

§ 270.2a51-3

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is under common control with, the consent company or the company with respect to which the consent company is, or will be, a qualified purchaser.

NOTES TO § 270.2A51-2: 1. On both April 30, 1996 and October 11, 1996, section 3(c)(1)(A) of the Act as then in effect provided that: (A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper) unless, as of the date of the most recent acquisition by such company of securities of that issuer, the value of all securities owned by such company of all issuers which are or would, but for the exception set forth in this subparagraph, be excluded from the definition of investment company solely by this paragraph, does not exceed 10 per centum of the value of the company's total assets. Such issuer nonetheless is deemed to be an investment company for purposes of section 12(d)(1).

2. Issuers seeking the consent required by section 2(a)(51)(C) of the Act should note that section 2(a)(51)(C) requires an issuer to obtain the consent of the beneficial owners of its securities and the beneficial owners of securities of any "excepted investment company" that directly or indirectly owns the securities of the issuer. Except as set forth in paragraphs (d) (with respect to indirect owners) and (e) (with respect to direct owners) of this section, nothing in this section is designed to limit this consent requirement.

[62 FR 17528, Apr. 9, 1997]

§ 270.2a51-3 Certain companies as qualified purchasers.

(a) For purposes of section 2(a)(51)(A) (ii) and (iv) of the Act [15 U.S.C. 80a-2(a)(51)(A) (ii) and (iv)], a company shall not be deemed to be a qualified purchaser if it was formed for the specific purpose of acquiring the securities offered by a company excluded from the definition of investment company by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)] unless each beneficial owner of the company's securities is a qualified purchaser.

(b) For purposes of section 2(a)(51) of the Act [15 U.S.C. 80a-2(a)(51)], a company may be deemed to be a qualified purchaser if each beneficial owner of the company's securities is a qualified purchaser.

[62 FR 17528, Apr. 9, 1997]

§ 270.3a-1 Certain prima facie investment companies.

Notwithstanding section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(c)), an issuer will be deemed not to be an investment company under the Act; *Provided*, That:

(a) No more than 45 percent of the value (as defined in section 2(a)(41) of the Act) of such issuer's total assets (exclusive of Government securities and cash items) consists of, and no more than 45 percent of such issuer's net income after taxes (for the last four fiscal quarters combined) is derived from, securities other than:

- (1) Government securities;
- (2) Securities issued by employees' securities companies;
- (3) Securities issued by majority-owned subsidiaries of the issuer (other than subsidiaries relying on the exclusion from the definition of investment company in section 3(b)(3) or (c)(1) of the Act) which are not investment companies; and
- (4) Securities issued by companies:

(i) Which are controlled primarily by such issuer;

(ii) Through which such issuer engages in a business other than that of investing, reinvesting, owning, holding or trading in securities; and

(iii) Which are not investment companies;

(b) The issuer is not an investment company as defined in section 3(a)(1)(A) or 3(a)(1)(B) of the Act (15 U.S.C. 80a-3(a)(1)(A) or 80a-3(a)(1)(B)) and is not a special situation investment company; and

(c) The percentages described in paragraph (a) of this section are determined on an unconsolidated basis, except that the issuer shall consolidate its financial statements with the financial statements of any wholly-owned subsidiaries.

[46 FR 6881, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-2 Transient investment companies.

(a) For purposes of sections 3(a)(1)(A) and 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A) and 80a-3(a)(1)(C)), an issuer is deemed not to be engaged in the business of investing, reinvesting, owning, holding or trading in securities

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during a period of time not to exceed one year; *Provided*, That the issuer has a *bona fide* intent to be engaged primarily, as soon as is reasonably possible (in any event by the termination of such period of time), in a business other than that of investing, reinvesting, owning, holding or trading in securities, such intent to be evidenced by:

(1) The issuer's business activities; and

(2) An appropriate resolution of the issuer's board of directors, or by an appropriate action of the person or persons performing similar functions for any issuer not having a board of directors, which resolution or action has been recorded contemporaneously in its minute books or comparable documents.

(b) For purposes of this rule, the period of time described in paragraph (a) shall commence on the earlier of:

(1) The date on which an issuer owns securities and/or cash having a value exceeding 50 percent of the value of such issuer's total assets on either a consolidated or unconsolidated basis; or

(2) The date on which an issuer owns or proposes to acquire investment securities (as defined in section 3(a) of the Act) having a value exceeding 40 percent of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(c) No issuer may rely on this section more frequently than once during any three-year period.

[46 FR 6883, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-3 Certain investment companies owned by companies which are not investment companies.

Notwithstanding section 3(a)(1)(A) or section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A) or 80a-3(a)(1)(C)), an issuer will be deemed not to be an investment company for purposes of the Act; *Provided*, That all of the outstanding securities of the issuer (other than short-term paper, directors' qualifying shares, and debt securities owned by the Small Business Administration) are directly or indirectly owned by a

company which satisfies the conditions of § 270.3a-1(a) and which is:

(a) A company that is not an investment company as defined in section 3(a) of the Act;

(b) A company that is an investment company as defined in section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(C)), but which is excluded from the definition of the term "investment company" by section 3(b)(1) or 3(b)(2) of the Act (15 U.S.C. 80a-3(b)(1) or 80a-3(b)(2)); or

(c) A company that is deemed not to be an investment company for purposes of the Act by rule 3a-1.

[46 FR 6884, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-4 Status of investment advisory programs.

NOTE: This section is a nonexclusive safe harbor from the definition of investment company for programs that provide discretionary investment advisory services to clients. There is no registration requirement under section 5 of the Securities Act of 1933 [15 U.S.C. 77e] with respect to programs that are organized and operated in the manner described in § 270.3a-4. The section is not intended, however, to create any presumption about a program that is not organized and operated in the manner contemplated by the section.

(a) Any program under which discretionary investment advisory services are provided to clients that has the following characteristics will not be deemed to be an investment company within the meaning of the Act [15 U.S.C. 80a, et seq.]:

(1) Each client's account in the program is managed on the basis of the client's financial situation and investment objectives and in accordance with any reasonable restrictions imposed by the client on the management of the account.

(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 impose reasonable restrictions on 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