

## Securities and Exchange Commission

## § 275.206(3)-1

U.S.C. 80b-3(b)(3)) prior to February 10, 2005, paragraph (b) of this section will not apply to the existing account of any equity owner of a private investment company who was an equity owner of that company prior to February 10, 2005.

(3) *Advisers to private funds with non-qualified clients.* If you are an investment adviser to a private investment company that is a private fund as that term is defined in § 275.203(b)(3)-1, and you were exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)) prior to February 10, 2005, section 205(a)(1) of the Act (15 U.S.C. 80b-5(a)(1)) will not apply to any investment advisory contract you entered into prior to February 10, 2005, provided, however, that this paragraph will not apply with respect to any contract to which a private investment company is a party, and provided further that section 205(a)(1) of the Act will apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract on or after February 10, 2005.

(d) *Definitions.* For the purposes of this section:

(1) The term *qualified client* means:

(i) A natural person who or a company that immediately after entering into the contract has at least \$750,000 under the management of the investment adviser;

(ii) A natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either:

(A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than \$1,500,000 at the time the contract is entered into; or

(B) Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(51)(A)) at the time the contract is entered into; or

(iii) A natural person who immediately prior to entering into the contract is:

(A) An executive officer, director, trustee, general partner, or person

serving in a similar capacity, of the investment adviser; or

(B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

(2) The term *company* has the same meaning as in section 202(a)(5) of the Act (15 U.S.C. 80b-2(a)(5)), but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

(3) The term *private investment company* means a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) but for the exception provided from that definition by section 3(c)(1) of such Act (15 U.S.C. 80a-3(c)(1)).

(4) The term *executive officer* means the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the investment adviser.

[63 FR 39027, July 21, 1998, as amended at 69 FR 72088, Dec. 10, 2004]

### **§ 275.206(3)-1 Exemption of investment advisers registered as broker-dealers in connection with the provision of certain investment advisory services.**

(a) An investment adviser which is a broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934 shall be exempt from section 206(3) in connection with any transaction in relation to which such broker or dealer is acting as an investment adviser solely (1) by means of publicly distributed written materials or publicly made oral statements; (2)

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by means of written materials or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (3) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or (4) any combination of the foregoing services: *Provided, however*, That such materials and oral statements include a statement that if the purchaser of the advisory communication uses the services of the adviser in connection with a sale or purchase of a security which is a subject of such communication, the adviser may act as principal for its own account or as agent for another person.

(b) For the purpose of this Rule, publicly distributed written materials are those which are distributed to 35 or more persons who pay for such materials, and publicly made oral statements are those made simultaneously to 35 or more persons who pay for access to such statements.

NOTE: The requirement that the investment adviser disclose that it may act as principal or agent for another person in the sale or purchase of a security that is the subject of investment advice does not relieve the investment adviser of any disclosure obligation which, depending upon the nature of the relationship between the investment adviser and the client, may be imposed by subparagraphs (1) or (2) of section 206 or the other provisions of the federal securities laws.

[40 FR 38159, Aug. 27, 1975]

**§ 275.206(3)-3T Temporary rule for principal trades with certain advisory clients.**

(a) An investment adviser shall be deemed in compliance with the provisions of section 206(3) of the Advisers Act (15 U.S.C. 80b-6(3)) when the adviser directly or indirectly, acting as principal for its own account, sells to or purchases from an advisory client any security if:

(1) The investment adviser exercises no "investment discretion" (as such term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78c(a)(35))), except investment discretion granted by the advisory client on a temporary or limited basis, with respect to the client's account;

(2) Neither the investment adviser nor any person controlling, controlled by, or under common control with the investment adviser is the issuer of, or, at the time of the sale, an underwriter (as defined in section 202(a)(20) of the Advisers Act (15 U.S.C. 80b-2(a)(20))) of, the security; *except that* the investment adviser or a person controlling, controlled by, or under common control with the investment adviser may be an underwriter of an investment grade debt security (as defined in paragraph (c) of this section);

(3) The advisory client has executed a written, revocable consent prospectively authorizing the investment adviser directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the advisory client, so long as such written consent is obtained after written disclosure to the advisory client explaining:

(i) The circumstances under which the investment adviser directly or indirectly may engage in principal transactions;

(ii) The nature and significance of conflicts with its client's interests as a result of the transactions; and

(iii) How the investment adviser addresses those conflicts;

(4) The investment adviser, prior to the execution of each principal transaction:

(i) Informs the advisory client, orally or in writing, of the capacity in which it may act with respect to such transaction; and

(ii) Obtains consent from the advisory client, orally or in writing, to act as principal for its own account with respect to such transaction;

(5) The investment adviser sends a written confirmation at or before completion of each such transaction that includes, in addition to the information required by 17 CFR 240.10b-10, a conspicuous, plain English statement informing the advisory client that the investment adviser:

(i) Disclosed to the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and