

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of § 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408-0420.

NRC Section Chief: Allen G. Howe.

Dated in Rockville, Maryland, this 12th day of March, 2004.

For the U.S. Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 04-6081 Filed 3-17-04; 8:45 am]

BILLING CODE 7590-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA-2222/803-169]

Excelsior Venture Partners III, LLC, et al.; Notice of Application

March 12, 2004.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Advisers Act of 1940 ("Advisers Act").

APPLICANTS: Excelsior Venture Partners III, LLC ("Excelsior"), U.S. Trust Company, N.A., on behalf of its separately identified division, U.S. Trust Company, N.A. Asset Management Division (the "Investment Adviser") and United States Trust Company of New York, on behalf of its separately identified division, U.S. Trust-New York Fund Asset Management Division (the "Investment Sub-Adviser," and together with Excelsior and the Investment Adviser, each an "Applicant," and collectively, the "Applicants").

RELEVANT ADVISERS ACT SECTIONS: Exemption requested under section 206A from section 205(a)(1).

SUMMARY OF APPLICATION: Applicants seek an order permitting Excelsior to make in-kind distributions of its portfolio securities to members of Excelsior and, in connection with these distributions, deem gains or losses on the distributed securities to be realized, for purposes of calculating the Investment Adviser's and Investment Sub-Adviser's performance compensation.

FILING DATES: The application was filed on April 26, 2002, and amended on July 8, 2002, May 6, 2003, and November 26, 2003.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving the Applicants with copies of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m., on April 5, 2004, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, Excelsior Venture Investors III, LLC, United States Trust Company of New York, and U.S. Trust Company N.A., 114 West 47th Street, New York, New York 10036.

FOR FURTHER INFORMATION CONTACT: Daniel S. Kahl, Senior Counsel, or Jamey G. Basham, Special Counsel, at (202) 942-0719 (Division of Investment Management, Office of Investment Adviser Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Excelsior is a limited liability company organized under the laws of Delaware and is a business development company as defined in Section 202(a)(22) of the Advisers Act ("BDC"). Excelsior has an effective registration statement on Form N-2 on file with the SEC. The investment objective of Excelsior is to seek long-term capital appreciation by primarily investing in private domestic companies in which the equity is closely held by company founders, management or a limited number of institutional investors. Excelsior also intends to invest, to a lesser extent, in domestic and international venture capital, buyout and other private equity funds managed by third parties, negotiated private investments in public companies and foreign companies in which the equity is closely held by company founders, management or a limited number of institutional investors. The foregoing

investments are referred to collectively herein as "Direct Investments."

2. U.S. Trust Company, N.A. Asset Management Division is a separately identified division of U.S. Trust Company, N.A., a national bank organized under the laws of the United States. U.S. Trust Company, N.A. Asset Management Division serves as Excelsior's investment adviser pursuant to an investment advisory agreement with Excelsior. U.S. Trust—New York Fund Asset Management Division is a separately identified division of United States Trust Company of New York, a state chartered bank and trust company. U.S. Trust—New York Fund Asset Management Division serves as the investment sub-adviser to Excelsior pursuant to an investment sub-advisory agreement among the Investment Sub-Adviser, the Investment Adviser and Excelsior. U.S. Trust Company, N.A. and United States Trust Company of New York are wholly-owned subsidiaries of U.S. Trust Corporation, a registered bank holding company. U.S. Trust Corporation and its subsidiaries are referred to collectively herein as "U.S. Trust."¹ Under the supervision of Excelsior's board of managers (the "Board of Managers"), the Investment Adviser and Investment Sub-Advisers are responsible for finding, evaluating, structuring and monitoring Excelsior's investments and for providing or arranging for management and administrative services for Excelsior. The Investment Adviser and the Investment Sub-Adviser are each registered as an investment adviser under the Advisers Act.

3. Pursuant to Excelsior's Limited Liability Company Operating Agreement (the "Operating Agreement"), the business and affairs of Excelsior are managed under the direction of its Board of Managers. The Board of Managers consists of four persons and, as required by Section 56(a) of the Investment Company Act of 1940, three of the managers are not "interested persons" of Excelsior within the meaning of Section 2(a)(19) of such Act.

4. Excelsior's members consist of individual and institutional investors and one registered investment company which functions as a feeder fund, Excelsior Venture Investors III, LLC (the "Feeder Fund"). Investors with accounts established at U.S. Trust hold approximately 92% of the units of membership interest in Excelsior and approximately 97% of the units in the Feeder Fund. Most other members of

¹ The Investment Adviser and Investment Sub-Adviser, as separately identified divisions, are part of the U.S. Trust Corporation subsidiaries.

Excelsior and the Feeder Fund are investors with accounts at Charles Schwab and Co., Inc., a registered broker-dealer and an affiliate of U.S. Trust Corporation. Each member of Excelsior other than the Feeder Fund met certain requirements, including that such investor's net assets were valued at \$1,000,000 or more, and that the amount subscribed for did not exceed 10% of such investor's net assets. The Feeder Fund holds approximately 63.48% of the net assets of Excelsior. Each member of the Feeder Fund met certain requirements, including that such investor's net assets were valued at \$500,000 or more, and that the amount subscribed for did not exceed 10% of such investor's net assets.

5. The Operating Agreement provides that items of income, gain, loss, deduction and expense of Excelsior will be determined and allocated as of the end of each tax year (typically December 31) to reflect the economic interests of its members and the Investment Adviser. Capital gains are allocated first to the Investment Adviser until the cumulative amount of all gains allocated to the Investment Adviser from the commencement of operations equals the Incentive Carried Interest calculated through the end of the period for which the allocation is being made.² The Investment Adviser will distribute a portion of the Incentive Carried Interest to the Investment Sub-Adviser. All remaining items of income, gain, loss, deduction and expense are allocated to Excelsior members pro rata in accordance with their capital investments.

