Docket Number 97–NM–22–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

97-07-01 Airbus: Amendment 39–9974. Docket 97–NM–22–AD.

Applicability: Model A330–301 series airplanes having manufacturer's serial number (MSN) 1 through 106, inclusive; and Model A340–211, –212, –311, and –312 series airplanes having MSN 1 through 113, inclusive; on which Airbus Modification No. 40063S10052 (ground cooling system) has been installed; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent water from accumulating in the Air Data/Inertial Reference Unit (ADIRU) trays of the avionics racks, which could result in the damage to or failure of the ADIRU(s) and consequent loss of air data and navigational information to the flightcrew, accomplish the following:

(a) Within 500 hours time-in-service after the effective date of this AD, deactivate the avionics ground refrigeration unit (GRU) in accordance with Airbus All Operators Telex 21–01, dated March 28, 1995.

(b) Modification of the avionics equipment ventilation system in accordance with Airbus Service Bulletin A330–21–3028, Revision 2, dated May 5, 1995 (for Model A330 series airplanes); or Airbus Service Bulletin A340–21–4046, Revision 2, dated May 5, 1995 (for Model A340 series airplanes); as applicable; constitutes terminating action for the requirements of paragraph (a) of this AD. Once the modification is completed, the avionics GRU may be reactivated.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The modification, if accomplished, shall be done in accordance with the following Airbus service bulletins, which contain the specified list of effective pages:

Service bulletin revision and date	Page No.	Revision level shown on page	Date shown on page
A330–21–3028, Revision 2, May 5, 1995	1, 3–6	2	May 5, 1995.
	2, 11, 23, 24, 29–30	1	March 3, 1995.
	7–10, 12–22, 25–28	Original	January 19, 1995.
A340–21–4046, Revision 2, May 5, 1995	1–4,	2	May 5, 1995.
	5–12, 14–24, 27–30	Original	January 19, 1995.
	13, 25, 26, 31, 32	1	March 3, 1995.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on April 15, 1997.

Issued in Renton, Washington, on March 19, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–7519 Filed 3–28–97; 8:45 am]

BILLING CODE 4910–13–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Release No. IC–22579; IA–1623; S7–24–95]

RIN 3235–AG07

Status of Investment Advisory Programs Under the Investment Company Act of 1940

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting rule 3a–4 under the Investment Company Act of 1940 to provide a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided on a discretionary basis to a large number of advisory clients having relatively small amounts to invest. An investment advisory program that is organized and operated in accordance with the rule's provisions is not required to register as an investment company under the Investment Company Act of 1940, or to comply with the Act's requirements. In addition, such a program is not subject to the registration requirement under section 5 of the Securities Act of 1933.

EFFECTIVE DATE: March 31, 1997.

FOR FURTHER INFORMATION CONTACT: Rochelle Kauffman Plesset, Senior Counsel, (202) 942–0660, Office of Chief Counsel, Division of Investment Management, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is adopting rule 3a–4 under the Investment Company Act of 1940 [15 U.S.C. 80a–1, *et seq.*] ("Investment Company Act"). Rule 3a–4 provides a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided to advisory clients ("investment advisory programs").

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Executive Summary

The Commission is adopting rule 3a–4 under the Investment Company Act to provide a nonexclusive safe harbor from the definition of investment company for certain investment advisory programs. These programs typically are designed by investment advisers or other money managers seeking to provide the same or similar professional portfolio management services on a discretionary basis to a large number of advisory clients having relatively small amounts to invest. Under rule 3a–4, any investment advisory program organized and operated in accordance with the rule's provisions is deemed not to be an investment company within the meaning of the Investment Company Act. In addition, a preliminary note to rule 3a–4 states that there is no registration requirement under section 5 of the Securities Act of 1933 ("Securities Act") [1] with respect to investment advisory programs that are organized and operated in compliance with the provisions of the rule.

The rule provides that: (i) each client's account must be 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; (ii) the sponsor of the program must obtain sufficient information from each client to be able to provide individualized investment advice to the client; (iii) the sponsor and portfolio manager must be reasonably available to consult with each client; (iv) each client must have the ability to impose reasonable restrictions on the management of the client's account; (v) each client must be provided with a quarterly account statement containing a description of all activity in the client's account; and (vi) each client must retain certain indicia of ownership of all securities and funds in the account. The rule is intended to be a nonexclusive safe harbor; a program that is not organized and operated in a manner consistent with the rule does not necessarily meet the Investment Company Act's definition of investment company. The rule, as adopted, does not include provisions regarding written policies and procedures, the maintenance of records, or the filing of a form with the Commission that were proposed for comment in 1995.

I. Background

In recent years, the number of investment advisory programs that are designed to provide professional portfolio management services on a discretionary basis to a large number of clients has increased greatly. These programs historically have been offered typically to clients who are investing amounts of money less than the minimum investments for individual accounts otherwise required by participating investment advisers, but significantly more than the minimum account sizes of most mutual funds.

These investment advisory programs typically are organized and administered by a sponsor, which provides, or arranges for the provision of, asset allocation advice and administrative services.[2] In some programs, the sponsor or its employees also provide portfolio management services, including the selection of particular securities, to the program's clients. In other programs, the sponsor selects, or provides advice to clients regarding the selection of, another investment adviser (which may or may not be affiliated with the sponsor) to act as the client's portfolio manager.[3] In these programs, the sponsor generally is responsible for the ongoing monitoring of the management of the account by the manager or managers selected. The sponsor, rather than the portfolio manager, often serves as the primary contact for the client in connection with the program.[4] Sponsors and portfolio managers usually meet the definition of "investment adviser" under the Investment Advisers Act of 1940

[1] 15 U.S.C. 77a, *et seq.*

[2] The sponsor often is a money management firm, a broker-dealer, a mutual fund adviser or, in some instances, a bank. *See, e.g.,* Wall Street Preferred Money Managers, Inc. (pub. avail. Apr. 10, 1992) (broker-dealer); United Missouri Bank of Kansas City, n.a. (pub. avail. May 11, 1990, as modified Jan. 23, 1995) (bank); Strategic Advisers Inc. (pub. avail. Dec. 13, 1988) (mutual fund adviser). The sponsor or one of its affiliates also may execute some or all of the transactions for client accounts.

[3] More than one portfolio manager may manage the client's assets, depending on the program, the client's investment objectives, and the size of the client's account. *See, e.g.,* Rauscher Pierce Refsnes, Inc. (pub. avail. Apr. 10, 1992); Wall Street Preferred Money Managers, Inc., *supra* note 2; Westfield Consultants Group (pub. avail. Dec. 13, 1991).

[4] Some investment advisory programs, however, are marketed by the sponsor through unaffiliated investment advisers, such as financial planners. In some of these programs, the unaffiliated investment adviser, rather than the sponsor, may serve as the primary contact for its clients that participate in the program. *See, e.g.,* Westfield Consultants Group, supra note 3.

(''Advisers Act''),[5] and may be required to register under that Act.[6] Included among investment advisory programs developed in the recent past are those commonly referred to as ''wrap fee programs.'' In a wrap fee program, the client typically is provided with portfolio management, execution of transactions, asset allocation, and administrative services for a single fee based on the size of the account.[7] At year-end 1995, assets in wrap fee programs totaled approximately $101.6 billion, an increase of over 30 percent in one year.[8]

Under wrap fee and other investment advisory programs, a client's account typically is managed on a discretionary basis in accordance with pre-selected investment objectives. Clients with similar investment objectives often receive the same investment advice and may hold the same or substantially the same securities in their accounts. In light of this similarity of management, some of these investment advisory programs may meet the definition of investment company under the Investment Company Act, and may be issuing securities for purposes of the Securities Act.[9]

In 1980, the Commission sought to address certain issues presented by investment advisory programs by proposing rule 3a–4 under the Investment Company Act, which would have provided a safe harbor from the definition of investment company for investment advisory programs operating in the manner described in the rule.[10] Commenters generally opposed the proposed rule, and it was never adopted.[11] After this proposal, however, the Commission's Division of Investment Management (''Division'') received numerous requests for assurance that it would not recommend enforcement action with respect to investment advisory programs if they operated without registering under the Investment Company Act. In response to these requests, the staff issued a series of no-action letters describing investment advisory programs that would not be deemed investment companies for purposes of the Investment Company Act.[12] Many, if not most, of the programs described in the no-action letters met the terms specified in the proposed rule.

