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April 9, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-03-10

Dear Ms. Murphy:

BNY ConvergEx Group, LLC ("ConvergEx") appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission (the "Commission") in Securities Exchange Act Release No. 34-61379[1] to promulgate new rule 15c3-5 (the "Proposed Rule") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Proposed Rule would govern all circumstances in which a broker-dealer provides market access to both its public customers and its broker-dealer customers (collectively, "clients"). Among other things, the Proposed Rule would effectively (i) prohibit broker-dealers from providing clients unfiltered access to national securities exchanges or alternative trading systems ("Sponsored Access Arrangements") and (ii) require broker-dealers that provide clients with any type of market access to establish pre-trade credit, risk-management, and compliance controls.

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ConvergEx is a leading provider of investment technology and execution solutions to institutional clients worldwide. Our offering includes a broad range of sophisticated technologies and innovative strategies designed to provide clients with the ability to gain access to liquidity while bringing value and cost efficiency to transactions. We offer some of the most advanced tools in the industry, specifically designed to help our clients have more choice and control over their execution strategies while addressing cost, timing, performance and market structure requirements. Among the key components of our offering that allows us to help clients achieve these goals are our market access technologies and capabilities, including direct market access to over 65 electronic markets worldwide, sales trader-assisted access to over 100 global markets, and a Sponsored Access Arrangement offering to select broker-dealer customers. ConvergEx has also provided Sponsored Access Arrangements to entities that are registered under the Exchange Act as national securities exchanges ("Exchanges"), acting in the capacity of an approved outbound routing facility for such Exchanges. ConvergEx's broker-dealer clients with Sponsored Access Arrangements

[1] Exchange Act Release No. 34-61379, File No. S7-03-10 (January 19, 2010), 75 Fed. Reg. 16 (January 26, 2010) (the "Proposing Release").

currently include only non-correspondent broker-dealers, which principally utilize the Sponsored Access Arrangement as a means of routing orders to exchanges or other market centers of which the routing broker-dealer is not a member.

In the recently published Concept Release on Equity Market Structure,[2] the Commission reiterated the Congressional objectives for regulation of the national market system, establishing the standard by which regulations should be considered and promulgated. In order for regulations to meet the requisite goals of ensuring the protection of investors and the maintenance of fair and orderly markets, new regulations must be consistent with these five principles:

1) economically efficient execution of securities transactions;
2) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
3) the availability of information to brokers, dealers, and investors with respect to quotations and transactions in securities;
4) the practicability of brokers executing investors' orders in the best market; and
5) an opportunity, consistent with efficiency and best execution, for investors' orders to be executed without the participation of a dealer.[3]

Recognizing that these five objectives may conflict in some instances, the Commission concluded that its role is to find the appropriate balance among these competing objectives.[4]

As discussed in more detail below, certain aspects of the Proposed Rule do not meet the objectives articulated by Congress and are unnecessary and harmful to the national market structure. Accordingly, ConvergEx strongly believes that, if the Proposed Rule is adopted, the Commission should modify it to address these issues.

ConvergEx believes the deficiencies in the Proposed Rule fall into two broad categories: (a) the Commission's inadequate recognition of the existing regulatory framework for broker-dealers; and (b) the Commission being less than fully informed about the uses of third-party technology by clients and the brokers that provide market access to them ("Market Access Brokers").

As regards the former, providing market access to broker-dealer customers is substantially different from providing market access to public customers. Broker-dealers have independent regulatory and supervisory obligations. Providing market access to broker-dealer customers is not akin to "giving your car keys to a friend who doesn't have a license

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[2] *See* Exchange Act Release No. 34-61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010) (the "Concept Release"). ConvergEx will be submitting a separate comment letter regarding issues raised in that Concept Release.

[3] *See* Section 11A of the Exchange Act, 15 U.S.C. §78k-1; *see also* Concept Release, 75 Fed. Reg. at 3596.

