

DATES: Comments on this information collection should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—U.S. Office of Personnel Management, Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management; or send via electronic mail to *oira_submission@omb.eop.gov* or fax to (202) 395-6974.

U.S. Office of Personnel Management.

John Berry,

Director.

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OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Information Collection 3206-NEW; Questionnaire for Public Trust Positions (SF 85P) and Supplemental Questionnaire for Selected Positions (SF 85P-S)

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day Notice and request for comments.

SUMMARY: Federal Investigative Services (FIS), U.S. Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on an information collection request (ICR), Office of Management and Budget (OMB) Control No. 3206-NEW, for Questionnaire for Public Trust Positions, Standard Form 85P (SF 85P) and Supplemental Questionnaire for Selected Positions, Standard Form SF 85P-S (SF 85P-S). As required by the Paperwork Reduction Act of 1995, (Pub. L. 104-13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104-106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until September 19, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Room 10235, Washington, DC 20503, Attention: Jasmeet K. Seehra, OMB Desk Officer or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395-6974; and Federal Investigative Services, U.S. Office of Personnel Management, 1900 E. Street NW., Washington, DC 20415, Attention: Lisa Loss or sent via electronic mail to *FISFormsComments@opm.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Federal Investigative Services, U.S. Office of Personnel Management, 1900 E. Street NW., Washington, DC 20415, Attention: Lisa Loss or sent via electronic mail to *FISFormsComments@opm.gov*.

SUPPLEMENTARY INFORMATION: This notice announces that OPM submitted to OMB a request for review and clearance of the revised information collection of information, Questionnaire for Public Trust Positions, SF 85P and Supplemental Questionnaire for Selected Positions, SF 85P-S, which are housed in a system named e-QIP (Electronic Questionnaires for Investigative Processing) and are information collections completed by applicants for, or incumbents of, Federal Civilian Government positions, or positions in private entities performing work for the Government under contract. The collections are used as the basis of information for background investigations to establish that such persons are: Suitable for appointment to or retention in Federal employment in a public trust position; fit for employment or retention in Federal employment in the excepted service when the duties to be performed are equivalent in degree of trust reposed in the incumbent to a public trust position;

fit to perform work on behalf of the Federal Government pursuant to a Government contract, when the duties to be performed are equivalent in degree of trust reposed in the individual to a public trust position; or eligible for physical and logical access to federally controlled facilities or information systems, when the duties to be performed by the individual are equivalent to the duties performed by an employee in a public trust position. For applicants, the SF 85P and SF 85P-S are to be used only after a conditional offer of employment has been made. The SF 85P-S is supplemental to the SF 85P and is used only as approved by OPM, for certain positions such as those requiring carrying of a firearm.

It is estimated that the total number of respondents for the SF 85P is 112,894 annually. The electronic application includes branching questions and instructions which provide for a tailored collection from the respondent based on varying factors in the respondent's personal history. The burden on the respondent will vary depending upon how the information collected relates to the respondent's personal history. In an empirical study, the median of participant time spent completing the SF 85P was 155 minutes. Accordingly, OPM estimates that the annual burden is 141,118 hours. It is estimated that the total number of respondents for the SF 85P-S is 11,717 annually. Each SF 85P-S form takes an estimated 10 minutes to complete. Accordingly, the estimated annual burden is 1,953 hours. e-QIP (Electronic Questionnaires for Investigations Processing) is a web-based system application that houses the SF 85P and SF 85P-S. This internet data collection tool provides faster processing time and immediate data validation to ensure accuracy of the respondent's personal information. The e-Government initiative mandates that agencies utilize e-QIP for all investigations and reinvestigations. A variable in assessing burden hours is the nature of the electronic application. The electronic application includes branching questions and instructions which provide for a tailored collection from the respondent based on varying factors in the respondent's personal history. Because the question branches, or expands for additional details, only for those persons who have indicated, by their previous answers, that a particular topic is relevant to them, the burden on the respondent is reduced when the respondent's personal history demonstrates that he or she has no pertinent information to provide regarding that line of questioning.

Accordingly, the burden on the respondent will vary depending on whether particular segments of the information collection relate to the respondent's personal history. Additionally, once entered, a respondent's complete and certified investigative data remains secured in the e-QIP system until the next time the respondent is sponsored by an agency to complete a new investigative form. Upon initiation, the respondent's previously entered data (except "yes/no" questions) will populate a new investigative request. The respondent will be allowed to update his or her information, and certify the data, but will need to revise only the information that has changed. In this instance, time to complete the form is reduced significantly.

The 60-day notice of the proposed information collection was published in the **Federal Register** on December 29, 2010 (**Federal Register** Notices/Volume 75, Number 249, page 82095-82097) as required by 5 CFR 1320, affording the public an opportunity to comment on the form(s). Comments were received from the Equal Employment Opportunity Commission (EEOC), Internal Revenue Service Personnel Security (IRS-PS), the Department of Homeland Security Office of Security (DHS-OS), the Office of the Secretary of Defense, Human Resources community (OSD-HR), and commenters from the Department of Justice, Treasury, and OPM. Two employee unions, the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU), submitted comments.

EEOC provided comments which, EEOC stated, were from the perspective of the federal agency enforcing the equal employment opportunity (EEO) laws for the federal and private sectors, with a particular focus, in this instance, on Section 501 of the Rehabilitation Act, as amended (Section 501), and Title VII of the Civil Rights Act, as amended (Title VII).

