UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In re	)
POLITICAL CONTRIBUTIONS BY	)
CERTAIN INVESTMENT ADVISERS,	)
17 C.F.R. §275.206(4)-5	)
	)

PETITION TO REPEAL

Jason Torchinsky
J. Michael Bayes
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
jt@hvjt.law

H. Christopher Bartolomucci
Brian J. Field
BANCROFT PLLC
500 New Jersey Avenue
Seventh Floor
Washington, DC 20001
(202) 234-0090
cbartolomucci@bancroftpllc.com

Counsel for Petitioners New York Republican State Committee and Tennessee Republican Party

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INTRODUCTION

Pursuant to the Administrative Procedure Act, 5 U.S.C. §553(e), and Rule 192(a) of the Securities and Exchange Commission's ("SEC" or "Commission") Rules, 17 C.F.R. §201.192(a), the Petitioners New York Republican State Committee and Tennessee Republican Party (the "State Parties") hereby petition the Commission to repeal its existing Political Contribution Rule, 17 C.F.R. §275.206(4)-5. *See* Exhibit A. The Rule is both unconstitutional and unlawful.

The Rule limits the ability of investment advisers to make otherwise lawful political contributions to certain candidates for state and federal office, thereby also restricting the fundraising capabilities of such candidates. Moreover, the Rule limits the fundraising capabilities of state political parties. The Rule states that it does so to "address[] practices that undermine the integrity of the market for advisory services," to promote "fairness" in the market, and to "level[] the playing field among advisers competing for State and local government business." 75 Fed. Reg. 41,018, 41,053 (July 14, 2010). Since the Rule was issued, the Supreme Court has made clear that the only governmental interest substantial enough to justify restrictions on the right to make political contributions is preventing corruption or the appearance thereof, and the only corruption that counts is *quid pro quo* corruption. The Commission's justification for the Political Contribution Rule fails to pass constitutional muster.

The Rule is also unconstitutionally vague. The State Parties recently challenged the Rule in federal court. *See N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C.); *N.Y. Republican State Comm. v. SEC*, No. 14-1194 (D.C. Cir.). In an effort to defeat the State Parties' standing, the Commission revealed the unclear scope of the Rule's prohibitions, making it nearly impossible to determine which state officials and which employees of investment advisers are covered by the Rule. This vagueness has already caused a significant chill on protected First Amendment activity.

Moreover, the Rule was issued in excess of the Commission's statutory authority. Congress gave the Commission authority to prohibit fraudulent, deceptive, or manipulative practices in the investment adviser services market, and to make rules that are reasonably designed to deter such practices. The Commission has not and cannot offer any evidence that fully disclosed political contributions or coordinated contributions to the state or federal accounts of state political parties, in amounts within the limits set by Congress, are likely to result in fraudulent, deceptive, or manipulative practices in most, many, or even a few instances. Instead, Congress reserved for itself the exclusive authority to set limits on federal political contributions and states retain exclusive authority to regulate political contributions to candidates for state office.

The Rule directly infringes upon the First Amendment rights of the State Parties and their members. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Given this ongoing irreparable injury, the State Parties request that the Commission review this petition to repeal on an expedited basis.

BACKGROUND

I. The Political Contribution Rule

Under the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §80b *et seq*., "[i]t shall be unlawful for any investment adviser, … directly or indirectly … to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." *Id.* §80b-6(4). The Advisers Act authorizes the Commission to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." *Id.*

In 1999, purporting to act under §80b-6(4), the Commission proposed a rule that would have prohibited investment advisers from receiving compensation for advisory services provided

to a government client for two years if the adviser or certain of its employees contributed to certain elected officials or candidates for elected office. *Political Contributions by Certain Investment Advisers*, 64 Fed. Reg. 43,556 (Aug. 10, 1999) (the "1999 Proposal"). In other words, the 1999 Proposal would have forced investment advisers to choose between making contributions up to the levels permitted by statute, or providing their services to certain government clients. This proposal was met with the objection of three commissioners of the Federal Election Commission ("FEC"), who stated that it "encroach[ed] upon the exclusive domain of the [Federal Election Campaign Act of 1971 ("FECA")]" and conflicted with Congress' intent to vest "sole jurisdiction to enforce the provisions contained within the FECA's covered area" in the FEC. Letter from Darryl R. Wold, Vice Chairman, FEC, *et al*., to Jonathan G. Katz, Secretary, SEC, 1999 WL 33949875, at *1–2 (Nov. 1, 1999). The SEC did not issue a final rule based on the 1999 Proposal.

In 2009—several years after Congress enacted the Bipartisan Campaign Reform Act ("BCRA") and, in doing so, declined to adopt the SEC's proposal or provide the SEC with any authority to do so itself—the SEC proposed for comment another rule seeking to deter investment advisers from making certain political contributions that otherwise would be lawful under FECA. *See Political Contributions by Certain Investment Advisers*, 74 Fed. Reg. 39,840 (Aug. 7, 2009). On July 14, 2010, the SEC approved a final rule "prohibit[ing] an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees make a contribution to certain elected officials or candidates." *Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41,018, 41,052 (July 14, 2010).

The Political Contribution Rule is triggered when an investment adviser makes a political contribution to an "official of [a] government entity," 17 C.F.R. §275.206(4)-5(a)(1), which

includes "an incumbent, candidate or successful candidate for elective office of a government entity if the office: (i) [i]s directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or (ii) [h]as authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity." *Id.* §275.206(4)-5(f)(6). "Government entity" means "any State or political subdivision of a State[.]" *Id.* §275.206(4)-5(f)(5). The Rule's prohibitions apply to "any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act." *Id.* §275.206(4)-5(a)(1).

These prohibitions also extend to "covered associate[s]" of investment advisers, which include "(i) [a]ny general partner, managing member or executive officer, or other individual with a similar status or function; (ii) [a]ny employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and (iii) [a]ny political action committee controlled by the investment adviser or by any [of its covered associates]." *Id.* §275.206(4)-5(f)(2).

When the Rule is triggered, an investment adviser is barred for two years from receiving compensation for advisory services provided to the particular government entity whose public official received the political contribution. *Id.* §275.206(4)-5(a)(1). The Commission also cautioned that the two-year ban may be triggered by contributions to a political party when the party solicits "funds for the purpose of supporting a limited number of government officials[.]" 75 Fed. Reg. at 41,031 n.163. In such instances, contributions "might well result in the same prohibition … as would a contribution made directly to the official." *Id.*

In addition to prohibiting direct contributions, the Political Contribution Rule makes it "unlawful" for an investment adviser or covered associate "[t]o coordinate, or to solicit any person or political action committee to make, any (A) [c]ontribution to an official of a government entity to which the investment adviser is providing or seeking to provide investment advisory services; or (B) [p]ayment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii). These restrictions are purportedly "intended to prevent advisers from circumventing the rule's prohibition on direct contributions to certain elected officials such as by 'bundling' a large number of small employee contributions to influence an election, or making contributions (or payments) indirectly through a State or local political party." 75 Fed. Reg. at 41,043. A political action committee that is "controlled" by an investment adviser is completely banned from making a contribution to a covered public official of a government entity who is also a candidate for elected office. 17 C.F.R. §275.206(4)-5(f)(2)(iii).

Finally, the Rule's broad catch-all provision makes it unlawful "for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section." *Id.* §275.206(4)-5(d).

There are limited exceptions to the Political Contribution Rule's two-year ban. First, the Commission provided what it characterizes as a "*de minimis* exception" under which an individual may contribute "to officials for whom the covered associate was entitled to vote at the time of the contributions and which in the aggregate do not exceed $350 to any one official, per election, or

to officials for whom the covered associate was not entitled to vote at the time of the contributions and which in the aggregate do not exceed $150 to any one official, per election." *Id.* §275.206(4)-5(b)(1). This exception is limited to "natural person[s]," and thus is unavailable to a political action committee controlled by an investment adviser. *Id.* Second, the "new covered associates" exemption provides that the Rule "shall not apply to an investment adviser as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the investment adviser unless such person, after becoming a covered associate, solicits clients on behalf of the investment adviser." *Id.* §275.206(4)-5(b)(2). And finally, the SEC may exempt an investment adviser who made a political contribution in violation of the SEC's rule from the two-year ban. *See id.* §275.206(4)-5(e).

