

done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Related Information

(1) For information about EASA AD 2021-0049, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; Internet www.easa.europa.eu. You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>. You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. This material may be found in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2021-0368.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3223; email sanjay.ralhan@faa.gov.

Issued on May 11, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-5733; File No. S7-05-21]

Performance-Based Investment Advisory Fees

AGENCY: Securities and Exchange Commission.

ACTION: Intent to issue order.

SUMMARY: The Securities and Exchange Commission (“Commission”) intends to issue an order that would adjust for inflation dollar amount thresholds in the rule under the Investment Advisers Act of 1940 that permits investment advisers to charge performance-based fees to “qualified clients.” Under that rule, an investment adviser may charge performance-based fees if a “qualified client” has a certain minimum net worth or minimum dollar amount of assets under the management of the adviser. The Commission’s order would increase, to reflect inflation, the minimum net worth that a “qualified client” must have under the rule. The order would also increase, to reflect inflation, the minimum dollar amount of assets under management.

Hearing or Notification of Hearing: An order adjusting the dollar amount tests

specified in the definition of “qualified client” will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary. Hearing requests should be received by the Commission’s Office of the Secretary by 5:30 p.m. on June 4, 2021. Hearing requests should state the nature of the writer’s interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission’s Secretary. Any such communication should be emailed to the Commission’s Secretary at Secretarys-Office@sec.gov.

FOR FURTHER INFORMATION CONTACT: Matthew Cook, Senior Counsel, at (202) 551-6787 or IRules@sec.gov, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission intends to issue an order under the Investment Advisers Act of 1940 (“Advisers Act” or “Act”).¹

I. Background

Section 205(a)(1) of the Advisers Act generally prohibits an investment adviser from entering into, extending, renewing, or performing any investment advisory contract that provides for compensation to the adviser based on a share of capital gains on, or capital appreciation of, the funds of a client.² Congress prohibited these compensation arrangements (also known as performance compensation or performance fees) in 1940 to protect advisory clients from arrangements that Congress believed might encourage advisers to take undue risks with client funds to increase advisory fees.³ In 1970, Congress provided an exception from the prohibition for advisory contracts relating to the investment of assets in excess of \$1,000,000,⁴ if an

¹ 15 U.S.C. 80b. Unless otherwise noted, all references to statutory sections are to the Advisers Act, and all references to rules under the Advisers Act, including rule 205-3, are to Title 17, Part 275 of the Code of Federal Regulations [17 CFR 275].

² 15 U.S.C. 80b-5(a)(1).

³ H.R. Rep. No. 2639, 76th Cong., 3d Sess. 29 (1940). Performance fees were characterized as “heads I win, tails you lose” arrangements in which the adviser had everything to gain if successful and little, if anything, to lose if not. S. Rep. No. 1775, 76th Cong., 3d Sess. 22 (1940).

⁴ 15 U.S.C. 80b-5(b)(2). Trusts, governmental plans, collective trust funds, and separate accounts referred to in section 3(c)(11) of the Investment Company Act of 1940 (“Investment Company Act”) [15 U.S.C. 80a-3(c)(11)] are not eligible for this exception from the performance fee prohibition under section 205(b)(2)(B) of the Advisers Act.

appropriate “fulcrum fee” is used.⁵ Congress subsequently authorized the Commission to exempt, by rule or order, any advisory contract from the performance fee prohibition if the contract is with any person that the Commission determines does not need the protections of that prohibition.⁶

The Commission adopted rule 205-3 in 1985 to exempt an investment adviser from the prohibition against charging a client performance fees in certain circumstances.⁷ The rule, when adopted, allowed an adviser to charge performance fees if the client had at least \$500,000 under management with the adviser immediately after entering into the advisory contract (“assets-under-management test”) or if the adviser reasonably believed, immediately prior to entering into the advisory contract, that the client had a net worth of more than \$1,000,000 at the time the contract was entered into (“net worth test”). The Commission stated that these standards would limit the availability of the exemption to clients who are financially experienced and able to bear the risks of performance fee arrangements.⁸ In 1998, the Commission amended rule 205-3 to, among other

⁵ 15 U.S.C. 80b-5(b). A fulcrum fee generally involves averaging the adviser’s fee over a specified period and increasing or decreasing the fee proportionately with the investment performance of the company or fund in relation to the investment record of an appropriate index of securities prices. See rule 205-2 under the Advisers Act; Adoption of Rule 205-2 under the Investment Advisers Act of 1940, As Amended, Definition of “Specified Period” Over Which Asset Value of Company or Fund Under Management is Averaged, Advisers Act Release No. 347 (Nov. 10, 1972) [37 FR 24895 (Nov. 23, 1972)]. In 1980, Congress added another exception to the prohibition against charging performance fees, for contracts involving business development companies under certain conditions. See section 205(b)(3) of the Advisers Act.