EEOC commented that Section 501 of the Rehabilitation Act restricts federal employers as to the circumstances under which they may make "disability-related inquiries" of applicants and employees. In EEOC's view, disability-related and non-disability-related inquiries are intertwined in sections 21 and 22 of the SF 85P, and therefore both sections are subject to Section 501's restrictions. EEOC commented that OPM should direct agencies to ask these questions (Section 21 "Illegal Use of Drugs and Drug Activity," and Section 22 "Use of Alcohol," only when Section 501 permits. EEOC recommended that

OPM add language to the instructions for the SF 85P that previously existed on the SF 85P-S, stating that Federal departments and agencies may pose disability-related inquiries to applicants only after an offer has been made, and to employees only under circumstances that are job related and consistent with business necessity. EEOC further recommended that OPM insert specific instructions about Section 501 at the beginning of the SF 85P, cross-referencing sections 21 and 22. OPM did not accept EEOC's recommendation. The instructions on the SF 85P already state that, "for applicants, the form is to be used only after a conditional offer of employment has been made." Therefore, Section 501 has already been properly addressed. OPM has clearly indicated the types of decision-making that the SF 85P supports, and as noted above, the information collection regarding illegal use of drugs, drug activity, and use of alcohol is necessary for the determinations the form supports.

EEOC acknowledged that federal agency employers need tools, such as the SF 85P, that allow them to collect complete information about the disposition of all arrests, charges, and other criminal proceedings in an applicant's background. EEOC stated it was unclear whether OPM intended its inquiry to encompass the disposition of all arrests, of all charges, and of all trials.

The collection of disposition information is indeed required for the arrests and charges that the form collects. The branching questions of the collection permit the respondent to provide relevant information, including circumstances and outcomes. The collection is tailored to specific timeframes, and OPM uses the information provided to obtain further information on dispositions, if necessary. Accordingly, by the time the agency has the background investigation before it, and is ready to adjudicate suitability, fitness, or eligibility, it should have disposition information before it in the record.

EEOC commented that OPM should educate federal employers about how to assess suitability for federal or contract employment when evaluating an applicant's police record. Although this comment appears to be out of the scope of commenting on the information collection, OPM responds that it agrees with the EEOC and does indeed already provide such guidance in the suitability. OPM is not responsible for establishing standards for fitness inquiries concerning employees of contractors.

EEOC recommended eliminating or significantly restricting the scope of

section 24, Financial Record, due to concerns that the inquiries could result in discriminatory uses of the requested information. It recommended that if OPM retains the section, or portions thereof, it should adopt explicit, objective guidelines for using the requested information, which at a minimum should require the decision-maker to determine and consider the background circumstances that led to the reported financial problems when deciding whether to hold them against the applicant. EEOC recommended open text fields to collect the information. OPM did not accept EEOC's recommendation to eliminate or significantly restrict the scope of section 24. OPM does already provide guidance to agencies regarding the appropriate use of information about financial issues in making suitability determinations using this form and what other circumstances, such as societal factors, should be considered in the analysis. Further, the proposed collection does include free text fields for the respondent to provide the circumstances surrounding the indebtedness and actions taken in regard to it.

IRS-PS stated that IRS agrees with the changes as presented. DHS-OS stated that DHS approves of the additional questions and expanded collection of information, particularly in regards to Section 21, Illegal Use of Drugs and Drug Activity, as it will assist DHS in the goal of a drug-free workplace. A commenter from the Department of Justice provided a favorable view regarding the proposed form, stating that the additions will greatly benefit personnel security programs in their adjudications. The commenter stated that the form asks for information that is pertinent and relevant to suitability determinations and fitness evaluations for contractors.

DHS-OS made suggestions to replace references to "eligibility" with "suitability" in the instruction pages of the form. These comments were not accepted because the form supports eligibility for physical and logical access to federally controlled facilities or information systems (when the duties to be performed are equivalent in degree of trust reposed in the incumbent to a public trust position) as well as suitability determinations. DHS-OS also suggested strengthening the advice regarding delays that occur as a result of credit freezes. This comment was accepted.

DHS-OS recommended that the questions posed in Section 13C, Employment Record, should be asked of all persons who have ever had federal

service, not merely those who have been in the federal service in the last seven years. This comment was not accepted, because OPM has concluded, based upon experience, that the questions on the form are sufficient to identify the conduct that would be relevant, in light of recency and other factors.

DHS-OS recommended that the criminal conviction questions ask if the individual has "ever" been convicted of any crime in civilian courts or in military courts martial, which would require a change to sections 15 and 20. DHS reasons that some convictions would warrant a negative suitability finding by a law enforcement agency irrespective of the age of the conviction. This recommendation was not accepted. OPM believes that requiring respondents to provide all criminal convictions regardless of age would result in an increased collection of information from respondents that would be unduly burdensome in light of the broad spectrum of offenses that would be reported and the diminished likelihood that offenses more than seven years old would warrant a negative suitability finding. Furthermore, the form already includes questions that would collect information necessary to determine eligibility for certain law enforcement positions in regard to the Lautenberg Amendment, and the investigation includes a check of the criminal history records on file with the Federal Bureau of Investigation and local law enforcement agencies to obtain a complete picture of the respondent's criminal history.

DHS-OS recommended that the Fair Credit Reporting Act Release specify a timeframe of five years. This recommendation was not accepted as a timeframe is not required.

A commenter from DOJ recommended that the form be modified so that "I don't know" is not an option regarding Selective Service Record. This recommendation was not accepted as it is possible that the SF 85P will be completed by someone without access to the internet to easily locate the information. Additionally, an explanation is required if "I don't know" is selected. The commenter similarly commented that "I don't know" should not be an acceptable answer when providing contact information for People Who Know You Well. This comment was not accepted. Although it is expected that most respondents will be able to provide contact information, it is OPM's experience that, in rare circumstances, this option is necessary. DOJ also provided a comment that other areas of the form should have an "I don't know"

option for information that could be difficult to provide. The form was not modified in response to this comment as the electronic platform of the questionnaire will allow an explanatory remark in "Additional Comments" at each section.

DOJ observed that the question regarding Illegal Use of Drugs, which was moved to the SF 85P from the SF 85P-S, previously allowed an exception for use prior to the age of 16. DOJ inquired whether this exception was intentionally omitted. The exception is not incorporated because OPM believes, based upon its experience, that conduct information before the age of 16 can be relevant, depending on the respondent's age and subsequent conduct.

A commenter from OSD-HR recommended that the section "Purpose of this Form" include a statement that the questionnaire shall not be used for National Security Sensitive position determinations. Similarly, the American Federation of Government Employees (AFGE) commented that OPM should clarify the distinction between the forms SF 85P and SF 85P-S and the form SF 86, as well as provide greater guidance as to when the completion of a particular form should be required. OPM accepted these comments and has added the statement suggested by OSDHR to the proposed questionnaire.

OSD-HR recommended that the instructions explain that after a suitability determination is made, the respondent may also be subject to continuous evaluation, which may include periodic reinvestigations to ensure continuing suitability for employment. This comment was not accepted. OSD-HR also stated that personnel in public trust positions should be subject to continuous evaluation, and the Investigative Process block and the Authorization for Release of Information should be amended to so state. This comment also was not accepted. Pursuant to Executive Order 13467, "[c]ontinuous evaluation" means reviewing the background of an individual who has been determined to be eligible for access to classified information (including additional or new checks of commercial databases, Government databases, and other information lawfully available to security officials) at any time during the period of eligibility to determine whether that individual continues to meet the requirements for eligibility for access to classified information." E.O. 13467, sec. 1.3(d). Individuals in that circumstance would be filling out an SF 86, not an SF 85P. The President dealt with incumbent public trust employees in Executive Order 13488.

E.O. 13488 states that "[i]ndividuals in positions of public trust shall be subject to reinvestigation under standards (including but not limited to the frequency of such reinvestigation) as determined by the Director of the Office of Personnel Management * * *". Pursuant to that Order, OPM promulgated 5 CFR 731.106(d), which provides that public trust employees must be reinvestigated at least every five years. A reinvestigation of a public trust employee with no access to classified information would be similar to the investigation the employee underwent at the time of appointment to the public trust position, and would not be the same as what is meant by continuous evaluation.

OSD-HR recommended that the Personal Interview area of the instructions should include reference to garnishments, tax warrants, and foreclosures as documentation regarding these may be required. This recommendation was not accepted because "other financial obligations" is a broad category that implicitly includes these areas, particularly since there are direct questions about garnishments, tax liens, and foreclosures in the financial record section.

OSD-HR recommended that "certificates" should be added to the types of educational awards required to be listed. This comment was not accepted because, although certificates may be received in connection with educational activities, compelling the listing of all certificates in this section would likely compel irrelevant information, given the vast array of educational certificate opportunities (e.g. cake decorating).

OSD-HR recommended that Section 13C define the term misconduct and provided a suggested definition. This recommendation was not accepted because misconduct is a commonly understood term. Also in Section 13C, OSD-HR recommended adding the word "otherwise" between "or" and "disciplined" as written, it may appear that official reprimands, etc. are not forms of discipline. This recommendation was not accepted as it is not necessary to capture the desired information.

OSD-HR recommended that non-appropriated fund applicants/employees be excluded from completing Section 14, Selective Service. This recommendation was not accepted as it would be more confusing to compel applicants to distinguish between NAF positions and other positions. OPM will provide guidance to assist agencies in using the information properly for decision-making.

OSD–HR recommended that “common law” be defined or removed from the form as common law marriage is not recognized in some states. This recommendation was not accepted. “Common law” is included on the form because it is, in fact, recognized in other states, and we need to account for it where it occurs. Similarly, civil unions and domestic partnerships are legally recognized in an increasing number of states. Therefore, with due regard to the comment from OSD–HR, the form was revised to collect information regarding legally recognized civil unions and domestic partnerships, in addition to legally recognized civil marriages.

OSD–HR suggested including a hyperlink to 21 U.S.C. 844 or 18 U.S.C. 3607 to clarify for applicants which convictions may be omitted from the form. This recommendation was not accepted as individuals to whom this applies should be aware of the reason, and the references may easily be researched as necessary.

OSD–HR recommended that “controlled substance” and “controlled substance activity” should be clearly defined. This recommendation was not accepted as this language has been used on the forms for many years and has not appeared to require further clarification.

OSD–HR recommended that the question of being “ordered, advised, or asked to seek counseling or treatment as a result of alcohol use” be treated as a stand-alone question (i.e., a question everyone must answer), rather than a branching question, which would be similar to the way this information was treated on the SF 85P–S, prior to its deletion. OSD–HR stated an alternative recommendation would be to place question 4 back on the SF 85P–S to ensure this information is collected appropriately. OPM accepted this comment and has added the question back on the SF 85P–S as a stand-alone question, while retaining it as a conditional question on the SF 85P.

OSD–HR recommended that the wording of the question regarding “negative impacts” from alcohol on the SF 85P should mirror the wording on the SF 86, to include impact on personal relationships. This recommendation was not accepted, as the wording on the SF 85P, with its emphasis on work relationships, is appropriate for the types of decisions the form SF- 85P supports, and, based upon OPM’s experience, the additional information is not necessary in this context.

OSD–HR recommended that Section 24, Financial Record, should include Chapter 12 in the list of bankruptcies. This recommendation was accepted.

OSD–HR recommended that references to tax liens should be changed to “tax lien (warrant).” This recommendation was not accepted because the Federal government and most (all but 7) states issue tax liens. Introducing “warrant” may confuse applicants unfamiliar with the term outside of its criminal application, and may result in more inaccurate responses than if it is not introduced.

OSD–HR recommended that the question regarding alimony and child support payments should be expanded beyond “current” to collect a history of neglecting these obligations. This comment was not accepted because, even though the question on alimony and child support asks about current delinquency, the applicant will still need to list any judgment, garnishment, or lien, as well as any delinquency over 120 days, in responding to the other questions on the form.

OSD–HR recommended adding an example of student loans in parenthesis following the question about delinquent federal debt. This recommendation was not accepted, as previous experience with this question on other forms has shown that including examples tends to lead the respondent to narrow his/her response to only the examples, even when qualifying language is included (“such as * * *”).

OSD–HR commented that Section 26 should be amended to remove the word “tortious” and replace it with “intentionally or negligently wrongful conduct.” This comment was not accepted because framing the question in another way would likely cause it to be interpreted too narrowly.

OSD–HR recommended that Section 27 be amended to remove the word “security” from the explanation block. This comment was accepted.

OSD–HR stated the word “clearance” is not appropriate in the Purpose paragraph in the Fair Credit Reporting Disclosure and Authorization. This comment was accepted and the word “clearance” has been changed to “ability.”

OSD–HR recommended reinstating the prior Agency Use block for “Compu/ADP” that appeared on the 1995 version of the SF 85P. This comment was not accepted because this term is not relevant, standing apart from other position designation factors. The Agency Use section includes a block for position title, which will help inform the adjudicators.

A commenter from Treasury stated that there are no suitability factors in connection with which to adjudicate an affirmative answer to Section 15’s question regarding service in a foreign

country’s military, intelligence, diplomatic, security forces, or government agency. This comment was not accepted. This question complements Section 15’s questions concerning service in the U.S. military and thus affords the opportunity to establish whether there have been instances of bad conduct during service in other contexts, where obtaining relevant records may be more difficult. Conduct that occurred in these locations may be relevant to the decisions these investigations support. Further, the U.S. Government has an interest in ensuring that persons in positions of public trust have not engaged in acts or activities designed to overthrow the U.S. Government by force, and the information provided in response to these questions is designed to assist the adjudicator with that determination.

The Treasury commenter also stated that branching questions in Section 19 regarding being questioned, searched, etc. appear to be too invasive for public trust positions and these encounters and activities are not identified as suitability factors. The form was not modified in response to this comment. The question is intended to elicit potential criminal conduct while in a foreign country. The information provided, though not necessarily conclusive, will help the investigating entity identify potential issues for further inquiry in a context where it would otherwise be difficult to locate appropriate records.

The Treasury commenter recommended that Question 23, Investigation and Clearance Record, be modified to ask the applicant to provide the name of the Treasury Bureau that conducted the investigation. This comment was accepted.

A commenter from OPM recommended that additional guidance should be provided on the form to explain the process by which the respondent should list any freeze on his or her credit accounts. This comment was not accepted as OPM provides such implementation guidance to agencies to assist respondents.

The commenter from OPM recommended that Agency Use Block D be removed as the form is not to be used for sensitive positions. This comment was accepted, and Block D has been removed. Additionally, Block C has been renamed, “Risk Level.”

The commenter from OPM suggested a link to the Department of Education’s Web site should be provided in the Education section in order to assist respondents in providing a valid school address. This comment was accepted and the link will be added.

The commenter from OPM suggested that the Relatives section be expanded to collect identifying information regarding brother/sister/stepbrother/step-sister. This comment was accepted.

The commenter from OPM suggested amending the question in the Illegal Use of Drugs section regarding use of illegal drugs while in certain positions to include public trust positions. This comment was not accepted as it is overly broad.

The commenter from OPM suggested adding a question to the SF 85P regarding whether the subject is currently registered or has ever had to register as a sex offender. This comment was not accepted as the conduct information that would be sought by such a question is already collected in the section regarding Police Record.

NTEU expressed concerns regarding the sweep of the proposed changes and the breadth of the information demanded of public trust employees. NTEU commented that there was a lack of justification for the expanded scope of the SF 85P and the elimination of questions from the SF 85P-S and that OPM has not provided sufficient explanation of the government's need for the information. In particular, NTEU suggested that OPM appeared to rationalize the introduction of expanded questioning on the form simply in order to mirror the SF 86, Questionnaire for National Security Positions. NTEU suggested that the Office of Management and Budget (OMB) should disapprove the proposed information collection.

Although in its proposed information collection request of December 2010, OPM did state that questions on the SF 85P and SF 86 were designed to mirror one another for consistency, that observation related to the objective of alignment, i.e., ensuring that questions in areas of overlapping concern are asked in the same manner to the extent possible, so that, if there is a future need for a different kind of investigation (e.g., if a public trust employee subsequently requires access to classified information), the investigating entity may limit the scope of any new investigation to areas of inquiry not previously pursued. OPM's intent in adding new questions was not to duplicate the SF 86. These questions were added, on the basis of knowledge gained from experience with the adjudicative function and consultation with agencies, to better enable agencies to make sound determinations of suitability for public trust positions or fitness or eligibility for a credential in other contexts. Where questions were being added to the SF 85P that already exist on the SF 86, however, an attempt

was made to use like language. In other words, OPM operates on the assumption that where the same information collection is attempted, similar wording should be used. This supports efficient electronic format development and potentially assists efficiency when persons move between positions that require different forms. The proposed SF 85P and SF 85P-S ask only the questions that OPM has concluded are necessary to ensure sufficient information to adjudicate suitability or fitness or eligibility at the public trust level.

The SF 85P and SF 85P-S are not to be used for the investigation of persons for national security positions. The proposed SF 85P and SF 85P-S support the investigations to establish that the respondents are suitable for appointment or retention in a public trust position fit for appointment or retention in the excepted service when the duties to be performed are equivalent in degree of trust reposed in the incumbent to a public trust position; fit based on character and conduct where the individual is going to perform work pursuant to a Government contract, when the duties to be performed are equivalent to the duties performed by an employee in a public trust position; or eligible for physical and logical access to federally controlled facilities or information systems, when the duties to be performed are equivalent to the duties performed by an employee in a public trust position.

These investigations seek to determine whether the conduct and character of the competitive service or career SES applicant, appointee, or employee promote the efficiency and protect the integrity of the service. Simply because information may be identified as a national security issue does not mean that it would not also be relevant to a suitability issue; in fact, many fact patterns that present national security issues may also present suitability concerns.

