

# Proposed Rules

Federal Register

Vol. 86, No. 93

Monday, May 17, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2021-0368; Project Identifier MCAI-2021-00204-T]

RIN 2120-AA64

#### Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS Model A318, A319, A320, and A321 series airplanes. This proposed AD was prompted by reports of low halon concentration in the forward and aft cargo compartments due to air leakage through cargo door seals, and the certification of improved cargo door seals. This proposed AD would require replacing the forward, aft, and bulk cargo compartment door seals with new seals; and installing a placard on the forward, aft, and cargo compartment doors; and for certain airplanes, implementing an operational limitation for certain routes, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by July 1, 2021.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For material that will be incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this IBR material on the EASA website at <https://ad.easa.europa.eu>. You may view this IBR 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. It is also available in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2021-0368.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2021-0368; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

**FOR FURTHER INFORMATION 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](mailto:sanjay.ralhan@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2021-0368; Project Identifier MCAI-2021-00204-T" at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to <https://www.regulations.gov>, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

#### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to 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](mailto:sanjay.ralhan@faa.gov). Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

#### Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021-0049, dated February 18, 2021 (EASA AD 2021-0049) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus SAS Model A318-111, -112, -121, and -122; A319-111, -112, -113, -114, -115, -131, -132, -133, -151N, -153N, and -171N; A320-211, -212, -214, -215, -216, -231, -232, -233, -251N, -252N, -253N, -271N, -272N, and -273N; and A321-111, -112, -131, -211, -212, -213, -231, -232, -251N, -252N,

–253N, –271N, –272N, –251NX, –252NX, –253NX, –271NX, and –272NX airplanes. Model A320–215 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This proposed AD was prompted by reports of low halon concentration in the forward and aft cargo compartments due to air leakage through cargo door seals, and the certification of improved cargo door seals. The FAA is proposing this AD to address low halon concentration, which could affect the fire extinguishing system efficiency in the cargo compartments and possibly result in failure of the system to contain a cargo compartment fire. See the MCAI for additional background information.

#### Relationship Between This Proposed AD and AD 2020–16–01

This NPRM would not supersede AD 2020–16–01, Amendment 39–21185 (85 FR 47013, August 4, 2020) (AD 2020–16–01). Rather, the FAA has determined that a stand-alone AD would be more appropriate to address the changes in the MCAI. This NPRM would require replacing the forward, aft, and bulk cargo compartment door seals with new seals; and installing a placard on the forward, aft, and bulk cargo compartment doors; and for certain airplanes, implementing an operational limitation for certain routes.

Accomplishment of the proposed actions would then terminate all requirements of AD 2020–16–01 for forward and aft cargo door seals having part number (p/n) D5237106020000, D5237106020200, D5237106020400, D5237300120000, or D5237300120200; and bulk cargo door seals having p/n D5237200220000 or D5237200220200 only. AD 2020–16–01 also addresses paragraphs (1) and (2) of EASA AD 2021–0049, and forward and aft cargo door seals p/n D5237106020400S, approved under parts manufacturer approval (PMA) PQ1715CE. This AD does not address p/n D5237106020400S, approved under PMA PQ1715CE. The FAA is considering additional rulemaking to require replacement of p/n D5237106020400S, approved under PMA PQ1715CE.

#### Related Service Information Under 1 CFR Part 51

EASA AD 2021–0049 describes procedures for replacing the forward, aft, and bulk cargo compartment door seals with new seals; and installing a placard on the forward, aft, and bulk cargo compartment door. For certain airplanes, EASA AD 2021–0049 describes procedures for implementing an operational limitation prohibiting flying the airplane over a route having a diversion time of more than 60 minutes. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

#### FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

#### Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2021–0049 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

EASA AD 2021–0049 specifies amending the Aircraft Flight Manual (AFM) and “operating that aeroplane accordingly.” However this AD would not include a requirement for “operating that aeroplane accordingly” as that action is already required by existing FAA operating regulations. FAA regulations require pilots to follow the procedures in the existing AFM including all updates. 14 CFR 91.9 requires that any person operating a civil aircraft must comply with the operating limitations specified in the AFM. Therefore, including a

requirement in this AD to operate the airplane according to the revised AFM would be redundant and unnecessary. Further, compliance with such a requirement in an AD would be impracticable to demonstrate or track on an ongoing basis; therefore, a requirement to operate the airplane in such a manner would be unenforceable.

#### Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2021–0049 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0049 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in the EASA AD. Service information specified in EASA AD 2021–0049 that is required for compliance with EASA AD 2021–0049 will be available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2021–0368 after the FAA final rule is published.

#### Costs of Compliance

The FAA estimates that this proposed AD affects 1,728 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

#### ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 11 work-hours × \$85 per hour = Up to \$935 .....	Up to \$6,760 .....	Up to \$7,695 .....	Up to \$13,296,960.

## Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

## Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

## The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

### PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

**Airbus SAS:** Docket No. FAA–2021–0368; Project Identifier MCAI–2021–00204–T.

#### (a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by July 1, 2021.

#### (b) Affected ADs

This AD affects AD 2020–16–01, Amendment 39–21185 (85 FR 47013, August 4, 2020) (AD 2020–16–01).

#### (c) Applicability

This AD applies to all Airbus SAS airplanes specified in paragraphs (c)(1) through (4) of this AD, certificated in any category.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes.

(3) Model A320–211, –212, –214, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –252N, –253N, –271N, –272N, –251NX, –252NX, –253NX, –271NX, and –272NX airplanes.

#### (d) Subject

Air Transport Association (ATA) of America Code 26, Fire protection; 52, Doors.

#### (e) Reason

This AD was prompted by reports of low halon concentration in the forward and aft cargo compartments due to air leakage through cargo door seals, and the certification of improved cargo door seals. The FAA is issuing this AD to address low halon concentration, which could affect the fire extinguishing system efficiency in the cargo compartments and possibly result in failure of the system to contain a cargo compartment fire.

#### (f) Compliance

Comply with this AD within the compliance times specified, unless already done.

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0049, dated February 18, 2021 (EASA AD 2021–0049).

#### (h) Exceptions to EASA AD 2021–0049

(1) Where EASA AD 2021–0049 refers to its effective date, this AD requires using the effective date of this AD.

(2) The requirements specified in paragraphs (1) and (2) of EASA AD 2021–0049 do not apply to this AD; FAA AD 2020–16–01 addresses those requirements.

(3) Where paragraph (4) of EASA AD 2021–0049 specifies amending the Aircraft Flight Manual (AFM) and "operating that aeroplane accordingly," this AD does not include a

requirement for "operating that aeroplane accordingly" as that action is already required by existing FAA operating regulations.

(4) Paragraph (4) of EASA AD 2021–0049 specifies amending "the Aircraft Flight Manual (AFM) of the aeroplane by inserting a copy of this AD," however, this AD requires amending "the existing AFM and applicable corresponding operational procedures."

(5) The "Remarks" section of EASA AD EASA AD 2021–0049 does not apply to this AD.

(6) The provisions specified in paragraphs (5) and (6) of EASA AD 2021–0049 do not apply to this AD.

#### (i) Terminating Action for AD 2020–16–01

Accomplishing the actions required by this AD for the affected parts defined in EASA AD 2021–0049 terminates all requirements of AD 2020–16–01 for forward and aft cargo door seals having part number (p/n) D5237106020000, D5237106020200, D5237106020400, D5237300120000, or D5237300120200; and bulk cargo door seals having p/n D5237200220000 or D5237200220200 only.

#### (j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: [9-AVS-AIR-730-AMOC@faa.gov](mailto:9-AVS-AIR-730-AMOC@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2021–0049 that contains RC procedures and tests: Except as required by paragraph (j)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be

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](mailto:ADs@easa.europa.eu); Internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>. At 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](mailto:sanjay.ralhan@faa.gov).

Issued on May 11, 2021.

**Lance T. Gant,**

*Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2021-10230 Filed 5-14-21; 8:45 am]

**BILLING CODE 4910-13-P**

## 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](mailto:Secretarys-Office@sec.gov).

#### FOR FURTHER INFORMATION CONTACT:

Matthew Cook, Senior Counsel, at (202) 551-6787 or [IArules@sec.gov](mailto:IArules@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”).<sup>1</sup>

### 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.<sup>2</sup> 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.<sup>3</sup> In 1970, Congress provided an exception from the prohibition for advisory contracts relating to the investment of assets in excess of \$1,000,000,<sup>4</sup> if an

appropriate “fulcrum fee” is used.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> In 1998, the Commission amended rule 205-3 to, among other

<sup>5</sup> 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.

<sup>6</sup> 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].”

<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>1</sup> 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].

<sup>2</sup> 15 U.S.C. 80b-5(a)(1).

<sup>3</sup> 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).

<sup>4</sup> 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.