

§ 270.3a-4 Status of Investment Advisory Programs.

Note: This section is a nonexclusive safe harbor from the definition of investment company for certain programs that provide investment advisory services to clients. Interests in programs that are organized and operated in compliance with the conditions of § 270.3a-4 also are not required to be registered under section 5 of the Securities Act of 1933 [15 U.S.C. 77e]. The section is not intended, however, to create any presumption about a program that is not organized and operated in compliance with the conditions.

(a) Notwithstanding section 3(a) of the Act [15 U.S.C. 80a-3], any program under which investment advisory services are provided to clients will not be deemed to be an investment company within the meaning of the Act, *provided that:*

(1) Each client's account in the program is managed on the basis of the client's financial situation, investment objectives, and instructions.

(2) (i) At the opening of the account, the sponsor or another person designated by the sponsor obtains information from the client regarding the client's financial situation and investment objectives, and gives the client the opportunity to provide specific instructions concerning the management of the account;

(ii) At least annually, the sponsor or another person designated by the sponsor contacts the client to determine whether there have been any changes in the client's financial situation, investment objectives, or instructions in the preceding year;

(iii) At least quarterly, the sponsor or another person designated by the sponsor notifies the client in writing to contact the sponsor or such other person if there have been any changes in the client's financial situation, investment objectives, or instructions, and provides the client with a means through which such contact is to be made; and

(iv) The sponsor and persons authorized to make investment decisions for the client's account are reasonably available to the client for consultation.

(3) Each client has the ability to impose reasonable restrictions on the management of its account, including the designation of particular securities or types of securities that should not be purchased for the account, or that should be sold if held in the account.

(4) The sponsor or person designated by the sponsor provides each client with a quarterly statement containing a description of all activity in the client's account during the preceding quarter, including all transactions made on

behalf of the account, all contributions and withdrawals made by the client, all fees and expenses charged to the account, and the value of the account at the beginning and end of the quarter.

(5) Each client retains indicia of ownership of all securities and funds in the account, including the right to:

(i) Withdraw securities or cash;

(ii) Pledge securities;

(iii) Vote securities, or delegate the authority to vote securities to another person;

(iv) Be provided in a timely manner with confirmations of securities transactions of the type required by § 240.10b-10 of this chapter, and all other documents that would have been provided to the client (or the client's agent) had the client purchased or sold the same securities outside the program; and

(v) Proceed directly as a securityholder against the issuer of any security in the client's account and not be obligated to join any person involved in the operation of the program, or any other client of the program, as a condition precedent to initiating such proceeding.

(6) (i) The sponsor of a program relying on this section must establish and effect written policies and procedures that are reasonably designed to ensure that each of the conditions of this section is met. To the extent that the sponsor designates another person to carry out its obligations under this section, the sponsor must obtain from that person an agreement in writing to carry out those obligations.

(ii) Notwithstanding the requirements of paragraph (e) of § 275.204-2 of this chapter as such requirements would apply to the records set forth in paragraph (a)(6)(ii) of this section:

(A) The sponsor shall maintain and preserve in an appropriate office of the sponsor during the period that it serves as the sponsor of the program, and in an easily accessible place for a period not less than three years after the sponsor ceases to serve in that capacity, all written policies, procedures and agreements required to be established under paragraphs (a)(6)(i) and (a)(6)(iii) of this section; and

(B) The sponsor or another person designated by the sponsor shall maintain and preserve 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, all documents created pursuant to the policies and procedures (including any client contracts, client questionnaires, and copies of client statements).

(iii) The sponsor shall enter into a written agreement with any person designated by the sponsor to maintain and preserve the books and records pertaining to the program (other than those specified in paragraph (a)(6)(ii)(A) of this section). Such agreement shall include a list of the books and records to be maintained and preserved by that person and a provision that the person will provide the sponsor copies of such books and records within a reasonable time of the sponsor's request.

(iv) The sponsor shall furnish to the Commission upon demand copies of all documents maintained under paragraph (a)(6)(ii) of this section.

(7) The sponsor has filed with the Commission Form N-3a4 [17 CFR 274.222] and any amendments thereto.

(b) As used in this section, the term sponsor refers to any person who receives compensation for sponsoring, organizing or administering the program, or for selecting, or providing advice to clients regarding the selection of, persons responsible for managing the client's account in the program. If a program has more than one sponsor, one person shall be designated the principal sponsor, and such person shall comply with the provisions of this section relating to the duties and responsibilities of the sponsor.

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3. The authority citation for Part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, and 80a-29 unless otherwise noted.

4. By adding § 274.222 to subpart C to read as follows:

§ 274.222 Form N-3a4, Notification of reliance on rule 3a-4 under the Investment Company Act.

This form shall be filed with the Commission as required by rule 3a-4 (§ 270.3a-4 of this chapter) by sponsors of investment advisory programs that intend to rely on the safe harbor provided by that rule.

Editorial Note: The text of Form N-3a4 appears in the Appendix to this document and will not appear in the Code of Federal Regulations.

Dated: July 27, 1995.

By the Commission.

Margaret L. McFarland,
Deputy Secretary.

Appendix

Note: The following Appendix will not appear in the Code of Federal Regulations.