Additionally, OPM's credentialing standards for those being considered for physical or logical access to federal facilities and information systems require a determination of whether there is an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of data subjects.

From a suitability or fitness perspective, an individual's abuse of

alcohol may impact on his or her ability to complete the duties of the job and/or raise questions about his or her reliability and trustworthiness, thus indicating that his or her employment would not promote the efficiency of the service or protect its integrity. From a credentialing perspective, or the perspective of fitness to perform under a contract, an individual's abuse of alcohol may put people, property, or information systems at risk and the investigation must support a determination regarding whether there is a reasonable basis to believe, based on the nature or duration of the individual's alcohol abuse without evidence of substantial rehabilitation, that issuance of a PIV card or permission to perform work poses an unacceptable risk.

Inappropriate use of drugs can raise questions about an individual's reliability and trustworthiness and ability or willingness to comply with laws, rules, and regulations, thus potentially indicating that his or her employment would not promote the efficiency of the service or protect its integrity. The investigation supports a determination of whether there is illegal use of narcotics, drugs or other controlled substances, without evidence of substantial rehabilitation. From a credentialing perspective, the investigation supports a determination of whether an individual's abuse of drugs may put people, property, or information systems at risk.

Failure to live within one's means, satisfy debts, and meet financial obligations may raise questions about the individual's honesty. Evidence of such failures may also signify that issuing a credential would put people, property or information systems at risk. For example, a person's consistent failure to satisfy significant debts may indicate that granting a PIV poses an unacceptable risk to Government financial assets and information systems to which the individual will have access.

Issues related to the use of information technology may be evaluated as suitability issues when they relate to criminal or dishonest conduct and when occurring on the job, as misconduct or negligence in employment. Unauthorized access to government information or improper use of government information once access is granted may compromise the privacy of individuals, and may make public, information that is proprietary in nature, thus compromising the operations and missions of Federal entities. Information obtained during the investigation supports the deciding

agency's ability to determine whether there is a reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems, or engage in inappropriate uses of such systems.

NTEU commented regarding Timing of the Interview and requests "as soon as possible," be retained, vice "immediately." This comment was accepted.

NTEU objected to language in the instructions that inform the applicant that the scope of a personal interview may exceed the time covered by the form when necessary to resolve issues. OPM did not accept this comment as the language on the form is properly advising the applicant of one aspect of the investigative process. Further, information beyond the scope of the question on the form may be necessary to provide information regarding patterns of behavior as well as conduct that occurred in the past but may have ongoing implications or ramifications to current conduct. The form is not intended to limit the scope of a proper investigation—it is simply one aspect of the investigation required to support the adjudication that is necessary.

NTEU commented that Section 10 of the form is an improvement but suggested that the form be amended to include a space for an employee to indicate uncertainty regarding whether he or she currently holds citizenship in the foreign country. The form in its electronic application provides an "additional comments" field which allow for explanations of this sort.

NTEU commented that Section 11 is an improvement over the current form but questioned why an employee need report whether the residence was owned or leased or other. This information assists investigators in verifying residences and seeking references as needed during the investigation. NTEU also commented that the three year reference period for residences is an improvement but questioned how an employee would answer the question if he has no reference to offer. The form in its electronic application provides an "additional comments" field which allow for explanations of this sort.

Regarding Section 12, NTEU questioned the need for an employee to provide the name of someone who knew him at school. This information assists investigators in identifying references from the educational activity, which is an important component of the individual's personal history.

NTEU suggested that Section 13 be modified to define the term

"employment." This comment was not accepted as the term is commonly understood. NTEU objected to collection of the name of someone who can verify unemployment activities and means of support while unemployed. This information provides alternative reference information necessary for the investigation when there is a period of unemployment and employment references are not possible. NTEU questioned why the government needs to know an employee's means of support. OPM did not amend the form in response to NTEU's question as information regarding the respondent's activities and means of support while unemployed may produce relevant conduct information for that period.

NTEU and AFGE provided similar comments regarding Section 13c., Employment Record. AFGE commented that the collection regarding adverse incidents in the workplace is overly invasive and unreliable, and further that this type of reporting requirement often operates in direct contravention of collective bargaining agreements and Agency directives and policies that provide that certain minor disciplines will be removed or expunged from Agency files after a certain period of time. NTEU recommended that the form be modified to omit any disciplinary action that was overturned at a higher level and to describe only the ultimate penalty, if it was modified or mitigated. NTEU suggested that at a minimum, the form should be modified to include a space to note the subsequent disposition of the disciplinary action. These comments were not accepted as information regarding the underlying conduct, regardless of the penalty assigned, is necessary when adjudicating an applicant's suitability or eligibility for a public trust position since the adjudicator is evaluating whether the individual's conduct could have an adverse impact on the efficiency of the service. Further, an agency's collective bargaining agreement with its employees does not override the obligation to collect sufficient information to meet the government wide legal requirement of an adequate suitability adjudication. The form provides fields for the applicant to explain circumstances and disposition of the disciplinary action. Adjudicators are required to establish that there was a reasonable basis to conclude that the conduct occurred in order to use the conduct as basis for a decision that a person is unsuitable for a position.

AFGE objected to Section 17 regarding cohabitant and former spouse information, Section 18 regarding

information about relatives and aliases of named relatives, and Section 19 regarding foreign countries visited, including any contact with any person known or suspected of being involved or associated with foreign intelligence, terrorist, security, or military organizations. AFGE commented that these questions are overreaching and constitutionally infirm, as in AFGE's view, they impinge on protected associational interests. OPM did not amend the form as a result of these comments.

Information collection regarding former spouses and cohabitants has been added to the collection as these individuals have proven to be useful sources of information when issues surface during an investigation. Further, regarding Sections 17, 18, and 19, background investigations necessarily involve inquiry into a person's personal history, including those relatives and associates with whom the person has the strongest ties. OPM inquires about these relationships not to gather information regarding beliefs but rather to develop information, as a result of these ties, that enables the adjudicator to determine whether there is relevant conduct on the part of the person being investigated. The relationships themselves are not relevant—it is the information that is developed about character and conduct that is of interest.

Regarding Section 17, NTEU commented that OPM has not provided sufficient explanation of the need for information regarding former spouses and cohabitants and suggested that it appears this information was added only because it exists on the SF 86. Information collection regarding former spouses and cohabitants has been added to the collection as these individuals have proven to be important sources of information when issues surface during an investigation. Cohabitants, as defined on the form, share a relationship that may be akin to the relationship with a spouse. Former spouses have shared such a relationship, at least in the past, and are similarly well-suited to provide information about conduct. Further, as stated above regarding AFGE's comment on this section, background investigations necessarily involve inquiry into a person's personal history, including those relatives and associates with whom the person has the strongest ties. OPM inquires about these relationships, not to gather information regarding beliefs but rather to develop information, as a result of these ties, that enables the adjudicator to determine whether there is relevant conduct on the part of the person being investigated as a result of those ties.

Regarding Section 19, Travel, NTEU suggested that the instructions indicate that frequent travel across the Mexican or Canadian borders could be described together, in the category of “many short trips” on “various” dates and that the form be revised to permit the listing of several countries in one box, when multiple countries were visited on the same trip. This comment was not accepted as delineating the information regarding specific countries is required in order to complete a thorough investigation, especially if information is developed concerning improper conduct in a particular location.

NTEU commented that completion of the travel section could be excessively onerous in this day of frequent overseas travel, and recommend that instead of requiring the employee to list all trips, it would make more sense to require the employee to list and describe only certain trips: Those where he or she was questioned/involved in an encounter with the police/contacted by persons suspected of being involved in or associated with foreign intelligence, terrorist, security, or military organizations. This comment was not accepted as the question is designed to shed light on the respondent’s activities and conduct during the time period, and knowledge of the travel itself permits exploration of potentially relevant conduct.

Regarding Section 20, Police Record, NTEU commented that providing a specific instruction to report instances when the record was sealed, expunged or otherwise stricken from the record or the charge was dismissed is an improvement in terms of clarity; however, NTEU commented that employees should not be required to disclose information that a court has determined is properly expunged or otherwise stricken from the record. AFGE similarly commented that the questionnaire should not inquire about criminal matters that have been expunged or otherwise sealed or eradicated from the court records. These comments were not accepted, because information regarding the underlying conduct is important to assess, whether or not the record was expunged or otherwise sealed or eradicated from the court record. The courts expunge or seal records for purposes specific to the respective justice systems they represent (e.g., to eliminate the impact upon sentencing for subsequent offenses or to protect the individual’s privacy). Those purposes are not necessarily relevant to the Federal Government’s obligation to assess suitability, fitness, or eligibility in the context of performing work for

the Government in a context that rises to the level of a public trust.

Regarding Section 21, Illegal Use of Drugs and Drug Activity, NTEU objected to moving the question about illegal drug use and drug activity to the SF 85P from the SF 85PS. NTEU recommended that the introduction to this section should indicate that it covers drug use or activity that is illegal under federal law, if that is the intent of the question. This recommendation was not accepted as individuals are expected to know and obey the laws of the states as well as the laws of the United States, and illegal drug use within the specified period might indicate character or conduct that would be inappropriate in an individual who would be occupying a position of public trust.

AFGE commented that the questionnaire provisions demanding information about drug use and drug activities violate employees’ constitutional right to privacy and their Fifth Amendment rights against self-incrimination. OPM did not accept this comment. The government has an interest in knowing whether an individual being considered for or occupying a position of public trust is reliable, trustworthy, and willing and able to comply with laws, rules, and regulations. Drug use could also have implications for the safety of co-workers and the public, if the individual is to have access to government facilities and systems. The questionnaire provides an assurance that the respondent’s truthful responses to Section 21 will not be used as evidence against the respondent in a criminal proceeding. The investigation supports a determination of whether there is illegal use of narcotics, drugs or other controlled substances, without evidence of substantial rehabilitation, which is relevant to an assessment of character and conduct. From a credentialing perspective, the investigation also supports a determination of whether an individual’s abuse of drugs may put people, property, or information systems at risk.

NTEU objects to the requirement of disclosure of drug use prior to the age of 16 and commented that the current SF 85P–S requires disclosure of drug use only since the age of 16 or in the last seven years, whichever is shorter, should be preserved. The comment was not accepted as conduct information before the age of 16 may be relevant, depending on the respondent’s age and subsequent conduct.

NTEU questioned the value of the question about future intent to use a drug or to engage in drug trafficking. The comment was not accepted as

responses to this question often shed light on the respondent’s conduct and reason for engaging in illegal drug use.

NTEU noted that there is some redundancy in the questions regarding whether the applicant has illegally used or has otherwise been involved with a drug or controlled substance in the last seven years, or while employed as a law enforcement officer, in a position affecting public safety, prosecutor, or as a courtroom official. This concern will be addressed in the electronic format; the branching nature of the questionnaire will ensure that respondents are not presented with duplicative questions.

NTEU questioned the need to ask about “cultivation” of any drug or controlled substance in the last seven years. This comment was not accepted as illegal cultivation is relevant information and represents conduct that is distinct from drug use.

NTEU objected to the question about intentional misuse of prescription drugs. This comment was not accepted as information regarding intentional misuse of prescription drugs may establish criminal conduct as well as possible impairment of judgment and reliability without evidence of substantial rehabilitation. Such conduct is also relevant to the question of reliability and trustworthiness, an important consideration with respect to the positions to which this form relates.

NTEU commented that it strongly opposes the required disclosure of voluntary counseling or treatment programs and stated that the disclosure, and the offering of mitigating information, should be at the employee’s option. OPM did not accept these comments. As stated above, the information collection regarding illegal use of drugs is necessary for the determinations the form supports; it is not possible to assess this information properly unless a complete picture is obtained, including information about efforts at rehabilitation.

Regarding Section 22, Alcohol, NTEU objected to the transfer of alcohol inquiries from the SF 85PS to the SF 85P, and to expansion of the question to ask about “negative impacts” on work performance or professional relationships. As stated above, an individual’s abuse of alcohol may impact on his or her ability to adequately perform the duties of the position. Such abuse may also raise questions about the individual’s reliability and trustworthiness, and may suggest the individual could put people, property, or information systems at risk. Impacts of alcohol use on work performance or professional

relationships are especially relevant to these decisions, because those are precisely the concerns about alcohol abuse that have prompted the inquiry.

NTEU objected to the required disclosure of counseling or treatment that the employee voluntarily sought, and stated that the disclosure and offering of evidence of rehabilitation, should be at the employee's option. AFGE commented that Section 22's questions regarding alcohol treatment violate the permissible areas of examination under the Rehabilitation Act and ADA, as inquiries regarding a drug addiction are proscribed. AFGE further commented that there is a constitutional right to privacy in the nondisclosure of personal information. OPM did not accept these comments. As stated above, the information collection regarding the use of alcohol is necessary for the determinations the form supports; moreover, because the form is to be proffered to the individual only after an offer has been made (or employment has been commenced) OPM believes it has adequately addressed the requirements of the Rehabilitation Act and the Americans with Disabilities Act.

Regarding Section 24, Financial Record, NTEU questioned the justification for expansion of questioning in this area. AFGE commented that the questions are overbroad because they fail to establish a nexus between the information sought and any specific positions. The nexus, in the suitability and fitness contexts, is with the concept of dishonesty. As noted above, failure to live within one's means, satisfy debts, and meet financial obligations may raise questions about the individual's honesty. The nexus, in the credentialing context is with the question of whether making the person eligible for access to government facilities and systems will put people, property or information systems at risk. For example, a person's consistent failure to satisfy significant debts may indicate that granting a PIV poses an unacceptable risk to Government financial assets and information systems to which the individual will have access. The adjudicator is not looking at the individual's financial condition per se. The adjudicator is assessing whether the individual is making an honest effort to discharge its obligation. The expanded questioning of the form will assist in gathering pertinent information regarding indebtedness that the previous SF 85P did not collect so that adjudicators can make more informed decisions.

NTEU commented that it is unclear how overdue taxes must be in order to be

reported on the form. NTEU stated it is unclear whether the section applies to taxes that are jointly owed (by the employee and a spouse or separated spouse), and the failure is due to the spouse. OPM did not accept the comment as the question requests the respondent to provide overdue taxes for which the respondent is responsible. Taxes that are jointly owed are owed by both parties. Further, the form provides the respondent with the ability to provide explanation and mitigating information.

NTEU recommended that the question about disciplinary action for misuse of a government credit card should be modified to include a box to report any subsequent reconsideration or modification of agency-imposed disciplinary action through, for example, a union grievance. OPM did not accept this comment as the form already provides the ability to provide further explanation.

NTEU questioned the need to inquire into use of a credit counseling service and recommended that this information should be voluntary, to be provided if the employee feels it advisable to offer evidence of attempts to correct a poor credit situation. OPM did not accept the comment. As noted above, OPM is interested in the individual's honest efforts to discharge obligations, and this information is highly pertinent to that question. Moreover, the question is tailored to collect information only when there is first a response indicating that there has been an actual inability to fully meet financial obligations.

NTEU commented that the question regarding whether the employee is "currently delinquent" on alimony, child support, or any federal debt is ambiguous as there is no instruction regarding how far in arrears an employee must be to be "delinquent." NTEU proposed a standard of 180 days for delinquency. OPM did not accept this comment as the question is designed to gather any current delinquency regarding alimony, child support, and federal debt. Based upon experience, OPM thinks that any delinquency with respect to these matters could be indicative of a character or conduct issue, and thus that information on current delinquencies of whatever duration is important in assessing character and conduct.

Regarding the question about whether the respondent is over 120 days delinquent on any debt in the past seven years, NTEU proposed a standard of 180 days as a realistic time within which to expect that an employee should be able to correct financial lapses. OPM did not accept the comment. Debts that are 120

days past due are serious enough to impact a person's creditworthiness. In deciding upon 120 days, OPM considered that such lapses are generally reported by credit grantors to credit bureaus by the time debts are 120 days past due as such debts are widely considered to establish a likelihood that the lapse will not be corrected.

AFGE also commented that the questions in Section 24 violate confidentiality provisions of the Fair Credit Reporting Disclosure and Authorization Act, and implicate other privacy issues. OPM did not accept this comment. At the time the investigation is conducted, OPM obtains the respondent's voluntary release of information covered by the Fair Credit Reporting Act. Unless the individual signs the release the investigation cannot go forward.

Regarding Section 25, Use of Information Technology Systems, NTEU commented that the section appears to have been added to mirror a 2008 addition to the SF 86. As stated, there were no questions added for the purpose of mirroring the SF 86. Rather the questions added support the determinations that are made using SF 85P-based investigations. Disclosures related to the use of information technology may turn up potentially criminal or dishonest conduct or, when the underlying conduct occurred on the job, evidence of misconduct or negligence in employment. Information obtained during the investigation supports a decision of whether the individual is sufficiently reliable to hold a public trust position or whether there is a reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems, or engage in inappropriate uses of such systems.

