April 9, 2008

Via Electronic Mail

Ontario Securities Commission
c/o John Stevenson, Secretary
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario, M5H 3S8
e-mail: jstevenson@osc.gov.on.ca

Madame Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
800, square Victoria, 22 étage
C.P. 246, Tour de la Bourse
Montréal (Québec) H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

Re: Proposed National Instrument 23-102 – Use of Client Brokerage Commissions as Payment for Order Execution Services or Research ("Soft Dollar" Arrangements)

Ladies and Gentleman:

BNY ConvergEx Group LLC ("BNY ConvergEx") is pleased to submit this letter in response to the Canadian Security Administrators' ("CSA") second request for comment to the proposed National Instrument 23-102 ("Proposed Instrument") and the related proposed Companion Policy 23-102 CP ("Proposed Policy").

BNY ConvergEx supports the CSA's endeavor to clarify the provisions made in OSC policy 1.9 *Use by Dealers of Brokerage Commissions as Payment for Goods and Services other than Order Execution Services* and the Autorite des marches financiers AMF Policy Statement Q-20. In addition to the response below to the specific request for comments, BNY ConvergEx would like to highlight its support for the CSA's decision to include

order execution management systems within the definition of Order Execution Services and Research Services, as well as including raw market data within the definition of Research Services. We also strongly agree with the CSA's definition of "client brokerage commissions" as including "any commission or similar transaction-based fee charged for a trade where the amount paid for the security is clearly separate and identifiable."[1] We read this definition to mean that riskless principal transactions where the mark-up/mark-down is disclosed on the trade confirmation can be utilized to accrue client brokerage commissions for purposes of paying for Order Execution and Research Services.

BNY ConvergEx was actively involved in the regulatory discussion leading to the U.K. Financial Services Authority's ("the FSA") release, 05/9 *Bundled brokerage and soft commission arrangements* in the U.K. We also participated in the process that led to the U.S. Securities and Exchange Commission's ("the SEC") release*, Commission Guidance Regarding Client Commission Practices under Section 28(e) of the Securities and Exchange Act of 1934*.

Response to Specific Request for Comments

1. What difficulties might be caused by a temporal standard for order execution services that might differ from the standard applied by the SEC, especially in the absence of any detailed disclosure requirements in the U.S.? In the event difficulties might result, do these outweigh any benefit from having a temporal standard that results in consistent classification of goods and services based on use?

We feel that a broad interpretation of the proposed definition of "order execution services" provides the necessary latitude to managers who have differing investment strategies. BNY ConvergEx endorses a slightly different temporal standard than the standard proposed by the OSC. We agree with the FSA that order execution services begin at "…the point when the investment manager makes an investment or trading decision…"[2] We agree with the SEC's temporal standard for the end point of a brokerage transaction. As stated in the SEC's most recent release, order execution "…ends when the funds or securities are delivered or credited to the advised account or the account holder's agent."[3] We feel that these parameters best define executions services as opposed to research services.

---

[1] Ontario Securities Commission, 'Request for Comments on Notice of Proposed NI 23-102 *Use by Dealers of Brokerage Commission as Payment of Goods and Services other than Order Execution Services'* January 2008 p. 490

[2] Financial Services Authority, 'Policy Statement 05/9 *Bundled Brokerage and Soft Commission Arrangements: Feedback on CP05/5 and Final Rules*' July 2005 Annex 7.18.4

[3] Securities and Exchange Commission '17 CFR Part 241 *Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities and Exchange Act of 1934; Final Rule'* July 2006 pp. 40-41

While the SEC'S temporal standard and the standard suggested in the Proposed Instrument differ slightly, they are similar enough so that they should not cause substantial difficulties for managers. Some of those services included in the OSC's temporal standard for execution might be defined as research services permitted under 28(e). An example of such a service might be trade analytics, which allow a manager to use past performance information to evaluate where best to execute a trade. If a manager needs to operate under both reporting regimes, these services would need to be listed as an order execution tool for the OSC, and as a tool used in the research process for the SEC.

2. What difficulties might be encountered by requiring the estimate of the aggregated commissions to be split between order execution and goods and services other than order execution? What difficulties might be encountered if instead the requirement was for the aggregate commissions to be split between research services and order execution services?

