

[Securities Regulation Daily Wrap Up, TOP STORY—6th Cir.: Republican groups press case over MSRB political spending rule, \(Nov. 22, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Three state Republican committee groups recently filed their opening brief in a case challenging the Municipal Securities Rulemaking Board's pay-to-play rule. The MSRB's rule imposed new limits on political spending by municipal advisers and dealers, but the Republican groups claim the rule is unconstitutional, contravenes existing federal election law, and ran afoul of the FY2016 omnibus appropriations legislation ([Tennessee Republican Party v. SEC](#), November 16, 2016).

Pay-to-play rule. The centerpiece of the MSRB's amended [Rule G-37](#) is a two-year ban applicable to municipal securities dealers and municipal advisers who make prohibited political contributions. The rule also includes disclosure requirements, an orderly transition period for banned firms, and a process to apply for exemptive relief. A de minimis contribution exclusion applies to political contributions made by a dealer or municipal adviser who is entitled to vote for the municipal entity official and who contributes no more than \$250 per election.

Previously, the SEC [argued](#) that the case should be dismissed because the Commission was barred from taking action on the MSRB rule, so the rule became final by operation of law only. The SEC also argued that the Congressional ban on the agency using funds in the current fiscal year to regulate political contribution disclosures may also bar the agency from defending the MSRB in court. The Republican groups' opposition to the SEC's motion to dismiss and their latest brief both argued that the SEC should have disapproved the rule because that action would not violate the ban on finalizing, issuing, or implementing such a rule.

The SEC political spending ban appears in Division O, Section 707, of Title VII of the [Consolidated Appropriations Act, 2016](#). Congress recently enacted a continuing resolution that keeps the government open until December 9, 2016 and which incorporates by reference the omnibus legislation's political spending rider (See Division C, Section 101(a)(5) of [H.R. 5325](#)).

Briefing in the MSRB litigation was [suspended](#) for a while after the SEC moved to dismiss the case. Since then, the case has been [referred](#) to the merits panel for consideration of jurisdictional "issues of first impression" and the Republican groups have submitted their opening brief. The SEC is set to reply by December 19.

Standing, constitutionality. The Republican groups argued they have associational standing to challenge the MSRB rule. Specifically, the groups point to three types of alleged injuries they claim to have suffered because of the pay-to-play rule: association with prospective supporters is more difficult; their ability to raise funds is hindered; and covered officials are at a disadvantage with respect to non-covered officials.

According to the Republican groups, the MSRB's rule is also unconstitutional and, thus, is "doomed four times over," by existing federal law, the SEC's and MSRB's own statutes, the First Amendment, and the omnibus politics rider.

For example, they argue that Congress enacted a comprehensive federal election law that gives Congress alone the power to define political contribution limits, even if that law grants enforcement powers to a single federal agency. Under this line of reasoning, the MSRB's rule forces municipal dealers and advisers to make a Hobson's choice: make lawful political contributions or perform their municipal work. The Republican groups likewise argued that the MSRB's rule is beyond the SEC's and MSRB's statutory authorities, even if other federal laws might not bar the rule.

The Republican groups also argue the rule violates the First Amendment. They cite the Supreme Court's *McCutcheon* opinion for the proposition that quid pro quo corruption is the government's only legitimate interest

in the regulation of political contributions. In [McCutcheon](#), four justices, led by the main opinion's author, Chief Justice Roberts, and bolstered by Justice Thomas's concurrence, held that statutory aggregate limits on how much a donor could give to all candidates or committees ran afoul of the First Amendment because they did not further the government's anti-corruption goals as stated in *Buckley v. Valeo* (that case also features prominently in another set of law suits challenging the SEC's in-house courts where it is often cited for its definition of inferior officer for purposes of Article II of the U.S. Constitution).

The Republican groups also seek to distinguish a 1995 decision by the D.C. Circuit. In [Blount](#), the appeals court denied a petition for review by the then-chairman of the Alabama Democratic Party of the SEC's order approving the MSRB's Rule G-37. The petition had asserted, among other things, a First Amendment challenge. Although the court expressed some doubts about what level of scrutiny to apply, it concluded that the rule could stand if it survived strict scrutiny. The Republican groups disputing the latest amendments to Rule G-37 posit that the Supreme Court's decisions in the years since *Blount* rest on a different line of reasoning that diminishes *Blount*'s impact in the context of Rule G-37.

The case is [No. 16-3360](#).

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Companies: Municipal Securities Rulemaking Board

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