

N-3a4 would notify the Commission of investment advisory programs that are intended to be organized and operated in compliance with the rule's requirements.⁷⁰ The form would assist the Commission in monitoring the use of rule 3a-4 and facilitate Commission examination of persons involved in investment advisory programs.

C. Advisers Act Issues Raised by Investment Advisory Programs

Wrap fee and other investment advisory programs raise, in addition to the Investment Company Act issues addressed in this release, a number of issues under the Advisers Act. The Commission expects to publish an interpretive release that would address many of these issues.

In particular, the Commission expects that the release will address the suitability obligations of sponsors and portfolio managers to clients of the investment advisory program, including suitability obligations regarding client participation in the program, the selection of portfolio managers, and the selection of investments. The release will discuss how an adviser's obligation to seek best execution applies in the context of wrap fee programs when brokerage commissions are not charged separately for each transaction. In addition, the interpretive release may discuss the application of the restrictions on principal and agency cross transactions in section 206(3) of the Advisers Act to investment advisory programs, including whether these restrictions apply to transactions with a sponsor that is unaffiliated with the portfolio manager recommending the transactions. Finally, the release may address certain issues unique to programs under which client assets are invested in mutual funds, including the disclosure obligations of investment advisers regarding the various fees associated with these programs.⁷¹

The release will not be issued until after comments have been received on

submitted Form N-3a4 with respect to, an investment advisory program, the new principal sponsor would be required to submit an amended Form N-3a4 identifying itself as the new sponsor and specifying the name of the prior principal sponsor.

⁷⁰ Paragraph (a)(7) also would require sponsors to file with the Commission any amendments to the form. Thus, proposed Form N-3a4 also would be used to change information included in a prior filing, to notify the Commission that the sponsor no longer intends to operate the program in reliance on the safe harbor, or to notify the Commission that a program operating in reliance on the safe harbor will cease operations.

⁷¹ The recently adopted wrap fee disclosure requirements set forth in Schedule H of Form ADV apply only to sponsors of wrap fee programs and not to sponsors of mutual fund wrap programs.

revised proposed rule 3a-4. This timing would allow the interpretive release to reflect, where appropriate, these comments. Such a time schedule will also permit the consideration of comment from members of the investment advisory program industry regarding the issues expected to be addressed in the interpretive release. Commenters are urged to submit such comments on these and any other issues investment advisory programs raise under the Advisers Act. Comment is specifically requested regarding how investment advisers participating in investment advisory programs currently understand and comply with their Advisers Act obligations. Commenters also are urged to suggest specific factual situations that the release should address.

III. Cost/Benefit Analysis

Revised proposed rule 3a-4 under the Investment Company Act would provide a nonexclusive safe harbor from the definition of investment company for investment advisory programs. Programs that are organized and operated in a manner consistent with the rule's conditions would not be required to register under the Investment Company Act or comply with the Act's substantive requirements. The revised proposed rule is intended to provide guidance to persons operating investment advisory programs regarding the status of these programs under the Investment Company Act, and help to ensure that such programs do not operate as investment companies without clients of the programs benefitting from the Act's protections.

Proposed Form N-3a4 would be filed with the Commission by sponsors of programs intending to rely on rule 3a-4. The proposed form would help the Commission in monitoring the use of rule 3a-4 and facilitate Commission examination of persons involved in these programs.

The Commission anticipates that the cost of compliance with revised proposed rule 3a-4 and the proposed form would be small. In addition, the Commission does not believe that compliance with any of the proposed provisions would be unduly burdensome. Comment is requested, however, on the costs and benefits associated with the revised proposed rule and proposed form. Commenters should submit estimates for any costs and benefits perceived, together with any supporting empirical evidence available.

IV. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 regarding revised proposed rule 3a-4 and proposed Form N-3a4. The Analysis notes that the revised proposed rule is intended to provide a nonexclusive safe harbor from the definition of investment company for investment advisory programs organized and operated in compliance with the conditions of the rule, and that the proposed form would be filed with the Commission by sponsors of investment advisory programs intending to rely on the rule. The Analysis explains that the rule is intended to provide guidance regarding the status of investment advisory programs under the Investment Company Act, and that the rule and the form would facilitate Commission examination of persons involved in the operation of a program. The Analysis concludes that the rule would not be overly costly or burdensome to sponsors of investment advisory programs that intend to rely on the safe harbor. A copy of the Initial Regulatory Flexibility Analysis may be obtained from Rochelle Kauffman Plessset, at Mail Stop 10-6, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

V. Statutory Authority

The Commission is publishing for public comment revised proposed rule 3a-4 and Form N-3a4 pursuant to the authority set forth in sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a-6(c), -37(a)].

Text of Revised Proposed Rule and Proposed Form

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-37, 80a-39 unless otherwise noted;

* * * * *

2. By adding § 270.3a-4 to read as follows: