that any type of contribution limit should stand — a result that undercuts the aims of campaign finance law from *Buckley* to *McCutcheon*. Part A argues that the SEC pay to play rule clearly targets both actual and apparent corruption, evidenced by past pay to play scandals and current perceptions about doing business in the investment adviser industry. Part B argues that courts should recognize the SEC's anti-fraud interest as an independently compelling government interest. Part C discusses the rule's narrow tailoring and argues that the SEC's anti-fraud interest and status as an independent legislature command the deference of courts to the agency's choice of tailoring.

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17 C.F.R. § 206(4)-5(f)(6) (covered officials include incumbents, candidates, or successful candidates for office at the state or local level).

## A. RULE 206(4)-5 TARGETS DIRECT QUID PRO QUO CORRUPTION

The challenge to Rule 206(4)-5 in *New York Republican State Committee* is based on an overly expansive reading of *McCutcheon* that exaggerates the implications of a relatively modest decision. The worry that Rule 206(4)-5 targets “general influence” is misguided, as ultimately the Court is fairly clear in its distinction between the concrete threat of quid pro quo and the general influence on the outcome of an electoral process that is inherent in large campaign contributions.

The plausibility of investment adviser quid pro quo arrangements by way of campaign contributions is undeniable, even on purely theoretical grounds.<sup>189</sup> Unlike many other contribution limits that apply to the general public, Rule 206(4)-5 applies to contractors who by virtue of their employment face a significant financial incentive to engage in corruption.<sup>190</sup> The very notion that one must “pay” to “play” suggests that an adviser must make a contribution so as to ensure consideration of a bid.<sup>191</sup> Even if findings of de facto corruption were lacking, the observable connection of quid pro quo is markedly direct in the investment adviser context and, in the very least, clearly gives rise to the appearance of corruption. States have widely recognized the danger of pay to play in this and other contexts.<sup>192</sup> Importantly, the Court has never established that a showing of real harm must be made to sustain a contribution limit.<sup>193</sup>

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189. See Retnasaba, *supra* note 39 (providing empirical evidence that campaign contributions in the context of contracting are corrupting and encourage even greater contributions).

190. See *supra* Part II.A (describing why investment advisers feel compelled to engage in pay to play).

191. *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) (“[T]he phrase ‘pay to play’ suggests that a contribution brings the donor merely a chance to be seriously considered, not the assurance of a contract.”).

192. States that have enacted statutes to regulate pay to play include California, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New Jersey, Ohio, and Pennsylvania, among others. Cal. Gov’t Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)–(2); Haw. Rev. Stat. § 11-355 30; Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5–19.7; Ky. Rev. Stat. Ann. § 121.330; La. Rev. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. § 19:44A-20.13–20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code § 3517.13(I) to (Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01 (amended by Va. Acts 2013, Ch. 583 (eff. July 1, 2014)); W. Va. Code § 3-8-12(d).

193. See *supra* Part III.A.1. Additionally, the Commission does not need to demonstrate a certain degree of wrongdoing before it can enact a prophylactic rule. *United States v. O’Hagan* 521 U.S. 642, 672–73 (1997).

While the plaintiffs in *New York Republican State Committee* promoted the view that the Commission enacted Rule 206(4)-5 on “wholly unsubstantiated speculation that some political contributions may in fact result in quid pro quo corruption,”<sup>194</sup> findings of quid pro quos between investment advisers and public officials are not at all lacking. SEC Rule 206(4)-5, too, was adopted in response to concrete events, rather than on an unfounded hypothetical.<sup>195</sup> Furthermore, concerns about pay to play were also found in the long and considerate review of 50 comment letters submitted in response to the initial rule proposal.<sup>196</sup> If it does not offer clear evidence of de facto corruption, the extensive documentation of pay to play concerns in the media and among industry actors at least suggests that the appearance of corruption is prominent. As described above, protection against the appearance of corruption is a separate and distinct interest from protection against corruption itself, and both are accepted by the Court as justifications for a campaign finance restriction.