6. The Operating Agreement provides for the distribution of all cash and other property, including an in-kind distribution of securities, received by Excelsior that the Board of Managers does not expect to use in the operation of Excelsior's business. The Investment Adviser generally will be entitled to a distribution equal to the Incentive Carried Interest. Excelsior's members

generally will be entitled to all amounts remaining for distribution pro rata in accordance with their capital investments.

7. The Operating Agreement provides that (i) Any property that is distributed in kind to one or more members shall be deemed to have been sold for cash equal to its fair market value, (ii) the unrealized gain or loss inherent in such property shall be treated as recognized gain or loss for purposes of determining profits and losses, (iii) such gain or loss shall be allocated pursuant to the Operating Agreement, and (iv) such in-kind distribution shall be made after giving effect to such allocation. To date, however, no in-kind distributions have been made by Excelsior.

8. Excelsior's Board of Managers will declare an in-kind distribution when it determines that such distribution is in the best interests of Excelsior and its members. Each member will be allocated securities distributed in kind in proportion to the member's ownership interest in Excelsior. Cash will be distributed in lieu of fractional share interests.

9. Securities distributed in kind by Excelsior in conjunction with this Application will be listed on a national securities exchange or on the NASDAQ Stock Market and will not be subject to legal or contractual restrictions on their resale. These securities will be valued at the average of the closing bid and ask price, or in the case of exchange traded securities the closing price, of the five days immediately preceding the distribution. Market liquidity will be an important factor in declaring distributions and Excelsior will not distribute securities at any one time in an amount that is more than 5% of the outstanding shares of an issuer. In those relatively infrequent situations when this restriction does not permit all of Excelsior's holdings of an issuer to be distributed at one time, Applicants will closely monitor the market prior to any subsequent distribution to assure that the prior distribution is no longer significantly impacting the price of the securities. Excelsior's Board of Managers will, in acting upon each proposed distribution, consider whether a distribution of cash proceeds from a sale of securities would be of greater benefit to its members, including the Feeder Fund, than a distribution of the securities in more than one distribution, as described above.

10. At the time Excelsior's Board of Managers declares an in-kind distribution, the Feeder Fund's Board of Managers will simultaneously declare an in-kind distribution having the same record date and distribution date to its

members. From the securities allocated to the Feeder Fund, Feeder Fund members will be entitled to receive shares, and cash-in-lieu of fractional share interests, in proportion to their interests in the Feeder Fund. The Feeder Fund will notify Excelsior of the number of shares to be distributed and the amount of cash-in-lieu payments to be made to each Feeder Fund member and will instruct Excelsior to make a distribution directly to Feeder Fund members as of the distribution date. The Applicants will provide notice to Excelsior and Feeder Fund members of the in-kind distribution and will facilitate obtaining members' brokerage instructions or establishing a brokerage account for the receipt of the securities distributed in kind. Any cash-in-lieu payment for fractional securities will be made within five business days of the distribution date to all Excelsior members and Feeder Fund members.

Applicants' Legal Analysis

1. Section 205(a)(1) of the Advisers Act prohibits any investment adviser, unless exempt from registration pursuant to section 203(b), from entering into a contract that provides for compensation based upon "a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client," commonly referred to as a "performance fee."

2. Section 205(b)(3) of the Advisers Act excepts from the performance fee prohibition of section 205(a)(1) a contract between an investment adviser and a BDC that provides for compensation not in excess of "20 per centum of the realized capital gains upon the funds of the [BDC] over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation." Applicants assert that section 205(b)(3) recognizes the appropriateness of a performance fee as compensation for advisers' activities in light of the special nature of BDCs.

3. Section 205(b)(3) of the Advisers Act, however, permits a performance fee only with respect to realized capital gains and does not contemplate the procedures set forth in the Operating Agreement whereby unrealized gains or losses will be deemed to be realized under certain conditions for purposes of calculating the Incentive Carried Interest. Excelsior's performance fee is prohibited by section 205(a)(1) and does not fall within the exception set out in section 205(b)(3).

4. Section 206A of the Advisers Act authorizes the SEC by order upon application to conditionally or unconditionally exempt any person or

² The "Incentive Carried Interest" is an amount equal to 20% of the excess, if any, of the cumulative amount of all capital gains realized by Excelsior on Direct Investments from the commencement of operations through the end of the period for which the allocation is being made over the sum of (x) the cumulative amount of all capital losses realized by Excelsior on all investments of any type from the commencement of operations through the end of such period; (y) the excess, if any, of the aggregate amount of unrealized capital depreciation on all investments of any type over the aggregate amount of all unrealized capital appreciation on all investments of any type determined as of the close of such period; and (z) the excess, if any, of the cumulative amount of all expenses of any type incurred by Excelsior over the cumulative amount of all income of any type earned by Excelsior, in each case from the commencement of operations through the end of such period.

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

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

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

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

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

Conditions

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

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

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

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

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

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

Margaret H. McFarland,
Deputy Secretary.

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

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

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

STATUS: Closed Meeting.

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

ANNOUNCEMENT OF ADDITIONAL MEETING: Additional Meeting.

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

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

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

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

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

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

Dated: March 15, 2004.

Jonathan G. Katz,
Secretary.

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

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

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

Regulation NMS

AGENCY: Securities and Exchange Commission.