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SEC Release 1092 on the Investment Advisers Act of 1940: Applicability of the Investment Advisers Act to Financial Planners and Other Persons Who Provide Financial Services

SEC RELEASE 1092 ON THE INVESTMENT ADVISERS ACT OF 1940: APPLICABILITY OF THE INVESTMENT ADVISERS ACT TO FINANCIAL PLANNERS AND OTHER PERSONS WHO PROVIDE FINANCIAL SERVICES

Congress enacted the Investment Advisers Act of 1940[1] (Advisers Act) to protect persons who rely on investment advisers for advice on purchasing and selling securities.[2] The Advisers Act broadly defines an investment adviser as any person who, either directly or through writings, engages in the business of advising others on the value or profitability of securities and receives compensation.[3] The Advisers Act protects investors by requiring all persons who qualify under the Act as investment advisers to register with the Securities and Exchange Commission (SEC).[4] The Advisers Act, however, specifies six classes of persons who are not investment advisers and exempts three classes of investment advisers from the Act's registration

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1. 15 U.S.C. § 80b-1 to 80b-21 (1982).

2. *See* S. REP. No. 1775, 76th Cong., 3d Sess. 21-22 (1940) [hereinafter *Senate Report*] (discussing need for national regulation of investment companies and investment advisers); H. REP. No. 2639, 76th Cong., 3d Sess. 27-28 (1940) [hereinafter *House Report*] (same). The House and Senate reports on the Advisers Act reflect a concern that unscrupulous and unqualified investment counselors controlled huge amounts of capital. *Senate Report, supra,* at 21; *House Report, supra,* at 28. Congress, therefore, enacted the Advisers Act to protect the integrity of the securities market and the financial security of individual investors. *Senate Report, supra,* at 21; *House Report, supra,* at 28.

3. *See* 15 U.S.C. § 80b-2(a)(11) (1982) (broadly defining term "investment adviser" under Advisers Act). Throughout this note, the term "investment adviser" refers only to persons that satisfy the Advisers Act's definition in section 202(a)(11). *See infra* notes 34-38 and accompanying text (discussing SEC's use of term "investment adviser"). The term "financial planner" refers to a person that provides any type of financial advice but not necessarily a person that qualifies as an investment adviser under the Advisers Act. *See infra* notes 39-44 (describing typical activities of financial planners).

4. *See* 15 U.S.C. § 80b-3(a) (1982) (requiring investment advisers to register with Securities and Exchange Commission); Securities & Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963) (observing that Congress enacted Securities laws in 1930's to replace philosophy of *caveat emptor* with full disclosure in securities market); S. REP. No. 85, 73d Cong., 1st Sess. 3-4 (1933) (discussing disclosure requirement that would pervade securities laws of 1930's). In addition to the Advisers Act and the Investment Company Act, Congress enacted four other securities acts during the 1930's. *Id.; see* Securities Act of 1933, 15 U.S.C. §§ 77a-77ll (1982 & Supp. IV 1986) (regulating initial distribution of securities offered to public through interstate commerce); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986) (regulating trading on national securities markets); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1982 & Supp. IV 1986) (regulating financing and operations of public utility holding companies); Trust Indenture Act of 1939 15 U.S.C. §§ 77aaa-77bbbb (1982) (providing for independent trustees to protect rights of holders of indenture securities).

requirements.[5] Nevertheless, the SEC staff has interpreted the Act's definition of an investment adviser broadly and has caused persons who provide many types of investment advice to question whether they must register with the SEC pursuant to the Advisers Act.[6] The SEC has attempted to clarify the Advisers Act's definition of an investment adviser through no-action letters and releases.[7] Recently, the SEC issued a Release (Release 1092) that discusses the applicability of the Advisers Act to persons who provide investment advice as a component of a variety of financial services.[8]

The SEC broadly defines the term "investment adviser" in Release 1092 to comport with the legislative history of the Advisers Act.[9] The Advisers Act originated from a report on investment trusts and investment companies that Congress instructed the SEC to prepare in 1935.[10] Congress planned to

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5. 15 U.S.C. § 80b-2(a)(11) (A)-(F) (1982). Congress expressly exempted from the definition of an investment adviser: banks, including bank holding companies that are not investment companies; lawyers, engineers, accountants, and teachers whose performance of investment advisory services is incidental to the practice of their main professions; brokers and broker-dealers whose performance of investment advisory services is incidental to their main businesses and that receive no separate compensation for investment advice; publishers of news, business, and financial publications of general circulation; any person whose investment advice relates solely to securities in which the United States has an interest; and other persons not within the intent of the Advisers Act as the SEC may later designate. *Id. See infra* note 31 and accompanying text (discussing classes of investment advisers that need not register under Advisers Act).

6. *See* Gartenberg, *Many Estate Planners Are Also Investment Advisers Required to Register with the SEC*, 14 EST. PLAN. 40, 40 (1987) [hereinafter *Estate Planners*] (suggesting that definition of investment adviser covers virtually every person that receives compensation for giving securities advice); *supra* note 3 and accompanying text (defining term "investment adviser" under Advisers Act). Because the SEC has interpreted the term "investment adviser" so broadly, Gartenberg warns that persons that counsel clients concerning any type of investment may function as investment advisers under the Advisers Act. *Estate Planners*, *supra*, at 45; *see* Sec. & Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963) (finding that Congress intended for courts and SEC to interpret provisions of Advisers Act flexibly to avoid fraudulent conduct).

7. *See* Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 HARV. L. REV. 747, 793 (noting that most guidance on definition of investment adviser is found in SEC no-action letters) [hereinafter *Information Technology*]. A no-action letter is a letter written by a staff attorney stating that, given an existing set of facts, the attorney will not advise the agency to take action because the facts do not warrant prosecution. BLACK'S LAW DICTIONARY 994 (5th ed. 1979). No-action letters do not prevent private citizens from challenging investment advisory conduct under the Advisers Act. *See infra* notes 21-23 and accompanying text (discussing limited private causes of action available under Advisers Act).

8. Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act of 1940 Release No. 1092, [Vol. 5] Sec. Reg. (PH) ¶ 27,612.2 (October 8, 1987) [hereinafter *Rel. No. 1092*]. Rel. No. 1092 reflects the views of the staff of the SEC Division of Investment Management. *Id.* at 27,555.

9. *See infra* notes 10-17 and accompanying text (discussing legislative history of Advisers Act); Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 190 (1985) (same).

10. *See* Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z-4 (1982 & Supp. IV 1986) (directing SEC to study investment trusts and investment companies and to report back to Congress on or before January 4, 1937). The SEC delivered a report to Congress in

use the information that the SEC gathered to draft legislation to curtail abuses in the securities industry that Congress believed were partially responsible for the stock market crash of 1929 and the depression of the 1930's.[11] The report that the SEC submitted to Congress focused on investment counseling services and the dangers that an ever-growing number of unregulated investment counselors posed to unwary investors.[12] Both Congress and the SEC, therefore, advocated legislation that would regulate a broad class of persons who provide investment advice.[13] Based on the information in the SEC's report, Congress began work on a bill consisting of two titles that ultimately became the Investment Company Act of 1940[14]

1939. *See* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935: Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong., 2d Sess. (1939) [hereinafter *SEC Report*] (SEC study of investment counseling services).

11. *See* Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (suggesting fraud by investment advisers contributed to stock market crash and depression); Comment, *The Investment Advisers Act of 1940 and the Supreme Court: Private Rights of Action Under the New Cort Test*, 6 DEL. J. CORP. L. 54, 55-56 (1981) (discussing abuses in which investors and investment advisers commonly engaged before 1929). The commentator notes that some common abuses in the securities industry in the 1920's were excessive use of credit by investors and manipulation of prices on the stock exchange by investment advisers and corporate insiders. *Id.*

12. *See SEC Report*, *supra* note 10, at 27-30 (discussing abuses among investment counselors and recognizing need for national regulation). The SEC noted, first, that investment counselors that lacked training and financial responsibility plagued the securities market of the 1920's. *Id.* at 27-28. According to the SEC, these underqualified and unscrupulous investment counselors endangered individual investors and the reputations of legitimate investment counselors by making exaggerated claims concerning investment opportunities. *Id.* at 28.

The SEC observed, second, that Congress should take action to eliminate conflicts of interest between investment counselors and clients. *Id.* The SEC suggested that unregulated investment bankers and securities brokers who earn money according to the investments that they sell are not likely to give unbiased advice to their clients. *Id.* at 29. The SEC also questioned whether unregulated corporate directors who provide investment advice to clients could reconcile the duty of a director of the corporation with the duty of an investment counselor to a client that holds stock in the same corporation. *Id.* According to the SEC, investment counselors that recommended securities that their own clients issued also presented a conflict of interest problem in the securities industry in the 1920's. *Id.* at 30.

The SEC suggested, finally, that Congress should enact regulations to protect investors from insolvent investment counselors and counselors who fail to protect securities that clients entrust to investment counselors. *Id.* According to the SEC, few states required investment counselors to maintain a minimum cash balance or to submit to periodic audits. *Id.* The SEC observed that a lack of government supervision enabled unscrupulous investment counselors fraudulently to use clients' funds. *Id.*

13. *See* Sec. & Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 186-195 (1963) (analyzing legislative history of Advisers Act and determining that Congress intended for courts and SEC to interpret provisions of Advisers Act flexibly to avoid fraudulent conduct); *SEC Report*, *supra* note 10, at 28 (recommending Congressional action to eliminate all types of fraud and conflict of interest in securities market); *Senate Report*, *supra* note 2, at 21 (expressing alarm over potential for abuse posed by investment counseling industry that controlled approximately $4,000,000,000 in private funds in 1939).

14. 15 U.S.C. §§ 80a-1 to 80a-52 (1982).

and the Investment Advisers Act of 1940.[15] The House and Senate committees that worked on the bill heard extensive testimony from the investment counseling industry.[16] The committees designed the bill to protect both investors and the reputations of legitimate investment advisers from the activities of unscrupulous and incompetent securities practitioners.[17]

Although Congress expressed lofty expectations, the original Advisers Act limited the SEC's authority primarily to recording the number and locations of investment advisers around the country.[18] Congress, however, has amended the Advisers Act to increase the ability of the SEC to monitor and discipline investment advisers.[19] Section 206 of the Advisers Act prohibits investment advisers from engaging in fraudulent, deceptive, or manipulative practices while acting in an advisory capacity.[20] Although section 206 fails expressly to create civil liability, several federal courts have suggested that section 206 impliedly creates a private cause of action for damages.[21] The

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15. *Id.* §§ 80b-1 to 80b-21.

16. *See* Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 195 (1981) (discussing testimony during Senate hearings on Investment Advisers Act). The committees and the witnesses from the investment industry recognized the importance of preserving a relationship of trust and confidence between investment advisers and their clients. *See House Report*, *supra* note 2, at 28 (noting that drafters of Advisers Act respected personal relationship between investment advisers and clients); *Senate Report*, *supra* note 2, at 21 (noting cooperation between SEC and industry representatives in preparation of bill).

17. *See Senate Report*, *supra* note 2, at 21 (recognizing need for legislation to protect public investors and reputations of legitimate investment counselors); *House Report*, *supra* note 2, at 28 (same).

18. *See* 1 T. FRANKEL, THE REGULATION OF MONEY MANAGERS 23 (1978) (describing original Investment Advisers Act as mere census of nation's investment advisers); *Financial Columnists as Investment Advisers: After Lowe and Carpenter*, 74 CALIF. L. REV. 2061, 2075 (1986) [hereinafter *Financial Columnists*] (suggesting Investment Advisers Act is weakest of federal securities acts).

19. *See* T. FRANKEL, *supra* note 18, at 23 (describing steps Congress has taken to remedy weaknesses in Investment Advisers Act). Since 1940, Congress has amended the Advisers Act to require investment advisers to keep full records, to provide for inspection of advisers' records by the SEC, and to regulate advisers that maintain custody of clients' funds. *Id.* Congress has also added a standard for fraud and an explicit statement that the Advisers Act prohibits fraud by unregistered advisers *Id.*

20. 15 U.S.C. § 80b-6 (1982). Section 206 of the Advisers Act generally prohibits any form of fraud or self-dealing by investment advisers. *Id.* Congress amended section 206 in 1960 to include all investment advisers, even if the Advisers Act does not require them to register. S. REP. No. 1760, 86th Cong., 2d Sess. 4, *reprinted in* 1960 U.S. CONG. CODE & ADMIN. NEWS 3052, 3505-06. Before Congress amended section 206 of the Advisers Act in 1960, section 206 expressly applied only to advisers that registered under section 203 of the Advisers Act. *Id.*

21. *See* Abrahamson v. Fleschner, 568 F.2d 862, 873 (2d Cir. 1977) (recognizing implied private right of action under section 206 of Advisers Act), *cert. denied*, 436 U.S. 913 (1978); Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1243 (5th Cir. 1978) (same), *vacated and remanded*, 444 U.S. 959 (1979); *Comment*, *supra* note 11, at 67-71 (discussing cases in which second and fifth circuits have implied cause of action for damages under section 206 of Advisors Act).

United States Supreme Court, however, has held that section 206 of the Advisers Act creates no private cause of action for damages.[22] According to the Supreme Court, the only private remedies available under the Advisers Act are rescission, injunction, and restitution in conjunction with contracts void under section 215.[23] By denying private citizens the right to sue investment advisers who have violated the Advisers Act and caused injury, the Supreme Court has placed responsibility for assuring compliance with the Advisers Act almost entirely on the SEC.[24]

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22. Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 19 (1979). In *Transamerica Mortgage Advisers, Inc. v. Lewis* the United States Supreme Court considered whether a shareholder bringing a derivative action on behalf of Mortgage Trust of America (Trust), a real estate investment trust, and a class action on behalf of the Trust's shareholders could recover damages for violations of § 206 of the Advisers Act. *Id.* at 13. The plaintiff alleged that several trustees of the Trust, the Trust's investment adviser, and two corporations affiliated with the Trust had committed multiple acts of fraud and breaches of fiduciary duty to the Trust in violation of the Advisers Act. *Id.* The plaintiffs sought injunctive relief, recision of the investment advisers contract between the Trust and the investment adviser, restitution of fees and other considerations that the Trust paid to the defendants, an accounting of illegal profits, and an award of damages. *Id.* at 14. The United States District Court for the Northern District of California held that the Investment Advisers Act confers no private right of action and, therefore, dismissed the complaint. *Id.* The plaintiff appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. Lewis v. Transamerica Corp., 575 F.2d 237, 237 (9th Cir. 1978). The Ninth Circuit reversed, holding that Congress' purpose in enacting the Advisers Act required courts to imply a private right of action for injunctive relief and damages. *Id.* at 239.

The defendants appealed the Ninth Circuit's ruling to the United States Supreme Court. *Transamerica*, 444 U.S. at 14. On appeal the plaintiffs argued that since Congress intended the Advisers Act to protect the clients of investment advisers, the Supreme Court should imply a private right of action for their benefit. *Id.* at 15. The Supreme Court conceded that Congress intended for section 206 of the Advisers Act to protect clients of investment advisers from fraudulent activities but, nevertheless, held that section 206 implies no private right of action for damages. *Id.* at 24. The Supreme Court noted that section 206 proscribes fraudulent conduct by investment asdvisers but creates no special civil liabilities. *Id.* at 19. The Supreme Court reasoned that since Congress expressly authorized private suits for damages in particular circumstances in other securities acts, Congress expressly would have created a private suit for damages in section 206 of the Advisers Act if Congress had wanted investors to be able to sue for damages. *Id.* at 21. The Supreme Court held that only section 215 of the Advisers Act, which voids contracts that violate the Advisers Act, implies a limited private cause of action for recision of the illegal contract or an injunction prohibiting further performance under the illegal contract and restitution of consideration that the client paid to the adviser. *Id.* at 19.

23. *See Transamerica*, 444 U.S. at 19 (discussing limited private causes of action available under Investment Advisers Act); 15 U.S.C. § 80b-15(b) (1982) (declaring certain contracts void under Advisers Act). Section 215(b) of the Advisers Act declares that any contract that the parties entered, performed, or will perform in violation of the Advisers Act is void as between the parties and third parties with actual knowledge of the facts. *Id.*

24. *See Comment*, *supra* note 11, at 72-74 (discussing Supreme Court's analysis of sections 206 and 215 of Advisers Act). Section 209 of the Advisers Act authorizes the SEC to bring civil actions in the federal courts to enforce compliance with the Advisers Act. 15 U.S.C. § 80b-9(e) (1982). Section 203 authorizes the SEC to impose various administrative sanctions on persons who violate any provision of the Advisers Act or various other securities acts. 15 U.S.C. § 80b-3(e) (1982); *see infra* notes 25-29 and accompanying text (discussing powers of SEC to enforce provisions of Advisers Act).

To help prevent investment advisers from engaging in fraudulent, deceptive, or manipulative practices, section 203(a) of the Advisers Act currently requires any investment adviser who uses the mails or any other means of interstate commerce to register with the SEC.[25] Additionally, the Advisers Act requires registered investment advisers to keep records of transactions and communications and to submit any reports that the SEC prescribes.[26] The SEC periodically may inspect an investment adviser's records to ensure that the adviser is complying with the Act.[27] Moreover, the Advisers Act delegates broad authority to the SEC to enforce the Act's provisions by seeking injunctive relief and criminal penalties.[28] The SEC also may hold hearings and censure, restrict, suspend, or revoke the registration of an investment adviser who has committed certain egregious offenses.[29]

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25. 15 U.S.C. § 80b-3(a) (1982).

26. *Id.* § 80b-4; Rules and Regulations, Investment Advisers Act of 1940, 17 C.F.R. § 275.204-1 to -2 (1987). The SEC requires new investment advisers to register with the SEC by filing Form ADV. 17 C.F.R. § 275.204-1(a)(1). Every investment adviser annually must file Form ADV-S within 90 days of the end of the adviser's fiscal year. *Id.* at 275.204-1(c). An investment adviser that wishes to withdraw its registration must file with the SEC Form ADV-W. *Id.* at § 275.203-2(a). The SEC prescribes several forms that non-resident investment advisers must file to appoint an agent for service of process, pleadings, and other papers. *Id.* at §§ 275.0-2, 279.4-279.7. *See id.* § 275.0-2(d)(3) (defining term "non-resident investment adviser" as investment adviser that resides, maintains a principal place of business, or incorporates in any place not subject to jurisdiction of United States).

The SEC requires all investment advisers except the classes that section 203(b) of the Advisers Act exempts to maintain current and accurate books and records. *Id.* § 275.204-2. According to the SEC, all investment advisers must maintain accounting and financial statements as well as all checks, bank statements, and bills or statement that relate to the adviser's business. *Id.* at -2(a)(1), (2), (4)-(6). The SEC also requires investment advisers to keep records of all orders to purchase and sell securities and originals of all written communications with clients containing investment advice. *Id.* at -(2)(a)(3), (7). Finally, the SEC requires investment advisers to keep records reflecting discretionary authority over clients' funds or businesses and certain personal interests that the adviser may have in securities. *Id.* at (2)(a)(8)-(12).

27. 15 U.S.C. § 80b-4 (1982). The Advisers Act provides that all records of investment advisers are subject to reasonable examinations by representatives of the SEC as the SEC deems necessary to protect investors. *Id.*

28. *Id.* § 80b-9(e) (action for injunction); *id.* § 80b-17 (criminal penalties). Section 209(e) of the Advisers Act gives the SEC discretionary authority to bring an action in the proper United States Court to enjoin acts or practices that violate the Advisers Act and to enforce compliance with the Advisers Act. *Id.* § 80b-9(e). Section 209(e) also gives the SEC discretionary authority to transmit evidence concerning violations of the Advisers Act to the United States Attorney General who, in his discretion, may begin criminal proceedings. *Id.* Section 217 of the Advisers Act provides that any person who willfully violates any provision of the Advisers Act or any rule that the SEC has adopted pursuant to authority under the Advisers Act shall, upon conviction, receive a prison sentence of not more than five years, a fine of not more than $10,000, or both. *Id.* § 80b-17.

29. *Id.* § 80b-3(e). Before the SEC may discipline an investment adviser under section 203(e) of the Advisers Act, the SEC must give the investment adviser notice and an opportunity for a hearing. *Id.* Section 203(e) allows the SEC to discipline an investment advisor who willfully made or caused another person to make false or misleading statements to the SEC in any application, report, or proceeding. *Id.* § 203(e)(1). The SEC also may take action

Despite the Advisers Act's requirement that investment advisers who use the mails or interstate commerce must register, section 202(a)(11) excludes six classes of persons who provide investment advice to the public from the definition of an investment adviser.[30] Additionally, section 203(b) of the Advisers Act excludes three classes of investment advisers from the Act's registration requirements.[31] Both the exclusions from the definition of an investment adviser and the exclusions from the Act's registration requirements considerably limit the scope of the Advisers Act.[32] Although Congress restricted the private causes of action that plaintiffs may pursue under the Advisers Act and the classes of persons to which the Advisers Act applies, the Advisers Act, nevertheless, affects a large class of persons in the securities market.[33] The SEC has interpreted the Advisers Act's definition of an investment adviser to reach beyond those persons whose sole business is providing advice on investment in securities.[34] The SEC has classified persons who regularly provide nearly any type of financial planning services for compensation as investment advisers.[35] In addition to including a large class of persons within the definition of the term "investment adviser," the Advisers Act further expands the group of persons regulated under the Advisers Act by broadly defining the term "security" to include a wide range of profit-sharing investment opportunities in addition to stocks and

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against an investment adviser who willfully has violated a federal securities law or has been convicted of a felony or misdemeanor related to the securities market. *Id.* § 203(e)(2)-(3). The Advisers Act also allows the SEC to discipline an investment adviser that a court of competent jurisdiction has enjoined from engaging in any occupation or activity relating to the sale of securities. *Id.* § 203(e)(3).

30. *See supra* note 5 and accompanying text (listing six classes of persons that Advisers Act excludes from definition of investment adviser).

31. 15 U.S.C. § 80b-3(b)(1)-(3) (1982). Section 203(b) of the Advisers Act excludes three classes of persons that qualify as investment advisers under the Advisers Act from the Act's registration requirements. *Id.* An investment adviser whose clients all reside within the state in which the adviser maintains his or its principal office and that offers no advice on securities listed or admitted to unlisted trading privileges on any national securities exchange need not register under the Advisers Act. *Id.* § 80b-3(b)(1). The Advisers Act also excludes any investment adviser who exclusively counsels insurance companies. *Id.* § 80b-3(b)(2). Any investment adviser who, during the preceding 12 months, has had fewer than 15 clients and who neither holds himself out as an investment adviser nor serves as an investment adviser to an investment company registered under the Investment Companies Act of 1940 need not register under the Advisers Act. *Id.* § 80b-3(b)(3).

32. *See Financial Columnists*, *supra* note 18, at 2081 (noting that Advisers Act applies to limited class of persons).

33. *See* 15 U.S.C. § 80b-2(a)(11) (1982) (defining investment adviser and listing exceptions to definition); *supra* notes 21-23 and accompanying text (discussing limited private causes of action under Advisers Act); *see also Financial Columnists*, *supra* note 18, at 2081 (noting Investment Advisers Act applies to limited class of persons).

34. *See Estate Planners*, *supra* note 6, at 41-44 (discussing variety of occupations that fall under Advisers Act). In *Estate Planners* the author discusses the circumstances in which financial planners, personal managers, attorneys, accountants and professional trustees must register under the Advisers Act. *Id.*

35. *See id.* at 40 (noting SEC's broad interpretation of Advisers Act's definition of investment advisor).

bonds.[36] The SEC's broad interpretation of the scope of the Advisers Act has generated confusion in the financial community.[37] In Release 1092 the SEC attempts to outline the inquiries that financial planners should make to determine whether they qualify as investment advisers and, therefore, must register under the Advisers Act.[38]

In Release 1092 the SEC states that a financial planner typically analyzes a client's financial circumstances and objectives and prepares a program to manage the client's resources.[39] According to the SEC a financial planner usually reviews a client's assets and liabilities, including insurance, savings, investments, and employee and retirement benefits, and makes recommendations on how the client should allocate resources and meet liabilities.[40] The SEC concludes, therefore, that financial planners provide primarily advisory services.[41] The SEC observes in Release 1092, however, that some financial planners also make specific recommendations to help clients implement the general recommendations in the client's financial program.[42] According to the SEC, financial planners may charge an overall fee or an hourly rate for their services.[43] The SEC observes, also, that some financial planners rely wholly or partially on commissions from the sale of investment products to their clients.[44]

The SEC states in Release 1092 that in addition to financial planners, pension consultants and sports and entertainment representatives provide financial services that may subject them to the registration requirements of the Advisers Act.[45] According to the SEC pension consultants typically

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36. 15 U.S.C. § 80b-2(a)(18) (1982). Under the Advisers Act the term "security" includes notes, stocks, treasury stocks, bonds, debentures, evidences of indebtedness, certificates of interest or participation in any profit-sharing agreement, and an extensive list of other interests in common enterprises. *Id.*

37. *See Information Technology*, *supra* note 7, at 793 (noting lack of judicial decisions that construe definition of investment adviser). Because the SEC interprets the Advisers Act's definition of an investment adviser broadly and courts rarely have interpreted the definition, financial planners frequently ask the SEC staff to determine whether their business practice fits the Advisers Act's definition. *Id.*; *see supra* note 7 and accompanying text (describing SEC no-action letters).

38. *See Rel. No. 1092*, *supra* note 8, at 27,555 (stating that purpose of Release is to provide uniform interpretations of federal and state adviser laws).

39. *See id.* (describing typical activities of financial planners); *infra* notes 40-41 and accompanying text (same); supra note 3 and accompanying text (distinguishing financial planner from investment adviser).

40. *Rel. No. 1092*, supra note 8, at 27,555.

41. *Id.* In Release 1092 the SEC suggests, for example, that a financial planner may provide advisory services by recommending that a client purchase additional insurance or revise existing coverage, open an individual retirement account, increase or decrease funds in savings accounts, or invest in the securities market. *Id.*

42. *Id.* The SEC observes in Release 1092 that some investment advisers actually sell insurance, securities or other investments to their clients. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* at 27,555-56 (discussing financial planning services that pension consultants and sports and entertainment representatives typically provide); *infra* notes 46-50 and accom-

analyze the needs of a pension plan and advise the plan's fiduciaries on available investment opportunities and the most advantageous allocation of the plan's assets.[46] The SEC notes that pension consultants also may assist a plan's fiduciaries in developing broad objectives and policies.[47] Release 1092 explains that sports and entertainment representative provide financial advisory services to professional athletes and entertainers.[48] According to the SEC representatives typically negotiate employment and promotional contracts and assist athletes and entertainers with budgeting, investing, and tax planning.[49] The SEC notes, further, that some representatives assume a direct role in collecting a client's income, paying the client's bills, and making investments for the client.[50]

While the registration requirements of the Advisers Act apply to nearly all financial planners, pension consultants, and sports and entertainment representatives, the SEC recognizes in Release 1092 that the Advisers Act applies to persons who provide investment advice in other capacities.[51] The SEC's primary purpose in Release 1092 is to describe how the SEC staff determines whether a person qualifies as an investment adviser.[52] In Release 1092 the SEC sets forth a three-pronged test to determine whether a person acts as an investment adviser.[53] The first prong of the SEC's test requires that the person provides advice or issues reports or analyses regarding securities.[54] The second prong limits the scope of the Advisers Act to persons who are in the business of providing financial advice.[55] The third prong of

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panying text (describing activities of pension consultants and sports and entertainment representatives).

46. *See Rel. No. 1092, supra* note 8, at 27,555-56 (describing typical duties of pension consultants).

47. *Id.* In *Rel. No. 1092* the SEC notes that in addition to recommending particular investments, pension consultants may assist plan fiduciaries in selecting persons to manage the assets of the plan. *Id.*

48. *See id.* at 27,556 (describing typical duties of sports and entertainment representatives).

49. *Id.*

50. *Id.*

51. *See id.* (recognizing that not all investment advisers function precisely as financial planners, pension consultants, or sports and entertainment representatives).

52. *See id.* at 27,556-556C (outlining procedure for determining whether person functions as investment adviser); *see infra* notes 53-57 and accompanying text (discussing SEC's method for determining whether person functions as investment adviser).

53. *See id.* at 27,556-556B (describing three criteria relevant to analysis of whether person functions as investment adviser). The SEC derived its discussion in Release 1092 of the securities advice and compensation elements of the Advisers Act's definition of an investment adviser almost solely from an earlier interpretive release. *Id.* The SEC's analysis of the business element of the definition of an investment adviser constitutes the primary departure from the language of the release that preceded Rel. No. 1092. *See id.* at 27,555 (noting SEC staff's attempt to clarify business element of definition of investment adviser).

54. *Id.* at 27,556; *see infra* notes 59-72 and accompanying text (discussing first prong of SEC's test to determine whether person functions as investment adviser).

55. *Rel. No. 1092, supra* note 8, at 27,556A; *see infra* notes 85-130 and accompanying text (discussing second prong of SEC's text to determine whether person functions as investment adviser).

the SEC's test requires that the person provides advice for compensation.[56] A person who satisfies all three requirements qualifies as an investment adviser and must register with the SEC unless the person fits within one of the Advisers Act's exemptions.[57]

To aid practitioners in determining when clients must register under the Advisers Act, the SEC in Release 1092 individually considers each prong of the test to determine whether a person functions as an investment adviser.[58] According to Release 1092 a person who advises clients or issues reports concerning specific securities clearly satisfies the first prong of the SEC test.[59] The SEC has concluded, however, that a person who provides advice or reports that do not pertain to specific securities also may provide the advice or analysis concerning securities necessary to bring a person under the Advisers Act.[60] The SEC has stated that an investment adviser who gives a client advice that is more involved than a discussion in general terms of the advantages and disadvantages of investing in securities provides advice concerning securities within the meaning of the Advisers Act.[61] Even advice on the desirability of investing in securities instead of other investments qualifies as advice concerning securities under the Advisers Act.[62] In

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56. *Rel. No. 1092*, *supra* note 8, at 27,556A-556B; *see infra* notes 73-84 and accompanying text (describing third prong of SEC's test to determine whether person functions as investment advisor).

57. *See Rel. No. 1092*, *supra* note 8, at 27,556C (discussing persons exempt from registration under Advisors Act); *supra* note 31 and accompanying text (describing persons that qualify under Advisers Act as investment advisers but need not register with SEC).

58. *See Rel. No. 1092*, *supra* note 8, at 27,556-556B (explaining SEC's interpretation of three prongs of test to determine whether person qualifies as investment adviser under Advisers Act).

59. *See id.* at 27,556 (recognizing applicability of Advisers Act to persons that provide specific securities advice).

60. *See id.* (providing examples of securities advice within meaning of Advisers Act); T. FRANKEL, *supra* note 18, at 156-62 (discussing investment advice within meaning of Advisers Act); *infra* notes 61-68 and accompanying text (describing persons that do not provide advice on specific securities yet qualify as investment advisers under Advisers Act).

61. *See* Linda Arnold, SEC No-Action Letter, Aug. 23, 1984 (LEXIS, Fedsec library, Noact file) [hereinafter *Linda Arnold*] (describing investment advice that satisfies first prong of SEC test to determine whether person is investment advisor); *see also* Southmark Financial Services, SEC No-Action Letter, August 23, 1984 (LEXIS, Fedsec library, Noact file) (same).

62. *Rel. No. 1092*, *supra* note 8, at 27,556; Sinclair-deMarinis, Inc., SEC No-Action Letter, May 1, 1981 (LEXIS, Fedsec library, Noact file) [hereinafter *Sinclair-deMarinis*]; Thomas Beard, SEC No-Action Letter, May 8, 1975) (LEXIS, Fedsec library, Noact file). In *Sinclair-deMarinis* an attorney asked the SEC whether Sinclair-deMarinis, a New York corporation dealing in numismatics, needed to register under the Advisers Act. *Sinclair-deMarinis*, *supra*. The attorney defined numismatics as coins, currency, tokens, medals, and stamps. *Id.* The attorney explained that Sinclair bought and sold numismatics strictly on a cash basis and contemplated issuing a market letter to advise clients and prospective clients on the value of various numismatics. *Id.* The SEC responded, first, that numismatics do not qualify as securities under section 202(a)(18) of the Advisers Act. *Id.* The SEC advised, therefore, that a business that provides advice solely on numismatics need not register under the Advisers Act. *Id.* The SEC indicated, however, that Sinclair might qualify as an investment adviser if Sinclair provided advice concerning the advisability of investing in numismatics relative to securities.

a no-action letter to *Linda Arnold*, for example, the SEC considered whether Ms. Arnold, a licensed dealer in life and health insurance and annuities, needed to register as an investment adviser.[63] Ms. Arnold was considering whether to begin providing limited financial planning services to her clients.[64] Ms. Arnold emphasized that she would restrict her recommendations to categories of investments and recommend no specific investments.[65] Although Ms. Arnold stressed that she would neither hold herself out to the public as an investment adviser, provide analysis or reports on securities, nor have custody of clients' funds, the SEC responded that Ms. Arnold might qualify as an investment adviser under the Advisers Act.[66] The SEC warned that if Ms. Arnold offered clients more than a general discussion of the advisability of investing in securities in the context of a conference concerning a client's financial plan, Ms. Arnold's activities might qualify her as an investment adviser.[67] Furthermore, the SEC cautioned that advice concerning specific categories of investments such as bonds, mutual funds, and technology stocks also could qualify as investment advice under the Advisers Act.[68]

Although the SEC broadly defines investment advice when determining whether advice that financial planners personally render to clients satisfies the first prong of the three-pronged investment adviser test, the SEC applies the first prong of the test less rigorously to published advice and analysis on securities.[69] The United States Supreme Court has restricted the SEC's ability to regulate persons who publish general securities advice by holding that the Advisers Act excludes publishers of impersonal, analytical reports concerning securities from the definition of an investment adviser.[70] The

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Id. Under the SEC's interpretation, therefore, Sinclair could avoid the Advisers Act's registration requirements if Sinclair restricted its investment advice to the market for numismatics. *Id.*

63. *Linda Arnold*, *supra* note 61. In *Linda Arnold* Arnold stated that in addition to selling insurance, she also prepared tax returns and provided accounting services on a fee basis. *Id.*

64. *Id.* Specifically, Arnold contemplated preparing financial statements such as balance sheets and cash flow statements, compiling data on the effects of inflation and taxes on her clients' objectives, and recommending a general investment strategy suitable for her clients' needs. *Id.*

65. *Id.*

66. *Id*; *infra* notes 67-68 and accompanying text (discussing SEC's reasons for determining that Advisers Act may require Arnold to register as investment adviser).

67. *Linda Arnold*, *supra* note 61.

68. *Id.*

69. *See Financial Columnists*, *supra* note 18, at 2079 (observing that financial columnists rendering impersonal advice are not subject to Advisers Act's registration requirements); *infra* notes 70-71 and accompanying text (discussing effect of Supreme Court ruling on applicability of Advisers Act to financial columnists).

70. *See* Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 210 & n.58 (1963) (holding that publishers of general, impersonal expressions of opinion concerning securities need not register under Advisers Act). In *Lowe* the United States Supreme Court considered whether to enjoin the publishers of a newspaper that contained investment advice because the publishers had not registered under the Advisers Act. *Id.* at 183. Christopher Lowe served as president and

Supreme Court recognized that Congress desired to regulate only those investment advisers who provide personalized investment advice and to avoid unconstitutional interference with publishers of general securities advice.[71] With the single exception of certain publications, therefore, the SEC regards all but the most general discussions as advice or analysis concerning securities under the Advisers Act.[72]

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principal shareholder of Lowe Management Corporation, a registered investment adviser from 1974 to 1981. *Id.* Because a New York court convicted Lowe of multiple fraudulent acts and theft, the SEC revoked Lowe Management Corporation's registration as an investment adviser in 1981 and ordered Lowe not to associate with any investment adviser. *Id.* Lowe, however, in conjunction with Lowe Management and two other corporations, continued to publish two investment newsletters. *Id.* The SEC, therefore, filed a complaint in the United States District Court for the Eastern District of New York, alleging that Lowe and the other corporations were violating the Advisers Act and that Lowe was violating the SEC order with respect to Lowe and Lowe Management Corporation. S.E.C. v. Lowe, 556 F.Supp 1359, 1362 (E.D.N.Y. 1983). The SEC asked the court to enjoin Lowe from publishing further investment newsletters and to force Lowe to comply with the SEC order revoking Lowe's registration as an investment adviser. *Id.* The district court enjoined Lowe and the defendant corporations from engaging in all types of investment advisory activity except for publishing their newsletters. *Id.* at 1371. The district court determined that although the SEC could regulate personal investment advice under the Advisers Act, the First Amendment to the United States Constitution prohibited the court from enjoining Lowe from publishing impersonal investment newsletters. *Id.* The district court, therefore, held that if Lowe complied with the Advisers Act's disclosure and reporting requirements, the SEC must allow Lowe to register for the limited purpose of publishing an impersonal newsletter. *Id.*

The SEC appealed the district court's holding to the United States Court of Appeals for the Second Circuit. S.E.C. v. Lowe, 725 F.2d 892, 892 (2d Cir. 1984). The Second Circuit reversed the district court's injunction, holding that the SEC did not violate Lowe's First Amendment rights when the SEC attempted to prohibit Lowe from publishing an investment newsletter. *Id.* at 898-900. According to the Second Circuit, government does not violate the First Amendment when it regulates advertising that is harmful to the public. *Id.* at 899-900. In view of Lowe's history of fraudulent activity, the Second Circuit determined that Lowe's newsletter presented a danger of further public deception. *Id.* at 901. Lowe appealed the Second Circuit ruling to the United States Supreme Court. Lowe v. S.E.C., 472 U.S. 181 (1985).

On appeal, the Supreme Court reversed the judgment of the Second Circuit. *Id.* at 211. Although the Supreme Court concluded that Congress sought to avoid unconstitutional regulation of the press when Congress drafted the Advisers Act, the Court decided Lowe's case solely on statutory grounds. *Id.* at 204, 207-11. The Supreme Court stated that Congress intended for the Advisers Act to regulate persons that tailor investment advice to the needs of individual clients. *Id.* at 208. Since Lowe's investment newsletters provided only advice on the securities market in general, the Supreme Court concluded that Lowe fit within the exception to the definition of an investment adviser for publishers of newspapers of general circulation. *Id.*; 15 U.S.C. § 80b-2(a)(11)(D) (1982). The Supreme Court held, therefore, that neither Lowe's unregistered status nor the SEC order prohibiting Lowe from associating with investment advisers justified a court order barring Lowe from publishing impersonal investment newsletters. *Lowe*, 472 U.S. at 211.

71. *See Lowe*, 472 U.S. at 207-08 (recognizing Congressional intent to regulate only those investment advisers that directly affect individual investment decisions and to avoid unconstitutional interference with persons that provide general rather than personalized investment advice).

72. *See Rel. No. 1092*, *supra* note 8, at 27,556-556A (describing what constitutes securities advice within meaning of Advisors Act).

The third prong of the SEC test to determine whether a person functions as an investment adviser restricts adviser status to those persons who give investment advice for compensation.[73] The SEC explains in Release 1092 that an investment adviser's compensation may take the form of an advisory fee, commissions, or any combination of the two.[74] The SEC states, further, that an investment adviser need not charge a separate fee for advisory services to satisfy the compensation element of the test.[75] According to the SEC, therefore, a financial planner receives compensation within the meaning of the Advisers Act even if the client pays the adviser a single fee for a package of financial services.[76] Insurance brokers, for example, that receive a single fee for analyzing clients' insurance needs and for providing general investment advice may satisfy the third prong of the SEC's test.[77]

The SEC notes in Release 1092, additionally, that a person may receive compensation under the Advisers Act even if the client does not directly pay the adviser.[78] Accordingly, if a person renders financial services, including investment advice, and receives economic benefit solely from commissions on investments that the client purchases, the SEC would find that the person receives compensation under the Advisers Act and satisfies the third prong of the three-pronged investment adviser test.[79] In *Warren H. Livingston*, for example, Mr. Livingston informed the SEC that he planned to start a business in which he would distribute annual and quarterly reports of public companies to organizations such as investment clubs and libraries.[80]

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73. *Id.* at 27,556A-556B; *see infra* notes 74-84 and accompanying text (discussing third prong of SEC test to determine whether person functions as investment advisor).

74. *Rel. No. 1092 supra* note 8, at 27,556A.

75. *Id.* at 27,556A-556B.

76. *Id*; FINESCO, SEC No-Action Letter, Dec. 11, 1979 (LEXIS, Fedsec library, Noact file) [hereinafter *FINESCO*]. In *FINESCO* a partnership of insurance brokers requested an interpretative position from the SEC on whether the partnership needed to register as an investment advisor. *FINESCO, supra.* The partners stated that although they acted primarily as insurance brokers, they also provided financial planning, tax counseling, and general investment advisory services. *Id.* FINESCO occasionally charged fees for counseling services but usually provided counseling services at no cost to insurance clients. *Id.*

The SEC responded that FINESCO should register as an investment advisor. *Id.* The SEC noted that a person providing financial advice received compensation within the meaning of the Advisers Act if the person charged a single fee for a package of financial services that included investment advice. *Id.* Because FINESCO occasionally charged a fee for advisory services, the SEC concluded that FINESCO satisfied the third prong of the test to determine whether a person functions as an investment advisor *Id.*

77. *See supra* note 76 and accompanying text (discussing no-action letter in which SEC applied third prong of test for investment advisor to insurance brokers that provided limited investment advice).

78. *Rel. No. 1092, supra* note 8, at 27,556B.

79. *Id.*; *cf. Rel. No. 1092, supra* note 8, at 27,556B n.10 (noting that Advisors Act exempts brokers and dealers that perform investment advisory services that are incidental to conduct of broker or dealer business and that receive no special compensation for investment advice); 15 U.S.C. § 80b-2(a)(11)(C) (1982).

80. Warren H. Livingston, SEC No-Action Letter, Mar. 8, 1980 (LEXIS, Fedsec library, Noact file) [hereinafter *Warren H. Livingston*].

Mr. Livingston explained that he would charge the companies a fee for distributing the reports but would not charge any fee to the recipients of the reports.[81] Mr. Livingston asked the SEC whether his prospective business venture would qualify him as an investment adviser under the Advisers Act.[82] In applying the third prong of the test to determine whether Mr. Livingston's plan would render him an investment adviser, the SEC stated that an investment adviser need not receive compensation from the recipients of the advice to qualify as an investment adviser under the Advisers Act.[83] The SEC concluded, therefore, that if Livingston received compensation from the issuers of the reports, Livingston would satisfy the third prong of the SEC test.[84]

Although the SEC in Release 1092 relies on an earlier interpretive release to discuss the securities advice and compensation elements of the three-pronged investment adviser test, the SEC attempts in Release 1092 to clarify the second prong of the test.[85] The second prong of the SEC's test requires that the person engage in the business of providing advice on securities.[86] The SEC explains in Release 1092 that if a person gives investment advice with some regularity, the giving of investment advice need not constitute all or any particular part of a person's business for the person to be in the business of providing advice on securities under the Advisers Act.[87] The SEC lists three criteria in Release 1092 to determine whether a person is in the business of providing securities advice.[88] The SEC deems a person to be in the business of providing securities advice if the person holds himself out as an investment adviser, receives separate compensation for securities advice, or regularly provides specific securities advice.[89] According to the

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81. *Id.*

82. *Id.*

83. *Id.* In *Warren H. Livingston* the SEC responded that the manner in which Livingston selected the reports that he distributed, the nature of the audience to whom Livingston delivered the reports, and whether Livingston edited the reports or added analysis or recommendations would determine whether Livingston qualified as an investment advisor. *Id.*

84. *Id.*

85. *See Rel. No. 1092, supra* note 8, at 27,556-556B (discussing securities advice and compensation elements of test to determine whether person functions as investment advisor); *id.* at 27,555 (proposing to clarify in Release 1092 second prong of test to determine whether person functions as investment advisor); *infra* notes 86-132 and accompanying text (discussing second prong of test to determine whether person functions as investment adviser); *see also* Applicability of the Investment Advisors Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act of 1940 Release No. 770 (August 13, 1981) [hereinafter *Rel. No. 770*] (LEXIS, Fedsec library, Noact file) (prior SEC release discussing scope of Investment Advisers Act that SEC sought to clarify and update in Release 1092).

86. *See Rel. No. 1092, supra* note 8, at 27,556A (discussing acts that constitute business of providing advice on securities).

87. *Id.*

88. *Id*; *infra* note 89 and accompanying text (listing SEC criteria to determine whether person is in business of providing securities advice).

89. *See Rel. No. 1092, supra* note 8, at 27,556A (listing three criteria that satisfy business standard under Advisers Act).

SEC, therefore, a person who satisfies one or more of the three criteria is in the business of providing advice on securities.[90] To clarify the second prong of the investment adviser test, the SEC in Release 1092 individually considers each criteria of the business test.[91]

When determining whether a person is in the business of giving investment advice, the SEC considers, first, whether the person holds himself out as an investment adviser or as one who provides investment advice.[92] Before issuing Release 1092 the SEC addressed the question of whether a person holds himself out as an investment adviser in the context of the exemption to the Advisers Act's registration requirements in section 203(b)(3).[93] The SEC also considered whether a person holds himself out as an investment adviser in the context of the section 202(a)(11)(B) exception to the definition of an investment adviser for persons whose advisory services are solely incidental to certain other professions.[94] According to the SEC, a person

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90. *Id.*

91. *See id.* (describing criteria that satisfy business test); *infra* notes 133-138 and accompanying test (discussing SEC's attempt in *Release 1092* to clarify business test under Advisers Act).

92. *Rel. No. 1092, supra* note 8, at 27,556A.

93. *See* Peter H. Jacobs, SEC No-Action Letter, Feb. 7, 1979 (LEXIS, Fedsec library, Noact file) [hereinafter *Peter H. Jacobs*] (considering whether lawyer held self out as investment adviser and, therefore, failed to qualify for exemption to registration requirements in section 203(b) of Advisers Act). In *Peter H. Jacobs*, Jacobs, a lawyer who managed his firm's pension plan, asked the SEC whether he qualified for an exemption from the Advisers Act's registration requirements. *Id.* Jacobs explained that he recently had received an offer from the brokerage house with which his firm held an account to manage several other corporate funds and individual accounts. *Id.* Jacobs wanted to know whether he needed to register as an investment adviser if he decided to accept the offer to manage additional funds. *Id.*

The SEC suggested that unless Jacobs qualified for the exception to the definition of an investment adviser for a lawyer whose performance of investment advisory services is solely incidental to another profession, Jacobs would have to register as an investment adviser. *Id.*; *see* 15 U.S.C. § 80b-2(a)(11) (1982) (exception to definition of investment adviser). The SEC noted, however, that section 203(b) of the Advisers Act exempts from the Advisers Act's registration requirements any investment adviser that, during the previous twelve months, has had fewer than fifteen clients and that neither acts as investment adviser to an investment company nor publicly holds himself out as an investment adviser. *Peter H. Jacobs, supra.* The SEC noted, further, that a person may hold himself out as an investment adviser by publicly offering services as an investment adviser or an investment manager. *Id. See* 15 U.S.C. § 80b-3(b) (1982) (exempting from Investment Advisors Act's registration requirements any investment advisor that, during previous twelve months, has had fewer than fifteen clients and that has not held himself out to public as investment advisor); *supra* note 22 and accompanying text (describing classes of investment advisers that need not register with SEC).

94. *See* 15 U.S.C. § 80b-2(a)(11)(B) (1982) (exempting lawyers, accountants, engineers and teachers whose performance of advisory services is solely incidental to main profession from definition of investment advisor); Hauk, Soule & Fasani, P.C., SEC No-Action Letter, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,311, at 79,943 (May 2, 1986) [hereinafter *Hauk*] (accountant that holds self out to public as investment advisor may not take advantage of exception to definition of investment advisor in section 202(a)(11)(B) of Advisers Act); David R. Markley, SEC No-Action Letter, Feb. 6, 1985 (LEXIS, Fedsec library,

need not use the words "investment adviser" to hold himself out as an investment adviser under the Advisers Act.[95] The SEC considers a person who publicly offers financial planning or investment planning services to be holding himself out as an investment adviser.[96] The United States Court of Appeals for the Seventh Circuit, however, has held that a person who offered services as an employment and business adviser to a professional football player did not hold himself out as an investment adviser.[97] Ac-

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Noact file) (same).

In *Hauk* a certified public accounting firm requested an SEC determination of whether the firm functioned as an investment advisor. *Hauk, supra.* One of the services that Hauk offered to its clients was a financial planning service. *Id.* Several members of Hauk's staff engaged in a comprehensive analysis of a client's financial situation and prepared a report projecting a client's future cash, insurance, and investment needs and recommending tax and estate planning strategies. *Id.* Hauk emphasized that it identified itself to the public as an accounting firm. *Id.* Although Hauk admitted that it referred to the report that it prepared as a financial plan, Hauk contended that it did not hold itself out to the public as an investment advisor. *Id.*

The SEC responded that whether an accountant or accounting firm holds itself out to the public as an investment advisor is relevant to whether the accountant or accounting firm qualifies for the exception to the definition of an investment advisor for persons that provide financial planning services that are solely incidental to the practice of accounting. *Id.*; 15 U.S.C. § 80b-2(a)(11)(B) (1982). The SEC suggested that an accountant who publicly offers financial planning, pension consulting, or other financial advisory services holds himself as an investment advisor. *Hauk, supra.* The SEC stated that on the basis of Hauk's representation, Hauk's financial planning service seemed solely incidental to its accounting practice and, therefore, exempt from the Advisers Act's registration requirements. *Id.*

95. *See Peter H. Jacobs, supra* note 93 (person who describes own services using such terms as investment management or investment adviser holds self out as investment advisor).

96. *See* Alan P. Woodruff, SEC No-Action Letter, Aug. 27, 1987 (LEXIS, Fedsec library, Noact file) (suggesting that person who publicly offers financial planning or investment planning services holds self out as investment advisor); Hauk, Soule & Fasani, *supra* note 94, at 76,943 (suggesting that person who offers financial planning, pension consulting, or other financial advisory services holds self out as investment adviser).

97. *See* Zinn v. Parrish, 644 F.2d 360, 363 (7th Cir. 1981) (concluding personal manager for professional football player did not hold self out as investment adviser). In *Zinn*, the United States Court of Appeals for the Seventh Circuit considered whether a personal manager who furnished business advice to a professional football player violated the Advisers Act by failing to register with the SEC as an investment adviser. *Id.* at 362. Leo Zinn, a business manager for professional athletes, entered into a series of contracts with Lemar Parrish, a professional football player for the Cincinnati Bengals. *Id.* at 361. The contracts required Zinn to negotiate football contracts for Parrish and to furnish advice on business investments, tax planning, and endorsement contracts. *Id.*

When Parrish refused to pay Zinn commissions for a contract that Zinn had negotiated, Zinn sued to recover the commissions. Zinn v. Parrish, 461 F. Supp. 11, 12 (N.D. Ill. 1977). The United States District Court for the Northern District of Illinois declared the contract unenforceable because Zinn had failed to register as a private employment agency under an Illinois statute and entered summary judgment for Parrish. *Id.* Zinn appealed the summary judgment to the United States Court of Appeals for the Seventh Circuit. Zinn v. Parrish, 582 F.2d 1282, 1282 (7th Cir. 1978). The Seventh Circuit reversed and remanded the case to the district court to resolve certain questions of fact. *Id.* On remand, the district court entered a verdict in Parrish's favor, holding that Zinn had failed to perform his own obligations under the contract and that the contract was void because Zinn had failed to register as an investment

cording to the SEC, a person may hold himself out by word of mouth or through stationery, business cards, or a listing in a telephone, building, or business directory.[98] Moreover, when a person allows a third party to publicize that the person is willing to accept new clients, the person may be holding himself out under the Advisers Act.[99]

The second criteria that the SEC considers to determine whether a person is in the business of providing securities advice is whether the person receives separate, definable compensation for giving advice on securities.[100]

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adviser under the Adviser's Act. *See* Zinn v. Parrish, 644 F.2d 360, 360-61 (7th Cir. 1981) (discussing unreported district court opinion on remand). Zinn appealed the district court's ruling to the Seventh Circuit. *Id.* at 361.

On appeal, the Seventh Circuit reversed the district court, ruling that Zinn did not need to register as an investment adviser. *Id.* at 364. The Seventh Circuit concluded that Zinn was not in the business of providing investment advice within the meaning of the Advisers Act. *Id.* On the specific issue of whether Zinn held himself out as an investment adviser, the Seventh Circuit cited testimony indicating that Zinn advertised by word of mouth that he would perform personal management services and that Zinn listed himself in the telephone directory as a public relations consultant. *Id.* The Seventh Circuit concluded, therefore, that Zinn did not hold himself out to the public as an investment adviser. *Id.* Because Zinn neither held himself out as an investment adviser nor regularly provided securities advice, the Seventh Circuit held that Zinn was not in the business of providing investment advice and, therefore, need not register as an investment adviser under the Advisers Act. *Id.* at 364.

98. *See* Oneco, SEC No-Action Letter, Feb. 22, 1985 (LEXIS, Fedsec library, Noact file) (suggesting mediums through which person may hold self out as investment adviser); *Peter H. Jacobs, supra* note 93 (same).

99. Guardian Investment Services, Inc., SEC No-Action Letter [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,361, at 77,146 (Sep. 18, 1986) [hereinafter *Guardian*]. In *Guardian* the attorney for American Bankers Insurance Group, Inc. (ABIG) asked the SEC to determine whether Guardian Investment Services, Inc., a wholly-owned subsidiary of ABIG, qualified for an exception to the registration requirements of the Advisers Act. *Id.* Guardian intended to advise ABIG and several of ABIG's other subsidiaries concerning only obligations on the governments of the United States and the state of Florida. *Id.* at 77,147. Guardian also proposed to provide investment advise to various Florida residents through contacts of ABIG. *Id.* Guardian insisted that it would advise neither non-Florida residents nor corporations that incorporated outside of Florida. *Id.*

The SEC responded that Guardian might qualify for the section 203(b)(1) exemption to the Advisers Act's registration requirements. *Id.* at 77,148. The SEC noted that Section 203(b)(1) provides an exemption to registration for advisers that only advise clients that reside within the state in which the adviser maintains his principal place of business and that furnish no advice on securities that appear on a national securities exchange. *Id.*; 15 U.S.C. § 80b-3(1) (1982). The SEC observed that Guardian would not qualify for the section 203(b)(3) exemption to the Advisers Act's registration requirements because the facts indicated that Guardian held itself out to the public as an investment adviser. *Guardian, supra,* at 77,148. According to the SEC, a person holds himself out as an investment adviser if the person allows others to publicize through word of mouth that the person desires to take on new investment clients. *Id.* Because Guardian intended to offer advisory services to clients that Guardian acquired through ABIG, the SEC concluded that Guardian would hold itself out as an investment adviser. *Id.* at 77,149.

100. *Rel. No. 1092, supra* note 8, at 27,556A. The SEC release that preceded Release 1092 also mentioned compensation as a factor relevant to whether a person is in the business of giving securities advice. *See Rel. No. 770, supra* note 85 (discussing separate compensation as component of business of providing securities advice.)

The compensation element of the business standard focuses more on the separate character of the compensation than the compensation element of the definition of an investment adviser.[101] The SEC has stated, for example, that a person's investment advisory business need not constitute all or any particular portion of his entire business to come within the Advisers Act.[102] According to the SEC, therefore, a person who earns only a small percentage of his total revenues from investment advisory services may, nevertheless, be in the business of providing investment advice under the Advisers Act.[103] The SEC has stated, further, that even a nonprofit corporation may be in the business of providing advice on securities if the corporation charges any type of fee for its services and compensates its officers and employees for those services.[104]

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101. *See Rel. No. 1092, supra* note 8, at 27,556B (distinguishing compensation that will satisfy definition of investment advisor from separate compensation that person in business of providing securities advice receives). Although most of the no-action letters in which the SEC addresses compensation discuss compensation in terms of the definition of an investment adviser, a few letters discuss separate compensation in terms of whether a person is in the business of providing investment advice. *See supra* notes 73-84 and accompanying text (discussing compensation element of definition of investment advisor); *infra* notes 102-104 and accompanying text (discussing letters in which SEC has addressed separate compensation as factor in determining whether person is in business of providing securities advice).

102. *See Hauk, supra* note 94, at 79,943 (fact that investment advice constitutes small portion of person's business does not guarantee that person is not in business of providing investment advice).

103. *Id.*

104. *See* Atlanta Economic Development Corp., SEC No-Action Letter, Jan 30, 1987 (LEXIS, Fedsec library, Noact file) [hereinafter *Atlanta*] (noting that SEC considers some nonprofit corporations to be in business of providing investment advice); Chimorel Services, Inc., SEC No-Action Letter, June 7, 1982 (LEXIS, Fedsec Library, Noact File) (same). In *Atlanta*, counsel for the Atlanta Economic Development Corporation (AEDC) requested the SEC to determine whether ADEC needed to register as an investment adviser. *Atlanta, supra.* AEDC stated that it exists for the purpose of promoting economic development in the city of Atlanta. *Id.* AEDC maintained a computer file of investment opportunities in Atlanta. *Id.* AEDC solicited potential investors and requested the investors to complete a questionnaire describing the type of investments that the investors would like to make. *Id.* AEDC utilized a computer matching system to provide potential investors with a list of opportunities in Atlanta that matched the investor's profile. *Id.* AEDC received an initial application fee and a periodic fee from each entrepreneur and potential investor. *Id.* The amount of a potential investor's fee depended upon the range of opportunities in which the investor expressed an interest. *Id.* Employees of AEDC receive regular salaries but no special compensation related to the success of AEDC. *Id.*

In considering whether AEDC had to register under the Advisers Act, the SEC suggested that AEDC might qualify for an exemption to the requirements of the Advisers Act because AEDC exists as an agency of the city of Atlanta. *Id*; *see* 15 U.S.C. § 80b-2(b) (1982) (exempting United States, states, political subdivisions of states, and agencies, instrumentalities and authorities thereof from provisions of Advisers Act). The SEC noted, however, that the Advisers Act may apply to a nonprofit corporation if the corporation charges a fee for the advisory services that it provides and if the corporation compensates its officers and employees. *Atlanta, supra.* Since AEDC charges a periodic fee for advisory services and pays salaries to employees, the SEC stated that the fact that AEDC distributed no net profits to individuals

Theoretically, a person could receive compensation that would bring him within the definition of an investment adviser but not qualify as separate compensation for the purpose of determining whether the person is in the business of providing securities advice.[105] Before Release 1092, neither the SEC nor the courts clearly distinguished the two contexts in which compensation appears.[106] In Release 1092, however, the SEC emphasizes the separate character of compensation that places a person in the business of giving securities advice.[107] Because separate compensation is one way to satisfy the second prong of the investment adviser test, persons questioning whether to register under the Advisers Act must consider the separate character of compensation that satisfies the business test.[108] The SEC's analysis in Release 1092 of an investment adviser's compensation, therefore, encourages more careful consideration of the two contexts in which compensation is relevant under the Advisers Act.[109]

The third factor that the SEC considers in determining whether a person is in the business of providing advice on securities is whether the person, on more than rare, isolated occasions, provides specific investment advice.[110] In Release 1092 the SEC explains that specific investment advice includes any oral or written recommendation concerning specific securities or specific categories of securities and any recommendation by an investment adviser that a client allocate specific percentages of his resources among various categories of securities.[111] The SEC notes, however, that general advice on

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did not necessarily exclude AEDC from the business of providing investment advice. *Id.*

The SEC distinguished *Atlanta* from an earlier inquiry in which the SEC issued a no-action position with respect to a nonprofit corporation that provided an investment matching service similar to the service that AEDC provides. *See* Venture Capital Network, SEC No-Action Letter, May 7, 1984 (LEXIS, Fedsec library, Noact file) [hereinafter *Venture*] (concluding that nonprofit corporation did not engage in business of providing investment advice). In *Venture*, the SEC observed that Venture Capital Network charged only a fixed introductory fee, regardless of the number of times that the investor utilized the service. *Id.* In *Atlanta*, however, AEDC admitted that it would charge potential investors a fee that would vary according to the range of services that the client utilized. *Atlanta, supra.* The SEC suggested that AEDC's variable fee brought AEDC within the Advisers Act's registration requirements as an entity that rendered investment advice as part of a regular business. *Id.*

105. *See Rel. No. 1092, supra* note 8, at 27,556B (distinguishing two contexts under Investment Advisors Act in which receipt of compensation is relevant).

106. *See* Polera v. Altorfer, Potesta, Woolard & Co., 503 F. Supp. 116, 119 (1980) (referring to special compensation as general requirement of definition of investment advisor); Elmer D. Robinson, SEC No-Action Letter, [1985-1986 Transfer Binder] Fed Sec L. Rep. (CCH) ¶ 78,188, at 76,767 (Jan 6, 1986) (same).

107. *See Rel. No. 1092, supra* note 8, at 27,556A (emphasizing that only compensation that represents a distinguishable charge for securities advice places person in the business of providing securities advice).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* In several no-action letters that preceded Release 1092, the SEC suggested that a person that provided advice on the wisdom of investing in specific securities or specific categories of securities was in the business of providing investment advice. *See* Jack N. Alpern

how a client should allocate assets between securities and other types of investments does not constitute specific investment advice.[112] The SEC notes, finally, that clever financial planners may attempt to structure their businesses to avoid the Advisers Act's registration requirements.[113] The SEC suggests, for example, that a financial planner deliberately may offer only general advice as a financial planner but offer specific securities advice under one of the professions exempt from the Advisers Act under sections 202(a)(11)(A)-(E).[114] To prevent financial planners from circumventing the Advisers Act's registration requirements, the SEC states in Release 1092 that the SEC will consider all of the financial services that a person offers to determine whether the person gives specific investment advice.[115] Thus, the SEC will consider a financial planner who offers specific securities advice in another capacity to be in the business of providing securities advice.[116]

The specific investment advice that places a person in the business of providing investment advice is difficult to distinguish from the advice on securities that satisfies the Advisers Act's definition of an investment adviser.[117] In Release 1092 the SEC attempts to differentiate specific investment advice from more general advice on securities.[118] Unlike the general investment advice requirement under the three-pronged investment adviser test, the SEC's standard of specific investment advice requires both specificity and frequency.[119] The most common example of a person who gives infrequent advice under the SEC standard is a person whose investment advice is solely incidental to one of the professions included under section

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Co., L.P.A., SEC No-Action Letter, Apr. 23, 1986 (LEXIS, Fedsec Library, Noact File) [hereinafter *Jack N. Alpern*] (discussing advice that satisfies business element of investment adviser test); Suzanne Clark-James, SEC No-Action Letter, Aug. 30, 1984 (LEXIS, Fedsec Library, Noact File) [hereinafter *Suzanne Clark-James*] (same).

112. *Rel. No. 1092*, *supra* note 8, at 27,556A. The general advice that the SEC states does not constitute specific investment advice must concern simply the types of ventures in which a client should invest but not the wisdom of investing in any particular type of venture. *See supra* note 111 and accompanying text (noting that advice on the wisdom of investing in particular types of ventures indicates person is in business of providing investment advice).

113. *Rel. No. 1092*, *supra* note 8, at 27,556A.

114. *Id.*; *see supra* note 5 and accompanying text (discussing classes of persons exempt from definition of investment adviser).

115. *Rel. No. 1092*, *supra* note 8, at 27,556A.

116. *Id.*

117. *See supra* notes 59-72 and accompanying text (discussing investment advice as element of definition of investment adviser). The SEC drew the precise language for the specific investment advice standard from the general discussion in the release that preceded Release 1092 of whether a person is in the business of providing advice on securities. *See Rel. No. 770*, *supra* note 85 (discussing types of advice that person in business of providing investment advice might offer).

118. *Rel. No. 1092*, *supra* note 8, at 27,556A.

119. *See infra* notes 120-132 and accompanying text (discussing specificity and frequency as components of specific investment advice).

202(a)(11)(B) of the Advisers Act.[120] Although specificity of securities advice is more difficult to analyze, the SEC stated in several no-action letters before Release 1092 that the SEC would deem a person in the business of providing securities advice if, other than on rare, isolated instances, the person discussed or issued reports concerning specific securities or specific categories of securities.[121] For example, in *Suzanne Clark-James* Ms. James, a certified public accountant, asked the SEC for advice on whether to register under the Advisers Act.[122] Ms. James stated that she offered financial planning and counseling and tax services to individual and small business clients and, when her clients requested additional services, she contacted other financial specialists on her clients' behalf.[123] Ms. James noted, additionally, that she intended to make financial planning a regular aspect of her accounting practice in the future.[124] The SEC advised Ms. James that if a person discusses with clients the advisability of investing in securities only in the context of a general discussion of the client's financial plan, the person would not be in the business of providing investment advice.[125] The SEC noted, however, that a person who advises a client to allocate his funds in bonds, mutual funds and technology stocks would be giving sufficiently specific investment advice to satisfy the business test.[126]

Conversely, in *Wallace E. Lin* a computer software manufacturer who sold programs to financial counselors and brokers who performed solely organizational and arithmetical functions asked the SEC to determine whether the manufacturer should register under the Advisers Act.[127] Mr. Lin explained that the program would gather statistics on major stocks listed on the New York and American Stock Exchanges and assist users in making

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120. *See supra* note 5 and accompanying text (discussing exceptions to definition of investment adviser); *see also* Zinn v. Parrish, 644 F.2d 360, 364 (7th Cir. 1981) (holding that isolated investment transactions incident to management contract with professional football player did not constitute business of providing advice on securities); *supra* note 97 and accompanying text (discussing *Zinn*).

121. *See Hauk*, *supra* note 94, at 76,943 (discussing securities advice that SEC considers to place person in business of providing securities advice); Jack N. Alpern Co., L.P.A., *supra* note 111 (same); Suzanne Clark-James, *supra* note 111 (same); *see also* Touche Holdings, Inc., SEC No-Action Letter, Dec. 30, 1987 (LEXIS, Fedsec library, Noact file) (applying specific investment advice test from Release 1092).

122. *Suzanne Clark-James*, *supra* note 111.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* In *Suzanne Clark-James* the SEC concluded that if a person discusses with clients, other than on rare, isolated occasions, the advisability of investing in specific securities or specific categories of securities, the person would be in the business of providing advice on securities. *Id.* The SEC suggested bonds, mutual funds, and technology stocks as examples of categories of securities. *Id.*

127. *See* Wallace E. Lin, SEC No-Action Letter, Apr. 15, 1985 (LEXIS, Fedsec Library, Noact File) [hereinafter *Wallace E. Lin*] (manufacturer of strictly mathematical computer software to assist investment brokers need not register under Advisers Act).

investment decisions.[128] Lin insisted that he would have no knowledge of particular stocks in which the buyers of his program might be interested and that he would make no recommendations to buy or sell any stocks that appeared on the program.[129] In considering whether Lin provided specific investment advice, the SEC noted that only very general reports and analyses do not constitute securities advice under the Advisers Act.[130] Because Lin provided only general, readily-available securities data, the SEC concluded that Lin did not provide investment advice that subjected him to the Advisers Act's registration requirements.[131] The SEC's requirements of specific and frequent investment advice, therefore, will exclude few persons from the business of providing advice on securities within the meaning of the Advisers Act.[132]

Although the SEC in Release 1092 purports to clarify the business element of the definition of an investment adviser, the Release provides little additional guidance for practitioners attempting to determine whether

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128. *Id.* In *Wallace E. Lin* Lin explained that his program consisted of a computer diskette that contained data on approximately 1800 stocks listed on the New York and American Stock Exchanges. *Id.*

129. *Id.* In *Wallace E. Lin* Lin noted that he attaches a disclaimer to each diskette stating that the seller does not purport to recommend any security included in the program and that the seller disclaims liability for any damages that buyers incur by relying on information in the program. *Id.*

130. *Id.* According to the SEC a person may publish information on securities without registering under the Advisers Act if anyone can easily obtain the information, the issuer did not carefully select the categories of information included in the report, and the issuer did not organize the information in a manner that suggests the purchase or sale of a particular security. *Id.*

131. *Id.* The SEC contrasted the facts of *Wallace E. Lin* with another set of facts involving a software manufacturer that produced a program similar to the program that Lin produced on which the SEC based a refusal to issue a no-action position. *See* Computer Language Research, Inc., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,185, at 76,753 (Dec 26, 1985) [hereinafter *Computer Language*] (refusing no-action position to manufacturer of computer software for financial planners). In *Computer Language* the manufacturer of a computer software package (CLR) asked the SEC to conclude that the manufacturer was not engaging in the business of providing securities advice. *Id.* The software that CLR manufactured processed personal financial and investment data that financial planners provided and produced a financial plan to assist the planner in advising the client. *Id.* In addition, CLR contemplated an arrangment with another manufacturer to link CLR's package to a service that would allow subscribers to enhance the general financial plans that CLR's package produced. *Id.* at 76,754-755. The enhanced plans would suggest specific categories of investments to implement the general recommendations that CLR's package provided. *Id.* The SEC suggested that CLR was in the business of providing securities advice. *Id.* at 76,757. The SEC explained that unlike the manufacturer in *Lin*, CLR offered software that produced personalized financial plans and contemplated offering an enhanced service that would provide recommendations on specific categories of securities. *Id.* at 76,758; *Wallace E. Lin, supra* note 125 (program generated only general statistical report on securities). Because CLR offered personalized, potentially specific advice concerning securities, the SEC declined issue a no-action position with respect to CLR's activities. *Computer Language, supra.*

132. *See supra* notes 121-132 and accompanying text (discussing large classes of persons that provide specific investment advice).

to register under the Advisers Act.[133] Except for the section covering the business test, the language of Release 1092 is nearly identical to the language of the release that Release 1092 supercedes.[134] The SEC even drew the requirements that satisfy the business test directly from the Advisers Act and from the previous release on the Advisers Act.[135] The SEC failed, however, to include substantially clearer language or references to the no-action letters that the SEC has written since the previous release on the issue of whether particular persons should register as investment advisers.[136] Nevertheless, additional references to no-action letters may not have clarified thoroughly the definition of an investment adviser because in many of the relevant no-action letters, the SEC merely recites the statutory definition of an investment adviser and instructs the inquiring party to apply the definition to his particular activities.[137] Because Release 1092 only slightly modifies the earlier SEC release on the definition of an investment adviser, persons who misunderstood the definition before Release 1092 may find little additional guidance in Release 1092.[138]

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133. *See supra* note 85 and accompanying text (noting that in Release 1092 SEC followed prior release in discussing first and third prongs of investment adviser test and modified only second prong).

134. *See supra* notes 85-132 and accompanying text (discussing SEC test to determine whether person is in business of providing securities advice); *Rel. No. 770*, *supra* note 85 (explaining first and third prongs of investment adviser test in language identical to Release 1092).

135. *See supra* notes 93-94 and accompanying text (noting that term "holds himself out" appears twice in text of Advisers Act); *supra* note 100 and accompanying text (noting that separate compensation criteria appeared in business test in prior release on scope of Advisers Act); *supra* notes 117-132 and accompanying text (contrasting securities advice as first prong of investment adviser test with specific investment advice as element of business test).

136. *See supra* notes 133-135 and accompanying text (noting that SEC drew language in Release 1092 from prior release and from text of Advisers Act); *supra* note 7 and accompanying text (noting that SEC has interpreted scope of Advisers Act through no-action letters and releases).

137. *See* Alan P. Woodruff, SEC No-Action Letter, Aug. 20, 1987 (LEXIS, Fedsec Library, Noact File) (instructing business and estate planning firm to apply section 203(b)(3) exception to Advisers Act to firm's activities); David R. Markley, SEC No-Action Letter, Feb. 6, 1985 (LEXIS, Fedsec Library, Noact File) (advising accountant to consider section 202(a)(11)(B) exception to definition of investment adviser).

138. *See* American Society of CLU and ChFC, SEC No-Action Letter, Jan. 29, 1988 (LEXIS, Fedsec Library, Noact File) [hereinafter *CLU*] (questioning whether Release 1092 included additional lawyers and accountants within definition of investment adviser). In *CLU* the vice president and general counsel for a national organization of insurance and financial service professionals (CLU) inquired about the internal consistency of Release 1092. *CLU*, *supra*. While observing that many of the provisions in Release 1092 did not represent new SEC positions, CLU questioned the SEC's interpretation in Release 1092 of the section 202(a)(11)(B) exception to the definition of an investment adviser. *Id*; *see* 15 U.S.C. § 80b-2(a)(11)(B) (1982) (excluding from definition of investment adviser any lawyer, accountant, engineer, or teacher whose performance of investment advisory services is solely incidental to conduct of their principal occupation). CLU noted the SEC's statement in Release 1092 that the section 202(a)(11)(B) exception does not exclude lawyers and accountants that hold themselves out as financial planners. *CLU*, *supra*. CLU argued that a person that holds himself

To clarify further the definition of an investment adviser in Release 1092 the SEC might have provided, in one document, explicit definitions of terms that the SEC uses in the three-pronged investment adviser test and in the business test and extensive citations to SEC materials that illustrate those terms in practice.[139] Release 1092 plainly indicates, however, that the SEC intends to construe broadly the statutory definition of an investment adviser.[140] By construing the statutory definition broadly, the SEC advances the Congressional policy of protecting investors by including a large group of persons within the Advisers Act's registration requirements.[141] Many financial planners, however, hope to avoid the restrictions and registration requirements that accompany status as an investment adviser by excluding themselves from the definition of an investment adviser.[142] When deciding whether to register under the Advisers Act, financial planners might avoid confusion by recognizing the SEC's broad definition of an investment adviser.[143] Unlike the SEC's prior release on the scope of the Advisers Act, Release 1092 phrases the criteria that satisfy the business test as three active requirements rather than three subjective characterizations of the financial planner's business.[144] Any person who, in the most liberal sense, satisfies the first and third prongs of the investment adviser test and engages in any one of the criteria that satisfies the business test will receive no assistance

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out as a financial planner need not register under the Advisers Act unless the person first satisfies the three-pronged investment adviser test. *Id.* CLU suggested that Release 1092 indicates that the SEC might require professionals that failed to satisfy the three-pronged investment adviser test to register under the Advisers Act. *Id.*

The SEC responded that CLU erroneously interpreted Release 1092. *Id.* The SEC assured CLU that no investment adviser that fails to satisfy all three prongs of the investment adviser test needs to register under the Advisers Act. *Id.* According to the SEC a person need only consider the exceptions to the definition of an investment adviser in section 202(a)(11)(A)-(E) if the person first qualifies as an investment adviser under the general definition. *Id.* The SEC insisted, therefore, that Release 1092 does not include additional accountants, lawyers, or other professionals within the Advisers Act's registration requirements. *Id.*

139. *See supra* notes 133-138 and accompanying text (discussing lack of clearer explanations in Release 1092 of terms that SEC uses to determine whether person functions as investment adviser).

140. *See supra* notes 6, 34-38 (noting SEC's broad interpretation of definition of investment adviser).

141. *See supra* notes 2, 4, 9-17 and accompanying text (discussing Congress's intention to protect investors through Advisers Act's registration requirements).

142. *See Linda Arnold*, *supra* note 61 (requesting SEC advice on how to limit proposed advisory activities to avoid Advisers Act's registration requirements); Richard K. May, SEC No-Action Letter, Dec. 11, 1979 (LEXIS, Fedsec Library, Noact File) (advising SEC that applicant wished to minimize start-up costs and continuous filing requirements by avoiding Advisers Act's registration requirements).

143. *See supra* note 6 and accompanying text (encouraging careful consideration of SEC's inclusive definition of investment adviser); *Estate Planners*, *supra* note 6, at 45 (same).

144. *See supra* notes 85-132 (discussing criteria that satisfy business test under Advisers Act); Kelvin, *Are Financial Planners Really Underregulated? A Comprehensive Study Including Recent Legal, Regulatory, and Industry Developments*, 49 J. AM. SOC. C.L.U. 38, 39 (1986) (noting that business test under SEC release that preceded Release 1092 focused on subjective public perception of financial planner's activities).

from the SEC in avoiding the Advisers Act's registration requirements.[145]

In Release 1092 the SEC attempts to clarify the Advisers Act's definition of an investment adviser.[146] The greatest departure from earlier SEC releases in Release 1092 is the SEC's explanation of the criteria that the SEC uses to determine whether a person is in the business of providing securities advice.[147] As the investment industry becomes more complex, the SEC's broad interpretation of the definition of an investment adviser will necessarily encompass an ever-growing number of persons.[148] Accordingly, the SEC continually will need to revise the terms of the Advisers Act so that persons will be able to decide without an individual SEC explanation whether the Advisers Act applies to their business activities.[149]

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145. *See supra* notes 53-57, 85-91 and accompanying text (discussing criteria that SEC considers in determining whether person must register under Advisers Act).

146. *See supra* notes 37-38 and accompanying text (discussing SEC's purpose in issuing Release 1092).

147. *See supra* notes 85-132 (discussing factors that determine whether person is in business of providing advice on securities under Advisers Act).

148. *See supra* notes 39-44 and accompanying text (discussing variety of services that financial planners may offer).

149. *See supra* notes 53-57 (discussing factors SEC presently considers to determine whether person functions as investment adviser).