It is noteworthy that the Commission successfully enacted Rule 206(4)-5 only after the concern surrounding pay to play activity became overwhelming. Pay to play activity in the investment adviser industry had been on the SEC’s radar at least since the Commission first proposed a rule similar to 206(4)-5 in 1999.<sup>197</sup> The SEC’s proposal was not met with much support then. The Commission successfully adopted Rule 206(4)-5 a decade later, only after publicity highlighted the importance of pay to play in the investment adviser industry. This important history demonstrates that a rule of its type, in this industry, would never have been adopted without a strong public perception that there was stark pay to play.

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194. Complaint, *supra* note 19.

195. See Part II.A.

196. See, e.g., Comment Letter of New York State Comptroller Thomas P. DiNapoli (Oct. 2, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-134.pdf> [<https://perma.cc/BD8V-7RL2>]; Comment Letter of New York City Mayor Michael R. Bloomberg (Sept. 9, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-87.pdf> [<https://perma.cc/A37A-SH74>]; Comment Letter of Kentucky Retirement Systems Trustee Chris Tobe (Sept. 18, 2009), <https://www.sec.gov/comments/s7-18-09/s71809-100.pdf> [<https://perma.cc/5K8N-SXVJ>].

197. SEC Release, *Political Contributions by Certain Investment Advisers*, Investment Advisers Act Rel. No. 1812 (Aug. 4, 1999), <https://www.sec.gov/rules/proposed/ia-1812.htm> [<https://perma.cc/3YZJ-RN7Q>] (proposing a pay to play rule similar to the one ultimately adopted as Rule 206(4)-5).

Even as a matter of policy, the absence of the campaign finance restriction cannot reasonably be said to promote proper exercise of First Amendment expression. The appearance of pay to play in government contracting prompts contributions that are not a genuine exercise of the contributors' First Amendment rights. Where a contractor believes a contribution is indispensable to acquiring a contract, the contractor makes a choice either to voice support for a particular candidate or risk the health of the business.<sup>198</sup> If the contractor chooses to contribute, the contribution is not prompted by a candidate's political or economic views.<sup>199</sup> Rather, the contribution is reduced to an access fee, comparable to buying a business opportunity.<sup>200</sup> The contribution is arguably not properly characterized as "speech" protected under the First Amendment, since paying a fee can hardly be equivalent to exercising a democratic right to expression and association. The fee payment is essentially part of a quid pro quo, even if the contributor is trying to gain access rather than an advantage over other contractors.

In summary, to find that contribution limitations on contractors target only "general influence" would be to misunderstand the Court's intentions in *McCutcheon*, render the prevention of corruption rationale meaningless, and raise questions as to the possibility of upholding any contribution limit whatsoever. The threat of quid pro quo is so strong in the investment adviser government contracting context that courts should not hesitate to find the valid interests in preventing quid pro quo corruption or the appearance of quid pro quo corruption — both compelling government interests under *McCutcheon* — when reviewing pay to play contribution limitations.

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198. See *supra* Part II.A.

199. Christopher Cotton, *Pay-to-Play Politics: Informational Lobbying and Contribution Limits When Money Buys Access*, 96 J. OF PUB. ECON. 1 (2012) (arguing that campaign contributions in pay to play situations are equivalent to an access fee).

200. *Id.* at 3.

B. COURTS SHOULD RECOGNIZE THE SEC'S UNIQUE,  
COMPELLING ANTI-FRAUD INTEREST

As shown above, SEC is capable of defending Rule 206(4)-5 under the classic anti-corruption interest even after *McCutcheon*,<sup>201</sup> and, in this sense, it is unnecessary to overturn four decades of campaign finance law to find that Rule 206(4)-5 is a proper campaign finance restriction. Nonetheless, recognizing the SEC's special anti-fraud interest can serve the important purpose of countering arguments that the rule improperly targets members of the investment adviser industry or seeks to prevent the general influence of money in politics. Although in *Blount v. SEC* the court considered the anti-fraud interest to merely be the flip-side of an anti-corruption interest,<sup>202</sup> arguably there is more to it than the court recognized.

For one, it is important to recognize that the SEC's interest lies in protecting a very specific group of people — third party fund beneficiaries. It does not target generalized harm from general influence, but rather counters the “specific evil” attendant to violations of fiduciary duties and engagement in fraud, deceit or manipulation and does so for a specific protected class. Congress gave the SEC authority to target specific evils of this nature.<sup>203</sup>

Secondly, the fact that the SEC is an independent agency that does not act with the purpose of affecting the electoral process in favor of incumbents bolsters an argument for deference to its decisions.<sup>204</sup> In its proposal preceding the enactment of Rule 206(4)-5,<sup>205</sup> the SEC wrote that it does not intend to engage in “campaign finance reform.”<sup>206</sup> As the SEC is not part of the legislature, the Commission's motives cannot be related to incumbent self-perpetuation in office through campaign finance regulation.

Furthermore, the SEC's anti-fraud interest is one that can be seen as being *in addition to*, rather than instead of or the flip side of, the anti-corruption interest. The relationship between these two interests can best be described as one being entirely founded

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201. See *supra* Part II.A.

202. 61 F.3d 938, 943 (1995).

203. S. Rep. No. 86-1760, at 8 (1960).

204. See *supra* Part III.B.

205. SEC Release, *Political Contributions by Certain Investment Advisers*, Proposed Rule, Investment Advisers Act Rel. No. 2910, 25 n.71 (Aug. 3, 2009), <http://www.sec.gov/rules/proposed/2009/ia-2910.pdf> [<http://perma.cc/4V44-XPNK>].

206. Final Rule, *supra* note 6.

on the other — *but for* the anti-fraud interest, the anti-corruption interest would not exist.

In this context, too, a court should worry that the SEC would not be able to appropriately fulfill its duty under the Investment Advisers Act if it could not regulate the investment adviser industry to prevent pay to play. In effect, the Commission would have to accept that its hands are tied and it cannot fulfill its mandate, even though it has a compelling interest in protecting beneficiaries and the markets generally.

### C. RULE 206(4)-5 IS NARROWLY TAILORED

Courts should give special deference to the Commission in its choice of provisions under Rule 206(4)-5 that is due to the Commission because of its independence and anti-fraud motive. Recognizing this would render the Commission's arguments for narrow tailoring all the more convincing. However, even without this confidence, Rule 206(4)-5 should survive both the closely drawn test of intermediate scrutiny and the narrowly tailored test of strict scrutiny.

Evidence of narrow tailoring is obvious in the rule's construction. First, the Commission limited contributions only to officials who have power over investment adviser selection. Second, the Commission left investment advisers the choice between making large contributions and conducting business with a particular entity, and did not impose a flat prohibition.<sup>207</sup> The Commission also allowed for symbolic expression through de minimis contributions and provided for exemptive relief where such relief would be appropriate.<sup>208</sup>

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207. Some would argue that the choice "between exercising a First Amendment right and retaining the ability to engage in professional ability" is "impermissible." Complaint, *supra* note 19. However, formally the choice does exist and a person's decision with respect to this choice can be based on whatever values they find important, and the law should not go further than to recognize this.

208. Exemptive relief has already been granted a number of times. See SEC Order, *Davidson Kempner Capital Management LLC*, Investment Advisers Act Rel. No. 3715 (Nov. 13, 2013), <https://www.sec.gov/rules/ia/2013/ia-3715.pdf> [<https://perma.cc/5JS5-VUKC>] (a covered associate and his wife made a \$2,500 contribution to the U.S. Senate Campaign of the Ohio State Treasurer acting on the mistaken belief that contributions to federal campaigns did not require compliance pre-clearance); SEC Order, *Ares Real Estate Estate Management Holdings, LLC*, Order, Investment Advisers Act Rel. No. 3969 (Nov. 18, 2014), <https://www.sec.gov/rules/ia/2014/ia-3969.pdf> [<https://perma.cc/MLF7-MKYV>] (covered official who made a \$1,100 contribution to the reelection campaign of the governor of Colorado mistakenly believed that the contribution was not subject to pre-clearance).