[4] Concept Release, 75 Fed. Reg. at 3597.

and letting him drive unaccompanied."[5] Broker-dealer customers have licenses. Because their licenses impose upon them independent regulatory obligations, many of the concerns articulated by the Commission in the proposing release and elsewhere simply are not applicable to market access arrangements between broker-dealers. Moreover, the Market Access Broker is significantly less able to establish appropriate pre-trade credit and other risk management controls with respect to orders from broker-dealer customers ("Sponsored Brokers") due to the lack of information regarding such regulated entities' underlying clients and orders (either proprietary or customer).

In addition, depending on the nature of the settlement arrangement between the Market Access Broker and Sponsored Broker, many of the credit and risk management concerns expressed by the Commission in the Proposing Release are better addressed by regulation of the Sponsored Broker rather than the Market Access Broker. For example, in correspondent flip arrangements and in qualified special representative ("QSR") and automated give-up ("AGU") arrangements, credit risk is effectively transferred to the Sponsored Broker on an intraday basis, in some cases within minutes of the trade execution. Likewise, in the listed-option markets the Options Clearing Corporation ("OCC") carrying clearing member for each customer has the settlement obligations, rather than the executing clearing member. The OCC recognizes that settlement obligations are not based upon market access provided by the executing OCC clearing member, but instead the broker-dealer holding the position on behalf of the customer.

With respect to the technology issues, the Proposed Rule and commentary does not sufficiently take into account the great variety of technologies utilized by the public customers of Market Access Brokers and Sponsored Brokers. Clients of Market Access Brokers have myriad technologies that they use, some developed in-house and others from vendors. The Proposed Rule, as drafted, would require the Market Access Broker to take control over all of the technologies used by such clients. For example, in order to maintain "direct and exclusive control" over the newly-imposed credit, risk management and compliance controls, the Market Access Broker would be required to either take control of its clients' technologies or trump those technologies. Yet there is no reason for this requirement where the Market Access Broker establishes by appropriate due diligence that the client has good controls. Another example comes with regard to the requirement that the Market Access Broker "restrict access to trading systems and technology that provide market access" by maintaining exclusive control over who is granted such access. Oftentimes such access is through the client's own systems (either in-house or vendor supplied). It is simply impossible for the Market Access Broker to exercise that level of control.

Moreover, the requirement of the Proposed Rule to impose pre-trade credit controls,[6] as opposed to controls designed to prevent duplicate orders or obvious errors, ignores both (i)

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[5] Speech of Mary L. Schapiro, Open Meeting (Jan. 13, 2010), available at www.sec.gov/news/press/2010/2010-7.htm.

[6] ConvergEx has assumed, for purposes of this comment letter, that a "pre-trade" control is imposed by the broker-dealer prior to the release of the order to the market. If the SEC intends for such controls to be imposed upon receipt of the order (or some other time), ConvergEx urges the SEC to clarify the meaning of "pre-trade" in the adopting release.

the impossibility of properly determining appropriate credit standards on an order-by-order basis for Sponsored Brokers where the Market Access Broker is unaware of the Sponsored Broker's client orders and executions in other markets where access is not provided by the same Market Access Broker, and (ii) the nature of many market access clients, particularly high-frequency trading clients whose orders are characterized by unusually high order-cancellation rates, with many such clients placing small orders at multiple price levels in hundreds or thousands of separate securities. Market Access Brokers today frequently find real-time monitoring of executions for such clients to be a far more effective risk management tool than pre-trade credit controls, due to the high order cancellation rates associated with the trading strategies of such clients.

I. The Proposed Rule Should Not Apply to Market Access Arrangements With Other Broker-Dealers and Exchanges

The Proposing Release makes clear that the Proposed Rule applies not only to market access arrangements with public customers, but also to market access arrangements generally with "any other person" who is provided with access to an exchange or alternative trading system.[7] This means that market access arrangements with other broker-dealers and Exchanges are covered by the Proposed Rule. According to the SEC:

> "The proposed definition [of 'market access'] is intentionally broad, so as to include not only direct market access or sponsored access services offered to customers of broker-dealers, but also access to trading for the proprietary account of the broker-dealer and for more traditional agency activities."[8]

