sary for an Eligible Pool because the Proposed RIA-QEP Exemption would be available to both delegating and designated CPOs with respect to that pool. The CFTC has nevertheless requested comment on whether any additional action is necessary to address existing delegation arrangements.

Other Proposed Amendments

- **Conforming Rule 4.13 amendments.** The NPRM would restore the cross-reference to Rule 4.13(a)(4) in Rule 4.13(b)(1)(ii), allowing the exemption to be claimed through NFA's electronic filing system, and in Rule 4.13(e)(2), extending the existing framework for CPOs that operate both registered and exempt pools to Eligible Pools.

- **CTA exemption.** The NPRM would restore the cross-reference to Rule 4.13(a)(4) in CFTC Rule 4.14(a)(8)(i)(D), allowing an otherwise eligible investment adviser to rely on the CTA registration exemption for advisory activities relating to CPOs and pools relying on the Proposed RIA-QEP Exemption.

- **Small pool exemption.** Separately, the NPRM would double the aggregate gross capital contributions threshold under CFTC Rule 4.13(a)(2) from $400,000 to $800,000, while retaining the existing limit of 15 participants per pool and the current exclusions from the capital-contribution calculation.

If adopted, the proposed rules could provide a more durable and flexible basis for CPO and CTA registration relief for SEC-registered private fund advisers, particularly those with funds that exceed the commodity interest trading limits under CFTC Rule 4.13(a)(3). Managers that are registered as CPOs or currently relying on the CFTC's no-action relief should consider whether the proposed exemption could provide an alternative basis for relief. Comments on the NPRM are due on October 5, 2026. The NPRM does not change existing obligations at this time, and the December 2025 no-action relief remains available while the rulemaking is pending.

ENDNOTES:

[1]Commodity Pool Operators and Commodity Trading Advisors: Reduction of Duplicative Regulation Through Intermediary Registration Exemptions; Expansion of the Exemption for Small Commodity Pools, 91 Fed. Reg. 54,264 (Aug. 21, 2026) (the "NPRM"), *available at*: https://thefederalregister.org/documents/2026-17079/commodity-pool-operators-and-commodity-trading-advisors-reduction-of-duplicative-regulation-through-intermediary-registr.

[2]*See* Morrison Foerster, CFTC Staff Issues No-Action Relief from CPO/CTA Registration for Certain Private Fund Managers and Credit Risk Transfer Transactions (Feb. 2, 2026), *available at*: https://www.mofo.com/resources/insights/260202-cftc-staff-issues-no-action-relief.

[3]CFTC Staff Letter No. 26-06 (Feb. 26, 2026), *available at*: https://www.cftc.gov/csl/26-06/download; CFTC Staff Letter No. 14-126 (Oct. 15, 2014). Letter 14-126 permits a "Delegating CPO" to avoid CPO registration, subject to specified conditions, where it delegates its CPO responsibilities to a registered "Designated CPO." Letter 26-06 preserved that relief where the Designated CPO instead relies on Letter 25-50 to avoid registration. *Available at*: https://www.cftc.gov/sites/default/files/idc/groups/public/%40lrlettergeneral/documents/letter/14-126.pdf.

[4]NPRM at 54268.

SEC PROPOSES TO RESCIND THE INVESTMENT ADVISER PAY-TO-PLAY RULE (RULE 206(4)-5): AN OVERVIEW AND KEY IMPLICATIONS

By Dabney O'Riordan, Michael L. Sherman and Christopher Staley

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On September 3, 2026, the Securities and Exchange Commission (the "SEC") proposed to rescind Rule 206(4)-5, commonly known as the "Pay-to-Play Rule" (the "Rule"), along with its related recordkeeping provisions in Rule 204-2(a)(18).[1] Over its 15-plus years of operation, the Rule has functioned less as a shield against genuine corruption and more as a strict-liability trap: the SEC's enforcement record shows firms fined tens of thousands of dollars over contributions as small as $400 to $1,000, made by people with no

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role soliciting the government client, including to candidates who did not win.[2] The SEC now acknowledges that the Rule "[l]acks clarity and creates a *de facto* strict liability standard, which can lead to situations where small donations or 'foot faults' potentially trigger substantial prohibitions."[3] In short, the Rule had become a "gotcha" for enforcement, divorced from the underlying purpose of preventing *quid pro quo* corruption in the award of government advisory mandates, and the SEC's attempt to fix it is, on balance, a sensible effort and welcome news for advisers.

Key Considerations for Advisers:

- **For Now, The Rule Remains in Force.** While it is unlikely this SEC would support enforcement actions along the lines of previous cases enforcing the Rule, advisers must keep in mind—particularly as the midterm elections near—that this is only a proposal, not a final rule. It is yet to be determined whether the Rule will ultimately be rescinded, and any violations now could become an enforcement focus in the future.

- **The Proposing Release Focuses on the Compliance Rule and Code of Ethics Requirements to Prevent Unlawful Pay-to-Play.** The SEC emphasizes its "ability to bring cases against investment advisers for fraudulent practices and violations of fiduciary duty for engaging in pay-to-play practices would remain unchanged" and that fiduciary duty and antifraud obligations "would continue to apply following the proposed rescission[.]"[4] Advisers, therefore, will be expected to establish reasonable policies and procedures to prevent pay-to-play practices. Unlike the current Rule, neither Rule 206(4)-7 (the "Compliance Rule") nor Rule 204A-1 (the "Code of Ethics Rule") enumerates specific required elements—meaning advisers that simply delete their existing pay-to-play policies without replacing them with a documented, risk-based framework would likely be exposed to SEC scrutiny under Rule 206(4)-7 even absent any actual contribution-driven scheme.

- **Existing agreements, state laws and SRO rules are unaffected and may now carry more relative weight.** Advisers with side letters that incorporate Rule 206(4)-5 by reference, or that separately restate its substantive prohibitions, could remain contractually bound by those terms even if the Rule is eventually rescinded. Further, rescission of the Rule would not absolve advisers of their obligations under local, state or Federal anti-corruption or procurement laws or similar SRO rules.[5]

The Scandal That Led to the SEC Adopting the Pay-to-Play Rule in 2010

A rescission of the Rule would return the SEC's focus primarily to addressing pay-to-play misconduct involving fraudulent or abusive practices—as was the case before the Rule went into effect in 2011. Liability in these pre-2010 cases generally turned on the same core fact pattern: a genuine *quid pro quo*—evidenced by a sham arrangement with no real work performed, a direct personal connection between the government official and the payment recipient, and non-disclosure of the arrangement to the pension fund—rather than merely making a political contribution. For example, an October 2000 SEC action alleged that a politician steered hundreds of millions of dollars of state pension fund investments to certain private equity firms in exchange for lucrative "consulting" or "finder's" fees paid to the politician's friends and political associates, with kickbacks to the politician, and found that these activities violated various anti-fraud provisions of the federal securities laws.[6]

SEC Enforcement After the Pay-to-Play Rule

Once the Rule took effect in 2011, the SEC's enforcement record shifted away from *quid pro quo* arrangements toward strict-liability violations of the Rule's technical prohibitions rather than the actual pay-to-play schemes that the Rule was intended to prevent.

In its first case under the Rule, the SEC charged a venture capital adviser with continuing to collect fees from two state pension funds after an associate made $2,000 and $2,500 campaign contributions—contributions the SEC expressly noted did not require "a showing of *quid pro quo* or actual intent to influence an elected official or candidate"—resulting in the SEC ordering the adviser to disgorge $256,697 and pay a $35,000 penalty.[7] This case foretold the future of SEC enforcement in this space—a focus on foot faults of the technical aspects of the Rule rather than its underlying purpose.

The SEC followed in 2017 and 2022 with two sweeps

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against multiple advisers for technical violations of the Rule. Following the second sweep against four advisers, with the SEC ordering the payment of $45,000 to $95,000 penalties for contributions of $1,000 or less to unsuccessful candidates, Commissioner Hester Peirce vocally dissented that the cases involved "one-time, small-dollar contributions" where none of the SEC's orders "find that any of the investment advisers solicited new or additional business[.]"[8]

Since then, there have been occasional one-off cases charging a violation of the Rule—none of which have involved a sum that one would expect to actually influence a decision maker to select an adviser. For example, in an April 2024 Order,[9] the SEC imposed a $60,000 penalty based on a single $4,000 contribution made by an individual nearly ten years *after* a decision had been made to invest in funds advised by the adviser—again drawing a dissent from Commissioner Peirce.[10]

SEC's Stated Reasons for Rescission

In the proposal, the SEC noted that practical difficulties of complying with the Rule have created a number of serious unintended effects. These include that the Rule is seen by industry participants as being unclear, overly complicated and a strict-liability standard that penalizes conduct rather than intent. Most notably, the Rule has resulted in some advisers prohibiting their personnel from making political contributions altogether—going well beyond what the rule requires and impeding the ability of personnel to participate fully in the political process. The SEC concluded the Rule was no longer needed because in its view the Advisers Act's antifraud provisions, fiduciary duty obligations, Compliance Rule and Code of Ethics Rule are adequate to police pay-to-play conduct while providing advisers greater flexibility to implement compliance policies more appropriately focused on addressing pay-to-play harms.

The SEC's Vision of Pay-to-Play Compliance Post Rescission

If adopted, the Proposing Release indicates that rescission would not create a compliance vacuum. Rather, the SEC takes the position that advisers would need to implement policies and procedures reflecting a principles-based approach that would be responsive to the anti-fraud provisions of Section 206 (and related fiduciary duty), the Compliance Rule and the Code of Ethics Rule—as well as state and local laws applicable to political contributions. Each of these carries different standards of proof—creating a different, and potentially difficult, practical burden for advisers.

The SEC's View of Key Anti-Fraud Considerations

Sections 206(1) and 206(2) would become the primary substantive prohibitions of the Advisers Act governing pay-to-play. Unlike the current Rule, a violation would require the SEC to show fraud or a breach of fiduciary duty—for example, that "[p]olitical contributions influence[d] the selection of an adviser to provide investment advisory services to State and local governments, including by constituting a prerequisite to competing for an advisory role," or that an adviser "engage[d] in or facilitate[d] an act, practice, or course of business which is fraudulent, deceptive, or manipulative" by failing to disclose a contribution that induced a government investment decision.[11] This is a higher bar than the current Rule's strict-liability standard for very technical violations.

Finally, many states and municipalities have their own rules around pay-to-play and procurement lobbying that will need to continue to be considered as advisers think about redesigning their compliance programs.

The SEC's View of the Key Considerations Under Rule 206(4)-7

Because the Compliance Rule requires every registered adviser to maintain written policies and procedures reasonably designed to prevent violations of the Advisers Act, the SEC contends that, if the Rule is rescinded, advisers' policies and procedures should be reasonably designed to prevent a pay-to-play violation under Sections 206(1) and (2). However, similar to an adviser's compliance policies and procedures generally, any pay-to-play policies can be tailored to an adviser's particular business and its related risks.[12]

The SEC's vision of what a tailored, principles-based compliance program would include once the prescriptive Rule falls away centers on a risk-assessment methodology consistent with its 2003 adopting release for the Compliance Rule, which stated that "[e]ach adviser, in designing its policies and procedures, should first identify conflicts and

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other compliance factors creating risk exposure for the firm and its clients . . . and then design policies and procedures that address those risks."[13] Applied to pay-to-play, the Proposing Release identified the following factors that advisers should at least consider to help ensure their pay-to-play policies and procedures are well-designed:

- **Risk identification.** Identifying and assessing the risk of pay-to-play conduct including indirect conduct such as "structuring transactions in a manner intended to hide the true purpose of a contribution or payment using third-parties, such as consultants, attorneys, family members, friends or companies affiliated with the adviser."[14]