According to the SEC, the Political Contribution Rule is designed to prevent so-called "pay-to-play" practices in the management of public pension plans, where investment advisers allegedly "seek to influence government officials' awards of advisory contracts" and elected officials "allow political contributions to play a role in the management of [public pension plan] assets." 75 Fed. Reg. at 41,019. In promulgating the Rule, the Commission failed to identify instances in which this has actually occurred. Instead, the bulk of the "pay-to-play" activities it invoked involved direct gifts or payments to government officials, not political contributions, and these bribes and kickbacks typically were in amounts far larger than the $2,700 limit on federal political contributions (or analogous state contribution limits). *See id.* at 41,019 nn.16–26. The SEC thus acknowledged that the Rule prohibits conduct that is rarely (if ever) actually fraudulent or manipulative, but instead claimed that the Rule is a permissible exercise of its authority "to adopt rules 'reasonably designed to prevent, [*sic*] such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.'" *Id.* at 41,022 (quoting 15 U.S.C. §80b-6(4)).

II. The State Parties' Interest

The Political Contribution Rule directly harms the State Parties and their members. The Rule makes it unlawful for investment advisers or covered associates "[t]o coordinate, or to solicit any person or political action committee to make, any [p]ayment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii)(B). The Commission further warned that if a "political party is soliciting funds for the purpose of supporting a limited number of government officials, then, depending upon the facts and circumstances, contributions to the … political party might well result in the same prohibition … as would a contribution made directly to the official." 75 Fed. Reg. at 41,031 n.163.

The Rule has directly harmed the State Parties. As noted above, the State Parties previously challenged the Rule in federal court, providing ample evidence of their interests and the harms that the Political Contribution Rule has caused. Jason Weingartner, the Executive Director of the New York Republican State Committee, stated that "donors and potential donors to the state party's federal account … have either limited their contributions or declined to contribute because of the Political Contribution Rule." *See* Dkt. 7-2, Decl. of J. Weingartner ¶9, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Aug. 8, 2014) ("Weingartner Decl.") (attached at Exhibit B). Likewise, Brent Leatherwood, the Executive Director of the Tennessee Republican Party, stated that he has encountered "donors and potential donors to the state party's federal account who have either limited their contributions or declined to contribute because of the Political Contribution Rule." *See* Dkt. 7-3, Decl. of B. Leatherwood ¶9, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Aug. 8, 2014) ("Leatherwood Decl.") (attached at Exhibit C). This has caused a direct harm to the State Parties' fundraising.

The Rule has also harmed the ability of the State Parties' members to contribute to candidates of their choice. As both Weingartner and Leatherwood stated, the Political Contribution Rule has caused their members to decline to make or to limit their political contributions to candidates for federal office. *See* Weingartner Decl. ¶10; Leatherwood Decl. ¶10; *see also* Dkt. 25-1, Supp. Decl. of J. Weingartner ¶4, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Sept. 5, 2014) ("Weingartner Supp. Decl.") (attached at Exhibit D); Dkt. 25-2, Supp. Decl. of B. Leatherwood ¶2, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Sept. 5, 2014) ("Leatherwood Supp. Decl.") (attached at Exhibit E). Likewise, Tennessee State Senator Jim Tracy, a covered official who recently ran for a seat in the U.S. House of Representatives, identified two contributors to his campaign who, as covered associates, limited their contributions because of the Political Contribution Rule. *See* Dkt. 27, Decl. of Jim Tracy ¶¶8–9, *N.Y. Republican State Comm. v. FEC*, No. 14-cv-01345 (Sept. 17, 2014) ("Tracy Decl.") (attached at Exhibit F).

Finally, the Rule has also harmed the ability of the State Parties' members, who are covered officials, to fundraise effectively. As noted above, both Weingartner and Leatherwood stated that their members have limited contributions to their members who are candidates for federal office because of the Political Contribution Rule. *See* Weingartner Decl. ¶10; Leatherwood Decl. ¶10. Likewise, Senator Tracy stated that the Political Contribution Rule hampered his ability to fundraise in an election he lost by just 38 votes to a candidate not covered by the Rule. *See* Tracy Decl. ¶11.

ARGUMENT

I. The Political Contribution Rule Is Unconstitutional.

The Political Contribution Rule severely burdens First Amendment rights, restricts protected activity for impermissible reasons, and is unconstitutionally vague. At bottom, the Rule

requires investment advisers to choose between exercising their constitutional right to support candidates through otherwise lawful political contributions and continuing to work as advisers to government entities and funds. Under the Rule, the only way for an investment adviser to do the latter is to forgo the former.

A. The Political Contribution Rule Impermissibly Limits Political Contributions to Promote Policy Goals Unrelated to the Prevention of Quid Pro Quo Corruption.

The Supreme Court recently stated that there is "only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014). And there is only one type of corruption that campaign finance restrictions may target: *quid pro quo* corruption. *Id.* at 1441. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.* at 1450. "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *Id.* at 1451 (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). In short, "[i]ngratiation and access … are not corruption," and thus are not things that campaign finance restrictions may target. *Citizens United*, 558 U.S. at 360.

Of course, the Political Contribution Rule does not target the spending of "large sums of money." Instead, it targets fully disclosed federal political contributions of $2,700 or less (or within analogous state contribution limits). But even setting that aside, the Rule must be repealed, as the Supreme Court has never recognized "address[ing] practices that undermine the integrity of the market for advisory services," 75 Fed. Reg. at 41,053, as a legitimate basis for imposing restrictions on the right to make political contributions. Nor has the Court deemed the government's interest in promoting "fairness" or "leveling the playing field among advisers

competing for State and local government business," *id.* at 41,019, 41,053, sufficiently important to override an individual's First Amendment rights.

Implicitly recognizing as much, the Commission attempted to squeeze the Rule into the Supreme Court's case law by portraying it as "a focused effort to combat *quid pro quo* payments by investment advisers seeking governmental business." *Id.* at 41,023 n.68. But that argument is doomed by its sheer implausibility where *disclosed* contributions *within* the limits established by FECA (or state laws) are concerned. As noted, the SEC did not identify a single instance in which an investment adviser made a fully disclosed and otherwise lawful campaign contribution "in connection with an effort to control the exercise of an officeholder's official duties." *McCutcheon*, 134 S. Ct. at 1450. Indeed, the Commission did not even attempt to justify its rule through the kind of "mere conjecture" that courts "have never accepted … as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *see also, e.g.*, *McCutcheon*, 134 S. Ct. at 1456 ("speculation … cannot justify … substantial intrusion on First Amendment rights").

In other words, the Commission openly acknowledges that the Political Contribution Rule is a broad prophylactic measure that deters constitutionally and statutorily protected conduct even when the government has no legitimate interest in doing so. *See* 75 Fed. Reg. at 41,022 (resting on authority "to adopt prophylactic rules that may prohibit acts that are not themselves fraudulent"). But Congress has already enacted a broad prophylactic restriction on campaign contributions, limiting them to $2,700 per candidate per election. That contribution limit "remain[s] the primary means of regulating campaign contributions[.]" *McCutcheon*, 134 S. Ct. at 1451. If the Commission wants to subject investment advisers to even more stringent restrictions "layered on top" of that statutory limit, *id.* at 1458, then it must produce actual evidence that the

existing limit—along with the myriad other restrictions imposed to enforce that limit or otherwise prevent *quid pro quo* corruption—is somehow insufficient to address *quid pro quo* corruption or the appearance thereof when it comes to investment advisers. But the Commission did not offer "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" that the Rule creates. *Randall v. Sorrell*, 548 U.S. 230, 261 (2006).

