

647 Commonwealth Avenue
Newton, MA 02459

December 17, 2015

The Honorable Robert Menendez
United States Senate
528 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Menendez:

You have asked for my opinion as to the meaning of the language of page 1982, lines 17-23 of the Consolidated Appropriations Act, 2016 (the **Act**), in the form available at tinyurl.com/z4pyew7 (accessed December 16, 2015). Those lines (the **SEC Funds Limitation**) relate to the Securities and Exchange Commission (**SEC**) and provide:

SEC. 707. LIMITATION ON SEC FUNDS.

None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission 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.

Specifically, you have asked about the terms “finalize, issue or implement” as they are used in this section. For this opinion, I have reviewed other portions of the Act, including page 97 lines 24-25, page 98 lines 1-9, page 344 lines 11-14, page 538 lines 10-25, page 539 lines 1-18, page 554 lines 19-24, and page 1983 lines 1-3. I have also examined such other documents and made such further legal and factual examination and investigation as I deemed necessary for purposes of giving the following opinion. I have assumed for purposes of this opinion that the Act was adopted as set forth in the above link and that no other contemporaneous or subsequent legislation relates to the matter covered by the SEC Funds Limitation.

Based on the foregoing, for reasons set forth below, I am of the opinion that the SEC Funds Limitation does not prohibit the SEC from discussing, planning, investigating, analyzing, evaluating, developing plans or possible proposals for, or proposing a rule, regulation or order relating to the disclosure of political contributions, contributions to tax-exempt organizations, or dues paid to trade associations (**Covered Disclosures**), or from spending funds made available by the Act to do the foregoing.

My reasons for this opinion include the fact that the plain language of the SEC Funds Limitation only restricts the SEC from using funds to “finalize, issue or implement” such a rule, regulation or order relating to Covered Disclosures. By law, convention, and custom, agencies such as the SEC engage in rulemaking in two or sometimes more formal stages, including at least “proposing” rules and then, after notice and opportunity for the public to comment, “finalizing” or “issuing” such rules. Once finalized and issued, rules sometimes also are then “implemented.” Prior to proposal,

agencies and their staffs engage in preparatory tasks, including internal discussion, planning, investigation, analysis, evaluation, development of plans and possible proposals. Agencies also sometimes publish “concept releases” inviting public comment on a general conceptual framework for future regulation. These steps often take years and consume significant agency funds and other resources, a fact that is a matter of public record. Had the Act been intended to restrict the SEC from using funds made available by the Act to engage in rule proposals or steps preliminary to rule proposals, it would not have used the phrase “finalize, issue or implement,” but would have used the phrase “plan, propose, finalize, issue or implement” or similarly broad language.

This conclusion is consistent with the fact that the Act uses such broad language at page 97 lines 24-25 (“propose”) and page 98 lines 1-9 (“take any other action with respect to”), as well as at 344 line 12 (“propose, plan for”) with respect to similar restrictions on use of funds made available by the Act. Any other conclusion would render language in those sections surplusage, inconsistent with customary principles of statutory interpretation.

Very truly yours,

A handwritten signature in cursive script that reads "JCoates".

John C. Coates IV

John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School