⁶ Section 205(e) of the Advisers Act. Section 205(e) of the Advisers Act authorizes the Commission to exempt conditionally or unconditionally from the performance fee prohibition advisory contracts with persons that the Commission determines do not need its protections. Section 205(e) provides that the Commission may determine that persons do not need the protections of section 205(a)(1) on the basis of such factors as “financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with [section 205].”

⁷ Exemption To Allow Registered Investment Advisers To Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client’s Account, Advisers Act Release No. 996 (Nov. 14, 1985) [50 FR 48556 (Nov. 26, 1985)] (“1985 Adopting Release”). The exemption applies to the entrance into, performance, renewal, and extension of advisory contracts. See rule 205-3(a).

⁸ See 1985 Adopting Release, *supra* footnote 7, at Sections I.C and II.B. The rule also imposed other conditions, including specific disclosure requirements and restrictions on calculation of performance fees. See *id.* at Sections II.C-E.

things, change the dollar amounts of the assets-under-management test and net worth test to adjust for the effects of inflation since 1985.⁹ The Commission revised the former from \$500,000 to \$750,000, and the latter from \$1,000,000 to \$1,500,000.¹⁰

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹¹ amended section 205(e) of the Advisers Act to provide that, by July 21, 2011 and every five years thereafter, the Commission shall, by order, adjust for the effects of inflation the dollar amount thresholds included in rules issued under section 205(e), rounded to the nearest multiple of \$100,000.¹² In May 2011, the Commission published a release (the “May 2011 Release”) that included a notice of intent to issue an order revising the dollar amount thresholds of the assets-under-management test (from \$750,000 to \$1,000,000) and the net worth test (from \$1,500,000 to \$2,000,000).¹³

The May 2011 Release also proposed amendments to rule 205–3 providing, among other things, that the Commission would issue an order every five years in the future adjusting the rule’s dollar amount thresholds for inflation.¹⁴ On February 15, 2012, the Commission adopted these proposed amendments, which amended rule 205–3 to carry out the inflation adjustment of the rule’s dollar amount thresholds.¹⁵

⁹ See Exemption To Allow Investment Advisers To Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client’s Account, Advisers Act Release No. 1731 (July 15, 1998) [63 FR 39022 (July 21, 1998)].

¹⁰ See *id.* at Section II.B.1.

¹¹ Public Law 111–203, 124 Stat. 1376 (2010).

¹² See section 418 of the Dodd-Frank Act (requiring the Commission to issue an order every five years revising dollar amount tests in a rule that exempts a person or transaction from section 205(a)(1) of the Advisers Act if the dollar amount test was a factor in the Commission’s determination that the persons do not need the protections of that section).

¹³ See Investment Adviser Performance Compensation, Advisers Act Release No. 3198 (May 10, 2011) [76 FR 27959 (May 13, 2011)]. The Commission issued an order to revise the dollar amount thresholds of the assets-under-management and net worth tests, as described above, on July 12, 2011. See Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205–3 under the Investment Advisers Act of 1940, Advisers Act Release No. 3236 (July 12, 2011) [76 FR 41838 (July 15, 2011)] (“2011 Order”). The 2011 Order was effective as of September 19, 2011. *Id.* The 2011 Order applied to contractual relationships entered into on or after the effective date and did not apply retroactively to contractual relationships previously in existence.

¹⁴ See May 2011 Release, *supra* footnote 13.

¹⁵ See Investment Adviser Performance Compensation, Advisers Act Release No. 3372 (Feb. 15, 2012) [77 FR 10358 (Feb. 22, 2012)] (amending rule 205–3 by, in part, revising the dollar amount thresholds to codify the 2011 Order); see also rule 205–3(d)(1)(i)–(ii).