B. The Commission's Reliance on *Blount v. SEC* Is Misplaced.

The Commission has insisted that the Rule's constitutionality was already resolved in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), which rejected a First Amendment challenge to a different rule governing municipal securities dealers. But *Blount* relied heavily on several strands of reasoning that the Supreme Court has recently rejected. For instance, *Blount* insisted that courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 945 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)). But the Supreme Court has since confirmed precisely the opposite, instructing that a "'prophylaxis-upon-prophylaxis approach' requires [courts to] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 134 S. Ct. at 1458 (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 479 (2007)). *Blount* also just assumed that the problem the SEC purported to target existed, *see* 61 F.3d at 945, in direct contradiction to the Supreme Court's more recent admonitions that speculation and conjecture do not suffice where First Amendment rights are concerned. *See McCutcheon*, 134 S. Ct. at 1452; *Shrink Mo.*, 528 U.S. at 392. And *Blount* impermissibly deemed the constitutional burden minimal because affected individuals could still "contribute up to $250 per election to each official for whom he or she is entitled to vote," 61 F.3d at 947–48—an argument nearly identical to one rejected in *McCutcheon*. *See* 134 S. Ct. at 1449 ("It is no answer to say that the individual can simply contribute less money").

Moreover, *Blount* completely overlooked the disparate impact that a restriction like the Political Contribution Rule has on candidates. The Supreme Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis v. FEC*, 554 U.S. 724, 738 (2008). Nor has it upheld a law that prevents some, but not all, candidates for the same office from receiving contributions from certain individuals. Yet that is precisely what the Political Contribution Rule does, as it prevents investment advisers from making $2,700 contributions to candidates for federal office who are covered officials, but not from making the same contribution to those candidates' opponents.

Finally, *Blount* did not discuss the constitutionality of anything comparable to the Political Contribution Rule's express prohibition on coordinating or soliciting contributions "to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii)(B). That restriction is unconstitutional wholly apart from the Rule's primary restriction, as it is so exceedingly attenuated from any conceivable "pay-to-play" concerns that the SEC might advance that it cannot plausibly be understood to further those interests "in any meaningful way." *McCutcheon*, 134 S. Ct. at 1452.

The D.C. Circuit Court of Appeals' recent citation to *Blount* in *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), is of no moment. Not only does that reference do nothing to cure the constitutional infirmities of *Blount*'s analysis, the *Wagner* court addressed a statute that has little in common with the Political Contribution Rule. Unlike the Rule, the ban on contributions by federal contractors addressed in *Wagner* was an act of Congress supported by 139 years of history. *See* 52 U.S.C. §30119; *Wagner*, 793 F.3d at 10–14. The contractor contribution ban is also substantially less onerous than the Political Contribution Rule, applying only "while they negotiate

or perform federal contracts," *Wagner*, 793 F.3d at 3, rather than for two years after a contribution is made. Moreover, the contractor contribution ban does not include any provisions similar to the Rule's broad prohibitions against contributions to state political parties.

In short, *Blount* involved a different rule, "a different statute and different legal arguments, at a different point in the development of campaign finance" jurisprudence. *McCutcheon*, 134 S. Ct. at 1447. The Supreme Court's recent decisions compel the result that the Rule's "prophylaxis-upon-prophylaxis approach" to restricting the rights of investment advisers to make political contributions cannot be reconciled with the First Amendment. *McCutcheon*, 134 S. Ct. at 1458.

C. The Political Contribution Rule Is Unconstitutionally Vague.

The Political Contribution Rule is also unconstitutionally vague. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Laws that are "impermissibly vague" must be "invalidat[ed]" for failing to satisfy this "requirement of clarity[.]" *Id.* And "[w]hen speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* The Commission recently confirmed that the Rule lacks this requisite clarity, causing "men of common intelligence" to "guess at [the Rule's] meaning and differ as to its application[.]" *Connally*, 269 U.S. at 391.

In the State Parties' recent challenge to the Political Contribution Rule in federal court, the Commission was unable to articulate clearly the scope of the Rule's prohibitions. As discussed above, two of the key components to determining whether a political contribution triggers the Rule's proscriptions are (1) whether the donor is a covered associate; and (2) whether the recipient is a covered government official. In both instances, the Commission's recent statements make it

nearly impossible to determine with confidence whether an individual is covered by the Rule, causing a widespread chill on First Amendment activity.

A covered associate is "[a]ny general partner, managing member or executive officer, or other individual with a similar status or function" of an investment adviser, or "[a]ny employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee[.]" 17 C.F.R. §275.206(4)-5(f)(2)(i)–(ii). Yet, when the State Parties identified multiple such individuals who wished to make political contributions to a Tennessee State Senator's political campaign, the SEC demurred. *See* Tracy Decl. ¶¶8–9; Dkt. 28, Resp. to Pls.' Mot. for Leave to File Tracy Decl. at 5, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Sept. 24, 2014) ("SEC Tracy Resp."). Steve McManus is Vice President, Senior Investment Officer of FTB Advisors, Inc., an investment adviser. S*ee* Exhibit G. Similarly, Steven Ruckart is the Registered Principal of Invest Financial Corporation, an investment adviser. *See* Exhibit H. Both of these individuals satisfy the Rule's definition of a covered official, were advised by their employers that they were covered associates, and limited their contributions to Tennessee State Senator Jim Tracy's campaign for Congress. Tracy Decl. ¶¶8–9.

The Commission argued, however, that neither was a covered associate because their employers were not currently receiving (or seeking to receive) compensation for advisory services to the government bodies with which Tracy was involved. SEC Tracy Resp. at 5. In fact, the Commission argued that "[i]f an investment adviser does not receive compensation from the governmental entity for which the recipient of the contribution is an official, there is no possibility that the timeout would affect the investment adviser's compensation and thus discourage a contribution." *Id.* at 5–6. This interpretation of the Rule not only ignores the plain fact that the

Rule *has already* discouraged contributions, it ignores the draconian effect of the two-year timeout, which effectively bars contributions by any covered associate of an investment adviser that may in the next two years wish to provide covered advisory services.

An "[o]fficial" of a government entity is "an incumbent, candidate or successful candidate for elective office of a government entity, if the office: (i) [i]s directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or (ii) [h]as authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity." 17 C.F.R. §275.206(4)-5(f)(6). The State Parties identified multiple such government officials who have been harmed by the Rule. But, as with the covered associates identified above, the Commission added new elements to this definition in an attempt to defeat the State Partiers' standing. For example, Lee Zeldin was a New York State Senator running for Congress who was responsible for electing individuals to the New York Board of Regents, who in turn help select investment advisers. *See* Dkt. 1, Complaint ¶44, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Aug. 7, 2014). Likewise, Tennessee State Senator Jim Tracy was responsible for voting on members of the Tennessee Consolidated Retirement System Board of Trustees, who in turn help select investment advisers for the Tennessee retirement system. Tracy Decl. ¶4. Tracy similarly shares the responsibility of appointing Tennessee's Treasurer, who serves as the Chairman of the Tennessee Retirement System Board of Trustees. *Id.* ¶5. Both Zeldin and Tracy thus had "indirect[] responsib[ility] for … the hiring of an investment adviser by a government entity[.]" 17 C.F.R. §275.206(4)-5(f)(6)(i).

Instead, the Commission argued that they were not covered by the Rule because they shared their authority to elect members to these state boards with other members of the state legislatures.

See Dkt. 18 at 17, Opp. to Mot. for Prelim. Inj., *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Sept. 5, 2014); SEC Tracy Resp. at 8. The Commission suggested that Tracy's and Zeldin's roles were "too attenuated from the investment adviser selection process to be covered by the rule." SEC Tracy Resp. at 8. This additional requirement is found nowhere in the Rule, which is silent on when "indirect[] responsib[ility]" becomes too attenuated to trigger the Rule's prohibitions.

