Investment Advisers Act of 1940 – Section 206(3)
Securities Exchange Act of 1934 – Section 28(e)

BNY ConvergEx Group, LLC

September 21, 2010

Our Ref. No. 2010414127

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT File No. 132-3

Your letter dated September 13, 2010 presents the issue of whether the provision of research services by a research firm that is also a broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act," and such broker-dealer, "Research BD") to an institutional investment manager ("Money Manager") would in and of itself establish an investment adviser/client relationship under the Investment Advisers Act of 1940 ("Advisers Act") between the Research BD and accounts managed by the Money Manager on a discretionary basis ("Managed Accounts"). Under the terms and representations detailed below, we do not believe that it would.

I. Background

Money Managers use different compensation arrangements to purchase research services from Research BDs that they use to manage the portfolios of their Managed Accounts. Some Money Managers use their own assets ("hard dollars"). Other Money Managers pay for such research services using brokerage commissions generated by the trading activities of their Managed Accounts through client commission arrangements under the safe harbor in section 28(e) of the Exchange Act.[1] Client commission arrangements structured in accordance with section 28(e) may vary considerably in their

[1] Section 28(e) of the Exchange Act provides a safe harbor that allows money managers to use funds of managed accounts to purchase "brokerage and research services" for the managed accounts provided by a broker-dealer without breaching their fiduciary duties to such accounts. Section 28(e) requires a money manager to determine in good faith that the amount of commission was reasonable in relation to the value of the brokerage and research services received. If the conditions of the safe harbor of section 28(e) are met, a money manager does not breach his fiduciary duties solely on the basis that he uses managed account commissions to pay a broker-dealer more than the lowest commission rate for the brokerage and research services. "Section 28(e) applies equally to arrangements involving [managed account] commissions paid to full service broker-dealers that provide brokerage and research services directly to money managers, and to third-party research arrangements where the research services and products are developed by third parties and provided by a broker-dealer that participates in effecting the transaction." *Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934*, Exchange Act Release No. 54165 (July 18, 2006) ("2006 Release"). Hard dollar arrangements are outside the scope of section 28(e). *See Commission Guidance Regarding the Duties and Responsibilities of Investment Company Boards of Directors with Respect to Investment Adviser Portfolio Trading Practices,* Investment Company Act Release No. 28345, n.70 (Jul. 30, 2008) (noting that section 28(e) is not available for trades "with no explicit commissions"), citing 2006 Release at n.27.

structure and complexity.[2] The research services of a Research BD that a Money Manager receives may be tailored to the needs of a Money Manager's Managed Account.

You state that BNY ConvergEx Group, LLC ("ConvergEx"), through certain of its subsidiaries that are broker-dealers registered under the Exchange Act ("Providing BDs"), delivers research and brokerage services to Money Managers pursuant to the safe harbor provided by section 28(e) through client commission arrangements. You state that ConvergEx offers client commission arrangements that permit a Money Manager to accumulate and consolidate "commission credits" generated through brokerage transactions that the Providing BDs and other broker-dealers registered under the Exchange Act effect for the Money Manager's Managed Accounts ("Commission Credits Pool"). You state that a Money Manager may request third-party research or proprietary research services of a Research BD for which ConvergEx would make cash payments using the Money Manager's accumulated commission credits in the Commission Credits Pool. You state that the Research BD will be unaffiliated with ConvergEx or the Money Manager. You further state that some of the research services that a Research BD may provide to a Money Manager may be tailored to the needs of a Money Manager's Managed Account.

II. Discussion

You acknowledge that a Managed Account is a client of its Money Manager. You contend, however, that a Managed Account should not be considered a client of a Research BD solely because the Research BD provides research services to the Managed Account's Money Manager through ConvergEx's client commission arrangements structured in accordance with section 28(e) of the Exchange Act. You further argue that the abusive practices addressed by section 206(3) of the Advisers Act would not arise in principal transactions between a Research BD and a Managed Account in these circumstances.

Section 206(3) of the Advisers Act, in relevant part, makes it unlawful for any investment adviser, directly or indirectly, acting as principal for its own account, knowingly to sell any security to, or purchase any security from, a client without disclosing to such client in writing, before the completion of the transaction, the capacity in which the adviser is acting and obtaining the client's consent to the transaction. Section 206(3) is intended to address the potential for self-dealing that could arise when an investment adviser acts as principal in a transaction with a client, such as through price manipulation or dumping unwanted securities into the client's account.[3]

In support of your view, you state that the safe harbor in section 28(e) of the Exchange Act, pursuant to which a Money Manager would purchase the research services of a Research BD, is predicated on the notion that the research services are provided to

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[2] *See* 2006 Release.