On July 27, 1995, the Commission proposed for comment a revised version of rule 3a–4 (''revised proposed rule 3a–4'' or ''revised proposed rule,'' proposed for comment in the ''July Release'').[13] The objective of the revised proposed rule was to clarify the Commission's views regarding the status of investment advisory programs under the federal securities laws by describing certain basic attributes of an investment advisory program that differ from those of an investment company that is required to register under the Investment Company Act.[14] The revised proposed rule was based largely on the provisions of the rule as originally proposed, as modified and explained in the subsequent no-action letters, but also required the creation and maintenance of certain documents and records. Like the original proposal, revised proposed rule 3a–4 would have provided a nonexclusive safe harbor from the definition of investment company for investment advisory programs that are organized and operated in the manner described in the rule.[15]

The Commission received comments on the revised proposed rule from 28 commenters, including three law firms, eight professional and trade associations, and 17 financial firms (*i.e.,* brokers, banks, investment advisers and others).[16] Commenters generally expressed support for the Commission's goal of providing a nonexclusive safe harbor from the definition of investment company for certain investment advisory programs. A number of commenters, however, raised concerns about particular aspects of the rule. Many of these comments are discussed in more detail below.[17]

II. Discussion

The Commission is adopting rule 3a–4 under the Investment Company Act. Like the proposed and revised proposed rules, rule 3a–4 provides a nonexclusive safe harbor from the definition of investment company for investment advisory programs that are organized

[5] 15 U.S.C. 80b–1, *et seq.* Section 202(a)(11) of the Advisers Act (15 U.S.C. 80b–2(a)(11)) defines ''investment adviser'' as ''any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities * * *.'' A bank generally is excepted from the definition of investment adviser under Section 202(a)(11)(A) of the Advisers Act. A broker-dealer that sponsors an investment advisory program generally cannot rely on the broker-dealer exception from the definition of investment adviser in Section 202(a)(11)(C) of the Advisers Act. *See, e.g.,* Status of Investment Advisory Programs under the Investment Company Act, Investment Company Act Release No. 21260 (July 27, 1995), 60 FR 39574 (Aug. 2, 1995) (''July Release''); National Regulatory Services, Inc. (pub. avail. Dec. 2, 1992).

[6] The National Securities Markets Improvement Act of 1996 (Pub. L. No. 104–290) amended the Advisers Act to provide that certain investment advisers will be subject primarily to the supervision of the Commission, while other advisers will be subject primarily to state regulation. Effective April 9, 1997, if an investment adviser is regulated or required to be regulated as an investment adviser in the state in which it maintains its principal office and place of business, it may not register with the Commission unless (1) it has assets under management of $25 million or more, or (2) it advises a registered investment company. Proposed rules published for comment by the Commission would reallocate regulatory responsibilities for investment advisers between the Commission and the states. Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1601 (Dec. 18, 1996), 61 FR 68480 (Dec. 27, 1996).

[7] *See* paragraph (g)(4) of rule 204–3 under the Advisers Act (17 CFR 275.204–3(g)(4)) (defining wrap fee program for purposes of wrap fee brochure requirement).

[8] Cerulli Associates, Inc. and Lipper Analytical Services, Inc., The Cerulli-Lipper Analytical Report: State of the Wrap Account Industry 5 (1996). These figures include assets in mutual fund wrap programs, also called mutual fund asset allocation programs. Unlike traditional wrap fee programs, mutual fund wrap programs contemplate that a client's assets are allocated only among specified mutual funds. Assets in mutual fund wrap programs represented 19% of total assets in wrap fee programs at year-end 1995. *Id.* at 7.

[9] For a detailed discussion of why an investment advisory program may meet the definition of investment company and may be deemed to be issuing securities, see July Release, *supra* note 5, at Section I. *See also* In the Matter of Clarke Lanzen Skalla Investment Firm, Inc., Investment Company Act Release No. 21140 (June 16, 1995); SEC v. First National City Bank, Litigation Release No. 4534 [1969–1970 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,592 (Feb. 6, 1970).

[10] Individualized Investment Management Services, Investment Company Act Release No. 11391 (Oct. 10, 1980), 45 FR 69479 (Oct. 21, 1980) (''1980 Release''). The 1980 Release also stated that the Commission's Division of Corporation Finance had indicated that if rule 3a–4 were adopted, that Division would not recommend that the Commission take enforcement action if interests in an investment advisory program operated in accordance with the proposed rule's requirements were not registered under the Securities Act. *Id.* at n.15.

[11] *See* July Release, *supra* note 5, at n.20 and accompanying text.

[12] *See, e.g.,* Benson White & Company (pub. avail. June 14, 1995); Wall Street Preferred Money Managers, Inc., *supra* note 2; Rauscher Pierce Refsnes, Inc., *supra* note 3; Westfield Consultants Group, *supra* note 3; WestAmerican Investment Company (pub. avail. Nov. 26, 1991); Rushmore Investment Advisers, Ltd. (pub. avail. Feb. 1, 1991); Qualivest Capital Management, Inc. (pub. avail. July 30, 1990); United Missouri Bank of Kansas City, n.a., *supra* note 2; Manning & Napier Advisors, Inc. (pub. avail. Apr. 24, 1990); Jeffries & Company (pub. avail. June 16, 1989); Strategic Advisers, Inc., *supra* note 2; Scudder Fund Management Service (pub. avail. Aug. 17, 1988); Shearson/American Express, Inc. (pub. avail. July 13, 1983); Paley & Ganz, Inc. (pub. avail. Dec. 6, 1982).

[13] July Release, *supra* note 5.

[14] July Release, *supra* note 5, at Section I.

[15] The Note to the revised proposed rule stated that interests in investment advisory programs organized and operated in compliance with the rule would not be required to be registered under the Securities Act. *See* July Release, *supra* note 5, at n.26 and accompanying text; Note to revised proposed rule 3a–4.

[16] The comment letters and a summary of the comments prepared by the Commission staff are included in File No. S7–24–95.

[17] *See infra* Section II.E.

and operated in the manner described in the rule. The rule's provisions have the effect of ensuring that clients in a program relying on the rule receive individualized treatment, including the opportunity to place investment restrictions on the management of their accounts and the right to receive disclosure documents in connection with securities held in their accounts. Moreover, if an advisory program were operated by an investment adviser registered under the Advisers Act, clients of the program would receive the protections of that Act. The safe harbor thus is designed to provide an exemption for certain investment advisory programs without undermining the protection of investors who participate in those programs.

A. Preliminary Matters

Several commenters supporting the goals underlying rule 3a–4 asked the Commission to clarify the scope of the rule. Two commenters, for example, asked the Commission to clarify that investment advisory programs that contemplate advisers not having investment discretion over their clients' assets generally do not need the safe harbor to avoid investment company status. The Commission notes that rule 3a–4 is intended to provide a safe harbor for discretionary investment advisory programs. A nondiscretionary program (*i.e.,* one in which the investor has the authority to accept or reject each recommendation to purchase or sell a security made by the portfolio manager, and exercises judgment with respect to such recommendations), generally will not meet the definition of investment company under the Investment Company Act or issue securities that are required to be registered under Section 5 of the Securities Act, regardless of whether the program is operated in accordance with the provisions of rule 3a–4.[18]

One commenter asked the Commission to clarify that a program's failure to operate in a manner consistent with every provision of the rule would not preclude the program from relying on the safe harbor. The rule sets forth circumstances under which an investment advisory program will not be considered an investment company, and a program that is not organized and operated in accordance with the rule's provisions cannot rely on the safe harbor. The safe harbor provided by the rule, however, is designed to be nonexclusive. Failure to operate in the manner described in rule 3a–4 does not necessarily indicate that a program is an investment company. Whether a program that operates outside of rule 3a–4 is an investment company is a factual determination and depends on whether the program is an issuer of securities under the Investment Company Act and the Securities Act.[19]

Commenters suggested that, rather than addressing the status of investment advisory programs under the Securities Act in a note to rule 3a–4, the rule itself should provide that interests in the programs do not constitute "securities" within the meaning of the Securities Act.[20] While the Commission has not revised the rule in this regard, it has revised the Note so that it does not imply that investment advisory programs organized and operated in accordance with the rule may result in the issuance of securities under the Securities Act.[21]

The Commission noted in the July Release that the adoption of rule 3a–4 would not affect the status of no-action letters previously issued by the Division with respect to investment advisory programs. Therefore, investment advisory programs operated in a manner consistent with those letters would continue not to be required to register under the Investment Company Act, and interests in the programs would not be required to be registered as securities under the Securities Act. The Commission also stated in the July Release that the Division, as a general matter, would not consider requests for no-action or exemptive relief with respect to programs that do not rely on the rule.[22] In making this statement, the Commission sought to indicate that in the future, the staff ordinarily will not respond to no-action requests or support applications for exemptive relief regarding investment advisory programs that are similar to those programs that have been the subject of the no-action letters issued by the Division, but that are not operated in accordance with all the provisions of rule 3a–4. The staff, however, will in the future consider requests raising interpretive issues under rule 3a–4, and will continue to entertain no-action requests with respect to programs that raise unique or novel issues.[23]

B. Definitions

1. The Sponsor

A number of the terms of the revised proposed rule provided that the "sponsor" of a program or another person designated by the sponsor must perform the duties and responsibilities set forth in the rule. Under paragraph (b) of revised proposed rule 3a–4, "sponsor" would have been defined as 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. Revised proposed rule 3a–4 would have provided that, if a program had more than one sponsor, one person would need to be designated as the principal sponsor, and that person would be responsible for carrying out the sponsor's duties and responsibilities under the rule.[24] The July Release noted that this definition and approach was the same as that used in paragraph (f) of rule 204–3 under the Advisers Act, which sets forth a separate brochure requirement for sponsors of wrap fee programs.[25]

[18] Whether a program is nondiscretionary is inherently a factual determination. A program designated as "nondiscretionary" in which the client follows each and every recommendation of the adviser may raise a question whether the program in fact is nondiscretionary.

