

transaction, or any class or classes of persons, or transactions, from any provision of the Advisers Act "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Advisers Act]."

5. Applicants request that the SEC grant an exemption from section 205(a)(1) of the Advisers Act to permit Excelsior to deem realized any unrealized gains or losses attributable to securities distributed in kind to its members for purposes of payment of the performance fee to the Investment Adviser and Investment Sub-Adviser.

6. Applicants assert that their exemption from section 205(a)(1) is consistent with the standards of section 206A regarding investor protection and the purposes of the Advisers Act. Applicants argue that Congress has already found it appropriate to permit a performance fee in the case of an investment adviser to a BDC. Applicants argue further that, to the extent that section 205(b)(3) of the Advisers Act requires such a fee to be based on net realized capital gains, Applicants' proposal is consistent with the statutory purposes. Once the in-kind distribution is made, Excelsior's members and the members of the Feeder Fund will have the exclusive ability to liquidate such investments and realize any gains or losses. Applicants also assert that there should be no concern over the proper valuation of the securities upon which the fee is based, because Applicants are requesting exemptive relief only with respect to in-kind distributions of securities for which a trading market exists on a national securities exchange or on the NASDAQ Stock Market.

7. Applicants state that they believe that it is in the best interests of the members of Excelsior and the members of the Feeder Fund, and in the public interest, for Excelsior to make in-kind distributions of securities. Applicants state that they believe that an in-kind distribution would enable Excelsior's members and the members of the Feeder Fund to maximize their investment. First, Applicants state that the alternative to an in-kind distribution is the sale of the securities and argue that such sales may have a negative effect on the price of the shares in the market. Second, Applicants represent that the securities to be distributed will be freely transferable and will not be subject to either legal or contractual restrictions on their sale. Moreover, Applicants represent that a distribution of securities will not constitute a taxable event with respect to Excelsior, its members, and

members of the Feeder Fund, so that the members of Excelsior and the Feeder Fund will, in determining whether to hold or sell the securities, control the timing of realization of capital gains or losses. Finally, Applicants assert that as a venture capital fund, Excelsior and its advisers have not held themselves out as having experience with respect to publicly traded securities, and therefore its members do not lose any benefit of management expertise by receiving an in-kind distribution of securities.

#### Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. The relief will only apply to the distribution in kind by Excelsior of securities that are traded on a national securities exchange or on the NASDAQ Stock Market and are subject to no legal or contractual restriction on their sale.

2. Securities distributed in kind pursuant to the relief will be valued at the average of the closing bid and asked price (or in the case of exchange-traded securities, the closing sale price) at which the relevant securities were quoted on the relevant exchange or system during the five trading days immediately preceding the distribution. Members will receive notice of the basis for the valuation at the time of or before distribution.

3. Excelsior agrees to use all reasonable endeavors to ensure that securities that are the subject of an in-kind distribution are transferred to its members as soon as practicable following their valuation in connection with the allocation of the Incentive Carried Interest, and in any event within 30 days thereof.<sup>3</sup> Distributions will be recommended by Applicants, and the Board of Managers of Excelsior will approve each distribution and establish its record date, which will also be the valuation date. Prior to an in-kind distribution, members who are not account holders at U.S. Trust will be requested to provide brokerage instructions or establish an account if necessary, and procedures will be followed to assure that members who respond on a timely basis will receive the portfolio securities promptly. Members that hold accounts at U.S. Trust will receive distributions within five (5) business days of the record date.

<sup>3</sup> Excelsior will make the same efforts to distribute securities to members of the Feeder Fund as it does for its own members.

For the SEC, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 04-6108 Filed 3-17-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** [69 FR 11901, March 12, 2004]

**STATUS:** Closed Meeting.

**PLACE:** 450 Fifth Street NW., Washington, DC.

**ANNOUNCEMENT OF ADDITIONAL MEETING:** Additional Meeting.

A Closed Meeting will be held on Monday, March 15, 2004 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (3), (5), (7) (9), and (10) and 17 CFR 200.402(a) (3), (5), (7), (9), and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Atkins, as duty officer, voted to consider the item listed for the closed meeting in a closed session and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting to be held on Monday, March 15, 2004 will be: an investigation.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942-7070.

Dated: March 15, 2004.

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 04-6254 Filed 3-1-04; 3:56 pm]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49408; File No. S7-10-04]

### Regulation NMS

**AGENCY:** Securities and Exchange Commission.