While it is certainly easier to make a rule that applies the market access principle across the board to any client, simplicity is not a valid justification for taking this approach. The rules governing broker-dealers make (and have always made) a clear distinction between the obligations broker-dealers have with respect to public customers and the obligations broker-dealers have with respect to other broker-dealers who are their customers. Indeed, the very definition of "customer" in the laws and rules excludes other broker-dealers.[9]

The rationale for drawing this distinction is self-evident: other broker-dealers are subject to the same rules and requirements, so there is no need to impose those requirements twice (or three times, or four times, etc.). In looking at the five Congressional objectives for market regulation, it is clear that Congress was focused on, among other things, encouraging competition among broker-dealers and between broker-dealers and market centers. Congress recognizes the special role broker-dealers play within the national market structure, and the Commission should not unduly inhibit that role or shift one broker-dealer's regulatory responsibilities to another.

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[7] Proposing Release, at 83.

[8] Proposing Release, at 21-22.

[9] *See, e.g.,* Exchange Act rule 15c3-3(a)(1) (excluding broker-dealers from the definition of "customer"); Exchange Act rule 10b-10(d)(1) (same); *see also* NASD rule 2320(a) (imposing best execution obligations on customers and customers of other broker-dealers, but not other broker-dealers).

There is no reason this distinction should not hold true for market access arrangements, be they Sponsored Access Arrangements, direct market access arrangements, or something else. The Commission in the Proposing Release identifies effectively three main controls the Proposed Rule is designed to enforce: credit, risk management, and compliance controls. The Proposed Rule would require the Market Access Broker to monitor and prevent, on a pre-trade basis, any orders or activities that might run afoul of any of those areas. We address each in turn with the view that each broker in a market access arrangement should be responsible for its own trading (customer or proprietary), as is currently the case under applicable laws and regulations.

Credit: Applying the Proposed Rule to market access arrangements with other broker-dealers and Exchanges will require Market Access Brokers to establish "appropriate pre-set credit or capital thresholds in the aggregate" for each Sponsored Broker. Yet pre-set aggregate credit limits will necessarily be arbitrary for Sponsored Brokers. This is particularly true where the Market Access Broker does not carry the accounts of the Sponsored Broker and the Sponsored Broker's customer and proprietary trading activities include high frequency, statistical arbitrage, and similar program trading strategies with significant day-to-day variations in volume.

The difficulty in establishing appropriate credit limits for other broker-dealers is exacerbated by the fact that broker-dealers typically execute only a portion of their trading activity under any particular Market Access Broker's market participation identifier or mnemonic (collectively, "MPID"). Such firms often maintain multiple market access arrangements (including access in their own MPID to the market centers of which it is a member or participant) and switch MPID usage based on a variety of factors. The outbound routing facilities of Exchanges present similar problems. The Market Access Broker cannot reasonably establish aggregate credit limits for the Exchange without information about the Exchange members originating the orders routed out by the Exchange. Even minor changes to an Exchange's outbound route fees or a change in order-routing practices by a significant order flow providing member can have dramatic results on the typical volume of orders for an Exchange.

The establishment of reasonable pre-trade aggregate credit limits for certain types of broker-dealers and Exchanges would be an arbitrary exercise with the very real possibility of temporarily severing vital market-center linkages relied on by sponsored firms to reduce risks incurred in other markets and comply with regulatory obligations. ConvergEx believes that such disruptions are more likely to increase than decrease the number of potential marketplace trade disputes. It also can interfere with the best execution performance of the Sponsored Broker.

With no real view into what the Sponsored Broker and/or its customers are doing or why they are doing it, the Market Access Broker has no realistic means of establishing useful pre-trade credit limits. Of course, the Sponsored Broker is in the best position to make credit determinations with respect to its own clients and is subject to regulatory capital requirements with respect to its own proprietary trading activities.

Risk Management: We differentiate risk management from credit controls in that risk management is designed to monitor and prevent so-called "fat finger" errors, either by humans or by the technology they utilize. Here, the appropriate line of demarcation should be drawn around who controls the humans or technology that causes the risk management event. In other words, each regulated entity should be responsible for the personnel and technology it deploys. We believe those obligations already exist in applicable laws and rules.

Where an associated person causes the error, it is plain that the responsibility should lie with the broker-dealer for whom s/he was acting. The same should hold true for technology, whether the technology is built by the broker-dealer or licensed by the broker-dealer from a vendor. It should perform due diligence and work with its in-house technology staff and vendors to make sure that appropriate risk management controls are in place. To make the Market Access Broker responsible adds an unwarranted layer; unwarranted in part because there is already a responsibility on the Sponsored Broker and in part because the Market Access Broker would have to pierce into the Sponsored Broker in order to establish realistic risk management metrics.

Moreover, holding the Sponsored Broker accountable for risk management, as with credit controls, makes sense because the Sponsored Broker is best positioned to see all of its trading activities, including those employing the technologies it has selected.

Compliance: The Proposed Rule requires broker-dealers that provide market access to establish risk management controls and supervisory procedures that are "reasonably designed to ensure compliance with all regulatory requirements."[10] The Proposed Rule, in addition, defines "regulatory requirements" expansively to include "all federal securities laws, rules and regulations, and rules of self-regulatory organizations, that are applicable in connection with market access."[11] While we believe that the Commission did not intend any expansion of the obligations of Market Access Brokers, the Proposed Rule should be revised to make clear that any controls be reasonably designed to ensure that the Market Access Broker complies with its regulatory obligations and not that such controls are required to make the Market Access Broker assume responsibility for preventing violative activity by a Sponsored Broker. Any final rule should not impose any obligation on the Market Access Broker in excess of the obligations it would have in respect of any order executed for the account of another broker-dealer other than through a market access arrangement.

Read literally, these provisions could have dramatic and unfortunate consequences in the context of market access arrangements with other broker-dealers. The Proposed Rule would require a Market Access Broker to impose supervisory procedures reasonably designed to ensure that the other broker-dealer's customers comply with all applicable laws and rules, including, among other things, the scienter-based provisions of the federal securities laws. We believe that the intent of the Commission was not to impose such a requirement, as such an approach is neither practical, nor realistic, nor consistent with the existing regulatory scheme. However, any final rule should clarify that this is the case.

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[10] Proposed Exchange Act rule 15c3-5(c)(2).
[11] Proposed Exchange Act rule 15c3-5(a)(2).

As the Staff is well aware, SRO rules require a member firm to establish and maintain supervisory systems and controls that are reasonably designed to ensure compliance with applicable laws and rules.[12] These well-established supervisory obligations, however, *apply to the business activities of the member firm*, not those of other broker-dealers with whom the member firm has a contractual relationship.[13] This is an important point. Member firms do not have an obligation to supervise the customer accounts of other broker-dealers for whom they act as an executing broker.[14] Nor can they. They may execute the trade, but the customer account resides somewhere else.

Consider the example of "marking the close." "Marking the close" is a scienter-based violation (usually charged under Exchange Act rule 10b-5) that occurs when a customer effects trades at or near the market close for the purpose of artificially influencing the closing price of a security.[15] Broker-dealers that provide market access to other broker-dealers do not know the end customer, its financial condition, risk tolerance, trading strategies, sophistication, objectives — or account holdings that might provide some incentive to set the closing price of a security. They do not monitor the positions in the account. They have no way to distinguish between an innocuous crossing transaction made late in the day for the purpose of rebalancing two managed portfolios and a manipulative scheme to affect the closing price. Those two scenarios will look identical and the Market Access Broker will have no information to conduct any kind of meaningful supervisory review. The Market Access Broker can see the trades, but has no ability to devise supervisory systems that are reasonably designed to ensure compliance.