[19] In the July Release, the Commission noted that an investment advisory program could be considered to be an issuer because the client accounts in the program, taken together, could be considered to be an organized group of persons. *See* July Release, supra note 5, at nn.11–15 and accompanying text; *see also* Advisory Committee on Investment Management Services for Individual Investors: Small Account Investment Management Services at 23 (Jan. 1973). ("An investment service which is operated on a discretionary basis and does not afford investors individual attention would appear to be offering an investment contract or security, if substantially the same investment advice is given to all clients or to discernible groups of clients. * * *")

[20] In letters issued by the Division of Investment Management granting no-action assurances to investment advisory programs, the Division of Corporation Finance also gave assurances that it would not recommend enforcement action to the Commission if the requestor relied on an opinion of counsel stating that interests in the investment advisory program were not "securities" within the meaning of the Securities Act. *See, e.g.*, Morgan Keegan & Company, Inc., *supra* note 12; Westfield Consultants Group, *supra* note 3; Rauscher Pierce Refsnes, Inc., *supra* note 3.

[21] The Note to rule 3a–4 states, in part, that there is no registration requirement under section 5 of the Securities Act with respect to programs that are organized and operated in the manner described in the rule.

[22] July Release, *supra* note 5, at n.27.

[23] The staff previously has indicated that it will no longer entertain requests for no-action relief regarding investment advisory programs unless they present novel or unusual issues. *See, e.g.*, Wall Street Preferred Money Managers, Inc., *supra* note 2.

[24] July Release, *supra* note 5, at Section II.A.1.

[25] The sponsor of an investment advisory program usually is an investment adviser under Section 202(a)(11) of the Advisers Act, and may be required to register under the Act. *See* July Release, *supra* note 5, at nn.5–8 and accompanying text and note 6 of this Release. Nonetheless, the rule is available to any investment advisory program, regardless of whether the sponsor is excepted from the definition of investment adviser (*e.g.*, a bank), or is required to be registered under the Act.

Some commenters were critical of the broad scope of the proposed definition of sponsor, noting that a program could have multiple sponsors under the definition, and asserting that the existence of multiple sponsors would serve no purpose in assuring that clients in a program receive individualized management services or that the program operates in the manner specified in the rule. One commenter suggested that the definition should be modified to reach only the manager that sponsors the program and participates in the management of the client's investment portfolio (or selects another person designated to perform such management services). The Commission notes that the structure of programs may vary widely, and that the broad definition of the term sponsor is intended to anticipate such variations and to provide persons involved in a program with the flexibility to designate the person in the best position to fulfill the rule's provisions. The Commission thus has determined to adopt the definition as proposed in order to preserve this flexibility.[26]

2. Investment Advisory Program

The safe harbor described in revised proposed rule 3a–4 would have been available to a ''program under which investment advisory services are provided to clients.'' The revised proposed rule, however, did not specifically define the term ''program.'' Certain commenters requested that the Commission provide further guidance as to what constitutes a program. The Commission notes that the use of the term ''program'' in the rule is intended to describe the types of advisory services that potentially could be subject to the Investment Company Act and the Securities Act. The Commission does not believe that it is necessary or advisable to include a definition of program in the rule, because such a definition could result inadvertently in the exclusion from the scope of the rule of an entity that otherwise would be entitled to rely on it.

C. Provisions Designed To Ensure That Each Client Receives Individualized Treatment

Revised proposed rule 3a–4 contained four provisions relating to the individualized treatment received by clients in investment advisory programs covered by the rule. The July Release stated that these provisions were based on the terms of rule 3a–4 as originally proposed, as those provisions were applied in the no-action letters.[27] The rule as adopted includes these four provisions, with certain modifications discussed below.

1. Individualized Management of Client Accounts

Paragraph (a)(1) of the revised proposed rule provided that a client's account must be managed on the basis of the client's financial situation, investment objectives and instructions. The July Release noted that this provision was designed to delineate a key difference between clients of investment advisers and investors in investment companies. A client of an investment adviser typically is provided with individualized advice that is based on the client's financial situation and investment objectives. In contrast, the investment adviser of an investment company need not consider the individual needs of the company's shareholders when making investment decisions, and thus has no obligation to ensure that each security purchased for the company's portfolio is an appropriate investment for each shareholder.[28] The Commission is adopting paragraph (a)(1) without substantive modification.[29]

In the July Release, the Commission noted that clients of an investment advisory program with similar investment objectives may hold substantially the same securities in their accounts in accordance with a portfolio manager's model, and that this does not necessarily indicate that clients in the program have not received individualized treatment for purposes of the rule.[30] The Commission is reaffirming this position in connection with the adopted rule.[31]

The Commission also stated in the July Release that it would not be necessary under the rule for a portfolio manager to make separate determinations regarding the appropriateness of each transaction for each client prior to effecting the transaction. One commenter supporting the Commission's position with respect to model portfolios nonetheless urged the Commission to require the sponsor or program manager specifically to evaluate the suitability of each transaction for each client. This commenter maintained that, without such individualized determinations, clients of an investment advisory program would not receive individualized advice.

Investment advisers under the Advisers Act owe their clients the duty to provide only suitable investment advice, whether or not the advice is provided to clients through an investment advisory program.[32] To fulfill this suitability obligation, an investment adviser must make a reasonable determination that the investment advice provided is suitable for the client based on the client's financial situation and investment objectives. The adviser's use of a model to manage client accounts would not alter this obligation in any way.

2. Initial and Ongoing Client Contact

Paragraph (a)(2) of revised proposed rule 3a–4 reflects the view that providing individualized investment advice contemplates an adviser having sufficient contact with a client to elicit the information necessary to provide the advice. In particular, under paragraph (a)(2), a program relying on the rule must provide that the sponsor or a person designated by the sponsor (''designated person'') contact and solicit information from the client. Such a program also must provide for the sponsor and the portfolio manager to be reasonably available to consult with the client concerning the management of the client's account.

Under paragraph (a)(2) of the revised proposed rule, an advisory program intended to qualify for the safe harbor

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[26] Paragraph (b) of rule 3a–4, as adopted.

[27] July Release, *supra* note 5, at Section II.A.2.

[28] July Release, *supra* note 5, at Section II.A.2.i.

[29] As noted above, paragraph (a)(1) of the revised proposed rule provided that a client's account must be managed on the basis of the client's financial situation, investment objectives and *instructions* (emphasis added). The Commission has determined that individualized treatment does not require that the client be entitled to give instructions to the adviser with respect to the management of the account other than those reasonable restrictions referenced in paragraph (a)(3). Therefore, the Commission has clarified the rule text by replacing the word ''instructions'' with the word ''restrictions.'' Nonetheless, the rule contemplates that a client's investment objective will be formulated with appropriate input from the client regarding the client's financial goals and risk tolerance.

[30] July Release, *supra* note 5, at n.34 and accompanying text.

[31] As indicated in the July Release, this position is consistent with no-action letters issued concerning programs that allocate client assets in accordance with computerized investment models. July Release, *supra* note 5, at n.34 and accompanying text; *see*, e.g., Qualivest Capital Management Inc., *supra* note 12 (sponsor proposed to use computerized investment allocation model to allocate client assets among money managers).

[32] *See* Suitability of Investment Advice Provided by Investment Advisers: Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994), 59 FR 13464 (Mar. 22, 1994) at nn.2–5 and accompanying text (''Investment advisers are fiduciaries who owe their clients a series of duties, one of which is the duty to provide only suitable investment advice. This duty is enforceable under the antifraud provisions of the Advisers Act, section 206, and the Commission has sanctioned advisers for violating this duty.'').

set out in the rule would have needed to require that the sponsor or a designated person: (1) obtain information from the client concerning the client's financial situation and investment objectives (including any restrictions that the client may wish to impose regarding the management of the account) at the time the client opens the account; [33] (2) contact the client at least annually to determine whether there have been any changes in the client's financial situation or investment objectives, or whether the client wishes to impose any reasonable restrictions on the management of the account or modify an existing restriction in a reasonable manner; and (3) notify the client in writing at least quarterly that the sponsor or designated person should be contacted if there have been any changes in the client's financial situation or investment objectives, or if the client wishes to impose or modify any restrictions on the management of the account. The Commission is adopting these three provisions as proposed, with minor modifications to clarify their meaning.[34]

In the July Release, the Commission noted that the provision regarding annual client contact was designed to ensure that sponsors have current information about clients in the program, which, in the Commission's view, is critical to the provision of individually tailored advice.[35] Like the revised proposed rule, the rule as adopted does not dictate the manner in which a sponsor contacts its clients annually.[36] Contact can be made, for example, in person, by telephone, or by letter or electronic mail that includes a questionnaire requesting the client to provide or update relevant information.[37]

The rule, as adopted, provides that the sponsor or a designated person seeking to rely on the rule must notify the client in writing at least quarterly that the sponsor or designated person should be contacted if there have been any changes in the client's financial situation or investment objectives, or if the client wishes to impose or modify restrictions concerning the management of the account.[38] This provision contemplates only that notice will be given to an investor, while the annual contact provision described above contemplates that the sponsor (or the designated person) will actively attempt to contact the client to obtain information in order to be covered by the rule.[39]

In the July Release, the Commission noted that, if the sponsor did not provide the portfolio manager with information obtained from the client, the manager might be unable to manage the client's account on the basis of the client's financial situation and investment objectives and in accordance with any reasonable restrictions imposed by the client. The Commission requested comment whether the rule should state explicitly that the sponsor or designated person must convey to the portfolio manager the information obtained from the client.[40] Some commenters stated that the rule should contain an explicit provision to that effect, while others suggested that such a provision was unnecessary. It would appear unlikely that the provision of paragraph (a)(1) providing that the account be managed based on the client's financial situation and investment objectives and in accordance with reasonable restrictions imposed by the client could be satisfied if the sponsor failed to transmit the client's financial information to the portfolio manager. The Commission therefore has determined not to include in rule 3a–4 an explicit requirement that the information must be provided to the portfolio manager.

Paragraph (a)(2) of the revised proposed rule would have provided that the sponsor and persons authorized to make investment decisions for the client's account be reasonably available to consult with the client concerning the management of the account. In the July Release, the Commission indicated that this provision contemplated a client's having reasonable access to the sponsor and the portfolio manager to ask questions or to seek additional information about the investment advisory program or the client's account.[41] The Commission recognizes that a program's sponsor may serve as the primary contact for clients in the program, and that direct client contact with the portfolio manager may not occur until after the sponsor and others have attempted to address the client's questions or concerns. Nonetheless, in the Commission's view, a program seeking to rely on the rule must provide a procedure by which each client has reasonable access to personnel of the manager who are knowledgeable about the management of the client's account, as necessary to respond to the client's inquiry.[42] Therefore, the Commission is adopting this provision of the revised proposed rule with the modification discussed below.

Several commenters suggested that the rule should permit delegation of the client consultation responsibilities to an employee of the advisory firm managing the client's account who is

[33] A sponsor or designated person seeking to rely on the rule as adopted could obtain this information through interviews (either in person or by telephone) and/or through questionnaires that clients must complete and return prior to the opening of the account. This position is consistent with no-action letters previously issued by the staff. *See, e.g.*, Rauscher Pierce Refsnes, Inc., *supra* note 3 (prospective client will be interviewed over the telephone); Manning & Napier Advisors, Inc., *supra* note 12 (prospective client initially submits written questionnaire and later is interviewed by telephone).

[34] Paragraphs (a)(2)(i), (a)(2)(ii) and (a)(2)(iii) of rule 3a–4, as adopted.

[35] July Release, *supra* note 5, at Section II.A.2.ii.

[36] Paragraph (a)(2)(ii) of rule 3a–4, as adopted. One commenter asked whether the rule permits a sponsor or designated person to contact a client by electronic mail. Under appropriate circumstances, an electronic mail message requesting information from clients in the program would constitute annual client contact within the meaning of rule 3a–4. *See* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Securities Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24644 (May 15, 1996) (interpretive release in which the Commission, among other things, provided general guidance to investment advisers that contemplate using electronic media to fulfill their disclosure obligations under the Advisers Act).

[37] This provision of the rule contemplates a reasonable attempt by the sponsor or designated person to reach and obtain information from the client. A sponsor or designated person that is unable to obtain information from a client after pursuing all reasonable means to contact the client would not be precluded from relying on the safe harbor.

[38] Paragraph (a)(2)(iii) of rule 3a–4, as adopted. This notice could be included as part of or with another mailing sent to the client. For example, the notification could be included as part of the quarterly account statement described in paragraph (a)(4) of the rule. For a discussion of the provisions of rule 3a–4 stating that quarterly account statements must be sent to investment advisory clients, *see infra* Section II.C.4.

[39] For this reason, the Commission disagrees with those commenters who asserted that the annual contact and quarterly notification provisions are duplicative.

[40] July Release, *supra* note 5, at Section II.A.2.ii.

[41] *Id.*

[42] This view is reflected in staff no-action letters. *See, e.g.,* Rauscher Pierce Refsnes, Inc., *supra* note 3 (the portfolio manager, when necessary, will be available to discuss more complex questions regarding the client's account); Westfield Consultants Group, *supra* note 3 (client will be furnished the name and direct telephone number of manager, who will be reasonably available during business hours). In one no-action request, a representation was made that the client would be able to contact his or her financial planner or the portfolio manager to obtain information or assistance during normal business hours, but the client might be charged hourly fees whenever the client requested that certain investment officers of the portfolio manager answer specific questions regarding investment strategies with respect to the client's account. Manning & Napier Advisors, Inc., *supra* note 12. Rule 3a–4 does not preclude a sponsor from charging reasonable fees for this or other services. However, such fees must be adequately disclosed to the client. *See* Item 7(f) of Schedule H of Form ADV (requiring disclosure of any fees in addition to the wrap fee that a client in a wrap fee program may pay).

knowledgeable about investment and other matters relevant to the account. The rule has been revised to state that ''the sponsor and personnel of the manager of the client's account who are knowledgeable about the account and its management'' must be reasonably available to the client for consultation.[43] In accordance with this provision, the contact person need not be the individual primarily responsible for managing the account, but must be sufficiently knowledgeable to discuss and explain investment decisions that were made.

3. Reasonable Management Restrictions

The Commission stated in the July Release that the ability of a client in an investment advisory program to place reasonable restrictions on the management of his or her account is a critical factor in determining whether individualized treatment is provided under the program.[44] Paragraph (a)(3) of the revised proposed rule, therefore, would have provided that a program relying on the rule must include a requirement that each client have the ability to impose reasonable restrictions on the management of his or her account. Such restrictions were described to include, for example, prohibitions with respect to the purchase of particular securities or types of securities. This provision of the rule is being adopted as reproposed, except that language has been added to the provision to clarify that a program relying on rule 3a–4 need not provide clients with the right to direct the manager to purchase specific securities or types of securities.[45]

Some of the commenters addressing this aspect of the proposal asked the Commission to provide additional guidance as to what constitutes a reasonable management restriction. As noted in the July Release, whether a particular restriction would be reasonable depends on an analysis of the relevant facts and circumstances.[46] In general, a restriction would be unreasonable if it is clearly inconsistent with the portfolio manager's stated investment strategy or philosophy or the client's stated investment objective,[47] or is fundamentally inconsistent with the nature or operation of the program.[48] Other factors that bear on whether a particular restriction is reasonable are the difficulty in complying with the restriction,[49] the specificity of the restriction and the number of other restrictions imposed by the client.[50] A restriction would not be unreasonable, however, simply because it placed administrative burdens on the manager, or could affect the performance of the account.

The Commission stated in the July Release that if the sponsor or portfolio manager of a program concluded that a particular restriction sought to be imposed by a client was unreasonable, the client should be notified and given an opportunity to restate the restriction more reasonably. The Commission also noted that if a client was unable or unwilling to modify an unreasonable restriction, then the client could be removed from the program without jeopardizing reliance on the safe harbor.[51] The Commission is also of the view that if a sponsor or portfolio manager is informed in advance that a client wants to impose a restriction the sponsor or portfolio manager deems unreasonable, and the client refuses to modify the restriction, then the sponsor or portfolio manager may refuse to accept the client. The Commission, however, does not agree with the suggestion of some commenters that a sponsor or portfolio manager should be permitted to refuse to accept a client without giving the client an opportunity to modify or withdraw the restriction.