Rule 205–3, as amended, states that the Commission will issue an order on or about May 1, 2016, and approximately every five years thereafter, for inflation the dollar amount thresholds of the rule’s assets-under-management and net worth tests,¹⁶ and specifies the price index on which future inflation adjustments will be based—the Personal Consumption Expenditures Chain-Type Price Index (“PCE Index”), which is published by the United States Department of Commerce,¹⁷ and is used in other provisions of the federal securities laws.¹⁸

On June 14, 2016, the Commission issued an order adjusting for inflation, as appropriate, the dollar amount thresholds of the assets-under-management test and the net worth test.¹⁹ As of August 15, 2016, the dollar amount of the assets-under-management test is \$1,000,000, and the dollar amount of the net worth test is \$2,100,000.²⁰

II. Discussion

A. Order Adjusting Dollar Amount Tests

Pursuant to section 418 of the Dodd-Frank Act and rule 205–3(e), today we

¹⁶ See rule 205–3(e).

¹⁷ See rule 205–3(e)(1). The PCE Index is an indicator of inflation in the personal sector of the U.S. economy. See Performance-Based Investment Advisory Fees, Advisers Act Release No. 4388 (May 18, 2016) [81 FR 32686 (May 24, 2016)], at text accompanying n.20.

¹⁸ See Definitions of Terms and Exemptions Relating to the “Broker” Exceptions for Banks, Securities Exchange Act Release No. 56501 (Sept. 24, 2007) [72 FR 56514 (Oct. 3, 2007)] (adopting periodic inflation adjustments to the fixed-dollar thresholds for both “institutional customers” and “high net worth customers” under Rule 701 of Regulation R); see also Amendments to Form ADV, Advisers Act Release No. 3060 (July 28, 2010) [75 FR 49234 (Aug. 12, 2010)] (increasing for inflation the threshold amount for prepayment of advisory fees that triggers an adviser’s duty to provide clients with an audited balance sheet and the dollar threshold triggering the exception to the delivery of brochures to advisory clients receiving only impersonal advice). The Dodd-Frank Act also requires the use of the PCE Index to calculate inflation adjustments for the cash limit protection of each investor under the Securities Investor Protection Act of 1970. See section 929H(a) of the Dodd-Frank Act; see also Securities Investor Protection Corporation, Securities Investor Protection Act of 1970 Release No. 183 (Jan. 27, 2021) [86 FR 7900 (Feb. 2, 2021)].

¹⁹ Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205–3 under the Investment Advisers Act of 1940, Advisers Act Release No. 4421 (June 14, 2016) [81 FR 39985 (June 20, 2016)] (“2016 Order”). The 2016 Order was effective as of August 15, 2016. *Id.*

²⁰ *Id.* As a result of the 2016 Order, the dollar amount threshold of the net worth test was increased to \$2,100,000, but the dollar amount threshold of the assets-under-management test remained at \$1,000,000 because the amount of the Commission’s inflation adjustment calculation was smaller than the rounding amount specified under rule 205–3. *Id.*, at nn.8–9 and accompanying text.

are providing notice²¹ that the Commission intends to issue an order making the required inflation adjustment to the assets-under-management test and the net worth test in the definition of “qualified client” in rule 205–3. As discussed above, rule 205–3(e) requires that we adjust the dollar amount thresholds of the rule by order on or about May 1, 2016 and every five years thereafter. We intend to issue an order that would increase the dollar amount of the assets-under-management test from \$1,000,000 to \$1,100,000, and would increase the dollar amount of the net worth test from \$2,100,000 to \$2,200,000. As required under rule 205–3, both dollar amounts would take into account the effects of inflation by reference to historic and current levels of the PCE Index. Because the amount of the Commission’s inflation adjustment calculations are larger than the rounding amount specified under rule 205–3, the dollar amounts of both tests would be adjusted as a result of the Commission’s inflation adjustment calculation effected pursuant to the rule.²²

B. Effective Date

We anticipate that, if we issue the order described above, the effective date will be 60 days following the order

²¹ See section 211(c) of the Advisers Act (requiring the Commission to provide appropriate notice of and opportunity for hearing for orders issued under the Advisers Act).

²² Specifically, rule 205–3(e) provides that the adjusted dollar amounts shall be computed by: (1) Dividing the year-end value of the PCE Index (or any successor index thereto) for the calendar year preceding the calendar year in which the order is being issued (in this case, 2020), by the year-end value of the PCE Index (or successor) for the calendar year 1997 (such quotient, the “Adjustment Percentage”); (2) for the assets-under-management test, multiplying \$750,000 by the Adjustment Percentage and rounding the product to the nearest multiple of \$100,000; and (3) for the net worth test, multiplying \$1,500,000 by the Adjustment Percentage and rounding the product to the nearest multiple of \$100,000. As of April 29, 2021, the end-of-year 2020 PCE Index was 111.146, and the end-of-year 1997 PCE Index was 74.623. Assets-under-management test calculation to adjust for the effects of inflation: $(111.146/74.623) \times \$750,000 = \$1,117,075.16$; $\$1,117,075.16$ rounded to the nearest multiple of \$100,000 = \$1,100,000. Net worth test calculation to adjust for the effects of inflation: $(111.146/74.623) \times \$1,500,000 = \$2,234,150.33$; $\$2,234,150.33$ rounded to the nearest multiple of \$100,000 = \$2,200,000. The values of the PCE Index are available from the Bureau of Economic Analysis, a bureau of the United States Department of Commerce. See <http://www.bea.gov>; see also Bureau of Economic Analysis, Table 2.3.4, “Price Indexes for Personal Consumption Expenditures by Major Type of Product,” available at https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&select_all_years=0&nipa_table_list=64&series=a&first_year=1997&last_year=2020&scale=99&categories=survey&thetable= (last visited Apr. 30, 2021).

date.²³ To the extent that contractual relationships are entered into prior to the order's effective date, the dollar amount test adjustments in the order would not generally apply retroactively to such contractual relationships, subject to the transition rules incorporated in rule 205–3.²⁴

By the Commission.

Dated: May 10, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–10164 Filed 5–14–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2021–0298; FRL–10023–53–Region 7]

Air Plan Approval; Nebraska; Revisions to Title 129 of the Nebraska Administrative Code; General Conformity

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the State Implementation Plan (SIP) submitted by the State of Nebraska on July 16, 2020. This proposed action will amend the SIP to revise title 129 of the Nebraska Administrative Code by removing a portion of the SIP that addresses general conformity. General Conformity ensures that the actions taken by federal agencies do not interfere with a state's plan to attain and maintain national standards for air quality. Since states are no longer required to include general conformity requirements in SIPs, these proposed revisions remove unnecessary language and do not substantively change any existing statutory or

regulatory requirement. The proposed revisions do not impact the stringency of the SIP or air quality nor do they impact the State's ability to attain or maintain the National Ambient Air Quality Standards. The EPA's proposed approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

DATES: Comments must be received on or before June 16, 2021.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2021–0298 to <https://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Written Comments” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Allie Donohue, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7986; email address: donohue.allie@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document “we,” “us,” and “our” refer to the EPA.

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I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2021–0298, at <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary

submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. What is being addressed in this document?

The EPA is proposing to amend Nebraska's SIP to include revisions to title 129 of the Nebraska Administrative Code. The EPA is proposing to approve revisions to the Nebraska SIP submitted by the State of Nebraska on July 16, 2020. Specifically, the EPA is proposing to amend the Nebraska SIP by removing a portion of the SIP as follows: Title 129, Chapter 40. General Conformity. EPA is proposing approval of these revisions as they remove unnecessary language and do not substantively change any existing statutory or regulatory requirement.

The EPA approved this rule into the Nebraska SIP in 1972. In August 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) which eliminated the requirement for states to adopt and submit General Conformity SIPs. Section 6011 of SAFETEA–LU revised the conformity requirements in section 176(c) of the CAA. Specifically, section 6011(f) revised section 176(c)(4)(A) of the CAA by deleting the requirement for the states to adopt and submit General Conformity SIPs.

In 2010, EPA revised the General Conformity regulations to make the adoption and submittal of the General Conformity SIP optional for state and eligible federally-recognized tribal governments. See 75 FR 17253 (April 5, 2010). Since there is no longer a requirement for SIPs to include general conformity requirements, EPA finds that the proposed revisions will not impact the stringency of the SIP or air quality.

States are no longer required to have their own general conformity rules. If a state does not have a conformity SIP, then federal agencies will conduct an evaluation under the requirements of 40 CFR 93.150–93.165. The SIP revision being proposed for approval by this action removes unnecessary language from the SIP and does not have an adverse effect on air quality in Nebraska.

III. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP

²³ When the Commission issued the 2011 and 2016 Orders adjusting the dollar amount tests of rule 205–3 as described above, the effective dates of the Orders were approximately 60 days following their issuance. See 2011 Order, *supra* footnote 13, at section III; 2016 Order, *supra* footnote 19, at section III.

²⁴ See rule 205–3(c)(1) (“If a registered investment adviser entered into a contract and satisfied the conditions of this [section] that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this [section]; Provided, however, that if a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), the conditions of this [section] in effect at that time will apply with regard to that person or company.”); see also May 2011 Release, *supra* footnote 13, at section II.B.3.