- **Market access arrangements between broker-dealers pose no greater financial risks than other similar arrangements that have long been permitted**

When thinking about the credit and risk management goals of the Proposed Rule, the Commission should keep in mind that a variety of arrangements have existed for many years whereby one broker-dealer effects transactions in the name of another broker-dealer. In some of these arrangements, the settlement (and hence financial) risk shifts from the effecting broker to the broker whose name is utilized. Examples of this include fully disclosed and omnibus clearing arrangements. In other situations, the settlement (and hence financial) risk remains with the effecting broker. Correspondent flip arrangements, "give-up" arrangements (including listed-option clearance at OCC), and QSR and AGU relationships are examples of these situations.

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[12] *See* NYSE rule 342(a); NASD rule 3010(a) and (b).

[13] *See* NYSE rule 342(a) (requiring the member to supervise "[e]ach office, department or business activity of a member"); NASD rule 3010(b) (requiring the member to supervise the "business activities in which it engages" and "the registered representatives, registered principals, and other associated persons").

[14] This does not mean, however, that Market Access Brokers should not be required to conduct supervisory reviews that are reasonably designed to ensure compliance with the SRO marketplace rules that apply to their activities as an executing broker. Such requirements are plentiful. ConvergEx conducts many reviews that relate to its obligations as an executing broker under the SRO marketplace rules.

[15] *See, e.g.*, *SEC v. Kwak*, 2008 WL 410427, *1 (D. Conn. 2008).

Under the Proposed Rule, both classes of arrangements would be treated the same, notwithstanding the different financial risks. Indeed, in a fully disclosed clearing arrangement where the introducing broker performs its own executions with its own MPID, the clearing broker would not have credit, risk management and compliance responsibilities under the Proposed Rule, even though it has significant credit risk. Contrast that situation with a correspondent flip arrangement, where the effecting broker is using Market Access Broker's MPID to execute on a market, but is retaining all the settlement risk itself. In that scenario, the Proposed Rule would apply the full panoply of credit, risk management and compliance controls to the Market Access Broker, even though the financial risk simply is not there.

These arrangements pose the exact same financial risks as sponsored or direct market access arrangements between broker-dealers. In both cases, one broker-dealer is permitted to effect transactions on behalf of another broker-dealer. The risks of such arrangements are mitigated — and have not resulted in significant losses — because each broker-dealer has an independent obligation to comply with the applicable laws and rules, each broker-dealer has an equal incentive to control its financial risk, and each broker-dealer has an independent obligation to supervise its trading activities. The Proposed Rule should not upset that balance.

The Proposed Rule would treat market access arrangements differently from all of the other arrangements in which a broker-dealer binds another broker-dealer to a transaction. It would impose no restrictions in some contexts (*e.g.*, "give-up" and QSR arrangements), while imposing significant restrictions in the context of market access. The Staff has failed to articulate any reason for the disparate treatment. The Proposed Rule should not arbitrarily impose restrictions on market access arrangements that bind one broker-dealer to the trades of another broker-dealer, but not others. The financial risks are identical.

- **Market access arrangements with Exchanges should be excluded from the Proposed Rule for the same reasons**

The comments above apply with equal (if not greater) force in the context of market access arrangements with Exchanges. Market Access Brokers for Exchanges are in no position at all to determine the risk parameters and compliance controls that are appropriate for orders routed from an Exchange, whose customers are themselves broker-dealers (with downstream customers of their own). The prevention and detection of scienter-based violations of the federal securities laws in this context is even more far-fetched. ConvergEx cannot fathom how a Market Access Broker for an Exchange could have any ability to detect or prevent scienter-based violations arising from the trading activities of a (twice-removed) customer of a broker-dealer member of an Exchange.

II. The Proposed Rule Is Far More Costly than the SEC Has Estimated and Would Result in a Significant Reduction in the Number of Market Access Brokers

The Commission estimates that the initial cost for a broker-dealer to develop the technology to comply with the Proposed Rule is $51,000.[16] The Commission further estimates that the "total ongoing annual cost" for a broker-dealer to maintain the technology used to comply with the Proposed Rule is $47,300.[17] ConvergEx believes that these estimates dramatically understate the technology costs that would be incurred by Market Access Brokers.