Even U.S. District Judge Beryl Howell was troubled by the Rule's uncertain scope and the Commission's arguments: "What do you say about the very troubling demonstration that I've had in this case that nobody understands the scope of the SEC's rule[?]" Oral Argument at 46:6–8, *N.Y. Republican State Comm. v. SEC*, No. 14-cv-01345 (D.D.C. Sept. 12, 2014); *see also id.* at 46:12–14 ("State Senator Zeldin has looked at this language and, as a law-abiding person says, Oh, my goodness, all my donors are reading this too?"). This confusion, according to Judge Howell, has a "chilling nature." *Id.* at 46:15.

It is no wonder that more than three quarters of investment advisers apply their internal political contribution rules to all employees, rather than try to determine which employees are covered associates. *2012 Investment Mgmt. Compliance Testing Survey*, Investment Adviser Assoc., 13 (June 14, 2012) ("IAA Report"), http://bit.ly/1Q3xJ7e; *see also* Amicus Br. of Fin. Servs. Inst. at 6, *N.Y. Republican State Committee v. SEC*, No. 14-1194 (D.C. Cir. Dec. 30, 2014) (explaining that the Commission's overbroad definitions have caused independent broker dealers "to adopt[] restrictions on their independent representatives to prevent facial violations of the Rule"). Likewise, nearly a quarter of all investment advisers have decided simply to prohibit all contributions over a *de minimis* amount. IAA Report at 14.

Investment advisers and public officials should not be required to guess the Rule's scope. "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012); *see also Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("Our reluctance to require parties to subject themselves to enforcement proceedings to challenge agency positions is of course at its peak where, as here, First Amendment rights are implicated and arguably chilled by a 'credible threat of prosecution.'"); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2743 (2011) (Alito, J., concurring) ("Vague laws force potential speakers to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.") (quotation marks omitted). Given the lack of clarity as to the Rule's scope, and the attendant chill of First Amendment activity, the Rule is unconstitutionally vague.

II. The Commission Lacked The Authority To Issue The Political Contribution Rule.

A. Congress' Comprehensive Regime of Political Contribution Limits Forecloses the SEC's Effort to Regulate the Same Conduct.

It is a long-settled principle that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (quotation marks omitted); *see also, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). Congress' "comprehensive regime of limitations on campaign contributions" is "precisely the kind of detailed statute whose specific provisions control matters that might otherwise fall under the total

governance of a more broadly conceived and crafted statute." *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1368 (D.C. Cir. 1988). The "intricate statutory scheme" Congress has crafted "includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process." *Buckley v. Valeo*, 424 U.S. 1, 12–13 (1976); *see also, e.g.*, *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996). That detailed regulatory regime simply does not leave room for agencies to use wholly unrelated delegations to impose campaign finance regulations of their own.

That is particularly so when it comes to the delicate task of deciding whether and how much people may contribute to candidates, parties, or political committees. As the Supreme Court recently reiterated, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders," and that includes the right, "protected by the First Amendment," "to participate in democracy through political contributions." *McCutcheon*, 134 S. Ct. at 1440–41. Accordingly, although "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption," *id.* at 1441, it treads on very constitutionally sensitive ground when it does so.

In keeping with that understanding, Congress has not delegated to any agency the sensitive undertaking of determining the point at which campaign contributions pose a risk of corruption or the appearance thereof. Instead, Congress consistently has reserved this role for itself, fixing by statute all limits on campaign contributions. This was so back when Congress first enacted FECA, and it remains so today, after Congress extensively revised FECA through BCRA. *Compare* 18 U.S.C. §608(b) (1975), *with* 52 U.S.C. §30116(a). Although Congress has given the FEC broad and exclusive jurisdiction to enforce the statutorily prescribed contribution limits, *see id.* §30109, Congress has not granted the FEC discretion to increase or decrease those limits on its own

initiative. Instead, that, too, is a judgment that Congress itself has made, dictating by statute the precise circumstances and manner in which its contribution limits may be adjusted. *See id.* §30116(c).

Congress also has reserved for itself the power to establish exceptions to its statutorily fixed limits. For instance, Congress has prohibited national banks, corporations, labor organizations, and their officers or directors from making any contributions in connection with elections for federal offices. *Id*. §30118. Congress also has prohibited foreign nationals from making any contributions in connection with any election. *Id.* §30121. And Congress has imposed restrictions on the circumstances under which people who contract their services to the government may make contributions, prohibiting them from doing so while they are negotiating or performing under a government contract. *Id*. §30119. Congress has not imposed any comparable restriction on investment advisers who are providing or seeking to provide their services to public pension funds.

All of that would pose problems for the Political Contribution Rule had the FEC promulgated it. After all, Congress may have granted the FEC "exclusive[]" "responsibility for the civil enforcement of matters specifically covered by" FECA and BCRA, *Galliano*, 836 F.2d at 1368; *see* 52 U.S.C. §30106(b)(1), but Congress has not granted the FEC discretion to displace its own judgment regarding the appropriate limits on the right to make political contributions with the agency's own views on the matter. Yet that is precisely what the Political Contribution Rule does: By forcing investment advisers to choose between receiving compensation for their services to public pension funds or making political contributions at the amounts permitted by FECA, the rule has the same practical effect as the restriction that Congress chose to impose only on government contractors. *See* 52 U.S.C. §30119.

That the Political Contribution Rule was promulgated by the SEC only dooms it further, as Congress has not granted the SEC any authority to regulate campaign contributions or other campaign finance-related activities. Instead, the Commission claimed this power only under its general grant of authority to promulgate rules designed to prevent investment advisers from engaging in "fraudulent, deceptive, or manipulative" business practices. 15 U.S.C. §80b-6(4). The Commission's expansive view of its authority is problematic even without the constitutional sensitivities or Congress' "comprehensive" and "first-amendment-sensitive" contribution limits regime, *Galliano,* 836 F.2d at 1368, 1370. But those factors readily defeat any suggestion that Congress intended the SEC—an agency with no expertise with the complex and delicate task of regulating federal elections—to be making decisions about whether or how much people may contribute to candidates or political parties under the guise of regulating the business practices of investment advisers.

That much is clear from the court's decision in *Galliano*. *Galliano* concerned an attempt by the Postal Service to impose additional disclosure requirements on political mailings pursuant to its authority to prevent "scheme[s] or device[s] for obtaining money … through the mail by means of false representation." 39 U.S.C. §3005. The *Galliano* court readily rejected the Postal Service's argument that it could use this general grant of authority to "countermand the precisely drawn, detailed prescriptions of FECA." *Galliano,* 836 F.2d at 1371 (quotation marks omitted). In doing so, the court reiterated that FECA's carefully crafted provisions are not "minimal requirement[s] that the Postal Service is free to supplement," but rather are the product of "[a] fine balance of interests [that] was deliberately struck by Congress." *Id.* at 1370. To allow an agency to prohibit conduct that is "consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions." *Id.*

To allow an agency other than the FEC to interfere with Congress' statutory scheme would be doubly problematic, as "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980); *cf. Hunter v. FERC*, 711 F.3d 155, 156 (D.C. Cir. 2013) (rejecting interpretation of one agency's authority that "would eviscerate the … exclusive jurisdiction" of another agency). And in the rare instance when Congress wants agencies other than the FEC to participate in the enforcement or administration of campaign finance laws, it says so directly. *See, e.g.*, 47 U.S.C. §315(b) (delegating to Federal Communications Commission authority to enforce proper sponsorship identification in political advertising); 26 U.S.C. §6096 (delegating authority to Internal Revenue Service to administer "check off program" that funds Presidential Election Campaign Fund).

