

undue burden on persons relying on the rule, or whether the burden of any condition would outweigh its benefits. Comment is specifically requested whether any of these conditions can be eliminated, consolidated, or otherwise made less burdensome without compromising investor protection.

Paragraph (a)(6)(i) would require the sponsor of the program to establish and effect written policies and procedures that are reasonably designed to ensure that each of the provisions of the rule is implemented. The paragraph also would require that, to the extent that the sponsor designates another person to carry out certain obligations under the rule, the sponsor must obtain from that person an agreement in writing to carry out those obligations. These provisions are designed to require the sponsor to formalize the manner in which it intends to comply with rule 3a-4, and, if the sponsor delegates its responsibilities under the rule, to specifically record the delegation and obtain from the other parties an agreement acknowledging their responsibilities.<sup>63</sup> The requirement that a sponsor establish and effect written procedures detailing compliance with the conditions of rule 3a-4 also is intended to provide the Commission with a readily available source of information regarding the manner in which the rule is being interpreted and applied by the investment advisory industry.

Paragraph (a)(6)(ii)(A) would require the sponsor to maintain and preserve all written policies, procedures and agreements that pertain to the operation of the investment advisory program in its office for as long as it serves as the sponsor of that program.<sup>64</sup> The paragraph also would require the sponsor to maintain and preserve these documents in an easily accessible place for not less than three years after the sponsor ceases to serve as sponsor of the program. Given the importance of these documents, the Commission believes that the documents must be maintained and preserved in the office of the sponsor for as long as the sponsor acts

in that capacity, so that they are available for easy reference. These documents also must be retained in an easily accessible place for three years after the sponsor of the program ceases to serve as the sponsor should any questions later arise about the operation of the program.

Paragraph (a)(6)(ii)(B) would require the sponsor or another person designated by the sponsor to maintain and preserve all documents created pursuant to the policies and procedures governing the operation of the program, such as client contracts, client questionnaires, and copies of client statements, in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the document was created. Under this provision, these documents would be required to be maintained and preserved in a manner similar to that required for advisory books and records under paragraph (e)(i) of rule 204-2.<sup>65</sup> Unlike rule 204-2, however, paragraph (a)(6)(ii)(B) would not require the documents to be kept for the first two years in the office of the person creating or receiving the records (i.e., the sponsor). Rather, the paragraph would permit the sponsor to designate another person to maintain and preserve these documents.<sup>66</sup>

Paragraph (a)(6)(iii) would require the sponsor to enter into a written agreement with any person designated to maintain and preserve the books and records pertaining to the program (other than the written policies, procedures and agreements). The paragraph also would require that the agreement include a list of the books and records maintained and preserved by that person and a provision obligating the person maintaining the books and records to provide the sponsor with

copies of such books and records within a reasonable time of the sponsor's request.

These requirements are intended to avoid duplicative recordkeeping by allowing the sponsor to designate another person involved in the operation of the investment advisory program to maintain copies of books and records provided that person has a contractual obligation to provide the records to the sponsor upon request. In addition, the requirement that each party's recordkeeping responsibilities be included in the party's agreement with the sponsor would help to ensure that each person is aware of its responsibilities. Finally, since the provision would require that the sponsor be able to request and obtain promptly the books and records maintained by such persons, it effectively would permit the sponsor to monitor more effectively the person's performance of its duties under the contract, and help facilitate Commission examinations.

Paragraph (a)(6)(iv) would require the sponsor to furnish to the Commission upon demand copies of the policies, procedures, all documents created pursuant to the policies and procedures, and the written agreements with other persons involved in the operation of the program. This provision is intended to facilitate Commission examination of investment advisory programs relying on rule 3a-4.

As discussed above, most sponsors of investment advisory programs are required to be registered under the Advisers Act.<sup>67</sup> Thus, these sponsors are already required under section 204 of the Advisers Act to make advisory records available to the Commission upon request.<sup>68</sup> Revised proposed rule 3a-4, however, would be available to all sponsors of investment advisory programs, regardless of their status under the Advisers Act. Accordingly, paragraph (a)(6)(iv) is intended to ensure that the Commission would have access to certain records with respect to investment advisory programs that are sponsored by persons that are not subject to the Advisers Act.

#### B. Form N-3a4

Paragraph (a)(7) would require any sponsor of an investment advisory program intending to rely on the safe harbor provided in rule 3a-4 to file with the Commission Form N-3a4.<sup>69</sup> Form

<sup>63</sup> In addition, because the procedures would be reasonably designed to ensure that the provisions of the rule are implemented, sponsors may wish to specify in the procedures the persons other than the principal sponsor that are involved in the operation of the program, and each person's duties. The procedures need not, however, specify each individual by name.

<sup>64</sup> Because an adviser may have more than one office, paragraph (a)(6)(ii)(A) would provide that these records should be kept "in an appropriate office of the sponsor." This language is similar to that used in paragraph (e)(i) of rule 204-2 under the Advisers Act (15 CFR 275.204-2), which sets forth the recordkeeping requirements for investment advisers.

<sup>65</sup> See *supra* note 64. Revised proposed rule 3a-4 would not require the creation of any records other than the policies, procedures, and written agreements if the sponsor designates another person to perform obligations under the revised proposed rule or to maintain and preserve certain books and records. Paragraphs (a)(6)(i), (a)(6)(iii). Paragraph (a)(6)(ii)(B), however, would specify how records that are created pursuant to the policies and procedures (whether or not also required by rule 204-2 under the Advisers Act) must be maintained. If records pertaining to the program are required to be created under rule 204-2, but not under the policies or procedures, those records would be required to be maintained in accordance with paragraph (e) of rule 204-2. See National Regulatory Services, Inc., *supra* note (portfolio manager in an investment advisory program must maintain records of brochure delivery at its office, even if sponsor created such records).

<sup>66</sup> However, as discussed below, the sponsor would be required to enter into a written agreement with the designated person that specifies that documents to be maintained by that person and that copies of such documents would be provided to the sponsor upon request.

<sup>67</sup> See *supra* notes 5-8 and accompanying text.

<sup>68</sup> 15 U.S.C. 80b-4.

<sup>69</sup> In addition, in the event that another person had previously served as principal sponsor of, and