- **Personnel classification.** Making appropriate distinctions between "advisory, senior level decision makers, or business development personnel"—who "carry heightened pay-to-play risks"—from "back-office, administrative, or clerical employees," and flagging personnel with a history of contributions.[15]

- **Pre-clearance.** Scaling any pre-clearance to firm size: "[a]n adviser with a small number of employees could determine that it does not need a formalized pre-clearance program," while "a large adviser with multiple advisory contracts with several public pension plans could determine that it is appropriate to have an electronic pre-clearance system[.]"[16]

- **Third-party solicitors.** Addressing the unique pay-to-play risks associated with the use of third-party solicitors. For example, the SEC suggested an adviser "could consider limitations such as requiring engagements to be approved by the adviser's Chief Compliance Officer or requiring any third-party soliciting government business on behalf of the adviser to be a registered investment adviser, registered broker-dealer, security-based swap dealer, or registered municipal adviser who has not made a political contribution to the government entity it is soliciting."[17]

- **Periodic monitoring.** Monitoring through, for example, "periodic audits of pre-clearance requests against a report documenting contributions by personnel to ensure compliance with its pre-clearance process[.]"[18]

- **Remediation.** A framework to address violation of the policy. According to the SEC, examples could include "seeking the return of contributions within a specific timeframe or potential disciplinary or other appropriate actions against employees that violate the policies and procedures."[19]

The SEC's View of the Key Considerations for the Code of Ethics

The Code of Ethics Rule requires an adviser to "set forth the standard of business conduct that the adviser requires of all of its supervised persons . . . [which] must reflect the adviser's fiduciary obligations and those of its supervised persons, and must require compliance with Federal securities laws."[20] As a result, the SEC explained in the Proposing Release that in addition to assessing whether its compliance policies and procedures address its particular pay-to-play risks, an adviser generally should assess its code of ethics in the context of its pay-to-play risks.[21]

Because the Code of Ethics Rule "does not require an adviser to adopt a particular standard of business conduct" but instead requires that the chosen standard "reflect its fiduciary obligations . . . and require compliance with the Federal securities laws," advisers should treat their code of ethics as a companion document to their compliance manual rather than an independent, freestanding policy.[22] For example, the SEC states that if an adviser "restricts certain types of contributions as part of its policies and procedures, the adviser should consider amending its code of ethics to reference that restriction."[23] Advisers, therefore, would want to consider cross-referencing any revised pay-to-play standards adopted under Rule 206(4)-7 in their codes of ethics to avoid any internal inconsistencies for which examiners are likely to test. There is also the related Form ADV obligation; an adviser is required, in Item 11 of Form ADV Part 2A, to "briefly describe its code of ethics and to explain that it will provide a copy of the code of ethics to any client or prospective client upon request."[24]

The SEC's View of Local, State, and Other Federal Anti-corruption or Procurement Laws

As the SEC explained in the Proposing Release, "[o]ther Federal, State, and local laws and regulations regarding the public procurement process (including the awarding of

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investment advisory mandates) exist independently of [the Rule] and would not be limited or otherwise impacted by its rescission."[25] Accordingly, if the Rule is rescinded, advisers must continue to consider their obligations under such laws. These compliance obligations, however, could help form the foundation of the risk-tailored, principles-based compliance program the SEC expects advisers to implement should the Rule be rescinded. For example, an adviser could leverage its existing familiarity with any jurisdiction-specific compliance obligations (*e.g.,* contribution thresholds, disclosure/affidavit requirements, look-back periods, placement-agent restrictions, *etc.*) as it considers the extent to which any tracking, disclosure, pre-clearance or monitoring infrastructure it had put in place to comply with the Rule could be modified.