Congress has not given the SEC—or anyone else, for that matter—any such explicit authority to impose additional restrictions on the constitutional rights of investment advisers to make campaign contributions. That Congress has not done so is particularly notable given that the SEC had already tried (unsuccessfully, and over the objection of several FEC commissioners) to do so before Congress overhauled FECA through BCRA. Had Congress agreed with the SEC that the standard limits are insufficient to prevent corruption or the appearance of corruption where investment advisers are concerned, it could have easily addressed the matter itself. Instead, Congress chose to retain a specialized limit on the circumstances under which campaign contributions may be made only with respect to federal government contractors. *See* 52 U.S.C. §30119. And it granted neither the FEC nor the SEC any discretion to extend that restriction to other actors or contexts. Moreover, just last month Congress reemphasized that the SEC has no role in regulating political contributions. In the recent Consolidated Appropriations Act of 2016, Congress stated that no funds shall be made available for the SEC "to finalize, issue, or implement

any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, §707. This provision not only makes clear that Congress has not granted the SEC any authority to regulate political contributions, it raises serious questions about the viability of the Political Contribution Rule altogether. In barring the SEC from issuing any orders regarding "contributions to tax exempt organizations," which would include state political party and candidate campaigns because they are tax exempt organizations pursuant to 26 U.S.C. §527, it is unclear what parts of the Rule remain.

The Rule similarly conflicts with the authority of state legislatures and regulators. The States retain "substantial sovereign powers" with which "Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). "Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013). "'[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Id.* (quoting *Gregory*, 501 U.S. at 461–62); *see also Carrington v. Rash*, 380 U.S. 89, 91 (1965) (States have "broad powers to determine the conditions under which the right of suffrage may be exercised"). In the absence of an "unmistakably clear" indication that Congress intended to legislate in a matter of State sovereignty, courts are to assume that Congress did not so intend. *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). There is no such indication in the Advisers Act.

In New York, the state legislature sets political contribution limits, *see* N.Y. Elec. L. §14-114, and the New York Board of Elections investigates violations of such limits, *see id.* §6203.1. Likewise, the Tennessee legislature sets political contribution limits, *see* Tenn. Code §2-10-302,

and the Tennessee Registry of Election Finance administers and enforces such limits, *see id.* §2-10-301(b). In so doing, the New York and Tennessee legislatures have determined the point at which campaign contributions pose a risk of corruption or the appearance thereof.

At no point has Congress given the Commission any authority to regulate an individual's state political contributions. Indeed, Congress did not even reserve for itself such authority. As such, there is no indication that Congress, in the Advisers Act or elsewhere, intended that any federal agency would to interfere with State authority to regulate State elections.

In short, the contribution limits that Congress has already imposed reflect "its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452. Just like the Postal Service in *Galliano*, the SEC is ill-equipped to second-guess that determination or impose restrictions more stringent than those Congress has chosen. Indeed, the exhaustive manner in which Congress has legislated on whether and how much people may contribute ought to foreclose any suggestion that Congress has entrusted any agency with making these exceedingly sensitive judgments. But in all events, it certainly forecloses any suggestion that Congress implicitly empowered the SEC to do so through a general grant of authority to prevent investment advisers from engaging in "fraudulent, deceptive, or manipulative" business practices. 15 U.S.C. §80b-6(4).

B. The Advisers Act Did Not Give the SEC Authority to Issue the Political Contribution Rule.

Even assuming Congress' comprehensive contribution limits regime does not preclude the SEC from enacting its own regulations on the matter, the Political Contribution Rule vastly exceeds the SEC's authority to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4). The Commission itself conceded that few (if any) contributions within the limits set

by FECA are likely to result in fraudulent, deceptive, or manipulative conduct. And the Commission simply lacks the power to impose categorical prophylactic prohibitions on conduct that is exceedingly unlikely to implicate its statutory mandate—particularly when that conduct is protected by the Constitution.

At the outset, it is important to recognize that the Political Contribution Rule targets only those instances in which investment advisers make fully disclosed federal political contributions in amounts less than $2,700 (or than analogous state contribution limits). Everything else already is prohibited directly by the campaign finance statutes, and therefore squarely within the enforcement jurisdiction of the FEC and the Department of Justice (or their state counterparts). *See* 52 U.S.C. §§30116, 30104, 30105. In other words, the Rule is necessarily premised on the notion that transparently contributing $2,700 or less to a covered official is likely to result in some sort of "fraudulent, deceptive, or manipulative" practice. 15 U.S.C. §80b-6(4).

Unsurprisingly, the Commission has not cited any instances of this happening. In fact, most examples of "pay-to-play" activity on which it relied in promulgating the Political Contribution Rule did not even involve a political contribution—let alone an investment adviser's publicly disclosed contribution within the relevant federal or state limits. *See* 75 Fed. Reg. at 41,019 nn.16–26. Instead, these examples largely involved payments and gifts given directly to government officials. *Id.*

Setting aside the fact that such conduct is already prohibited by both state and federal law, *see, e.g.*, 18 U.S.C. §201 (prohibiting payment of bribes to federal officials); N.Y. Penal Law §200.04 (prohibiting payments of bribes to state officials); Tenn. Code §39-16-102 (same), its purported prevalence does nothing to further the notion that otherwise-lawful political contributions are a frequent source of "fraudulent, deceptive, or manipulative" practices in the

investment adviser community. 15 U.S.C. §80b-6(4). Indeed, the Commission never identified with any specificity what "fraud" might result from the modest publicly disclosed contributions its rule precludes. The Commission suggested instead that political contributions have the "potential[]" to "defraud prospective clients" because "[t]he most qualified adviser may not be selected," "[t]he pension plan may pay higher fees," or the advisers may "obtain greater ancillary benefits." 75 Fed. Reg. at 41,022. Even accepting the dubious notion that those broad generalizations hold true with respect to publicly disclosed contributions, the SEC does not explain how any of these perceived ills actually "defrauds" a prospective client.

The SEC also vaguely alluded to its authority to enforce the "Federal fiduciary standard" that it insists §80b-6(4) creates. *See id*. But courts have recognized the possibility of violations of this implied fiduciary duty only when investment advisers have breached established standards or obligations, such as by misappropriating investment opportunities, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 13–14 (1979); acting as an investment adviser without registering, *id*.; purchasing inferior securities on behalf of a client, *id*.; receiving an undisclosed personal benefit from a transaction recommendation, *Belmont v. MB Inv. Partners, Inc*., 708 F.3d 470, 503 (3d Cir. 2013); or engaging in self-dealing, *Kusner v. First Pa. Corp.*, 531 F.2d 1234, 1236 (3d Cir. 1976). The Commission does not and cannot explain how making a fully disclosed federal contribution of $2,700 (or similar disclosed state political contribution) to a covered official is likely to result in anything comparable to these clear ethical violations.

Instead, the SEC relied on the notion that Congress has authorized it to "adopt prophylactic rules that may prohibit acts that are not themselves fraudulent." 75 Fed. Reg. at 41,022. That may be so, but Congress has authorized the SEC to enact prophylactic rules only when they are "reasonably designed to prevent" conduct by investment advisers that is fraudulent, deceptive, or

manipulative. 15 U.S.C. §80b-6(4). As the Supreme Court has explained, categorical prohibitions satisfy such grants of prophylactic authority only when they "reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002); *see also United States v. O'Hagan*, 521 U.S. 642 (1997). "When the generalizations fail to hold in the run of cases," however, "the justification for the categorical rule disappears." *Ragsdale*, 535 U.S. at 93.

That is precisely the situation here. The Commission identified absolutely no basis for assuming that most, many, or even more than a few publicly disclosed political contributions made by investment advisers to covered officials will involve the kind of quid pro quo arrangement that it claims it has authority to prevent. In other words, even the SEC seems to recognize that "[i]t is not a 'fair assumption' … that this fact pattern will occur in any but the most exceptional of cases." *Id.* (quoting *O'Hagan*, 521 U.S. at 676).

That would be troubling enough if the SEC's rule did not deter conduct that the Constitution protects—and conduct that Congress has elsewhere expressly permitted. But there is no denying the reality that the Political Contribution Rule prevents individuals from exercising their First Amendment "right to participate in democracy through political contributions." *McCutcheon*, 134 S. Ct. at 1441. The SEC acknowledged as much: "the two-year time out provision may affect the propensity of investment advisers to make political contributions." 75 Fed. Reg. at 41,023. The SEC likewise acknowledged that "the rule impacts contributions regardless of whether they are being made for the purposes of engaging in pay to play." *Id.* at 41,058.