[3] *See* Investment Trusts and Investment Companies: Hearings on S. 3580 before the Subcomm. of the Comm. on Banking and Currency, 76th Cong., 3d Sess. 320-22 (1940).

the Money Manager and not to the Managed Account of the Money Manager. You further make the following representations (together, "Representations"):

- the Money Manager is an investment adviser to the Managed Account and, as such, is subject to fiduciary obligations to the Managed Account as a matter of law;

- the Money Manager exercises investment discretion over the assets of the Managed Account and is responsible for managing the portfolio of the Managed Account;

- neither the Research BD nor any "person associated with" the Research BD, as defined in section 202(a)(17) of the Advisers Act, exercises investment discretion over the assets of the Managed Account (other than discretion as to the price at which or the time to execute an order of a Money Manager for the purchase or sale of a definite amount or quantity of a specified security for a Managed Account);[4]

- neither the Research BD nor any of its affiliated persons, as defined in section 202(a)(12) of the Advisers Act, provides investment advice directly to the Managed Account;[5]

- the Money Manager is not a "person associated with" the Research BD, as defined in section 202(a)(17) of the Advisers Act;

- the Managed Account does not have a contractual relationship with the Research BD or any of its affiliated persons, as defined in section 202(a)(12) of the Advisers Act, with regard to the provision of investment advice to the Money Manager for the benefit of the Managed Account, and does not compensate the Research BD or any of its affiliated persons for investment advice (other than through the portion of brokerage commissions maintained in a Commission Credits Pool);

- the Managed Account does not select or participate in selecting the research services that the Research BD provides to the Money Manager;

- the Money Manager is responsible for independently determining the value of the brokerage and research services in accordance with its "good faith" determination under section 28(e) of the Exchange Act.

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[4] *See Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, Investment Advisers Act Release No. 2652, n.13 (Sept. 24, 2007) (describing circumstances under which the Commission proposes to view a broker-dealer's exercise of investment discretion to be temporary or limited).

[5] It would not be inconsistent with this Representation if the Research BD provides investment advice to clients who are also the Money Manager's Managed Accounts on other transactions that are entirely unrelated to any transaction in respect of which the Money Manager obtains research services from a Research BD through an arrangement described in your letter.

You conclude, therefore, that the mere use of the research services of a Research BD by a Money Manager in its investment decision-making process on behalf of a Managed Account does not establish an investment adviser/client relationship between the Research BD and the Managed Account, including with respect to the prohibition in section 206(3) of the Advisers Act relating to principal transactions between the Research BD and the Managed Account. You argue that clarifying the inapplicability of section 206(3) of the Advisers Act to these transactions will support the "unbundling" of execution and research costs, which the Commission has stated to be beneficial to money managers' clients.[6] You explain that ConvergEx has found that some Research BDs who prepare proprietary research have declined to accept cash payments using the Money Manager's commission credits in the Commission Credits Pool for such research because they believe doing so would jeopardize their ability to effect principal transactions with the Money Manager's Managed Accounts. You further explain that, when that research is offered as third-party research for cash payments using the Money Manager's commission credits in the Commission Credits Pool, the research is quantified as to its value, placing fiduciaries such as the Money Managers in a better position to assess the value of the research being obtained with commissions and to make the good faith determination required by section 28(e) of the Exchange Act.

III. Conclusion

In our view, the provision of research services by a Research BD to a Money Manager, when conducted in accordance with the Representations, would not in and of itself establish an investment adviser/client relationship under the Advisers Act between the Research BD and the Money Manager's Managed Accounts.[7] Our position does not depend on whether the Research BD receives payment for providing research services to a Money Manager through or outside an arrangement subject to section 28(e) of the Exchange Act.

Lily C. Reid
Senior Counsel

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6 *See* 2006 Release.

7 Our view is not inconsistent with prior staff positions addressing other types of arrangements. *See, e.g., Morgan, Lewis & Bockius LLP*, SEC Staff No-Action Letter (pub. avail. Apr. 16, 1997); *Copeland Financial Services, Inc.*, SEC Staff No-Action Letter (pub. avail. Sept. 21, 1992); and *Kempner Capital Management, Inc.*, SEC Staff No-Action Letter (pub. avail. Dec. 7, 1987).

