

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

My name is Brian Fitzgibbon the CEO of Fitzgibbon Toigo & Co LLC a licensed Broker Dealer. I felt compelled to respond to the terrible proposal referenced above that was put forth by the SEC. I have a six person office which I started six years ago to assist quality private equity firms raise capital. We look for firms with proven managements, well articulated investment philosophies and sound strategies. I have 39 years experience in investment management. Other team members are long experienced as plan sponsors, institutional consultants, stock analysts and placement agents. All have Series 7 and 63 registrations while four have additional Series 24 registrations – none are politically connected. The work we provide our clients is extensive and includes: consulting with manager on strategy and tactics; developing and implementing a marketing and sales program; assisting in preparation of marketing materials and PPM; identifying, qualifying & contacting potential investors; identifying & contacting consultants who may have clients who are potential investors; providing all investors with introductory marketing materials including PPM; giving introductory presentations; arranging presentation meetings for manager and participating; arranging all follow-ups with prospects until close; consult with advisor on market conditions; and forward requests for additional information. Before we begin we do extensive due-diligence on prospective managers

It is difficult for me to understand why SEC Chairman Mary Schapiro is attacking legitimate Broker/Dealers licensed as placement agents under FINRA an agency she controlled and still does indirectly under the current structure. It is obvious that the agency wishes to recast its image after the Madoff scandal but it doesn't make sense to attack one of the law-abiding constituencies that it currently regulates. Regulations were already in place for disclosure of cash payments for client solicitations under Rule 206(4)-3 of the Investment Advisor's Act of 1940 for both the investment adviser and placement agent solicitor. This rule of disclosure was violated in NY and everyone involved should be punished. The fact that Carlyle wished to influence decisions in NY by hiring Hank Morris a politician close to the NY State Controller is not a legitimate indictment of licensed placement agents. The investment manager, public fund officer and lax regulations and procedures at the fund were all contributing factors.

The New York State Attorney General Andrew Cuomo wishes to appear eager to clean-up financial issues in NY as he plans to run for Governor. "We applaud the SEC for the new rules it proposed today," he said. These rules will institutionalize on a national scale the principles we established in our Code of Conduct and settlement agreements with Carlyle Group, Riverstone Holdings LLC, PCG Corporate Partners and others". To my surprise, Andrew Cuomo (a politician) seems to be speaking for the SEC. In response to the recent New York State Common Retirement Fund Scandal, what solution was determined by the Controller, SEC and the Attorney General? A ban on hiring Carlyle as a GP for New York State in the future and a loss of future incentive bonus on assets under management. No! The SEC did nothing so daring as going after a politically connected firm. It is helpful to remember that Carlyle was and is the prime beneficiary of this gamesmanship in NY. They received approximately a one year loss of fees for their actions. Did it suspend the license of the B/D that employed Hank Morris? It took a less enlightened policy by suggesting a scorched earth policy to ban all 600-700 B/D firms that have licensed placement agents. It will have the effect of assisting big firms like Carlyle eliminate competitors for funds. The SEC is in a strong position to protect public

funds from abuse but who is going to protect us from the poor judgments of the SEC and the NY Attorney General as they try to improve their own political position?

In reality the greatest source of corruption in public pension funds are the officials with responsibility for the funds activities including trustees. Mary Schapiro sites two letters of complaint from the NY State Controller and NYC Comptroller as reasons for action. Both funds pledge support to the SEC to ban the use of placement agents to stop pay to play activities. This jump in logic is incredible. They mention nothing about creating a check and balance system for sole trustees of public funds. Bill Thompson is the same person who was the focus of an investigative piece on the front page of the New York Times on August 19th where it was reported the Comptroller received more than \$500,000 in contributions from money managers. I believe the Attorney General and SEC are obligated to examine the Democratic party's leading mayoral contender further because they have clear evidence of existing managers trying to influence future hire and fire decisions of a public fund.

The solution to this pay to play issue is simple. Seriously prohibit political contributions. Everyone is in favor of a rule to stop this activity. The SEC controls investment managers and its subsidiary FINRA controls broker/dealers. Require all managers to be registered with the SEC and all placement agents to be registered through FINRA. Ban the use of political contributions to politicians involved in decision making at public funds prior to time of hiring and during entire time the fund is under management. Have all related parties sign a statement that they are in compliance with the regulations regarding contributions and any violators are to have their license suspended for a two year period.

Let me try to address some of the comments and questions asked by the SEC in its proposed rule.

“Indeed, we have alleged that third party solicitors have played a central role in each of the enforcement actions against investment advisers that we have brought in the past several years involving pay to play schemes.” I believe that it would be more accurate to state that investment managers and fund officials have also played a central role in these actions. One of the managers that was recently fined by NY State had been in a similar position in another state jurisdiction in the past. Let us not forget that the placement agent takes instruction from and is paid by the manager who is the main beneficiary of any circumvention of the rules to get business. Fortunately there has been no prevalence of dishonest behavior by the great majority of managers or licensed placement agents. Therefore a draconian policy against placement agents is unwarranted.