In short, the Political Contribution Rule is unauthorized, unjustified, and massively overbroad in a way that raises grave First Amendment concerns. Because the SEC exceeded its statutory authority, the Commission should repeal the rule.

CONCLUSION

For the foregoing reasons, the Commission should repeal the Political Contribution Rule.

Respectfully submitted,

s/H. Christopher Bartolomucci

JASON B. TORCHINSKY
SHAWN SHEEHY
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
jt@hvjt.law

H. CHRISTOPHER BARTOLOMUCCI
BRIAN J. FIELD
BANCROFT PLLC
500 New Jersey Avenue
Seventh Floor
Washington, DC 20001
(202) 234-0090
cbartolomucci@bancroftpllc.com

Counsel for Petitioners New York Republican State Committee and Tennessee Republican Party

January 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2016, I served the foregoing Petition for Repeal by first-class mail with:

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci

EXHIBIT A

opinions as to the investment merits of particular securities, or (iii) any combination of the foregoing services.

(e) *Special rule for solicitation of government entity clients.* Solicitation activities involving a government entity, as defined in § 275.206(4)–5, shall be subject to the additional limitations set forth in that section.

[44 FR 42130, July 18, 1979; 54 FR 32441, Aug. 8, 1989, as amended at 62 FR 28135, May 22, 1997; 63 FR 39716, July 24, 1998; 75 FR 41069, July 14, 2010]

§ 275.206(4)–4 [Reserved]

§ 275.206(4)–5 Political contributions by certain investment advisers.

(a) *Prohibitions.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)), it shall be unlawful:

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)) to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)) or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is a regulated person or is an executive officer, general partner, managing member (or, in each case, a person with a similar status or function), or employee of the investment adviser; and

(ii) To coordinate, or to solicit any person or political action committee to make, any:

(A) Contribution to an official of a government entity to which the investment adviser is providing or seeking to provide investment advisory services; or

(B) Payment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity.

(b) *Exceptions*—(1) *De minimis exception.* Paragraph (a)(1) of this section does not apply to contributions made by a covered associate, if a natural person, to officials for whom the covered associate *was* entitled to vote at the time of the contributions and which in the aggregate do not exceed $350 to any one official, per election, or to officials for whom the covered associate was not entitled to vote at the time of the contributions and which in the aggregate do not exceed $150 to any one official, per election.

(2) *Exception for certain new covered associates.* The prohibitions of paragraph (a)(1) of this section shall not apply to an investment adviser as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the investment adviser unless such person, after becoming a covered associate, solicits clients on behalf of the investment adviser.

(3) *Exception for certain returned contributions.* (i) An investment adviser that is prohibited from providing investment advisory services for compensation pursuant to paragraph (a)(1) of this section as a result of a contribution made by a covered associate of the investment adviser is excepted from such prohibition, subject to paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, upon satisfaction of the following requirements:

(A) The investment adviser must have discovered the contribution which resulted in the prohibition within four months of the date of such contribution;

(B) Such contribution must not have exceeded $350; and

(C) The contributor must obtain a return of the contribution within 60 calendar days of the date of discovery of such contribution by the investment adviser.

(ii) In any calendar year, an investment adviser that has reported on its annual updating amendment to Form ADV (17 CFR 279.1) that it has more than 50 employees is entitled to no more than three exceptions pursuant to paragraph (b)(3)(i) of this section, and an investment adviser that has reported on its annual updating amendment to Form ADV that it has 50 or fewer employees is entitled to no more than two exceptions pursuant to paragraph (b)(3)(i) of this section.

(iii) An investment adviser may not rely on the exception provided in paragraph (b)(3)(i) of this section more than once with respect to contributions by the same covered associate of the investment adviser regardless of the time period.

(c) *Prohibitions as applied to covered investment pools.* For purposes of this section, an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity.

(d) *Further prohibition.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of Advisers Act (15 U.S.C. 80b–6(4)), it shall be unlawful for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section.

(e) *Exemptions.* The Commission, upon application, may conditionally or unconditionally exempt an investment adviser from the prohibition under paragraph (a)(1) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act (15 U.S.C. 80b);

(2) Whether the investment adviser:

(i) Before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of this section; and

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g,* Federal, State or local); and

(6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

(f) *Definitions.* For purposes of this section:

(1) *Contribution* means any gift, subscription, loan, advance, or deposit of money or anything of value made for:

(i) The purpose of influencing any election for Federal, State or local office;

(ii) Payment of debt incurred in connection with any such election; or

(iii) Transition or inaugural expenses of the successful candidate for State or local office.

(2) *Covered associate* of an investment adviser means:

(i) Any general partner, managing member or executive officer, or other individual with a similar status or function;

(ii) Any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and

(iii) Any political action committee controlled by the investment adviser or by any person described in paragraphs (f)(2)(i) and (f)(2)(ii) of this section.

(3) *Covered investment pool* means:

(i) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is an investment option of a plan or program of a government entity; or

(ii) Any company that would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)), but for the exclusion provided from that definition by either section 3(c)(1), section 3(c)(7) or section 3(c)(11) of that Act (15 U.S.C. 80a–3(c)(1), (c)(7) or (c)(11)).

(4) *Executive officer* of an investment adviser means:

(i) The president;

(ii) Any vice president in charge of a principal business unit, division or function (such as sales, administration or finance);

(iii) Any other officer of the investment adviser who performs a policy-making function; or

(iv) Any other person who performs similar policy-making functions for the investment adviser.

(5) *Government entity* means any State or political subdivision of a State, including:

(i) Any agency, authority, or instrumentality of the State or political subdivision;

(ii) A pool of assets sponsored or established by the State or political subdivision or any agency, authority or instrumentality thereof, including, but not limited to a ''defined benefit plan'' as defined in section 414(j) of the Internal Revenue Code (26 U.S.C. 414(j)), or a State general fund;

(iii) A plan or program of a government entity; and

(iv) Officers, agents, or employees of the State or political subdivision or any agency, authority or instrumentality thereof, acting in their official capacity.

(6) *Official* means any person (including any election committee for the person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity.

(7) *Payment* means any gift, subscription, loan, advance, or deposit of money or anything of value.

(8) *Plan or program of a government entity* means any participant-directed investment program or plan sponsored or established by a State or political subdivision or any agency, authority or instrumentality thereof, including, but not limited to, a ''qualified tuition plan'' authorized by section 529 of the Internal Revenue Code (26 U.S.C. 529), a retirement plan authorized by section 403(b) or 457 of the Internal Revenue Code (26 U.S.C. 403(b) or 457), or any similar program or plan.

(9) *Regulated person* means:

(i) An investment adviser registered with the Commission that has not, and whose covered associates have not, within two years of soliciting a government entity:

(A) Made a contribution to an official of that government entity, other than as described in paragraph (b)(1) of this section; and

(B) Coordinated or solicited any person or political action committee to make any contribution or payment described in paragraphs (a)(2)(ii)(A) and (B) of this section; or

(ii) A ''broker,'' as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) or a ''dealer,'' as defined in section 3(a)(5) of that Act (15 U.S.C. 78c(a)(5)), that is registered with the Commission, and is a member of a national securities association registered under section 15A of that Act (15 U.S.C. 78o–3), provided that:

(A) The rules of the association prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on broker-dealers than this section imposes on investment advisers and that such rules are consistent with the objectives of this section.

(10) *Solicit* means:

(i) With respect to investment advisory services, to communicate, directly or indirectly, for the purpose of obtaining or retaining a client for, or referring a client to, an investment adviser; and

(ii) With respect to a contribution or payment, to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.

[75 FR 41069, July 14, 2010]

§ 275.206(4)–6 Proxy voting.

If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)), for you to exercise voting authority with respect to client securities, unless you:

(a) Adopt and implement written policies and procedures that are reasonably designed to ensure that you vote client securities in the best interest of clients, which procedures must include how you address material conflicts that may arise between your interests and those of your clients;

(b) Disclose to clients how they may obtain information from you about how you voted with respect to their securities; and

(c) Describe to clients your proxy voting policies and procedures and, upon request, furnish a copy of the policies and procedures to the requesting client.

[68 FR 6593, Feb. 7, 2003]

§ 275.206(4)–7 Compliance procedures and practices.

If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b–6) for you to provide investment advice to clients unless you:

(a) *Policies and procedures.* Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act;

(b) *Annual review.* Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and

(c) *Chief compliance officer.* Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.

[68 FR 74730, Dec. 24, 2003]

§ 275.206(4)–8 Pooled investment vehicles.

(a) *Prohibition.* It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)) for any investment adviser to a pooled investment vehicle to:

(1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or

(2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

(b) *Definition.* For purposes of this section ''pooled investment vehicle'' means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a))

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

New York Republican State Committee 315 State Street Albany, NY 12210 Tennessee Republican Party 2424 21st Avenue, Suite 200 Nashville, TN 37212 *Plaintiffs*, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION 100 F Street, N.E. Washington, D.C. 20549 *Defendant.*	Case No.

DECLARATION OF JASON WEINGARTNER

I, Jason Weingartner, pursuant to 28 U.S.C. § 1746, declare as follows under penalty of perjury:

1. My name is Jason Weingartner. I have personal knowledge of the facts set forth herein and am otherwise competent to testify.
2. I am a United States Citizen and I reside at 20-64 46th Street, Astoria, NY 11105.
3. I am currently the Executive Director of the New York Republican State Committee.
4. In my role as Executive Director, I am responsible for the state party's operations including all fundraising activity. State party fundraising involves not only raising funds for the party itself, but also consulting with and assisting state and federal candidates with their fundraising efforts.

5. Because of my current employment, I regularly encounter the regulations at 17 C.F.R. §§ 275.206(4)-5 and 275.204-2 (the "Political Contribution Rule") that limit the ability of investment advisors to make certain political contributions.
6. I have advised state and local officeholders who have run for federal office or have considered running for federal office about the negative impact of this rule on their ability to raise funds for their federal campaign committee from certain donors.
7. Currently, the New York Republican State Committee has one state officeholder running for federal office who is harmed by the Political Contribution Rule: State Senator Lee Zeldin, who is running for a seat in the U.S. House of Representatives in New York's First Congressional District.
8. We regularly have state and local officials consider running for federal office.
9. I have encountered donors and potential donors to the state party's federal account who have either limited their contributions or declined to contribute because of the Political Contribution Rule.
10. I have encountered potential donors who have declined to contribute or limited their contributions to certain candidates for federal office because of the Political Contribution Rule.
11. I expect that the Political Contribution Rule will continue to cause individuals to either refrain from contributing entirely or limit their contributions in accordance with the regulation unless it is enjoined with respect to accounts regulated by the Federal Election Campaign Act.
12. The SEC's Contribution limit has significantly hindered the state party, our candidates for federal office, and our members who would otherwise be donors to our federal

account and the federal campaigns of our state and local officials who are seeking or are considering seeking federal office.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15 day of July, 2014

New York, NY

City State

Jason Weingartner

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The New York Republican State Committee,	)	
And	)	Civ. No. _____
The Tennessee Republican Party	)	
Plaintiffs,	)	
v.	)	
SECURITIES AND EXCHANGE COMMISSION,		
Defendant.		

DECLARATION OF FREDERICK BRENT LEATHERWOOD

Brent Leatherwood, pursuant to 28 USC 1746, declares as follows under penalty of perjury:

1. My name is Frederick Brent Leatherwood. I have personal knowledge of the facts set forth herein and I am otherwise competent to testify.
2. I am a United States citizen, and I reside in Nashville, TN.
3. I am currently the Executive Director of the Tennessee Republican Party.
4. In my role as Executive Director, I am responsible for the state party's operations including all fundraising activity. State party fundraising involves not only raising funds

for the party itself, but also consulting with and assisting state and federal candidates with their fundraising efforts.

5. Because of my current employment, I regularly encounter the regulations at 17 C.F.R. §§ 275.206(4)-5 and 275.204-2 (the "Political Contribution Rule") that limit the ability of investment advisors to make certain political contributions.
6. My staff and I have advised state and local officeholders who have run for federal office or have considered running for federal office about the negative impact of this rule on their ability to raise funds for their federal campaign committee from certain donors.
7. The Tennessee Republican Party has had state and local officeholders running for federal office who are harmed by the Political Contribution Rule.
8. We regularly have state and local officials consider running for federal office.
9. I have encountered donors and potential donors to the state party's federal account who have either limited their contributions or declined to contribute because of the Political Contribution Rule.
10. I have encountered potential donors who have declined to contribute or limited their contributions to certain candidates for federal office because of the Political Contribution Rule.
11. I expect that the Political Contribution Rule will continue to cause individuals to either refrain from contributing entirely or limit their contributions in accordance with the regulation unless it is enjoined with respect to accounts regulated by the Federal Election Campaign Act.
12. The SEC's Contribution limit has significantly hindered the state party, our candidates for federal office, and our members who would otherwise be donors to our federal

account and the federal campaigns of our state and local officials who are seeking or are considering seeking federal office.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23 day of July, 2014

Nashville, TN
City State

Frederick Brent Leatherwood
F. Brent Leatherwood

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK REPUBLICAN STATE COMMITTEE; and TENNESSEE REPUBLICAN PARTY, *Plaintiffs,* v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Defendant.*	Case No. 1:14-cv-01345-BAH

SUPPLEMENTAL DECLARATION OF JASON WEINGARTNER

I, Jason Weingartner, pursuant to 28 U.S.C. § 1746, declare as follows under penalty of perjury:

1. I serve as the Executive Director of the New York Republican State Committee, the governing body of the New York Republican Party.
2. I am a member of the New York Republican Party.
3. I have been a member of the New York Republican Party since 1998, when I registered to vote as a Republican in New York State.
4. The donors and potential donors who I have encountered who have either limited or declined to make contributions to the New York State Committee or candidates for federal office have done so based on a belief or concern that a contribution or a larger contribution would violate the Political Contribution Rule. Many of these donors or potential donors are members of the New York Republican Party.
5. New York State Senator Lee Zeldin is a member of the New York Republican Party, and is registered to vote as a Republican.

I declare under penalty of perjury that the foregoing it true and correct.

Executed this 4 day of September, 2014.

Astoria, NY
City State

Jason Weingartner

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK REPUBLICAN STATE COMMITTEE; and TENNESSEE REPUBLICAN PARTY, *Plaintiffs*, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Defendant*.	)	Case No. 1:14-cv-01345-BAH

SUPPLEMENTAL DECLARATION OF FREDERICK BRENT LEATHERWOOD

I, Brent Leatherwood, pursuant to 28 U.S.C. § 1746, declare as follows under penalty of perjury:

1. As Executive Director of the Tennessee Republican Party, I not only serve as the chief of staff for the Party but I also meet the requirement under our Bylaws to be classified as a member of the Tennessee Republican Party.
2. The donors and potential donors I have encountered who have either limited or declined to make contributions to the Tennessee Republican Party or candidates for federal office have done so based on a belief or concern that a contribution or a larger contribution would violate the Political Contribution Rule. Many of these donors or potential donors are members of the Tennessee Republican Party.
3. Many of the state and local officeholders who run for federal office and are harmed by the Political Contribution Rule are members of the Tennessee Republican Party.

I declare under penalty of perjury that the foregoing it true and correct.

Executed this 4 day of September, 2014.

Nashville, TN
City State

Frederick Brent Leatherwood
F. Brent Leatherwood

EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK REPUBLICAN STATE COMMITTEE; and TENNESSEE REPUBLICAN PARTY, *Plaintiffs*, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Defendant.*	)	Case No. 1:14-cv-01345-BAH

DECLARATION OF JIM TRACY

I, Jim Tracy, pursuant to 28 U.S.C. § 1746, declare as follows under penalty of perjury:

1. My name is Jim Tracy. I have personal knowledge of the facts set forth herein and am otherwise competent to testify.
2. I am a United States Citizen, and I reside in Shelbyville, Tennessee.
3. I am a member of the Republican Party of Tennessee.
4. I am a Member of the Tennessee Senate representing District 14, wherein I am a Member of the Joint Committee, Council for Pensions and Insurance ("Joint Committee"). As a Member of the Joint Committee, I am one of fourteen Members entitled to vote for the Chair and Vice-Chair of the Joint Committee. The Chair and Vice-Chair of this Joint Committee serve as *ex officio* members of the Tennessee Consolidated Retirement System Board of Trustees ("Board"), which participates in selecting investment advisers for assets of the Tennessee Retirement System. As a Member of the Joint Committee, I am in a position and have the opportunity to share my

views and relevant information with the Chair and Vice-Chair regarding the Board's selection of investment advisers.

5. I also vote as a Member of the Tennessee Senate for the State Treasurer. The State Treasurer serves as Chairman of the Tennessee Consolidated Retirement System Board of Trustees. As a Member of the Senate, I am in a position and have the opportunity to share my views and relevant information with the State Treasurer regarding the Board's selection of investment advisers.

6. Because of my membership in the Senate and the Joint Committee, it is my understanding and belief that I am a covered official as that term is defined in the SEC's Political Contribution Rule (17 C.F.R. § 275.206(4)-5(f)(6)).

7. In 2014, I was a candidate for the U.S. House of Representatives from Tennessee's Fourth Congressional District. I ran against the Republican incumbent, U.S. Representative Scott DesJarlais. Unlike me, Rep. DesJarlais is not a covered official under the Political Contribution Rule.

8. One contributor to my campaign was Steve McManus, a Member of the Tennessee House of Representatives. Rep. McManus is a covered associate of a registered investment adviser. Rep. McManus limited his contribution from his campaign account to my campaign to only $150. Rep. McManus told to me that he would have contributed more than $150 but for the SEC's Political Contribution Rule.

9. Another contributor to my congressional campaign was Steven Ruckart, a resident of Tennessee's Fourth Congressional District. Mr. Ruckart is also a covered associate of a registered investment adviser—RAI Advisors. Mr. Ruckart contributed $2,600 to my congressional campaign. Because of Mr. Ruckart's status as a covered associate, and

because of my status as a covered official, the Political Contribution Rule restricted his ability to contribute to my congressional campaign. I refunded $2,450 to Mr. Ruckart so that he and his company would be in compliance with the Political Contribution Rule.

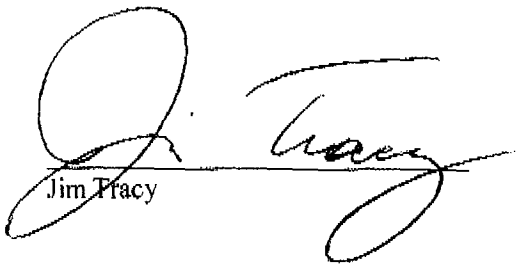
10. The SEC's Political Contribution Rule therefore impeded my ability to campaign for federal office.

11. On August 7, 2014, Tennessee held its congressional Republican primary election. In that election, I lost to the incumbent Scott DesJarlais by 38 votes out of 77,504 votes cast.

I declare under penalty of perjury that the foregoing it true and correct.

Executed this 17th day of September, 2014.

Nashville, TN
City State



Jim Tracy

EXHIBIT G

Investment Adviser Representative Report Summary

VIEW DETAILED REPORT

STEPHEN MCMANUS (CRD# 1078058)

The report summary provides an overview of the Investment Adviser Representative's professional background and conduct. The information contained in this report has been provided by the Investment Adviser Representative, investment adviser and/or securities firms, and/or securities regulators as part of the states' investment adviser registration and licensing process. The information contained in this report was last updated by the Investment Adviser Representative, a previous employing firm, or a securities regulator on **07/31/2014**.

CURRENT EMPLOYERS

FTB ADVISORS, INC.
IARD# 17117
4990 POPLAR AVE
MEMPHIS, TN 38117
Registered with this firm since: 10/10/2013

QUALIFICATIONS

This Investment Adviser Representative is currently registered in **2** jurisdiction(s).

Is this Investment Adviser Representative currently suspended with any jurisdiction? **No**

Note: Not all jurisdictions require IAR registration or may have an exemption from registration. Additional information including this individual's qualification examinations and professional designations is available in the Detailed Report.

REGISTRATION HISTORY

This Investment Adviser Representative was previously registered with the following Investment Adviser firms:

FIRM (IARD#) - LOCATION	REGISTRATION DATES
FTB ADVISORS, INC. (IARD# 143830) - MEMPHIS, TN	09/03/2008 - 10/10/2013
UBS PAINEWEBBER INC. (IARD# 8174) - MEMPHIS, TN	01/07/2002 - 04/16/2003

For additional registration and employment history details as reported by the individual, refer to the Registration and Employment History section of the Detailed Report.

DISCLOSURE INFORMATION

Disclosure events include certain criminal charges and convictions, formal investigations and disciplinary actions initiated by regulators, customer disputes and arbitrations, and financial disclosures such as bankruptcies and unpaid judgments or liens.

Are there events disclosed about this Investment Adviser Representative? **No**

BROKER DEALER INFORMATION

This individual is registered as a broker and an investment adviser representative. For more information about this individual's record as a broker, visit FINRA's BrokerCheck website at:

http://www.finra.org/brokercheck

EXHIBIT H

Investment Adviser Representative Report Summary

VIEW DETAILED REPORT

RALPH STEVEN RUCKART (CRD# 725945)

The report summary provides an overview of the Investment Adviser Representative's professional background and conduct. The information contained in this report has been provided by the Investment Adviser Representative, investment adviser and/or securities firms, and/or securities regulators as part of the states' investment adviser registration and licensing process. The information contained in this report was last updated by the Investment Adviser Representative, a previous employing firm, or a securities regulator on **12/16/2015**.

CURRENT EMPLOYERS

INVEST FINANCIAL CORPORATION
IARD# 12984
805 S CHURCH ST SUITE 9
MURFREESBORO, TN 37130
Registered with this firm since: 08/14/2006

QUALIFICATIONS

This Investment Adviser Representative is currently registered in **1** jurisdiction(s).

Is this Investment Adviser Representative currently suspended with any jurisdiction? **No**

Note: Not all jurisdictions require IAR registration or may have an exemption from registration. Additional information including this individual's qualification examinations and professional designations is available in the Detailed Report.

REGISTRATION HISTORY

This Investment Adviser Representative was previously registered with the following Investment Adviser firms:

FIRM (IARD#) - LOCATION	REGISTRATION DATES
TRANSAMERICA FINANCIAL ADVISORS, INC. (IARD# 3600) - MURFREESBORO, TN	01/22/2004 - 08/01/2006

For additional registration and employment history details as reported by the individual, refer to the Registration and Employment History section of the Detailed Report.

DISCLOSURE INFORMATION

Disclosure events include certain criminal charges and convictions, formal investigations and disciplinary actions initiated by regulators, customer disputes and arbitrations, and financial disclosures such as bankruptcies and unpaid judgments or liens.

Are there events disclosed about this Investment Adviser Representative? **Yes**

The following types of events are disclosed about this Investment Adviser Representative:

Type	Count
Customer Dispute	3

BROKER DEALER INFORMATION

This individual is registered as a broker and an investment adviser representative. For more information about this individual's record as a broker, visit FINRA's BrokerCheck website at: http://www.finra.org/brokercheck