

D.C. Court Dismisses Challenge to SEC Pay to Play Rule (For Now)

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In an important [decision](#), the US District Court for the District of Columbia yesterday dismissed a constitutional challenge to the [SEC's "pay to play" rule](#), which restricts contributions and fundraising by some individuals who are associated with hedge funds, private equity funds, and other registered investment advisers. The Court ruled that the case had been filed in the wrong court, and that the district court in which it was filed lacked subject-matter jurisdiction.

Significantly, in dicta, the Court also expressed some doubt as to whether the state political parties challenging the SEC rule even had standing to bring the suit. The standing issue, which has been apparent since the filing of the suit, turns on the fact that plaintiffs were not able to identify a registered investment adviser, or an individual associated with one, to participate in the suit as a plaintiff. There is a material question, which the court did not ultimately reach, as to whether the state party plaintiffs could possibly have standing.

After the Court expressed concerns about standing early in the suit, the plaintiffs submitted an affidavit, filed after briefing had been completed, by a state legislator who asserted harm under the SEC rule. It is not clear that this will be sufficient to resolve the standing issues that have dogged the case from the outset, though the Court appeared to leave open that possibility.

It is fairly clear that the SEC rule suffers significant constitutional infirmities, especially in light of US Supreme Court campaign finance decisions that post-dated enactment of the SEC's pay to play rule. What the world needs now is an employee of a registered investment adviser, who is herself covered by the SEC rule, and who is willing to serve as a plaintiff. But many such people, and their employers, fear that challenging the SEC in court could provoke retaliation from the powerful agency. The difficulty in identifying a willing plaintiff with clear standing only highlights the chilling effect of SEC regulation when the agency strays beyond its core mission and attempts to regulate political speech.

The next stop for this case will be the US Court of Appeals for the DC Circuit. The district court hinted broadly that the DC Circuit might want to revisit some of its own case law to clear a path for this case to be heard. There are thorny issues of subject-matter jurisdiction and timeliness to be worked through, even before a court would be ready to consider the standing issue. In the meantime, the possibility remains that another suit, filed with other plaintiffs, could be filed in another circuit, which may present both procedural and substantive advantages.

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