INCOMING LETTER

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September 13, 2010

Douglas J. Scheidt, Esq.
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U.S. Securities and Exchange Commission
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Dear Mr. Scheidt:

The purpose of this letter is to request interpretive advice from the Division of Investment Management on behalf of BNY ConvergEx Group, LLC ("ConvergEx") regarding the status of research firms that are also broker-dealers registered under the Securities and Exchange Act of 1934 ("Exchange Act") participating in third-party client commission arrangements for the provision of research to an institutional investment manager ("Money Manager") under the safe harbor found in Section 28(e) of the Exchange Act. In a third-party client commission arrangement, a fiduciary Money Manager effects transactions in securities for accounts which the Money Manager manages on a discretionary basis (the "Managed Accounts") through a broker-dealer registered under the Exchange Act such as certain subsidiaries of ConvergEx (the "Providing BD") who provides research services which have been developed by a third-party research firm.[1] This letter focuses on research firms who are also broker-dealers registered under the Exchange Act ("Research BDs") who may provide their proprietary research to a Money Manager in a third-party client commission arrangement and subsequently execute transactions in a principal capacity with the underlying accounts of the Money Manager.

[1] Among other conditions which must be met for the safe harbor to apply, the research services must provide lawful and appropriate assistance to the Money Manager in the investment decision-making process.

Notwithstanding the fact that Research BDs may be registered as investment advisers with the U.S. Securities and Exchange Commission ("SEC" or the "Commission") or one or more states, it has long been the understanding of the research industry that the mere fact that research services of a Research BD are used by a Money Manager in the investment decision-making process with respect to its Managed Accounts does not establish an adviser/client relationship between the Research BD and the Managed Accounts. This is of particular importance if the Research BD executes securities transactions in a principal capacity for Managed Accounts of a Money Manager because, if an adviser/client relationship with the Managed Account were to arise by virtue of the Research BD's having delivered its research services to the Money Manager, such transactions could implicate Section 206(3) of the Investment Advisers Act of 1940 (the "Advisers Act").

In its July 2006 interpretive guidance on Section 28(e) arrangements,[2] the Commission noted that one of its goals was to promote flexibility in structuring client commission arrangements under Section 28(e) so that money managers would be able to trade through broker-dealers who they believe provide superior execution services, while continuing to receive research from the research firms of their choice, including other broker-dealers.[3] The July 2006 Release also endorsed the view that independent research providers should be accorded equal treatment with proprietary research providers, and stated that third-party research arrangements and proprietary arrangements are encompassed by the Section 28(e) safe harbor on equal terms.[4]

We have been advised by ConvergEx that certain broker-dealers who prepare and distribute proprietary investment research for portfolio executions have cited the potential application of Section 206(3) as grounds to refuse to accept payment for their proprietary investment research from an

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[2] SEC Rel. No. 34-54165, 71 Fed. Reg. 41978 (July 24, 2006) (hereinafter the "July 2006 Release").

[3] See July 2006 Release, 71 Fed. Reg. at 41992-41993 (". . . efficient execution venues provide good, low-cost execution while research providers offer valuable research ideas that can benefit managed accounts. We believe that this separation of functions is beneficial to the money managers' clients . . .").

[4] Id. at 41992.

executing broker in a client commission arrangement under Section 28(e).[5] The position taken by these broker-dealers is frustrating the Commission's goals of furthering the separation of brokerage and research functions, and of promoting equal treatment of independent and proprietary research providers as well as frustrating legitimate business operations.

We have advised ConvergEx that in our view: 1) the provision of research services of a Research BD to a Money Manager by a Providing BD through a Section 28(e) arrangement would not in and of itself establish an investment adviser/client relationship between the Research BD and the Managed Accounts; and, 2) the prohibition of Section 206(3) of the Advisers Act would not apply to principal transactions between a Research BD and the Managed Accounts or other accounts of a Money Manager merely because the Providing BD provides research services of the Research BD to the Money Manager. We seek your concurrence with this advice.

Background

ConvergEx is the parent of several leading U.S. institutional broker-dealers specializing in global agency securities transactions on behalf of accounts and commission management for asset managers and plan sponsors.[6] ConvergEx's broker-dealer subsidiaries are registered with the SEC and are members of FINRA and a number of leading exchanges, including the New York Stock Exchange. One of the primary services offered by ConvergEx is the delivery of research and brokerage services to the institutional money management community under arrangements which avail themselves of the Section 28(e) safe harbor. An important component of ConvergEx's Section 28(e) services is client commission arrangements ("CCAs") which allow Money Managers to accumulate and consolidate "commission credits" in a pool maintained by ConvergEx (the "Commission

[5] Section 202(a)(11) of the Investment Advisers Act of 1940 exempts from the definition of investment adviser a broker-dealer whose advisory services are solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation therefore. Broker-dealers who receive a cash payment through a client commission arrangement have suggested that they are unable to rely on this exception. As discussed herein, the interpretation sought by ConvergEx is not based on Section 202(a)(11), but rather on the premise that a Research BD is not acting as an adviser to a Money Manager's Managed Account when a Providing BD provides research of the Research BD to the Money Manager through a client commission arrangement.

[6] For the sake of simplicity, we refer to "ConvergEx" in this letter when referencing activities engaged in by ConvergEx's broker-dealer subsidiaries.

Credits Pool"). The Commission Credits Pool contains credits generated by brokerage transactions for accounts of the Money Manager executed by ConvergEx or other broker-dealers registered under the Exchange Act which have arrangements to remit a portion of the commissions on such transactions to the Commission Credits Pool.[7] Money Managers may request research services, including third-party research or proprietary research services of a Research BD that is not affiliated with ConvergEx or the Money Manager, for which ConvergEx makes cash payments using the Money Manager's accumulated credits in the Commission Credits Pool. Some of the research services a Research BD may provide to a Money Manager may be tailored to the needs of a Money Manager's Managed Accounts.

As discussed above, certain Research BDs have raised the concern that the provision of their proprietary research to a Money Manager in exchange for cash payments by a Providing BD such as ConvergEx may, in the absence of further clarification, trigger the restrictions of Section 206(3) of the Advisers Act with respect to the Research BDs engaging in principal trades with the Money Manager's accounts.

Analysis

(a) The Provision of Research Services to a Money Manager by a Research BD Does Not By Itself Establish an Adviser/Client Relationship between the Research BD and the Managed Account of the Money Manager

A Managed Account is a client of the Money Manager and is not an advisory client of the Research BD merely because the Managed Account's Money Manager uses the Research BD's research. The Section 28(e) safe harbor is predicated on the notion that research services are provided to a Money Manager and not to the Managed Accounts of the Money Manager. The structure of Section 28(e) arrangements reinforces the conclusion that a Research BD's relationship is with the Money Manager and not the Managed Accounts. In this regard, the research services are selected by the Money Manager, not the Managed Accounts. The amount of compensation to be paid to the Research BD is determined by the Money Manager and the

[7] Such arrangements are structured in accordance with the guidance in the July 2006 Release.

Providing BD, not the Managed Accounts. The research services of the Research BD are provided to, and used by, the Money Manager and not the Managed Accounts. The Money Manager does not need to, and in most cases is unable to, trace commissions used to pay for research to a particular Managed Account.[8] Typically all contacts with respect to research services are between the Money Manager and the Research BD. In short, in providing research services to the Money Manager the Research BD has no communication or dealings with the Managed Accounts, nor would the Money Manager expect the Research BD to communicate with his underlying accounts. Thus, there is no basis for establishing an adviser/client relationship between the Research BD and the Managed Account merely because the Money Manager to the Managed Account uses the research services of the Research BD in its investment decision-making process on the behalf of the Managed Account.

(b) The Provision of a Broker-Dealer's Research Services to a Money Manager Through a Client Commission Arrangement Would Not Trigger the Prohibitions of Section 206(3) Relating to the Research BD Effecting Principal Transactions with the Money Manager's Clients

As discussed above, in a client commission arrangement a Research BD's relationship is with the Money Manager, and not the Managed Accounts. Even if an advisory relationship were to arise between a Money Manager and a Research BD because of the provision of research services, this should not trigger the application of the Section 206(3) consent and approval process to a principal trade between a Research BD and a Managed Account or another account managed by a Money Manager, because there is no adviser/client relationship between the Research BD and the Managed Account.

The statutory language of the Section 206(3) prohibition speaks to transactions between an adviser and its "client." The Managed Account is not an advisory client of the Research BD (even if it is a brokerage client of the Research BD and even if the Money Manager is an advisory client of the

[8] See Securities Exchange Act of 1934, Section 28(e)(1) (indicating that a fiduciary's good faith determination of the value of research services provided by a broker-dealer is "viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion.").

Research BD) and thus by its terms the statute does not apply. Furthermore, with respect to investment advisers which are also broker-dealers, Section 206(3) specifically states that the section's prohibitions "shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction." A Research BD that executes principal trades with a Managed Account is not acting as an investment adviser to the account with respect to such transactions, for the additional reason that such role is served by the Money Manager.

A Research BD has no discretion over accounts managed by the Money Manager and provides no financial management services to these accounts. The possibility of overreaching on the part of the Research BD is minimized because the Money Manager (a fiduciary independent of the Research BD) controls and implements all investment decisions in respect of transactions of the Managed Account, including any principal transactions between the Managed Account and the Research BD. Nor would the conflicts of interest sought to be addressed by Section 206(3) be implicated should the Research BD be permitted to trade as principal with the underlying accounts. The Research BD would have no control over the timing or type of security to be traded. The Research BD does not unilaterally set the price of the securities transaction with the Managed Account, rather this price is negotiated by the Research BD and the Money Manager. It would therefore be impracticable and wholly without regulatory purpose to require a Research BD to send a written disclosure to and obtain consent from the Money Manager's accounts prior to any principal trades with them.

Moreover, the purpose of Section 206 is not apparent here. The SEC staff has previously granted relief regarding practices that do not present the types of abuses Section 206(3) was designed to prevent, namely, price manipulation and the dumping of unwanted securities into managed accounts. For example, in *Morgan, Lewis & Bockius LLP*, 1997 SEC No-Act. LEXIS 529 (April 16, 1997) (hereinafter the "Morgan, Lewis Letter"), the SEC staff took the position that the plan sponsor of a wrap fee program, a dually registered broker-dealer/investment adviser (the "Dual Registrant"), could effect principal and agency-cross transactions for plan participants, upon the direction of an independent, unrelated portfolio manager for the plan participants, without complying with the notice and consent

requirements of Section 206(3). In that letter, the SEC staff specifically noted that "Section 206(3) expressly excludes transactions with a customer of a broker or dealer if the broker or dealer is not acting as an investment adviser 'in relation to **such transaction**' (*emphasis supplied*)."

We note that in the Morgan, Lewis Letter the Dual Registrants sponsoring the wrap programs were deemed to be investment advisers to participants in the programs because the Dual Registrants provided advice to participants regarding the selection of asset managers. Accordingly, the issue presented in the letter was whether the Dual Registrants acted as an adviser with respect to specific principal transactions entered into between the Dual Registrants and program participants. The Morgan, Lewis Letter concluded that the Dual Registrants did not act as an adviser with respect to such transactions, even in situations where the Dual Registrants provided research services (such as research reports) to portfolio managers participating in the program.[9] As discussed above, in the present fact pattern, the Research BDs are not acting as investment advisers to the Managed Accounts and thus the grounds to apply Section 206(3) to transactions between the Research BDs and the Managed Accounts are even less apparent.

Finally, we note that the practice of broker-dealers furnishing research to Money Managers and at the same time effecting principal or agency trades with the Money Manager's underlying accounts is a prevalent way of doing business. In existing proprietary research arrangements under Section 28(e) full service broker-dealers provide their own research to Money Managers and execute principal trades with clients of the Money Managers without the protection of Section 206(3). In such circumstances the interests of the clients are protected by the fiduciary relationship between the Money Manager and the account, and Money Managers have proven capable of protecting advisory clients' interests in such arrangements. It would be incongruous and contrary to the goals cited in the 2006 Release for a broker-dealer who provides research to a Money Manager through a proprietary research arrangement to be allowed to trade as principal with underlying accounts of the Money Manager without restriction but to require this same broker-dealer providing the same research through a third party arrangement to comply with Section 206(3).

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[9] Morgan, Lewis Letter 1997 SEC No-Act. Lexis 529 at *8.

(c) Issuing this Requested Interpretation Will Foster the Quantification of the Value of Proprietary Research Services Which Would Assist Money Managers in Making the "Good Faith" Determination Required by Section 28(e)

In the July 2006 Release, the SEC acknowledged the importance of a money manager ascertaining the value of research obtained with client commissions under a Section 28(e) arrangement.[10] In this regard, the Commission noted that where a broker-dealer offers its research for an unbundled price, the price should inform the money manager as to the research's market value and help the money manager make its "good faith" determination.[11] The SEC went on to say the separation of functions (*i.e.*, execution and research) or "unbundling" is beneficial to the money manager's clients.[12]

By adopting the proposed interpretation, the Staff will remove an impediment to unbundling. As discussed above, some Research BDs who prepare proprietary research have declined to accept cash payments for such research using the Money Manager's accumulated commission credits in the Commission Credits Pool because they believe to do so would jeopardize their ability to effect principal transactions with the underlying accounts of the Money Manager. The interpretive guidance sought here by ConvergEx would presumably result in more broker-dealers agreeing to accept cash payments using the Money Managers' Commission Credits Pools for their proprietary research. With this more favorable environment for dissemination of proprietary research for cash, the quantification of proprietary research would become more prevalent and more transparent. In turn, fiduciaries utilizing commissions to obtain research will be in a better position to assess the value of the research being obtained with commissions and to make the "good faith" determination required by Section 28(e). In other words, proprietary research, which is now offered on a bundled basis (*i.e.*, execution and research costs are not separated for the commission

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10 July 2006 Release, 71 Fed Reg. at 41991-41992.

11 Id.

12 Id. at 41993.

charge) becomes unbundled when the proprietary research is offered as third party research for cash. The research is thereby quantified as to its value.

An additional benefit of unbundling research services from execution services is that it would assist Money Managers in meeting their best execution obligations by allowing them the flexibility of executing trades with their execution venue of choice and continuing to be able to access the research of their choice, whether it is prepared by the executing broker, an independent research firm, or another broker-dealer.[13]

In summary, a favorable response by the SEC staff will lead to quantification of the value of proprietary research, facilitate the ability of money managers to make the "good faith" determination under Section 28(e) as to the value of the research, and otherwise support the principles stated in the SEC's 2006 Release regarding commission arrangements under Section 28(e).

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Based on the facts and analysis set forth in this letter, we ask the Staff to issue an interpretation confirming our view that the provision of research services of a Research BD to a Money Manager by a Providing BD through an arrangement pursuant to Section 28(e) of the Exchange Act, would not in and of itself establish an investment adviser/client relationship between the Research BD and the Money Manager's Managed Accounts, including with respect to the prohibition in Section 206(3) of the Advisers Act relating to principal transactions between the Research BD and the Managed Accounts.

Our analysis and view set forth above, and the interpretation we request from the Staff, is predicated on the following:

- the Money Manager is an investment adviser to the Managed Account and, as such, is subject to fiduciary obligations to the Managed Account as a matter of law;

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[13] See e.g. July 2006 Release, 71 Fed. Reg. at 41993.

- the Money Manager exercises investment discretion over the assets of the Managed Account and is responsible for managing the portfolio of the Managed Account;

- neither the Research BD nor any "person associated with" the Research BD, as defined in Section 202(a)(17) of the Advisers Act, exercises investment discretion over the assets of the Managed Account (other than discretion as to the price at which or the time to execute an order of a Money Manager for the purchase or sale of a definite amount or quantity of a specified security for a Managed Account);[14]

- neither the Research BD nor any of its affiliated persons, as defined in Section 202(a)(12) of the Advisers Act, provides investment advice directly to the Managed Account;[15]

- the Money Manager is not a "person associated with" the Research BD, as defined in Section 202(a)(17) of the Advisers Act;

- the Managed Account does not have a contractual relationship with the Research BD or any of its affiliated persons, as defined in Section 202(a)(12) of the Advisers Act, with regard to the provision of investment advice to the Money Manager for the benefit of the Managed Account, and does not compensate the Research BD or any of its affiliated persons for investment advice (other than through the portion of brokerage commissions maintained in a Commission Credits Pool);

- the Managed Account does not select or participate in selecting the research services that the Research BD provides to the Money Manager;

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[14] *See Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, Investment Advisers Act Release No. 2652, n.13 (Sept. 24, 2007) (describing circumstances under which the Commission proposes to view a broker-dealer's exercise of investment discretion to be temporary or limited).

[15] It would not be inconsistent with this representation if the Research BD provides investment advice to clients who are also the Money Manager's Managed Accounts on other transactions that are entirely unrelated to any transaction in respect of which the Money Manager obtains research services from a Research BD through an arrangement described in this letter.

• the Money Manager is responsible for independently determining the value of the brokerage and research services in accordance with its "good faith" determination under Section 28(e) of the Exchange Act.

If you have any questions regarding this request, please call Lee A. Pickard or William D. Edick at 202-223-4418. On behalf of BNY ConvergEx Group, LLC, we appreciate your consideration of this request.

Sincerely,

Lee A. Pickard

cc: Andrew J. Donohue, Director, Division of Investment Management

Lily C. Reid, Senior Counsel, Division of Investment Management

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