In the SEC footnotes, they unfairly lump together placement agents with finders, lobbyists, consultants, solicitors and other intermediaries. The great majority of placement agent groups are financial professionals associated with B/D's and regulated under FINRA with spotless records. A definition of placement agent may be helpful. A Private Placement Agent or Placement Agent - is an individual, or, more frequently, a firm that assists entrepreneurs or private companies looking to raise private equity or other limited partnership interests through a so called private placement. Within the context of private equity, placement agents are licensed to serve several functions: raise growth capital, mezzanine capital or venture capital for a company; raise investor commitments to new private equity funds; advise existing owners of private equity assets

on secondary market sales of their interests. As such, the placement agent acts as an intermediary between those seeking to raise money and various investors who may be interested in investing in the company looking to raise funds. Many placement agents are structured as groups within large investment banking firms (e.g., Credit Suisse, Lazard, UBS Investment Bank, Citigroup) or as separate boutique investment banks licensed under FINRA and the SEC. Placement agents will regularly seek to raise capital from a variety of institutional investors (e.g., pension funds, insurance companies, endowments, fund of funds, Sovereign wealth funds) as well as high net worth individuals. Placement agents are most often compensated through fees, paid by the company or individuals raising capital, based on the amount of money raised. They are required by law under the Investment Advisors Act of 1940 to disclose under Rule 206(4)-3 the following: name of solicitor, name of advisor, nature of relationship, statement that solicitor will be compensated by adviser, terms of compensation, any additional charge if any that will be added to advisory fee.

“Government authorities in New York and other jurisdictions have prohibited or are considering prohibiting the use of consultants, solicitors or placement agents by investment advisors to solicit government investment business”. This is an unfair and misleading statement as it doesn't mention all of the public funds that have rejected the Cuomo/SEC idea of banning legitimate placement agents.

“Proposed rule 206(4)-5 would make it unlawful for any investment advisor to provide or agree to provide, directly or indirectly, “payment” to any person to solicit a government entity for investment advisory services unless such person is: (i) a “related person of the investment adviser or, if the related person is a company, an employee of that related person; or (ii) any of the adviser's employees, general partners, LLC managing members, executive officers (or other person with a similar status or function, as applicable)”. Placement agents are investment professionals licensed as B/D's under FINRA. Who ceded the moral high ground to investment manager personnel who are not required by the SEC to be registered? They certainly have as much motivation to corrupt as anyone in that the investment manager is the prime beneficiary of any successful solicitation. The SEC proposed rule treats these internal or related people differently; this doesn't make sense and is not an equitable or well thought out policy.

We request comments on our proposal to prohibit the use of third-party solicitors of government business. Is our proposed prohibition on the use of third-party solicitors an appropriate means to deter pay to play practices? The proposal to prohibit the use of third party solicitors by SEC definition includes a number of different market participants making no differentiation between a lobbyist with political connections that unfairly influences investment decisions and a hard working investment professionals regulated with the appropriate regulatory authority. As investment professionals regulated under FINRA, we develop and implement a sophisticated marketing program including: funding goals, assistance to legal counsel on offering materials, creation of marketing materials and management/control of sales process. We resent any unwarranted attack on the ethics of placement agents and the SEC never makes a rational argument for its desire to eliminate them. We do welcome any proposal to require registration of everyone as well as any rule that prohibits political contributions. The SEC policy would be more balanced if licensed placement agents were given the same opportunity as managers to commit to not contribute to officials of any government entity where they are seeking business.

To what extent might the proposed ban on using third parties to solicit government business disproportionately impact the ability of certain investment advisers, such as those that are smaller and less established, to compete in the market to provide advisory services to government clients? The Preqin Research Report did a study on the potential effects of the SEC proposal on banning the use of placement agents and they believed the consequences were severe. They pointed out that without placement agent assistance some of the best fund managers may never get to market. This will have an effect on overall returns of private equity and funding health of some of these public funds. It could also have a snowball effect and actually stunt US economic growth. I believe the SEC has totally underestimated the importance of the role placement agents play in providing capital to deserving funds. It would also severely hurt minority and women businesses from raising initial capital. I believe that it would create an extremely unlevel playing field with big firms like Carlyle being the winner at everyone else's expense.

In summary, I would like to say that a ban on political contributions is a good idea while a ban on placement agents is unfair, irrational and harmful to Private Equity. There will always be some corrupt public officials and organizations that want to game the system. If the penalties are stiff enough and SEC enforcement vigorous enough, bad behavior will be discouraged.

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