As with many regulatory restrictions, the compliance burden of Rule 206(4)-5 may be sizable and the danger of misunderstandings that lead to noncompliance may prompt compliance professionals to present the pay to play rule as a flat prohibition. Thus, the nuances of the rule that achieve its narrow tailoring may be lost in practice, when compliance professionals seek to avoid confusion and inadvertent noncompliance. As a result, the practical effect of the rule may be to chill political speech more than it intends or anticipates.<sup>209</sup> This, however, is a worry that arises in the compliance-based implementation of many regulations, and is not a fault of Rule 206(4)-5's purpose or structure.

Rule 206(4)-5 will likely face the greatest scrutiny with respect to the chosen level of contribution limits, which permit individuals to contribute no more than \$350 to covered municipal candidates for whom the contributor is eligible to vote and no more than \$150 to candidates for whom the contributor is not eligible to vote.<sup>210</sup> The SEC has clarified that it chose the de minimis levels to mirror those of MSRB Rule G-37, adjusted for inflation.<sup>211</sup> Nonetheless, the SEC will undoubtedly have to offer further justification for its choice in order to counter the claim that the limits impose prophylaxis upon prophylaxis when considered alongside the federal contribution limit.

Provided that a court recognizes the need for deference to the agency's judgment, it should be sufficient that the SEC expressed the following worry in its adopting release to Rule 206(4)-5: "the

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policy because the adviser was not seeking new investments from the client); SEC Order, *Crestview Advisors, LLC*, Investment Advisers Act Release No. 3997 (Jan. 14, 2015), <https://www.sec.gov/rules/ia/2015/ia-3997.pdf> [<https://perma.cc/EHB4-8EQK>] (covered official realized that an inappropriate contribution had been made at the end of the year and promptly sought a refund of the contribution). However, exemptive relief may not be granted where no corrective measures were taken and where petitioners for relief rely on an argument that the contributions are unlikely to create the appearance of corruption. See SEC, *In the Matter of TL Ventures, Inc.*, Investment Advisers Act Release No. 3859 (June 20, 2014), <https://www.sec.gov/litigation/admin/2014/ia-3859.pdf> [<https://perma.cc/XG29-E99F>].

209. ROBERT K. KELNER, COVINGTON & BURLING, COMPLIANCE CORNER: COMPLIANCE WITH SEC PAY TO PLAY RULE 206(4)-5 12, 12 (2011), <http://www.cov.com/files/Publication/17cac6c9-f7c8-4c65-8f0d-81c72ffbd79c/Presentation/PublicationAttachment/d1c9d6fd-ab9f-4670-9b13-861cb0a614cf/Compliance%20with%20SEC%20Pay%20to%20Play%20Rule%20206%284%29-5.pdf> [<http://perma.cc/72AB-G274>] ("[F]or smaller firms, there is often an inclination to adopt a policy flatly banning political contributions.")

210. 17 C.F.R. § 275.206(4)-5(b)(1).

211. Final Rule, *supra* note 6, at 41,035 & n.230 ("[W]e are taking the suggestion of several commenters that we should increase the de minimis amount to reflect the effects of inflation since the MSRB first established its \$250 de minimis amount in 1994.")

\$1,000 amount suggested by some commenters strikes us as a rather large contribution that could influence the hiring decisions, depending upon the size of the jurisdiction, the amount of campaign contributions to opposing candidates, and the competitiveness of the primary or prospective election.”<sup>212</sup> As the Court itself expressed in *Randall*, the rule maker “is better equipped to make . . . empirical judgments” about what contribution restrictions are appropriate.<sup>213</sup> Courts should not “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”<sup>214</sup>

Even if the Commission’s judgment is questioned, the amount of the Rule’s contribution limits can easily be defended on the basis of preventing “bundling,”<sup>215</sup> a practice whereby independent actors coordinate so as to collectively make a large contribution to an official. Where such coordination is motivated by a desire to engage in pay to play, it constitutes a form of circumvention of Rule 206(4)-5. Coordination between the individual investment advisers of one firm to contribute to a candidate may amount to a very large sum of money in contributions, particularly if the limit is placed in the thousands of dollars.

Under *Randall*, the most relevant inquiry for the evaluation of de minimis levels is whether the limits “magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage.”<sup>216</sup> The SEC has never showed supporting evidence that challengers are not adversely affected. In the context of a covered official running for federal office, the SEC should seek evidence to support that that official is not “significantly disadvantaged” compared to other candidates.<sup>217</sup> Any such evidence could bolster the SEC’s claims, and the Commission could only benefit from such further research.

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212. *Id.*

213. *Randall v. Sorrell*, 548 U.S. 230, 248 (2007); *see also* Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 155 (2003) (“[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity.”).

214. Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 210 (1982).

215. The SEC did foresee that investment adviser employees may attempt to “bundle” their contributions in order to aggregate a sizable campaign contribution. This is evident in the fact that the SEC created anti-circumvention rules, such as Rule 206(4)-5(d), and stated that aggregating the de minimis contributions of multiple covered associates and related actors violates the rule. *See* Final Rule, *supra* note 6, at 41,043.

216. *Randall*, 548 U.S. at 280.

217. *See supra* Part III.C.

There are numerous reasons to believe that the SEC's limits do not significantly disadvantage challengers over incumbents. For one, the chosen contribution limits are within the range of many contribution limits across the country. Additionally, the rule has not been shown to significantly impact fundraising efforts of candidates, since the number of donors and donees the rule affects is relatively limited. Finally, self-entrenchment is plainly not a motivation of the SEC in its use of authority in this context.

## V. CONCLUSION

Campaign finance law seeks a balance between two frequently competing interests — protection of the individual's First Amendment right to political expression and prevention of the corrupting effects of money in politics. To find Rule 206(4)-5 unconstitutional would be to destroy this balance by disregarding an important anti-corruption interest. But the harm of such a ruling would go beyond neglecting established jurisprudence. It would also operate against the SEC's important anti-fraud interest in protecting public fund beneficiaries and the integrity of the market.

Indeed, SEC Rule 206(4)-5 presents a uniquely strong case for upholding a contribution limit's constitutionality. The rule targets quid pro quo corruption and the appearance thereof, espouses legitimate interests in preventing fraud and protecting investors under the Investment Advisers Act, and establishes reasonable contribution limits with respect to few actors, while allowing for symbolic contributions and exemptive relief. Although recent Roberts Court decisions, such as *McCutcheon* and *Randall*, have shown that the Court will likely look less favorably upon contribution limits in the future, the holdings of the Court do not threaten Rule 206(4)-5. Where the opinions suggest that the Court will look more skeptically upon contribution limits in the future, Rule 206(4)-5 survives even the most unfavorable interpretations of the Court's claims. Specifically, the rule is capable of surviving the limitation of the definition of "corruption" to quid pro quo, a standard of review equivalent to strict scrutiny, and minimized deference to legislative motives.

Courts should recognize that Rule 206(4)-5 was adopted based on ample evidence of corruption and the appearance of corruption. They should further acknowledge that the Commission is an independent agency, rather than a potentially self-perpetuating legislature, and that the Commission has a distinct anti-fraud interest. Further than this, courts should recognize that pay to play and the appearance of pay to play harm a broad spectrum of actors, including fund beneficiaries who bear the cost of sub-optimal management, investment advisers who fail to contribute or who feel compelled to make a contribution, candidates for government office who do not engage in pay to play or are pressured to engage when their opponents do, and taxpayers who pick up the bill when public fund money is not optimally allocated to managers. Striking down Rule 206(4)-5 would do little to promote democratic freedom of expression, but would instead perpetuate a practice which transforms contributions from a form of speech to a mere fee for business access. The cost of this access fee is one we would all bear, in direct dollar value and in the tarnished integrity of our markets and political institutions.