4. Quarterly Account Statements

Paragraph (a)(4) of the revised proposed rule stated that each client in a program covered by the rule must be provided quarterly with a statement describing 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, and all fees and expenses charged to the account. The statement also would have included the value of the account at both the beginning and end of the quarter. Some commenters asserted that the rule should not specify the contents of quarterly statements. The Commission is not persuaded by this argument. This provision, which is consistent with several no-action letters that had specified the contents of the quarterly reports,[52] reflects the view that a key element of individualized advisory services is an individualized report about a client's account. The Commission therefore is adopting this provision substantially as proposed, with one modification clarifying that statements may be sent more often than quarterly.[53]

5. Minimum Account Size

The revised proposed rule would not have specified a minimum size for client accounts in a program.[54] While the Commission acknowledged in the July Release that providing individualized advice to a large number of relatively small accounts may be so costly and time-consuming as to render individualized treatment impracticable, it noted that the provisions of the revised proposed rule should be sufficient to ensure individualized treatment, and that innovations in computer technology may allow portfolio managers to render individualized treatment to relatively small accounts on a cost-effective

[43] Paragraph (a)(2)(iv) of rule 3a–4, as adopted.

[44] July Release, *supra* note 5, at Section II.A.2.iii.

[45] Paragraph (a)(3) of rule 3a–4, as adopted.

[46] July Release, *supra* note 5, at Section II.A.2.iii.

[47] July Release, *supra* note 5, at Section II.A.2.iii. The exclusion of individual stocks or stocks from a particular country, for example, would appear to be a reasonable restriction under ordinary facts and circumstances. A general restriction on the purchase of the securities of foreign issuers may be unreasonable, however, if the manager's investment strategy is to invest exclusively or primarily in foreign securities. Under those circumstances, it may be necessary for the client and the sponsor to reassess the choice of manager or the client's investment objective or strategy.

[48] July Release, *supra* note 5, at Section II.A.2.iii. While rule 3a–4 generally contemplates that clients in mutual fund asset allocation programs should have the ability to exclude specific funds from their accounts, under some circumstances a restriction on the purchase of a fund included in the program may be inconsistent with the operation of the program. This could be the case, for example, when there is only a single fund with a specified investment objective available in the program, and that fund plays a necessary role in the overall investment strategy determined to be appropriate for the client. *See* Benson White & Company, *supra* note 12 (program under which client assets are allocated among four mutual funds based upon the client's age need not give clients the opportunity to place restrictions on the purchase of any of the funds).

[49] In the context of a mutual fund asset allocation program, for example, compliance with restrictions based on the securities held by a fund in which program assets are invested (*i.e.*, a restriction that would require a manager to monitor the fund's portfolio securities) may be so burdensome as to be unreasonable.

[50] The restrictions that a client seeks to impose on his or her account could be unreasonable when considered in the aggregate, even though each restriction may be reasonable when considered separately, or if the client alters them or imposes new restrictions with excessive frequency. Paragraph (a)(2)(iii) of the rule, which contemplates that a sponsor notify each client at least quarterly to contact the sponsor if the client wishes to modify restrictions concerning the management of the account, is not intended to imply that it necessarily would be reasonable for a client to change his or her investment restrictions on a quarterly basis.

[51] July Release, *supra* note 5, at Section II.A.2.iii.

[52] *See* Westfield Consultants Group, *supra* note 3 (quarterly statements will contain a review and analysis of client account); Strategic Advisers, Inc., *supra* note 2 (quarterly statements will contain a description of investments).

[53] Paragraph (a)(4) of rule 3a–4, as adopted.

[54] The Division has granted no-action relief to investment advisory programs with varying minimum account sizes. *See, e.g.,* Qualivest Capital Management, Inc., *supra* note 12 ($5 million); Wall Street Preferred Money Managers, Inc., *supra* note 2 ($100,000); Strategic Advisers, Inc., *supra* note 2 ($50,000).

basis.[55] Nonetheless, the Commission requested comment whether the rule should include a provision specifying a minimum account size.

All but one of the commenters responding to the request for comment opposed the inclusion of a minimum account size provision in rule 3a–4. These commenters asserted that the sponsor and the portfolio manager are in the best position to determine the appropriate minimum account size for a program based upon the nature of the program. The Commission has concluded that a particular account size is not a necessary element to ensure that clients are provided with individualized investment management services. The Commission recognizes, however, that the smaller the minimum account size of an investment advisory program, the more likely that clients would not have the ability to demand and receive individualized treatment in the program. In assessing the status under the Investment Company Act of a program that does not qualify for the safe harbor under rule 3a–4, therefore, the Commission will consider a relatively large minimum account size as evidence that individualized treatment is being provided to clients of the program.

D. Client Retention of Ownership of Securities

Under paragraph (a)(5) of the revised proposed rule, a program covered by the rule would have been characterized by each client retaining certain specified indicia of ownership of all securities and funds in that client's account.[56] The Commission stated in the July Release that the indicia of ownership specified in revised proposed rule 3a–4 are those that provide clients with the ability to act as owners of the securities in their accounts.[57]

A number of commenters addressing this aspect of the revised proposed rule noted circumstances in which the client's ability to exercise ownership rights over securities in his or her account could be restricted for reasons external to the program. One commenter pointed out, for example, that the assets in the account of a self-directed retirement plan may be subject to restrictions imposed by the terms of the plan or by federal tax law.[58] These commenters were concerned that such restrictions may preclude the program from relying on the safe harbor.

Paragraph (a)(5) of rule 3a–4 contemplates only that the *program* does not impose additional restrictions or limitations on client ownership of securities held in program accounts, and that a client's participation in the program will not alter his or her ability to exercise the ownership rights enumerated in the rule.[59] The language of the rule has been modified to clarify this standard.[60]

1. Ability to Withdraw and Pledge Securities

The revised proposed rule would have provided that clients be able to withdraw securities or cash from their accounts. In addition, revised proposed rule 3a–4 also would have specified that clients be able to pledge the securities in their accounts. The July Release stated that investment advisory programs relying on the safe harbor could require a client to withdraw securities from his or her account before using them as collateral.[61]

A number of commenters maintained that the retention by clients of the right to pledge securities should be eliminated from the final rule. One of these commenters asserted that, because clients may be forced to withdraw their securities before pledging them, the provision of the revised proposed rule regarding the right to pledge securities is unnecessary if the client has the right to withdraw them. The Commission agrees, and has modified the rule text to remove this provision.[62]

2. Right to Vote Securities and Receive Certain Documents as Securityholders

The revised proposed rule would have provided that the client have the right to vote the securities in his or her account. This provision would have permitted clients to delegate the authority to vote securities to another person, such as the portfolio manager or other fiduciary, so long as the client retained the right to revoke the delegation at any time. The Commission indicated that the right to vote proxies implied that the client would receive proxy materials in sufficient time to permit the client to consider how to vote and to submit the proxies.[63] The Commission is clarifying that, if a client delegates voting rights to another person, the proxies, proxy materials, and, if applicable, annual reports, need be furnished only to the party exercising the delegated voting authority.[64]

[55] July Release, *supra* note 5, at Section II.A.2.v.

[56] Rule 3a–4, as originally proposed, would have provided that clients maintain to the extent reasonably practicable *all* indicia of ownership of the funds in their accounts, and specified certain requisite attributes of ownership. 1980 Release, *supra* note 10; paragraph (c) of rule 3a–4 as originally proposed.

[57] Like the revised proposed rule, rule 3a–4 as adopted does not provide that the client be the record owner of the securities held in its account. The Division has taken the position that an investment advisory program would not be deemed to be an investment company solely because securities of clients participating in the program are held in nominee or street name. United Missouri Bank of Kansas City, n.a., *supra* note 2 (investment company securities held in nominee name). *See, e.g.,* Manning & Napier Advisors, Inc., *supra* note 12 (non-investment company securities held in nominee name).

[58] This commenter suggested that providing the right to pledge securities in the account of a retirement plan could cause the plan to lose its status as a qualified plan under the Internal Revenue Code. In general, a qualified plan must provide that benefits under the plan may not be anticipated, assigned, alienated, or subject to attachment, garnishment, levy, execution, or other legal process. *See* Internal Revenue Code (''IRC'') Section 401(a)(13) [26 U.S.C. 401(a)(13)]; Treas. Reg. § 1.401(a)–13 (as amended by T.D. 8219, 53 FR 31837 (Aug. 22, 1988)). In addition, the IRC imposes an additional tax of 10% on early distributions from a qualified retirement plan. *See* IRC Section 72(t)(1) [26 U.S.C. 72(t)(1)].

[59] Similarly, paragraph (a)(5) would not prohibit a client from being charged reasonable fees for services in connection with the ownership of securities held in the program, provided such fees could be charged if the client held the securities outside the program. Of course, all fees must be permissible under applicable state and federal law and must be adequately disclosed. *See* Item 7 of Schedule H of Form ADV.

[60] Paragraph (a)(5) of rule 3a–4, as adopted. The rule's text also has been changed to clarify that the rule provides for the retention of only the rights of ownership specified in the rule. Of course, nothing in the rule is intended to prevent clients from retaining other rights of ownership, if permitted by the program.