In the case of ConvergEx, the maintenance costs alone would vastly exceed the sum of the Commission's estimates. ConvergEx has discussed maintenance costs with outside vendors and has learned that it would cost in excess of $1 million a year for IT services that include "fat finger," credit and, to a limited extent, compliance controls. ConvergEx also has estimated the cost of building a solution in-house at roughly $750,000.

ConvergEx believes that such expenses are cost-prohibitive for many Market Access Brokers, and would result in a significant reduction in the number of Market Access Brokers competing in the marketplace. This is not at all consistent with the Congressional objectives. Any proposal that raises costs while reducing the number of broker-dealer competitors is inconsistent with at least three of the Congressional objectives for regulation of the national market system. It does not promote economically efficient markets, the availability of information, or fair competition among broker-dealers.[18] Reducing the number of Market Access Brokers may serve the interests of a surviving oligopoly, but it does not serve the interests of investors or the market as a whole.

III. The Proposed Rule Should Not Require Broker-Dealers That Provide Market Access to Have "Exclusive Control" Of Risk Management Controls

The Proposed Rule also has specific dictates with respect to how Market Access Brokers must implement technology when providing market access to clients. Of particular interest to ConvergEx, the Proposed Rule would require Market Access Brokers to maintain (a) "direct and exclusive control" over the "risk management controls" that they implement[19] and (b) "effective security procedures to control" access to the systems by which it provides market access to clients.[20]

Each of these proposals would impose impossible burdens on Market Access Brokers and their clients. They appear to reflect a belief by the Commission that each client utilizes only technologies developed and provided to it by its Market Access Broker. This is incorrect. In many instances, the Market Access Broker cannot impose controls on the systems by which

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[16] Proposing Release, at 58.
[17] Proposing Release, at 59.
[18] Exchange Act § 11A, 15 U.S.C. § 78k-1; *see also* Concept Release, 75 Fed. Reg. at 3596.
[19] Proposed Exchange Act rule 15c3-5(d).
[20] Proposed Exchange Act rule 15c3-5(c)(2)(iii).

it provides market access to clients. The Market Access Broker cannot impose such controls, for example, when the client has access through a FIX line from its own order management system. It is simply outside of the control of the Market Access Broker.

Each of these proposals would also force Market Access Brokers to develop and deploy only in-house technologies, both for the provision of market access and for its credit, risk management and compliance controls. Given the way clients and brokers utilize technologies, the Commission's proposals are not practical and would be cost-prohibitive.

- **Backdrop on the Use of Technology by Market Participants**

All market participants make independent decisions about which technologies they deploy. And they all deploy multi-faceted technology approaches to accomplish their goals. Broker-dealers use different systems for different types of trading (e.g., portfolio trading versus block trading versus retail order flow versus market making); different algos and smart routers for different market conditions and client needs; and different back office systems for the various reporting, books and records, risk management and settlement requirements. Clients also utilize various systems for various purposes. They have order management systems, execution management systems, their own algos, their own risk management systems, and their own back office systems. Both broker-dealers and clients may build some or all of their technologies in-house or may utilize vendors for some or all of their technologies. There are myriad combinations and each market participant has a different configuration.

Some clients deploy a combination of order management and trading technologies from their brokers (and it could be a different technology set from each broker they do business with), third party vendors and in-house team. Sometimes they will have so-called middleware that attempts to provide a common link between all these systems, other times they will not.

It is important to comprehend that much, if not all, of the technologies utilized by clients are outside the control of the Market Access Broker. While in certain discrete situations the Market Access Broker is the sole technology provider to the client, that is a rare bird indeed.

