

SECURITIES AND EXCHANGE COMMISSION

Investment Advisers Act Release No. 4825 / 803-00241

PNC Capital Advisors, LLC; Notice of Application

December 8, 2017

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of application for an exemptive order under Section 206A of the Investment Advisers Act of 1940 (the “Advisers Act”) and Rule 206(4)-5(e).

Applicant: PNC Capital Advisors, LLC (“Applicant” or “Adviser”).

Relevant Advisers Act Sections: Exemption requested under Section 206A of the Advisers Act and Rule 206(4)-5(e) from Rule 206(4)-5(a)(1) under the Advisers Act.

Summary of Application: Applicant requests that the Commission issue an order under Section 206A of the Advisers Act and Rule 206(4)-5(e) exempting it from Rule 206(4)-5(a)(1) under the Advisers Act to permit Applicant to receive compensation from certain government entities for investment advisory services provided to the government entities within the two-year period following a contribution by a covered associate of the Applicant to an official of the government entities.

Filing Dates: The application was filed on April 18, 2017, and an amended and restated application was filed on October 10, 2017.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 2, 2018, and should be accompanied by proof of service on Applicant, in the form of an affidavit or, for

lawyers, a certificate of service. Pursuant to Rule 0-5 under the Advisers Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

Addresses: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090. Applicant: PNC Capital Advisors, LLC, One East Pratt Street, Baltimore, MD 21202.

For Further Information Contact: Kyle R. Ahlgren, Senior Counsel, at (202) 551- 6857 or Holly L. Hunter-Ceci, Assistant Chief Counsel, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

Supplementary Information: The following is a summary of the application. The complete application may be obtained via the Commission's website at <http://www.sec.gov/rules/iareleases.shtml> or by calling (202) 551-8090.

Applicant's Representations:

1. Applicant is a financial services firm registered with the Commission as an investment adviser pursuant to the Advisers Act. Applicant provides discretionary investment advisory services to a wide variety of investors. Applicant is a wholly-owned subsidiary of PNC Bank, National Association (the "Bank"), and the Bank is a wholly-owned subsidiary of PNC Financial Services Group, Inc. ("PNC").

2. Certain Ohio government entities have established separately managed accounts to which the Adviser provides investment advisory services (each such government entity, a "Client" and collectively, the "Clients"). Each Client is a "government entity" within the meaning of Rule 206(4)-5(f)(5).

3. The individual who made the campaign contribution (the “Contributor”) that triggered the two-year compensation ban (the “Contribution”) is a dual-hatted employee of the Bank and the Adviser. In his role as a business development officer of both the Adviser and the Bank, he solicited and continues to solicit business for the Adviser and the Bank from private corporations and non-profit entities in Pennsylvania, West Virginia, California and Texas. The Contributor has never solicited business in Ohio, whether for the Adviser or for the Bank. The Adviser listed the Contributor as a covered associate in its records maintained under Rule 204-2 under the Advisers Act, and subjected him to its policies for a covered associates.

4. In June 2016, the Bank began to contemplate promoting the Contributor to Market Director, a position that has oversight over all sales operations in parts of Pennsylvania for investment advisory services business. In anticipation of this promotion, in December 2016 the Contributor solicited a government entity for investment advisory services for the first time (a local government entity in Pennsylvania). However, after the PNC Corporate Ethics Department’s discovery of the Contribution, a hold was placed on the Contributor’s promotion. The hold remains in effect.

5. The Contributor was at the time of the Contribution a “covered associate” within the meaning of Rule 206(4)-5(f)(2), and the Contribution triggers the compensation ban under the two-year lookback provision in Rule 206(4)-5(b)(2). At no time has the Contributor been involved in soliciting the Clients, and has never communicated with the Clients. The Contributor has never solicited any other state or local Ohio government entity. The Contributor has never made presentations for, or met with, any representatives of any Client or with any other Ohio government entities, or supervised any person who met with any Client or other Ohio government entity. If promoted to Market Director, the Contributor will neither meet with any

Ohio government entities personally, nor supervise any person who solicits investment advisory services business from Ohio government entities.

6. The recipient of the Contribution was John Kasich (the “Official”), Governor of Ohio, in his campaign for President of the United States. The Clients are overseen by boards of trustees or directors to which the Governor appoints certain members and which have influence over selecting an investment adviser. Due to the power of appointment, the Governor is, and at the time of the Contribution was, an “official” of each Client within the meaning of Rule 206(4)-5(f)(6).