[61] July Release, *supra* note 5, at Section II.A.3.i.

[62] The Commission regards a client's ability to pledge securities in his or her account directly without first withdrawing them as an additional attribute of the client's ownership of the securities. While the absence of a right to pledge would not cause a program to fall outside of rule 3a–4, a client's right to pledge securities may be relevant to determining whether a program that is not relying on the safe harbor would be considered to be an investment company.

[63] July Release, *supra* note 5, at Section II.A.3.ii.

[64] *See infra* Section II.D.3. Rule 3a–4, as adopted, is in no way intended to indicate the instances under which a client's right to vote proxies may be delegated to another person. Whether the right can be delegated depends on applicable state and federal law. An employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (''ERISA''), for example, may provide that the plan's named fiduciary may delegate asset management, including the authority to vote proxies, to an ''investment manager'' for the plan, as that term is defined in Section 3(38) of ERISA. *See, e.g.,* Sections 402–405 of ERISA [29 U.S.C. §§ 1102–1105]; Letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, U.S. Department of Labor, to Robert A.G. Monks, Institutional Shareholder Services, Inc. (Jan. 23, 1990), 1990 ERISA LEXIS 66. Certain provisions of the federal securities laws also contemplate that clients can delegate their right to vote proxies. Under the Commission's proxy rules, the term ''beneficial owner,'' the person who must receive proxy materials, includes an investment adviser that has the power to vote, or to direct the voting of, a security pursuant to an agreement with the client. *See* Securities Exchange Act Rule 14b–2(a)(2) [17 CFR § 240.14b–2]. Rules adopted by the New York Stock Exchange (''NYSE''), the National Association of Securities Dealers, Inc. (''NASD'') and the American Stock Exchange, Inc. (''AMEX'') permit a securityholder to designate a registered

Continued

Revised proposed rule 3a–4 contemplated that the client (or the client's agent) would be provided with documents that the client (or agent) would have received had the same securities been owned by the client outside the program. These documents may include prospectuses, periodic shareholder reports, proxy materials, and any other information and disclosure required by applicable laws or regulations.

Some commenters suggested that clients be permitted to waive receipt of the documents generally required to be provided to securityholders, as they could have waived receipt of immediate confirmations under the revised proposed rule.[65] Rule 3a–4 does not limit a client's right to waive receipt of these documents. Nor does rule 3a–4 prohibit a client from making an informed designation of another person, including a financial planner or registered broker-dealer, to receive such documents on the client's behalf.[66] Whether a client in an investment advisory program may waive receipt of documents or designate another person to receive documents depends upon whether the client would have been able to do so under applicable federal or state law if the securities were owned directly.

3. Right to Receive Trade Confirmations

The revised proposed rule contained a provision under which a client would have the right to receive in a timely manner confirmations of securities transactions of the type required by rule 10b–10 under the Securities Exchange Act of 1934.[67] Two commenters objected to the provision of the rule that the confirmations be ''of the type required by rule 10b–10.'' These commenters asserted that this provision was burdensome, particularly with respect to banks and trust companies that are not subject to rule 10b–10. The Commission has decided that the confirmation provision, like the other indicia of ownership specified in the rule, should apply only to the extent that the client would have a right to receive confirmations from the person executing the transaction if he or she traded the securities through that person outside the program. Therefore, the Commission has revised the provision of the rule addressing confirmations to delete the reference to rule 10b–10. As revised, this provision would state that a client in an investment advisory program must receive confirmations that the person executing the transaction is required to send under the laws regulating that person's activities. This provision of the rule also provides that the confirmations must include the information specified by the applicable law governing such content.[68]

As discussed in the July Release, rule 10b–10 permits customers of registered broker-dealers to waive receipt of individual confirmations in certain circumstances.[69] A client in an investment advisory program whose transactions are executed by a registered broker-dealer effectively has the option to receive either individual confirmations for each transaction or periodic statements, delivered no less frequently than quarterly, that include the information required by rule 10b–10 with respect to all transactions that occurred within the period covered by the statement.[70] Two commenters suggested that the Commission clarify that an entity that is not required to be registered with the Commission as a broker-dealer could rely on the safe harbor if it sent quarterly statements to clients who waived their rights to receive individual confirmations. As discussed above, the confirmation provision in rule 3a–4 applies only to the extent that the client would have a right to receive confirmations if he or she traded the securities outside the program. A client's ability to waive receipt of confirmations will not be altered because securities are held in a program account. Whether a client whose transactions are not executed by a registered broker-dealer may waive receipt of confirmations or other transaction notifications must be determined by reference to the laws that govern the relationship.[71]

4. Legal Rights as Securityholders

Revised proposed rule 3a–4 would have provided that the client retain the right to proceed directly against an issuer of securities in a client's account without joining any other person involved in the program. The July Release indicated that underlying this provision (which was based on representations made in several no-action letters) [72] was the view that a key element of providing individualized advisory services is that a client have the same rights as a person holding the securities outside an investment advisory program.

Certain commenters suggested that this provision of the revised proposed rule may be problematic with respect to client securities that are held in nominee or street name, or by a trustee. These commenters stated that the nominee or trustee might be considered an indispensable party in any action against the issuer, and that nominal joinder of the nominee or trustee might be required. These comments have been addressed by the revision discussed above regarding restrictions on the exercise of ownership rights that are

investment adviser who has discretion over the management of the client's account to receive and vote proxies on his or her behalf. *See* NYSE Guide, Rules of Board, Rules 450, 451, 452 and 465; NASD Conduct Rules, Rule 2260; AMEX Rules 575, 576, 577 and 585.

[65] *See infra* Section II.D.3.

[66] In the revised proposed rule, the paragraph regarding receipt of documents specifically referred to receipt by the client's agent. Paragraph (a)(5)(iv) of revised proposed rule 3a–4; July Release, *supra* note 5, at Section II.A.3.iii. In connection with modifying the rule text to effect the changes discussed above, *supra* Section II.D, the reference to the client's agent has been deleted as a conforming change. These changes in the rule text are not intended to indicate that a client in an investment advisory program may not designate another person to receive documents that must be provided to securityholders by law.

[67] 17 CFR 240.10b–10.

[68] Paragraph (a)(6) of rule 3a–4, as adopted. Banks that execute securities transactions for customers generally are subject to confirmation requirements under the banking laws. *See, e.g.,* 12 CFR 12.4–12.5 (Office of the Comptroller of the Currency (''OCC'') confirmation requirements for national banks). The OCC recently proposed amendments to these rules that would make their confirmation requirements more closely reflect the requirements of rule 10b–10. OCC, Recordkeeping and Confirmation Requirements for Securities Transactions (Dec. 7, 1995), 60 FR 66517 (Dec. 22, 1995). In addition, the Federal Deposit Insurance Corporation (''FDIC'') recently considered when and how to amend its regulations governing recordkeeping and confirmation requirements for securities transactions by state nonmember banks (12 CFR part 344). FDIC, Recordkeeping and Confirmation Requirements for Securities Transactions (May 14, 1996), 61 FR 26135 (May 24, 1996).

[69] July Release, *supra* note 5, at n.60 and accompanying text, *citing* Securities Exchange Act Release No. 34962 (Nov. 10, 1994), 59 FR 59612 (Nov. 17, 1994) (''Exchange Act Release 34962'').

[70] Although a client may waive his or her right to receive the immediate confirmation, the client may not waive his or her right to receive the periodic statement. Exchange Act Release 34962, *supra* note 68, at nn.34–36 and accompanying text.

[71] One commenter observed that a person executing transactions on behalf of a client whose shares are held in nominee name may not know the identity of the client, and asked the Commission to clarify how a program relying on the safe harbor could comply with the confirmation provision with respect to such a client. In the case of transactions effected by a registered broker-dealer, the Division of Market Regulation has expressed the view that a good faith effort should be made in these circumstances to obtain the information necessary to send the confirmation required by rule 10b–10 directly to the client. If these efforts are not successful, then the confirmation should be sent, in accordance with certain procedures, to the client's custodian or a fiduciary authorized to manage the account. See Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Securities and Exchange Commission, to George P. Miller, Vice President and Associate General Counsel, Public Securities Association (Sept. 29, 1995).

[72] *See, e.g.,* Westfield Consultants Group, *supra* note 3; Manning & Napier Advisors, Inc., *supra* note 12; Jeffries & Company, *supra* note 12; Rauscher Pierce Refsnes, Inc., *supra* note 3.

external to the program.[73] Otherwise, the Commission is adopting this provision as proposed.[74]

E. Policies and Procedures and Form N–3a4

Paragraph (a)(6) of revised proposed rule 3a–4 contemplated the establishment by a program's sponsor of written procedures and agreements governing the operation of the program, and the maintenance of records relating to the program. Paragraph (a)(6) would have provided that the sponsor must: (1) Establish and effect written policies and procedures that are reasonably designed to ensure that each of the provisions of the rule are implemented; (2) maintain and preserve all written policies, procedures and certain other documents relating to the program for specified periods of time; (3) enter into written agreements with other persons that the sponsor designates to retain records pertaining to the program; and (4) furnish to the Commission upon demand copies of the policies, procedures and other documents created pursuant to these policies and procedures. Paragraph (a)(7) of the revised proposed rule would have provided that the sponsor of an investment advisory program intending to rely on the safe harbor file Form N–3a4 with the Commission.