- **Direct and Exclusive Control**

Sponsored access and direct market access systems can be highly complex. To keep these systems running smoothly, many providers of market access — ConvergEx among them — use service providers. Service providers assist in developing, programming, adjusting, repairing, modifying and maintaining sponsored and direct market access systems. Service providers also help to reduce costs. The role of the service provider is well-defined in this context. Service providers act at the direction of the broker-dealer. They do not take on regulatory responsibility. Broker-dealers, conversely, are not absolved of regulatory responsibility merely because they outsource a function to a service provider.[21]

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[21] It should be noted that outsourcing arrangements with service providers differ, in important respects, from allocations of functions made between broker-dealers in clearing arrangements

It is unclear whether the Proposed Rule — which requires broker-dealers to have "exclusive control" over their risk management controls — would prevent the outsourcing of market access IT to a service provider. (On the one hand, service providers act at the direction of the broker-dealer. On the other hand, some measure of actual physical control has been turned over to the service provider.) ConvergEx believes that the best solution is to remove the word "exclusive" from proposed Exchange Act rule 15c3-5(d). Alternatively, ConvergEx urges the Staff to clarify in the adopting release that relationships with service providers were not meant to be prohibited by the Proposed Rule. In either case, it serves no purpose to prohibit service providers in this context when the broker-dealer retains ultimate authority over its risk management controls, and continues to bear full regulatory responsibility. Indeed, a prohibition of this kind may cause affirmative harm. Prohibiting service providers in this context has the likely effect of increasing costs to broker-dealers (and ultimately customers), and rendering market access systems more prone to errors and malfunctions.

- **Customers should be permitted to strengthen the risk management controls imposed by the broker-dealer**

Determining the credit limits, price and size parameters, and other risk management controls that are appropriate for a customer with sponsored or direct market access is not a simple matter. It is a gradual, give-and-take process that involves the customer at various junctures. For these reasons, too, these determinations do not and should not occur within the "exclusive control" of the broker-dealer.

Although ConvergEx agrees that the broker-dealer should be responsible for determining baseline limits for its customer, there are other entirely appropriate adjustments that occur (and should continue to occur) outside of the broker-dealer's exclusive control. It is not unusual, for example, for a customer to have the ability to tighten its aggregate credit, size or position limits. Likewise, it is not unusual for a customer to have the ability to impose additional or enhanced trading restrictions on a particular trader or group of traders. (Sophisticated customers often have front-end systems that allow them to make these adjustments independently.) Provided that baseline limits are established and enforced by the broker-dealer, customers should be permitted to tighten risk management controls as they see fit. This is an important part of the risk management process. For these reasons, we again urge the Staff to revise the Proposed Rule to remove the word "exclusive" from proposed Exchange Act rule 15c3-5(d). Risk management controls cannot truly be said to be under the "exclusive control" of the broker-dealer when they can be made more restrictive by the customer. Alternatively, ConvergEx urges the Staff to clarify in the adopting release that the Proposed Rule was not intended to prohibit customers from strengthening the risk management controls imposed by the broker-dealer.

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pursuant to NYSE rule 382 or NASD rule 3230. Unlike a function that is outsourced to a service provider, a function that is allocated to a clearing firm pursuant to NYSE rule 382 or NASD rule 3230 results in a true allocation of regulatory responsibility. The broker-dealer that allocates the function is absolved of responsibility from a regulatory perspective.

III. Conclusion

For all of the foregoing reasons, ConvergEx respectfully requests that the Staff revise the Proposed Rule: (1) to exclude market access arrangements that are entered into with other broker-dealers and Exchanges, allowing these regulated entities to continue to allocate responsibilities between themselves, and (2) to remove the requirement for risk management controls to be under the "exclusive control" of the broker-dealer or, in the alternative, clarify in the adopting release that relationships with service providers were not intended to be prohibited by the Proposed Rule, and that the Proposed Rule was not intended to prohibit customers from strengthening risk management controls.

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We thank the Commission for its serious consideration of these comments. If you have any questions about this comment letter or need any additional information, please feel free to contact ConvergEx's general counsel, Lee A. Schneider, at (212) 468-7767 or lschneider@convergex.com.

Very truly yours,

Joseph M. Velli
Chairman & CEO

cc: Hon. Mary L. Schapiro, Chairwoman
Hon. Luis A. Aguilar, Commissioner
Hon. Kathleen L. Casey, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Elisse B. Walter, Commissioner
Robert W. Cook, Division of Trading & Markets
James Brigagliano, Division of Trading & Markets