

# Client Update

## SEC Pay-to-Play Placement Agent Restriction Delayed, and a Reminder for Campaign Season

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On June 25, 2015, the staff of the Securities and Exchange Commission (the “SEC”) again delayed the compliance date of the provision of Rule 206(4)-5 under the Investment Advisers Act of 1940 (the “Pay-to-Play Rule”) that will prohibit investment advisers from retaining placement agents and client solicitors that are not themselves subject to “pay-to-play” rules until such time as both the Financial Industry Regulatory Authority (“FINRA”) and the Municipal Securities Rulemaking Board (“MSRB”) have adopted such rules.<sup>1</sup> It is currently not clear when FINRA and the MSRB will adopt their proposed rules.

In addition, with the kick-off of presidential campaign season upon us, we recommend that investment advisers, including advisers to public and private investment funds, remind their covered associates of their restrictions under the Pay-to-Play Rule and applicable state and local laws, including with respect to state or local government officials running for federal office (e.g., governors running for president).

### BACKGROUND

The Pay-to-Play Rule includes three main components applicable to all investment advisers:

- A prohibition from receiving compensation for providing advice to a government entity for two years after the adviser or one of its covered associates makes a contribution to certain government officials, whether that contribution was made before or after the covered associate joined the adviser (the “Two-Year Timeout”);

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<sup>1</sup> This delay is effective notwithstanding the publication on the same day of an SEC notice that this provision would go into effect on July 31, 2015. See *infra* note 5 and the accompanying text.

- A prohibition from coordinating or soliciting contributions to certain state or local government officials and payments to certain state or local political parties (the “Coordination and Solicitation Ban”); and
- A ban on making a payment to a person (such as a solicitor or placement agent) who solicits state or local government entities, unless the person is a “Regulated Person” (the “Solicitor and Placement Agent Restriction”).<sup>2</sup> A “Regulated Person” is (i) a registered investment adviser who has not violated either the Two-Year Timeout or the Coordination and Solicitation Ban or (ii) a registered broker-dealer or a registered municipal advisor who is subject to a pay-to-play rule that the SEC has found by order is substantially equivalent to or more stringent than the SEC’s Pay-to-Play Rule.

### DELAY OF SOLICITOR AND PLACEMENT AGENT RESTRICTION

The SEC previously twice delayed the compliance date for the Solicitor and Placement Agent Restriction (the third component mentioned above) because neither FINRA nor MSRB have adopted pay-to-play rules regarding registered broker-dealers or registered municipal advisors, respectively.<sup>3</sup> The SEC staff has now extended the compliance date a third time by posting a FAQ that provides no-action relief until the later of (i) the effective date of such a FINRA pay-to-play rule or (ii) the effective date of such an MSRB pay-to-play rule.<sup>4</sup> This FAQ was likely published to provide relief from the notice published by the SEC on the same day confirming that the Solicitor and Placement Agent Restriction would go into effect on July 31, 2015.<sup>5</sup>

Therefore, compliance with the Solicitor and Placement Agent Restriction remains effectively delayed until both FINRA and MSRB take action. In August 2014, MSRB proposed extending their pay-to-play rule for municipal securities

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<sup>2</sup> For additional information on the Pay-to-Play Rule, see our Client Update: SEC Adopts New Pay-to-Play Rule (Jul. 12, 2010), available at <http://www.debevoise.com/insights/publications/2010/07/sec-adopts-new-paytoplay-rule>.

<sup>3</sup> For additional information, see our Client Update: Compliance Date for Placement Agent Prohibition in Pay-to-Play Rule Delayed Again (Jun. 12, 2012), available at <http://www.debevoise.com/insights/publications/2012/06/compliance-date-for-placement-agent-prohibition->.

<sup>4</sup> Staff Responses to Questions About the Pay to Play Rule at Question I.4 (posted Jun. 25, 2015), available at <http://www.sec.gov/divisions/investment/pay-to-play-faq.htm>.

<sup>5</sup> Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Notice of Compliance Date, SEC Release No. IA-4129 (Jun. 25, 2015).

dealers to also cover municipal advisors.<sup>6</sup> FINRA proposed a pay-to-play rule for registered broker-dealers in November of 2014.<sup>7</sup> Neither of these proposed rules has been adopted. As a result, it is not clear when the Solicitor and Placement Agent Restriction will become effective.

### REMINDER FOR CAMPAIGN SEASONS

With a large number of presidential hopefuls having already announced, investment advisers may be advised to remind their covered associates of their obligations under any policies and procedures adopted by the adviser with respect to the Pay-to-Play Rule and relevant state and local laws. In particular, advisers and their covered associates should be careful regarding:

- Contributions to state or local government officials running for federal office (e.g., Gov. Christie, Gov. Jindal and Gov. Walker), including compliance with both the SEC Pay-to-Play Rule and state and local campaign finance and pay-to-play laws;
- Indirect contributions to government officials (e.g., “funneling” contributions through political action committees or spouses or other family members); and
- Use of the investment adviser’s name or resources for the solicitation of contributions for a government official or political party (e.g., use of the adviser’s offices for a fundraiser).

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Please do not hesitate to contact us with any questions.

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<sup>6</sup> Request for Comment on Draft Amendments to MSRB Rule G-37 to Extend Its Provision to Municipal Advisors, MSRB Regulatory Notice 2014-15 (Aug. 18, 2014).

<sup>7</sup> FINRA Requests Comment on a Proposal to Establish a “Pay-to-Play” Rule, FINRA Regulatory Notice 14-50 (Nov. 2014).