In the July Release, the Commission specifically requested comment whether any of the provisions under paragraph (a)(6) of the rule could be ''eliminated, consolidated, or otherwise made less burdensome without compromising investor protection.'' [75] Most commenters addressing this aspect of the revised proposed rule viewed the provisions as unnecessary, unduly burdensome, irrelevant to determining whether an investment advisory program is an investment company under the Investment Company Act, or as an improper attempt by the Commission to regulate entities—principally banks—that are excepted from the definition of investment adviser under the Advisers Act. A few commenters also suggested that provisions setting forth written policies and procedures would discourage sponsors from relying on the safe harbor. For similar reasons, most commenters also opposed any filing provision under the rule.

Although the Commission does not agree with many of the comments pertaining to the proposed recordkeeping and other operational provisions, the Commission has reevaluated these provisions and determined not to adopt them for a number of reasons. First, the Commission agrees that compliance with these types of formal procedural provisions generally should not be determinative of an entity's status under the Investment Company Act. As one commenter noted, none of the other rules under the Investment Company Act exempting certain entities from investment company regulation contain similar procedural provisions.[76]

Second, with respect to programs sponsored by registered investment advisers, the recordkeeping requirements under the Advisers Act and the Commission's authority to examine registered investment advisers should be sufficient to enable the Commission to detect violations of the Investment Company Act. Most, if not all, of the records that would have been covered by the revised proposed rule currently are required to be maintained under rule 204–2 under the Advisers Act.[77]

With respect to those investment advisory programs sponsored by banks that are not subject to the Advisers Act, the Commission staff intends to consult and work closely with the relevant banking agencies so that these programs will be subject to oversight designed to determine whether the programs are being operated as unregistered investment companies. Further, to the extent these programs include registered investment companies as investment vehicles for their clients, or that registered investment advisers serve as subadvisers in a program sponsored by a bank, the Commission will have access to certain records relating to the programs through its authority to examine such registered entities.

Despite its determination not to include in rule 3a–4 a provision pertaining to written policies and procedures, the Commission continues to believe that it is important for the sponsor of an investment advisory program to monitor the program's compliance with the rule. Each person relying on rule 3a–4 is responsible for demonstrating its compliance with the rule's provisions. A sponsor that establishes and implements written policies and procedures designed to ensure adherence to the provisions of rule 3a–4 would greatly reduce the chance that the program will fail to operate in the manner specified in the rule. Moreover, the implementation of such procedures by an investment adviser may serve to protect the adviser in certain instances from liability for violating, or aiding and abetting violations of, the Investment Company Act and/or the Securities Act, or failing to supervise a person under the adviser's supervision who violates those Acts.[78] The Commission, therefore, strongly recommends that a sponsor of an advisory program seeking to rely on rule 3a–4 establish and implement written policies and procedures, and a system for applying such procedures, that are reasonably designed to ensure that the program operates in the manner contemplated by the rule.

The Commission also believes that it would be advisable for a person seeking to rely on rule 3a–4 to maintain the records necessary to evidence compliance with the rule, even if the person is not subject to rule 204–2 under the Advisers Act or certain of the records are not required by that rule. As noted above, a person seeking to rely on rule 3a–4 must be able to establish compliance with each of the rule's provisions. Compliance with many of these provisions, including those relating to client contact, the delivery of documents to clients, and the opportunity of clients to place reasonable restrictions on the management of their accounts, would be difficult, if not impossible, to demonstrate without contemporaneous recordkeeping.

F. Investment Advisers Act Issues Raised by Investment Advisory Programs

The Commission noted in the July Release that wrap fee and other investment advisory programs raise, in addition to the Investment Company

[73] *See supra* Section II.D.

[74] Paragraph (a)(5)(iv) of rule 3a–4, as adopted.

[75] July Release, *supra* note 5, at Section II.A.4.

[76] *See* rule 3a–1 (certain prima facie investment companies); rule 3a–2 (transient investment companies); rule 3a–3 (certain investment companies owned by companies that are not investment companies); rule 3a–5 (exemption for subsidiaries organized to finance the operations of domestic or foreign companies); rule 3a–6 (foreign banks and foreign insurance companies); and rule 3a–7 (issuers of asset-backed securities).

[77] For instance, paragraph (a)(7) of rule 204–2 [17 CFR 275.204–2(a)(7)] generally requires a registered adviser to maintain originals of all written communications received and copies of all written communication sent by the adviser relating to the adviser's advice or recommendations. Under section 204 of the Advisers Act, records maintained under rule 204–2 must be made available to Commission examiners.

[78] Section 203(e)(5) of the Advisers Act [15 U.S.C. 80b–3(e)(5)] provides that no person will be deemed to have failed to supervise another person subject to his or her supervision if: (1) the person has established procedures that would reasonably be expected to prevent or detect the other person's violation, and a system for applying such procedures; and (2) the supervisor reasonably discharged his or her duties under the procedures and system and did not have reasonable cause to believe that such procedures were not being complied with.

Act issues addressed in the release, a number of issues under the Advisers Act. The Commission requested comment on certain of these issues and indicated the possible publication of an interpretive release that would address them.[79] The Commission received few comments in response to this request, and the comments that were received suggested that investment advisory programs did not raise unique issues under the Advisers Act, but simply presented issues under the Act in a specific factual context. The Commission, therefore, has decided not to publish an interpretive release at this time. The staff of the Division will entertain requests for no-action or interpretive guidance with respect to the application of the Advisers Act in the context of investment advisory programs.

III. Cost/Benefit Analysis

Rule 3a–4 under the Investment Company Act provides a nonexclusive safe harbor from the definition of investment company for investment advisory programs. Programs that are organized and operated in the manner described in the rule are not required to register under the Investment Company Act or to comply with the Act's substantive provisions. The 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.

The Commission anticipates that the cost of compliance with rule 3a–4 will be small. In addition, the Commission does not believe that compliance with any of the provisions will be unduly burdensome. Furthermore, because the rule is based principally on long-standing staff positions, the Commission believes that it will not substantially alter current industry practice or the costs associated therewith.

Section 2(c) of the Investment Company Act provides that whenever the Commission is engaged in rulemaking under the Investment Company Act and is required to consider or determine whether an action is consistent with the public interest, the Commission also must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The Commission has considered rule 3a–4 in light of these standards and believes that, by removing uncertainty with respect to the status of certain investment advisory programs under the Investment Company Act, the rule is consistent with the public interest, and will promote efficiency and the competition among sponsors of such programs. In addition, the rule will have no adverse effect on capital formation, nor be unduly burdensome to those sponsors wishing to comply with the rule.

IV. Paperwork Reduction Act

An investment advisory program structured to take advantage of the safe harbor contained in rule 3a–4 will provide for each client in the program receiving a statement quarterly describing all activities in the client's account during the preceding quarter. Such a provision constitutes a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*),[80] because providing the quarterly statements is necessary to meet the provisions of the safe harbor. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information without display of a valid OMB control number. Accordingly, the Commission submitted the revised proposed rule to the Office of Management and Budget (''OMB'') pursuant to 44 U.S.C. 3507 and received approval of the rule's ''collection of information'' requirement (OMB control number 3235–0459). Because the collection of information requires disclosure to third parties (the client accountholders), assurance of confidentiality is not an issue.

As noted above, the Commission has determined not to adopt the other collection of information requirements it proposed, including the establishment of written procedures and agreements governing the operation of the program, the maintenance of records relating to the program, and the filing of Form N–3a4 with the Commission.[81] Due to this decision, as well as a revision to the Commission's estimate of the amount of assets presently in investment advisory programs, the Commission has revised its estimate of the paperwork burden. The total aggregate estimated annual reporting burden associated with the rule's requirements has been reduced by 152,724.5 hours. The potential respondents are the approximately 53 sponsors of investment advisory programs. The Commission now estimates that there are 1,016,000 clients of investment advisory programs, and the reporting burden imposed by rule 3a–4 is one hour per client, for a total aggregate annual reporting burden of 1,016,000 hours. On average, the annual reporting burden for each respondent is estimated to be 19,169.8 hours. The Commission notes that many sponsors already may provide quarterly statements to clients and the burden under paragraph (a)(4) of rule 3a–4 is likely to be less for such sponsors.

V. Final Regulatory Flexibility Analysis

A summary of the Initial Regulatory Flexibility Analysis regarding revised proposed rule 3a–4 was published in the July Release. No comments were received on the Initial Regulatory Flexibility Analysis, and no comments were received with respect to the effect of the rule on small entities. The Commission has prepared a Final Regulatory Flexibility Analysis in accordance with 5 U.S.C. 604 regarding rule 3a–4.

The analysis states that the rule is intended to provide a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided to clients. The analysis notes that the objective of rule 3a–4 is to help ensure that investment advisory programs do not operate as *de facto* investment companies by clarifying the Commission's views regarding the status of investment advisory programs under the federal securities laws. The conditions of the rule are designed to describe certain basic attributes that can differentiate an investment advisory program from an investment company. As discussed more fully in the analysis, because the rule is a nonexclusive safe harbor, no entity, either large or small, is required to operate in accordance with its terms, and notes that a program that is a small entity and that does not operate in the manner contemplated by the rule is not presumed to be an investment company.

As discussed in the analysis, the Commission estimates that of the 53 sponsors offering investment advisory programs in 1995, approximately 6 programs met the Commission's definition of small entity for purposes of the Investment Company Act (*i.e.*, an investment company with net assets of $50 million or less as of its most recent fiscal year [17 CFR 270.0–10]).

The analysis states that the rule does not impose any reporting or recordkeeping requirements with the exception of one condition which requires programs relying on the rule to furnish its clients a statement, at least quarterly, describing activity in the client's account. This condition reflects representations in several no-action

[79] July Release, *supra* note 5, at Section II.C.

[80] *See supra* Section II.C.4.

[81] *See supra* Section II.E.

letters and is consistent with industry practice. In addition, the analysis notes that the Commission has attempted to minimize the rule's burden on all persons, not just small entities, particularly by eliminating provisions included in the Revised Proposed Rule relating to the creation and maintenance of books and records to facilitate and support a program's reliance on the rule, and to the filing of a form with the Commission. The analysis also notes that alternatives for providing different means of compliance for small entities were considered, but that the rule is crafted in a manner designed to permit program sponsors considerable flexibility as to how they comply with the safe harbor's conditions. Furthermore, the analysis states that exempting small entities from the conditions of the rule would be inconsistent with the Commission's statutory authority to protect investors. Cost/benefit information reflected in the ''Cost/Benefit Analysis'' section of this Release also is reflected in the analysis.

A copy of the Final Regulatory Flexibility Analysis may be obtained by contacting Rochelle Kauffman Plesset, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 10–6, Washington, D.C. 20549.

VI. Effective Date

Rule 3a–4 is effective upon publication in the **Federal Register**. Pursuant to 5 U.S.C. 553(d)(1), immediate effectiveness is appropriate because rule 3a–4 is purely exemptive in nature. It provides a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided to advisory clients. Under the rule, programs that are organized and operated in the manner described in the rule are not required to register under the Investment Company Act or to comply with the Act's requirements. The benefits of the rule should be available at the earliest possible time.

VII. Statutory Authority

The Commission is adopting rule 3a–4 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 Rule

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 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:

§ 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 in the client's financial situation or investment objectives, and whether the client wishes to impose any reasonable restrictions on the management of the account or reasonably modify existing restrictions;

(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 or investment objectives, or if the client wishes to impose any reasonable restrictions on the management of the client's account or reasonably modify existing restrictions, and provides the client with a means through which such contact may be made; and

(iv) The sponsor and personnel of the manager of the client's account who are knowledgeable about the account and its management are reasonably available to the client for consultation.

(3) Each client has the ability to impose reasonable restrictions on the management of the client's 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; *Provided, however*, that nothing in this section requires that a client have the ability to require that particular securities or types of securities be purchased for the account.

(4) The sponsor or person designated by the sponsor provides each client with a statement, at least quarterly, containing a description of all activity in the client's account during the preceding period, 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 period.

(5) Each client retains, with respect to all securities and funds in the account, to the same extent as if the client held the securities and funds outside the program, the right to:

(i) Withdraw securities or cash;

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

(iii) Be provided in a timely manner with a written confirmation or other notification of each securities transaction, and all other documents required by law to be provided to security holders; and

(iv) Proceed directly as a security holder 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.

(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 be

considered the sponsor of the program under this section.

By the Commission.

Dated: March 24, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–8075 Filed 3–28–97; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 5, 184, 529, and 610

Food and Drugs; Technical Amendments

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendments.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to correct certain typographical and other inadvertent errors. This action is being taken to clarify and improve the accuracy of the regulations.

EFFECTIVE DATE: April 1, 1997.

FOR FURTHER INFORMATION CONTACT: LaJuana D. Caldwell, Office of Policy (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–2994.

SUPPLEMENTARY INFORMATION: FDA has discovered certain nonsubstantive errors that have been incorporated into the agency's codified regulations. FDA is correcting these errors. The errors in the regulations are as follows:

1. In 21 CFR 5.89(b)(1) ''x-reay'' is corrected to read ''x-ray''.

2. In 21 CFR 184.1(a) the phrase ''of this chapter of'' in the third sentence is corrected to read ''of this chapter or''.

3. In 21 CFR 529.50(c)(2) ''*Klebsiella* ssp.'' is corrected to read ''*Klebsiella* spp.''.

4. In 21 CFR 610.53(c), in the table, in the entry for ''Rubella Virus Vaccine Live,'' in the third column, under the heading ''Manufacturer's storage period 0 °C or colder (unless otherwise stated),'' ''°C'' is corrected to read ''do''.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). Notice and public procedure are unnecessary because FDA is merely correcting nonsubstantive errors.

List of Subjects

21 CFR Part 5

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

21 CFR Part 184

Food ingredients.

21 CFR Part 529

Animal drugs.

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 5, 184, 529, and 610 are amended as follows:

PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION

1. The authority citation for 21 CFR part 5 continues to read as follows:

Authority: 5 U.S.C. 504, 552, App. 2; 7 U.S.C. 138a, 2271; 15 U.S.C. 638, 1261–1282, 3701–3711a; secs. 2–12 of the Fair Packaging and Labeling Act (15 U.S.C. 1451–1461); 21 U.S.C. 41–50, 61–63, 141–149, 467f, 679(b), 801–886, 1031–1309; secs. 201–903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321–394); 35 U.S.C. 156; secs. 301, 302, 303, 307, 310, 311, 351, 352, 361, 362, 1701–1706, 2101 of the Public Health Service Act (42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 264, 265, 300u–300u–5, 300aa–1); 42 U.S.C. 1395y, 3246b, 4332, 4831(a), 10007–10008; E.O. 11490, 11921, and 12591.

§ 5.89 [Amended]

2. Section 5.89 *Notification of defects in, and repair or replacement of, electronic products* is amended in paragraph (b)(1) by removing ''x-reay'' and adding in its place ''x-ray''.

PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

3. The authority citation for 21 CFR part 184 continues to read as follows:

Authority: Secs. 201, 402, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 371).

§ 184.1 [Amended]

4. Section 184.1 *Substances added directly to human food affirmed as generally recognized as safe (GRAS)* is amended in the third sentence in paragraph (a) by removing the phrase ''of this chapter of'' and adding in its place the phrase ''of this chapter or''.

PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

5. The authority citation for 21 CFR part 529 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

§ 529.50 [Amended]

6. Section 529.50 *Amikacin sulfate intrauterine solution* is amended in paragraph (c)(2) by removing ''*Klebsiella* ssp.'' and adding in its place ''*Klebsiella* spp.''

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

7. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371); secs. 215, 351, 352, 353, 361 of the Public Health Service Act (42 U.S.C. 216, 262, 263, 263a, 264).

§ 610.53 [Amended]

8. § 610.53 *Dating periods for licensed biological products* is amended in the table in paragraph (c), in the entry for ''Rubella Virus Vaccine Live,'' in the third column, under the heading ''Manufacturer's storage period 0 °C or colder (unless otherwise stated),'' by removing ''°C'' and adding in its place ''do''.

Dated: March 25, 1997.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 97–7971 Filed 3–28–97; 8:45 am]

BILLING CODE 4160–01–F

21 CFR Part 310

[Docket Nos. 91P–0186 and 93P–0306]

Iron-Containing Supplements and Drugs: Label Warning Statements and Unit-Dose Packaging Requirements; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of January 15, 1997 (62 FR 2218). The final rule amended the regulations to require label warning statements on products taken in solid oral dosage form to supplement the dietary intake of iron or to provide iron for therapeutic purposes and to require unit dose packaging for iron-containing products that contain 30 milligrams or more of iron per dosage unit. The final rule was published with some typographical errors. This document corrects those errors.

DATES: Effective July 15, 1997.

FOR FURTHER INFORMATION CONTACT: Linda S. Kahl, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3101.

SUPPLEMENTARY INFORMATION: