

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-XXX, OMB Control No. 3235-XXXX]

Submission for OMB Review; Comment Request; Rule 211(h)(2)-1

Upon Written Request, Copies Available

From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (“PRA”), the Securities and Exchange Commission (“Commission”) submitted an information collection request to the Office of Management and Budget (“OMB”) for review and clearance for the collection of information associated with the new Rule 211(h)(2)-1 17 CFR 275.211(h)(2)-1 under the Investment Advisers Act of 1940 that was adopted by the Commission on August 23, 2023.¹ The title for this collection of information is: “Rule 211(h)(2)-1 under the Investment Advisers Act of 1940.”

Final rule 211(h)(2)-1 prohibits all private fund advisers from, directly or indirectly, engaging in the following activities, unless they provide written disclosure to investors and, in some cases, obtain investor consent regarding such activities: charging the private fund for fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority (other than fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the

Investment Advisers Act of 1940 or the rules promulgated thereunder); charging the private fund for any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons; reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders; charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis when more than one private fund or other client advised by the adviser or its related persons have invested in the same portfolio company; and borrowing money, securities, or other private fund assets, or receiving a loan or extension of credit, from a private fund client.

In the Proposing Release, we solicited comment on whether rule 211(h)(2)-1 should include disclosure and/or consent requirements.² In response to comments received, we have decided to adopt such a requirement. Accordingly, the final rule generally will provide either a disclosure-based exception or a disclosure- and consent-based exception for each restricted activity. We believe that investors will be better informed and receive enhanced protection as a result, while still potentially benefiting from these activities when they are carried out in the interests of the fund, if investors are provided with disclosures and, in some cases, consent rights regarding these activities. The collection of information is necessary to provide private fund investors with information about their private fund investments. We believe that many advisers fail to provide disclosure of the

activities covered by the restrictions or, when disclosure is provided, it is often insufficient.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a “collection of information” requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(2)-1 and is mandatory if the adviser engages in the restricted activity. The respondents to these collections of information requirements will be all investment advisers that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 12,234 investment advisers (including both registered and unregistered advisers but excluding advisers managing solely securitized asset funds (“SAFs”)) that provide advice to private funds.³ We estimate that these advisers, on average, each provide advice to 8 private funds (excluding SAFs). We further estimate that these private funds will, on average, each have a total of 63 investors. As a result, an average private fund adviser will have a total of 504 investors across all private funds it advises. Because the information collected pursuant to final rule 211(h)(2)-1 requires disclosures to private fund investors, these disclosures will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates associated with the rule.

TABLE 3—RULE 211(h)(2)-1 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate ¹	Internal time cost	Annual external cost burden
Proposed Estimates					
Preparation of written notices	15	10 hours ²	\$422 (blended rate for compliance attorney (\$425), accounting manager (\$337), senior portfolio manager (\$383) and assistant general counsel (\$543)).	\$4,220	\$3,178. ³

¹ See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. IA-6383 (August 23, 2023) [88 FR 63206 (September 14, 2023)] (“Adopting Release”); the Adopting Release solicited comment on the “collection of information” requirements and associated burdens. The Commission received no comments in response to this request in the Adopting Release; however, we have adjusted certain of the estimates upwards to reflect updated data/figures for certain estimates.

² Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 5955

(Feb. 9, 2022) [87 FR 16886 (Mar. 24, 2022)] (“Proposing Release”).

³ The following types of private fund advisers (excluding advisers managing solely SAFs), among others, will be subject to the rule: unregistered advisers (*i.e.*, advisers that may be prohibited from registering with us), foreign private advisers, and advisers that rely on the intrastate exemption from SEC registration and/or the *de minimis* exemption from SEC registration; However, we are unable to estimate the number of advisers in certain of these categories because these advisers do not file reports or other information with the SEC and we are unable to find reliable, public information; as a

result, the above estimate is based on information from SEC-registered advisers to private funds, exempt reporting advisers (at the State and Federal levels), and State-registered advisers to private funds, in each instance excluding advisers that manage solely SAFs; these figures are approximate, exclude in each instance advisers that manage solely SAFs, and assume that all exempt reporting advisers are advisers to private funds; the breakdown is as follows: 5,248 SEC-registered advisers to private funds; 5,234 exempt reporting advisers (at the Federal level); 562 State-registered advisers to private funds; and 1,922 State exempt reporting advisers.

TABLE 3—RULE 211(h)(2)–1 PRA ESTIMATES—Continued

	Internal initial burden hours	Internal annual burden hours	Wage rate ¹	Internal time cost	Annual external cost burden
Provision, distribution, collection, and tracking of written notices and consents.	9	6 hours ⁴	\$73 (rate for general clerk)	\$438.	
Total new annual burden per private fund.		16 hours		\$4,658	\$3,178.
Avg. number of private funds per adviser.		8 private funds		8 private funds	8 private funds.
Number of advisers		12,234 advisers		12,234 advisers	9,176 advisers. ⁵
Total new annual burden		1,565,952 hours		\$455,887,776	\$233,290,624.

Notes:

¹ The hourly wage rates in these estimates are based on (1) SIFMA’s Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead; and (2) SIFMA’s Office Salaries in the Securities Industry 2013, modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

² This includes the internal initial burden estimate annualized over a three-year period, plus 5 hours of ongoing annual burden hours and assumes notices and consent forms will be issued once a quarter to investors; the estimates assume that most private fund advisers will rely on the disclosure-based or investor consent exceptions to the rules and thus distribute written notices and consent forms to investors (and collect, retain, and track consent forms); however, the estimates also take into account that certain fund agreements may not permit or otherwise contemplate the activity restricted by the rule (e.g., liquid funds may not contemplate an adviser clawback of performance compensation) and, accordingly, the estimates take into account that advisers to those funds will not prepare written notices (or, if applicable, prepare, collect, retain, and track consent forms) as contemplated by the rule. The estimate of 10 hours is based on the following calculation: ((15 initial hours/3 years) + 5 hours of additional ongoing burden hours) = 10 hours.

³ This estimated burden is based on the estimated wage rate of \$565/hour, for 5 hours, for outside legal services and \$353/hour, for one hour, for outside accounting services, at the same frequency as the internal burden hours estimate; the Commission’s estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

⁴ This includes the internal initial burden estimate annualized over a three-year period, plus 3 hours of ongoing annual burden hours; the estimate of 6 hours is based on the following calculation: (9 initial hours/3 years) + 3 hours of additional ongoing burden hours) = 6 hours.

⁵ We estimate that 75% of advisers will use outside legal services for these collections of information; this estimate takes into account that advisers may elect to use outside legal services (along with in-house counsel), based on factors such as adviser budget and the adviser’s standard practices for using outside legal services, as well as personnel availability and expertise.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by January 19, 2024 to (i) MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: December 14, 2023.

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99171; File No. SR–ISE–2023–36]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fees for Options on the Nasdaq 100 Index in the Exchange’s Pricing Schedule at Options 7

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 8, 2023, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for Nasdaq 100 Index options in the Exchange’s Pricing Schedule at Options 7, Section 5A. While these amendments

are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the fees for NDX³

³ For purposes of the Pricing Schedule, “NDX” means A.M. or P.M. settled options on the full value of the Nasdaq 100® Index. See Options 7, Section 1(c).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.