Conclusion

The SEC has raised a number of questions for which it is seeking comment in considering whether to move forward with its proposal to rescind the Rule. While rescission seems like the most likely outcome under this administration, the SEC's questions indicate it is open to potentially amending the Rule to make it less restrictive and easier to apply or to further clarify the positions it has outlined in the proposing release as to what are reasonably designed policies to address pay-to-play in the absence of the specific requirements of the existing Rule.[26] The comment period closes on November 9, 2026.

ENDNOTES:

[1]*See Political Contributions by Certain Investment Advisers*, Release No. IA-6994 (Sep. 3, 2026) (the "Proposing Release"), *available at*: https://www.sec.gov/files/rules/proposed/2026/ia-6994.pdf.

[2]*See, e.g.,* Statement of Commissioner Hester M. Peirce, Laudable Ends, Poorly Pursued: Statement Regarding Recent Pay-to-Play Rule Settlements (Sept. 15, 2022) (detailing the facts of four pay-to-play cases and describing the Rule as "an exceedingly blunt instrument."), *available at*: https://www.sec.gov/newsroom/speeches-statements/peirce-statement-pay-play-rule-settlements-091522.

[3]Proposing Release, *supra* note 1, at 7.

[4]*Id.* at 8.

[5]*See id.* at 8 ("A rescission of the Commission's political contribution rule would not curtail any other existing criminal and civil laws against public sector corruption.").

[6]Specifically, the SEC alleged violations of Section 17(a) of the Securities Act, Section 10(b) of, and Rule 10b-5 under, the Securities Exchange Act, and Sections 206(1) and 206(2) of the Investment Advisers Act and breaches of the adviser's fiduciary duty through failure to disclose the *quid pro quo* arrangements. *See SEC v. Paul J. Silvester, et al.*, Lit. Rel. No. 16759 (Oct. 10, 2000), *available at:* https://www.sec.gov/enforcement-litigation/litigation-releases/lr-16759. A number of related cases arose out of the same facts. *See, e.g., In the Matter of Lisa A. Thiesfield*, Release No. IA-2186 (Oct. 29, 2003), *available at*: https://www.sec.gov/enforcement-litigation/administrative-proceedings/ia-2186; *See also In the Matter of Thayer Capital Partners, TC Equity Partners IV, L.L.C., TC Management Partners IV, L.L.C., and Frederic V. Malek*, Release No. IA-2276 (Aug. 12, 2004); *see also S.E.C. v. DiBella*, 587 F.3d 553, Fed. Sec. L. Rep. (CCH) P 95528 (2d Cir. 2009) (affirming the jury verdict and district court judgment in the SEC's enforcement action), *available at*: https://www.sec.gov/enforcement-litigation/administrative-proceedings/33-8457.

[7]*In the Matter of TL Ventures Inc.*, Release No. IA-3859 (June 20, 2014), *available at:* http://www.sec.gov/litigation/admin/2014/ia-3859.pdf.

[8]Statement of Commissioner Hester M. Peirce, *supra* note 2.

[9]*Available at*: https://www.sec.gov/files/litigation/admin/2024/ia-6590.pdf.

[10]*See* Statement of Commissioner Hester M. Peirce, There's Got to Be a Better Way: Statement of Dissent Regarding Wayzata Investment Partners LLC (Apr. 15, 2024), *available at*: https://www.sec.gov/newsroom/speeches-statements/peirce-statement-wayzata-041524.

[11]Proposing Release, *supra* note 1, at 9, 26.

[12]*See id.* at 34-36.

[13]Compliance Programs of Investment Companies and Investment Advisers, Release No. IA-2204 (Dec. 17, 2003), at Section II.A.1, *available at:* https://www.sec.gov/files/rules/final/ia-2204.htm.

[14]Proposing Release, *supra* note 1, at 37.

[15]*See id.*

[16]*Id.* at 37-38.

[17]*Id.* at 38-39.

[18]*Id.* at 39.

[19]*Id.*

[20]*Id.* at 28.

[21]*See id.* at 29, 39-40.

[22]*See id.* at 39-40.

[23]*Id.* at 40.

[24]*Id.*

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