SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-6955]

Performance-Based Investment Advisory Fees

AGENCY: Securities and Exchange Commission.

ACTION: Notice of intent to issue order.

SUMMARY: The Securities and Exchange Commission (the "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 [**INSERT DATE [25] DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER***], 2026. 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: Daniel Levine, Senior Counsel, at (202) 551-3937, 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] In 1970, Congress provided an exception from the prohibition for advisory contracts relating to the investment of assets in excess of $1,000,000,[3] if an appropriate "fulcrum fee" is used.[4] Congress subsequently authorized the Commission to exempt, by rule or order,

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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 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.

4 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.

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.[5]

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.[6] 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.[7] In 1998, the Commission amended rule 205-3 to, among other things, change the dollar amounts of the assets-under-management

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5 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]."

6 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).

7 *See* 1985 Adopting Release, *supra* footnote 6, 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.

test and net worth test to adjust for the effects of inflation since 1985.[8] The Commission revised the former from $500,000 to $750,000, and the latter from $1,000,000 to $1,500,000.[9]

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[10] 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.[11] 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).[12]

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.[13] On February 15, 2012, the Commission adopted

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8 *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)].

9 *See id*. at Section II.B.1.

10 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

11 *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).

12 *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.

13 *See* May 2011 Release, *supra* footnote 12.

these proposed amendments, which amended rule 205-3 to carry out the inflation adjustment of the rule's dollar amount thresholds.[14] Rule 205-3, as amended in 2012, stated that the Commission would issue an order on or about May 1, 2016, and approximately every five years thereafter, adjusting for inflation the dollar amount thresholds of the rule's assets-under-management and net worth tests,[15] and specified the price index on which future inflation adjustments would be based—the Personal Consumption Expenditures Chain-Type Price Index ("PCE Index"), which is published by the United States Department of Commerce[16] and is used in other provisions of the Federal securities laws.[17]

On June 14, 2016 and June 17, 2021, the Commission issued orders adjusting for inflation, as appropriate, the dollar amount thresholds of the assets-under-management test and the net worth test.[18] In November 2021, the Commission amended rule 205-3 to replace the

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14 *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) through (ii).

15 *See* rule 205-3(e).

16 *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.

17 *See e.g.,* Qualifying Venture Capital Funds Inflation Adjustment, Investment Company Act Release No. 35305 (Aug. 21, 2024) [89 FR 70479 (Aug. 30, 2024)] (adjusting for inflation the dollar threshold used in defining a "qualifying venture capital fund" under the Investment Company Act); 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); 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)].

18 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. Order Approving Adjustment for

specific dollar amount thresholds in the rule's net worth and assets-under-management tests with references to the specific dollar amount thresholds adjusted for inflation in the most recent order issued by the Commission.[19] The 2021 Amendments also updated the specific reference point in paragraph (e) of rule 205-3 from May 1, 2016 to "on or about May 1, 2026, and approximately every five years thereafter" to establish the next expected date for issuance of a Commission order.

As of August 16, 2021, the dollar amount of the assets-under-management test is $1,100,000, and the dollar amount of the net worth test is $2,200,000.[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 are providing notice[21] 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, 2026, and approximately every five years thereafter. We intend to issue an order that would increase the dollar amount of the assets-under-management test from $1,100,000 to $1,400,000 and would increase the dollar

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Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940, Advisers Act Release No. 5756 (June 17, 2021) [86 FR 32993 (June 23, 2021)] ("2021 Order"). The 2021 Order was effective as of August 16, 2021.

19 *See* Performance-Based Investment Advisory Fees, Advisers Act Release No. 5904 (Nov. 4, 2021) [86 FR 62473 (Nov. 10, 2021)] ("2021 Amendments"). The 2021 Amendments define "most recent order" as the most recently issued Commission order in accordance with paragraph (e) of rule 205-3 and as published in the *Federal Register*.

20 *See* 2021 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).

amount of the net worth test from $2,200,000 to $2,700,000. 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 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

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[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, 2025), 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 March 26, 2026, the end-of-year 2025 PCE Index was 128.214, and the end-of-year 1997 PCE Index was 70.710. Assets-under-management test calculation to adjust for the effects of inflation: (128.214/70.710) x $750,000 = $1,359,927.87; $1,359,927.87 rounded to the nearest multiple of $100,000 = $1,400,000. Net worth test calculation to adjust for the effects of inflation: (128.214/70.710) x $1,500,000 = $2,719,855.75; $2,719,855.75 rounded to the nearest multiple of $100,000 = $2,700,000. 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/?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#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbInNlbGVjdF9hbGxfeWVhcnMiLCIwIl0sWyJuaXBhX3RhYmxlX2xpc3QiLCI2NCJdLFsic2VyaWVzIiwiUSJdLFsiZmlyc3RfeWVhciIsIjE5OTUiXSxbImxhc3RfeWVhciIsIjIwMjUiXSxbInNjYWxlIiwiMCJdLFsiY2F0ZWdvcmllcyIsIlN1cnZleSJdLFsidGhldGFibGUiLCIiXV19= (last visited March 26, 2026).

[23] When the Commission issued the 2011, 2016, and 2021 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 12, at section III; 2016 Order, *supra* footnote 18, at section III; 2021 Order, *supra* footnote 18, at section III.

apply retroactively to such contractual relationships, subject to the transition rules incorporated in rule 205-3.[24]

By the Commission.

Dated: March 27, 2026.

Vanessa A. Countryman,

Secretary.

[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 12, at section II.B.3.