7. The Contributor, a long-time Republican, attended an April 2016 fundraiser for Governor Kasich’s presidential campaign in Pittsburgh, Pennsylvania. Governor Kasich spoke at the fundraiser, and the Contributor made a \$1,000 donation to the Kasich campaign. The Contribution was reported by the campaign as received on April 22, 2016, according to a report filed with, and made available online by, the Federal Election Commission. Other than being an attendee at the event, the Contributor has had no interactions with the Official, his staff, or any other Ohio official regarding the Contribution or any other matter.

8. The Contributor made the Contribution without pre-clearance from PNC’s Corporate Ethics Department, and without disclosing the Contribution in his quarterly certification (as clearly required by PNC’s policies, procedures and annual training). The Contributor did not appreciate that both Rule 206(4)-5 (the “Rule”) and the Adviser’s policy required him to pre-clear and disclose the Contribution because the Contributor was focused on the Official in his capacity as a candidate for President of the United States. At no time did any employee of PNC or the Adviser or the Bank (other than the Contributor) have any knowledge that the Contribution had been made prior to its discovery on February 17, 2017. Applicant

represents that the Contribution was not motivated by a desire to influence the award of investment advisory business.

9. The Contribution was discovered by PNC's Corporate Ethics Department on February 17, 2017 through the controls built into its compliance procedures. As part of PNC's required background check for his promotion to Market Director, the Contributor disclosed the Contribution in the political contribution lookback form, in which any individual who is about to take a covered associate position must disclose any contribution he or she made during the prior two years. Upon discovery of the Contribution, PNC immediately notified the Contributor that the Contribution was against PNC policy and a violation of the Rule, and a refund was requested from the campaign on March 8, 2017. The Contributor received the refund on May 3, 2017. All compensation earned that is attributable to the Clients' investments since the Contribution Date has been placed in escrow. Absent exemptive relief from the Commission, Applicant undertakes to refund the escrowed compensation consistent with applicable laws and the Rule.

10. The initial selection process pursuant to which the various Clients decided to establish a separate account with the Adviser, or enter into a separate account that is sub-advised by the Adviser, was completed between 1996 and 2010. One Client opened two accounts with the Adviser after the Contribution Date pursuant to the Client's pre-existing relationship with the Adviser where the Client would, as it had done in prior years, open an account when it issues debt in order to manage the proceeds of such issuance. While some Clients have added funds to their accounts post-Contribution, Clients on the whole have withdrawn more funds than they have added, resulting in a net decrease in assets under management across all Clients combined.

11. PNC's pay-to-play policies and procedures (the "Policy") apply to PNC's subsidiaries (including the Adviser) and were adopted and implemented on March 14, 2011, well

before the Contribution was made. The Policy requires that all contributions to any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, including a state or local official running for federal office, must be pre-cleared. There is no *de minimis* exemption from this pre-clearance requirement. The Adviser's employees must complete PNC's annual ethics training, which includes a segment on ethics requirements for personal political contributions. Employees who are subject to the Policy are sent multiple compliance alerts reminding them of the Policy and the need to pre-clear political contributions. Employees subject to the Policy must submit a quarterly certification confirming that they have disclosed all political contributions made in the prior quarter. The Contributor submitted a certification for the quarter covering April 2016 confirming that he had done so, but in fact he had not pre-cleared or disclosed the Contribution.

12. PNC has amended the quarterly certification for covered associates to specifically explain that the requirement to report "all" contributions includes contributions to federal candidates who are state or local officials at the time of the contribution. This amended quarterly certification has been rolled out to covered associates for the quarter ending September 30, 2017.

#### Applicant's Legal Analysis

1. Rule 206(4)-5 under the Advisers Act prohibits a registered investment adviser from providing "investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser." Each Client is a "government entity" within the meaning of Rule 206(4)-5(f)(5), the Contributor was at the time of the Contribution a "covered associate" within the meaning of Rule 206(4)-5(f)(2), and the Official

was at the time of the Contribution an “official” within the meaning of Rule 206(4)-5(f)(6). The Contribution therefore triggered the Rule’s ban under the two-year lookback provision in Rule 206(4)-5(b)(2).

2. Section 206A of the Advisers Act authorizes the Commission to “conditionally or unconditionally exempt any person or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].”

3. Rule 206(4)-5(e) provides that the Commission may exempt an investment adviser from the prohibition under Rule 206(4)-5(a)(1) upon consideration of the factors listed below, among others:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act;

(2) Whether the investment adviser: (i) before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of the Rule; and (ii) prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and (iii) after learning of the contribution: (A) has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and (B) has taken such other remedial or preventive measures as may be appropriate under the circumstances;

- (3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;
- (4) The timing and amount of the contribution which resulted in the prohibition;
- (5) The nature of the election (e.g., federal, state or local); and
- (6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

4. Applicant requests an order pursuant to Section 206A and Rule 206(4)-5(e), exempting it from the two-year prohibition on compensation imposed by Rule 206(4)-5(a)(1) with respect to investment advisory services provided to the Clients within the two-year period following the Contribution.

5. Applicant contends that given the nature of the Contribution, and the lack of any evidence that the Adviser or the Contributor intended to, or actually did, interfere with the Clients' merit-based process for the selection or retention of advisory services, the Clients' interests are best served by allowing the Adviser and its Clients to continue their relationships uninterrupted. Applicant states that causing the Adviser to serve without compensation for a two-year period could result in a financial loss of approximately \$700,000, or 700 times the amount of the Contribution. Applicant contends that the policy underlying the Rule is served by ensuring that no improper influence is exercised over investment decisions by governmental entities as a result of campaign contributions, and not by withholding compensation as a result of unintentional violations.

6. Applicant submits that the exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act. As summarized below and detailed in the



Application, Applicant further submits that the other factors set forth in Rule 206(4)-5(e) similarly weigh in favor of granting an exemption to the Applicant to avoid consequences disproportionate to the violation.

7. Applicant states that the Adviser adopted and implemented the Policy, which is fully compliant with and more rigorous than the Rule's requirements, on March 14, 2011, well before the Contribution Date.

8. Applicant states that aside from the Contributor, no executives, employees or covered associates of the Adviser knew of the Contribution until it was self-reported by the Contributor as a result of the multiple controls PNC uses in connection with promotions and transfers.

9. Applicant states that after learning of the Contribution, the Adviser, through its outside counsel, immediately requested a full refund of the Contribution, which was subsequently received. Applicant further states that the Adviser then established escrow accounts and moved all monies impacted by the two-year compensation ban into those escrow accounts.

10. Applicant states that in response to the Contribution, the Adviser reviewed and assessed the continued effectiveness of its Policy and determined that while the Policy was strong and robust, it undertook to enhance the employees' understanding of the Policy through additional education, training, and clarification to the wording of the covered associates' quarterly certification form.

11. Applicant states that the Contributor did not solicit a government entity until December 2016 (in Pennsylvania, not Ohio), that his geographic area for soliciting clients or

supervising others does not include Ohio, and that he has never solicited or otherwise communicated with the Clients.

12. Applicant states that the Clients' initial investments with the Adviser substantially pre-date the Contribution and were made on an arm's length basis, and neither the Contributor nor the Adviser took any action to have the Official influence those investments, directly or indirectly. Applicant further states that the Contributor did not solicit or supervise anyone who solicited the Clients with respect to these investments, and any new investments were made in the ordinary course of business and had nothing to do with the Contribution.

13. Applicant states that the Contributor's intent in making the Contribution was not to influence the selection or retention of the Adviser, and that the Contributor is a long-time Republican who was spontaneously motivated to make the Contribution solely because of his personal political beliefs.

#### Applicant's Conditions

The Applicant agrees that any order of the Commission granting the requested relief will be subject to the following conditions:

1. The Contributor will be prohibited from soliciting investment from any "government entity" client or prospective client for which the Official is an "official" as defined in Rule 206(4)-5(f) until April 22, 2018.

2. The Contributor will receive a written notification of this condition and will provide a quarterly certification of compliance until April 22, 2018. Copies of the certifications will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Adviser, and be available for inspection by the staff of the Commission.

3. The Adviser will conduct testing reasonably designed to prevent violations of the conditions of the Order and maintain records regarding such testing, which will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Adviser, and be available for inspection by the staff of the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman  
Assistant Secretary