We do not forsee many difficulties in requiring the estimate of the aggregated commissions to be split between order execution and goods and services other than order execution. As long as the requirement allows for a "reasonable estimate" of the cost of those services in addition to execution we believe that it is an achievable requirement.[4]

We applaud the OSC's equal treatment of proprietary research brokers and third party providers within the proposed disclosure requirements. This equal treatment has always existed in the U.S. As the SEC reiterated in the 2006 release, "Section 28(e) applies equally to arrangements involving client 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 participated in effecting the transaction."[5]

Investment managers are dependent, to some extent, upon brokers to value the cost of goods and services other than order execution provided. Brokers know the expense of their services better than outside parties and know how their services are being valued by the entire spectrum of their clientele. Furthermore, the broker providing research services understands the service level and components of the broker's research that are provided to a given client.

Due to the non-transparent nature of paying for proprietary research commissions, it is probable that proprietary research brokers will have more difficulty valuing their research services separately from order execution. In contrast, this is not an issue in third party research arrangements. Third party research arrangements are fully transparent, and the exact amount paid for services within a given period of time is easily discernable. BNY

[4] OSC, 'Request' p. 494
[5] SEC, '17 CFR Part 241' p. 21

ConvergEx, as a leading global provider of commission management services, has always reported the amount of aggregate client commissions used to pay for execution and for research services on our monthly client statements.

3. As order execution services and research services are increasingly offered in a cross-border environment, should the Proposed Instrument allow an advisor the flexibility to follow the disclosure requirements of another regulatory jurisdiction in place of the disclosure requirements, so long as the advisor can demonstrate that the requirements in that other jurisdiction are, at a minimum, similar to the requirements in the Proposed Instrument? If so, should this flexibility be solely limited to quantitative disclosure given that the issues associated with differences in quantitative disclosure requirements between regulatory jurisdictions are likely greater than the problems associated with differences in narrative disclosure requirements? In addition, should there be limitation on which regulatory jurisdictions an advisor may look to for purposes of identifying suitable alternative disclosure requirements and, if so, which jurisdictions should be considered eligible and why?

The globalization of securities markets has fostered a need for cooperation between regulators and a growing trend toward mutual recognition among jurisdictions with comparable "high quality" regulatory regimes.

To this end, we do think that the Proposed Instrument should allow an advisor the flexibility to follow the narrative and quantitative disclosure requirements of another regulatory jurisdiction as long as those requirements are similar to those outlined within the proposal. Harmonization of disclosure requirements is most relevant with regards to the U.K. and U.S. disclosure requirements where guidelines are also evolving presently. We expect other markets to follow in the coming years.

As referenced by the OSC, the original request showed a concern that "the requirements should be harmonized to the greatest extent possible with those in the U.K. and the U.S."[6] Similarly, the SEC recognized this in the 2006 finalized report from July:

"With the globalization of the world financial markets, many U.S. participants have a significant presence abroad and in particular the United Kingdom. To the extent that the Commissions approach to client commissions is compatible with that taken in the United Kingdom market participants costs of compliance with multiple regulatory regimes are reduced."[7]

The existing U.K. disclosure industry practices outlined by the Investment Management Association ("IMA") are "similar" enough to the OSC's proposed disclosure that they will function adequately as the primary or only method of disclosure for Canadian

[6] OSC, 'Request' p. 490
[7] SEC, '17 CFR Part 241' p. 20

managers. In the IMA's March 2005 release the narrative and quantitative disclosure requirements are described as such:

- Level One: house policies, processes and procedures in relation to the management of costs incurred on behalf of clients (see Appendix 1).
- Level Two: client-specific information (see Appendices 2 and 3). The most important requirement is for the disaggregation of transactions by counterparties and for the disclosure of amount of commissions generated on those transactions and services received in exchange for these commissions. Additional commentary should be provided where this helps to put numerical disclosure into context. It also requires managers to disclose, in percentage terms, the firm wide pattern of trading and sources and uses of commission for all clients in that asset class and to compare that to the specific client.[8]

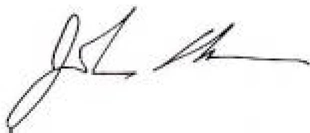
We also expect that SEC will publish for comment qualitative guidelines to be used by fund boards to better assess their managers' commission use practices.

4. Should a separate and longer transition period be applied to the disclosure requirements to allow time for implementation and consideration of any future developments in the U.S.? If so, how long should this separate transition period be?

We feel that a six month period of time should suffice for implementation of disclosure requirements. This is similar to the time period implemented in the U.K. and U.S.

We thank the CSA for the opportunity to comment on the Proposed Instrument and would be happy to provide further information or discuss these issues in greater detail in the future.

Very truly yours,



John Meserve
Executive Managing Director
BNY ConvergEx Group LLC

[8] Investment Management Association, 'Pension Fund Disclosure Code' March 2005 p. 7