



1633 Broadway, 48th Floor
New York, NY 10019

October 2, 2009

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-18-09: Political Contributions by Certain Investment Advisers

Dear Ms. Murphy:

BNY ConvergEx Group, LLC (“ConvergEx”) is pleased to have this opportunity to comment on the SEC’s proposal of rule 206(4)-5 under the Advisers Act, which is designed to eliminate inappropriate pay to play practices.¹

ConvergEx is a premier provider of investment technology solutions and global agency brokerage services to institutional clients worldwide. Our three key business lines – investment technologies, liquidity and execution management, and intermediary and clearing services – specialize in providing a full array of leading technologies and an integrated platform of performance driven, global trading capabilities supported by a culture of extraordinary client service. With over 900 employees operating out of locations as diverse as Boston, New York, Chicago, London, Hong Kong, Dubai and Johannesburg, ConvergEx reaches buy-side and sell-side customers around the world, giving them access to financial technologies and trading capabilities.

ConvergEx supports the SEC’s overall policy goal of addressing inappropriate influences by financial services firms on decisions by government entities. We believe, however, that such concerns would be better addressed through rulemaking that targets particular problems and provides for greater disclosure rather than one that paints with the broad brush of this proposal. Nonetheless, to the extent that the SEC does proceed to adopt some version of proposed rule 206(4)-5, we request clarification from the SEC on certain points, as set forth below.

Our primary U.S. broker-dealer, BNY ConvergEx Execution Solutions LLC (“CES”), is also a registered investment adviser in connection with its transition management services business. CES provides transition management to a variety of private and governmental pension plans and other institutional clients. For the most part, CES handles these relationships solely on a brokerage basis. However, certain pension plans, both private and governmental, request CES to act as a registered investment adviser in connection with acting as transition manager. The request can come during the initial solicitation process (typically by RFP), or it may come once CES has been chosen as a

¹ Political Contributions by Investment Advisers, Inv. Adv. Act Rel. No. 2910 (Aug. 3, 2009).

transition manager, during the contract negotiation phase or even further along in the relationship.

With respect to the proposed rule, we are concerned about potential ambiguity in paragraph (a)(2), which would prohibit investment advisers such as CES from compensating third party solicitors of government clients other than solicitors who are related persons of the adviser, employees of related persons, or designated personnel of the advisers. While we believe that the general ban on third-party solicitors is unnecessary, we are concerned in particular about the vagueness of the rule's definition of "related person." Paragraph (f)(9) of the proposed rule would define a related person as "any person, directly or indirectly, controlling or controlled by the investment adviser, and any person that is under common control with the investment adviser." The proposed rule, however, does not define the term "control."

The lack of clarity over the term "control" in the context of proposed rule 206(4)-5 is of concern to us because sometimes personnel of an affiliate, for compensation, solicit both private and governmental clients for our transition management business, which clients' request that we act as a registered investment adviser for the transition. The relevant affiliate currently is under common ownership that is greater than 25% but less than 50%.

The term "control" is not defined in the Advisers Act and its rules, but the SEC and its staff on many occasions have applied the definition under the Advisers Act's companion statute, the Investment Company Act of 1940. Section 2(a)(9) of the Investment Company Act, in pertinent part, presumes that a person controls a company if the person owns more than 25% of the voting securities of the company. For example, the SEC has applied a test of ownership of 25% or more of any class of a company's voting securities as constituting control that makes the owner a "related person" for purposes of Form ADV, Part 1A.² Similarly, staff no-action letters considering when there was a change in control triggering an "assignment within the meaning of section 202(a)(1) of the Advisers Act have applied a similar "control" test.³ In addition, we note that the staff similarly applied a 25% threshold and an implicit control analysis in taking the position that section 206(3) of the Advisers Act would apply to transactions between an adviser's clients and a private fund in which the adviser owns more than 25%.⁴

Further, we note that "control" can take other forms beyond percentage of ownership. While the ownership percentage may fall below 25%, an affiliate may still exercise control through presence on the board of directors, provisions in organizing documents permitting it to set compliance standards, and historical ownership.

Because of the strictness of the proposed ban on compensation of solicitors that are not related persons, their employees, or our personnel, we believe it is critical for the SEC to clarify the test for control included in the definition of "related person." We request that, if SEC retains the ban on compensating third-party solicitors in any form in a final

² See Form ADV, Glossary of Terms, number 5. When the Commission adopted the revisions to Form ADV incorporating that definition of "related person," it also adopted amendments to rule 0-7 under the Advisers Act, which defines "small business" and "small organization" for purposes of rulemaking procedures, to incorporate a similar control test. Inv. Adv. Act Rel. No. 1897 (Sept. 12, 2000).

³ See, e.g., Anderson, Bagnall & Smythe, *Investment Advisers: Law & Compliance* § 8.03[2][a] (LexisNexis) and staff positions cited.

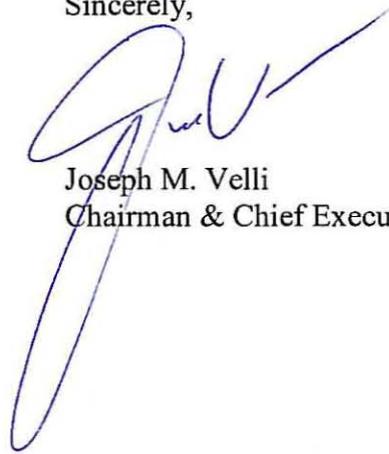
⁴ *Gardener Russo & Gardner*, SEC No-Action Letter (June 7, 2006).

rule, the SEC confirm that the term “control” will be interpreted under existing Advisers Act analyses, including the position that the ownership of 25% or more of any class of voting securities is presumed to confer control. We also believe that any final rule should include in the test for “control” a list of other factors evidencing control, such as board of directors’ seats, compliance standards and historical control relationship.

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We appreciate the opportunity to provide comments on this proposal. If you have any questions about our comments or would like additional information, please contact Lee A. Schneider at lschneider@bnyconvergex.com or (212) 468-7767.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Velli', with a large, sweeping flourish extending downwards and to the left.

Joseph M. Velli
Chairman & Chief Executive Officer