NTEU noted its approval of the advice regarding self-incrimination but expressed concern regarding what it viewed as a lack of clarity as to the activity intended to be covered by this section as well as its breadth. NTEU suggested that the description of activity covered by this section be tightened and more clearly defined, so as to capture only such things as true hacking and introduction of viruses or other malicious software. AFGE objected to Section 25, stating that issues of alleged compromise of Personally Identifiable Information and Privacy Act violations are often nuanced and highly technical interpretations made by those ill-equipped to make such evaluations, and are arbitrarily and capriciously applied by Agencies. OPM did not accept these

comments. The questions are designed to collect information regarding specific conduct and incidents. OPM has provided a broad enough context to explain the intent of the question and provides guidance to agencies about how to use the information properly in adjudications of suitability or credentialing.

Regarding Section 26, Non-Criminal Court Actions, NTEU proposed that the section be rephrased to inquire only about civil court actions alleging fraud or intentional tortious conduct by the employee defendant. NTEU stated its view that this change is necessary because it is not uncommon for a complaint to name a long list of defendants and many counts, with only some relevant to any given defendant. AFGE objected to Section 26, stating that merely being a named defendant in a lawsuit of this nature, no matter how frivolous or the nature of the disposition, is irrelevant to maintaining a public trust position, and should not be used to impermissibly taint an employee's record and evaluation, as it is here. OPM did not accept these comments. Information about court proceedings often provides leads concerning alleged conduct that could be relevant to suitability, fitness or credentialing concerns. For examples, such records might include allegations of physical violence, allegations of theft, conversion of property, or other dishonest conduct, or allegations of negligence of a sort that might be relevant to the individual's trustworthiness in the position in question. The question is designed to elicit whether records exist that could surface such information and to permit the investigator's training and experience regarding suitability investigations to inform the collection of information from the records as opposed to requiring the respondent to apply a filter as to what might be relevant. Further, the presence of any information collected on the form is not a taint on the respondent, as the information must be evaluated using specific criteria established for the type of decision the investigation supports.

Regarding Section 27, Association Record, NTEU suggested that this section appears to have been added to mirror the SF 86. AFGE objected to Section 27 on the basis of First Amendment association and speech interests. As previously stated, there were no questions added for the purpose of mirroring the SF 86. The questions were added because, based upon OPM's experience it is useful in developing leads that, in turn, may permit OPM to develop relevant

information about character and conduct that would permit adjudicators to make more informed decisions about suitability, fitness, and credentialing.

NTEU commented that because some of the questions are aimed at conduct that is undeniably criminal, it wondered at the absence of any guarantee of use immunity against self-incrimination in a criminal proceeding. Advice concerning immunity in connection with this question appears in the first paragraph of the questionnaire.

Regarding the Authorization for Release of Medical Information, NTEU commented that it has previously complained that the permissible uses for the Authorization for Release of Medical Information were not clearly outlined in the SF 85P and stated that the proposed instructions correct that situation. However, NTEU objected to the language of the proposed form that indicates that employees will also be required to complete the Medical Release "in the event information arises in an investigation that requires further inquiry for resolution, and only to resolve such issues." NTEU commented that this language is not an effective limitation and permits an investigator to require signature on the Release at will. OPM did not amend the form in response to this comment as the proper use and handling of the investigative questionnaire by investigations program personnel is governed by investigative policies appropriate to the types of decision-making the investigations support. The President, in E.O. 13488, has required that agencies re-investigate periodically the incumbents of public trust positions, and, depending upon the types of issues that might arise in such a reinvestigation, the medical information covered by the release could be highly salient to the question whether it continues to be appropriate to retain the individual in the position that he or she encumbers.

Regarding the electronic format of the form, NTEU commented that it does not oppose the e-QIP format and recognized that use of branching questions can assist a respondent in determining what follow-up questions to answer. NTEU expressed a concern, however, about the extent of an employee's ability to correct or amend answers to eliminate inadvertent errors or omissions once inputted and inquired whether a half-completed form could be saved and continued at a later date and whether a form submitted through e-QIP could be later revised. Although this concern appears to be outside of the scope of comments on the information collection, OPM advises that respondents are able to save and

continue inputting information as necessary, up to the point that the respondent certifies that the information is accurate and complete. Once the collection has been certified, the applicant may contact the agency that asked him or her to complete the questionnaire should the applicant need to amend or correct the information he or she provided.

Regarding the Burden on Respondents, NTEU suggested that the estimated burden of 75 minutes to complete the SF 85P underestimated the burden imposed on those who will have to complete this form. OPM has reassessed the burden imposed on nonfederal respondents. The electronic application includes branching questions and instructions which provide for a tailored collection from the respondent based on varying factors in the respondent's personal history. The burden on the respondent will vary depending upon what branching questions are triggered by the respondent's personal history. OPM employed the Department of Defense Personnel Security Research Center to conduct a study of the estimated burden of the SF 85P based on empirical data gathered in a simulated background investigation context. A sample of 33 participants successfully completed the study. Time burden estimates ranged greatly, from 70 to 435 minutes. The average of participant time spent completing the form was 183 minutes and the median was 155 minutes. In calculating the burden estimate for the SF 85P, the median number will be used, due to the variations expected from the tailored collection.

Comments regarding the SF 85P-S were received from commenters at DOJ, OSD-HR, and from NTEU. Commenters from the DOJ and OSD-HR recommended that the SF 85P-S should be eliminated and that the questions from the SF 85P-S be incorporated into the SF 85P. These comments were not accepted because the SF 85P-S collects information necessary for adjudication only of certain positions, particularly those that require the carrying of firearms.

NTEU commented that questions about illegal drug use and alcohol should be reserved for the SF 85P-S. This comment was not accepted because OPM has concluded, on the basis of experience, that the information collected regarding these areas is relevant to all of the decision-making the SF 85P supports, and not merely the positions that traditionally used the SF 85P-S in the past.

As stated above, OSD-HR recommends that the question of being

“ordered, advised, or asked to seek counseling or treatment as a result of alcohol use” be treated as a stand-alone question on the SF 85P or alternatively, that question 4 be placed back on the SF 85P–S to ensure this information is collected appropriately. OPM accepted this comment and has added the question back on the SF 85P–S as a standalone question, while retaining it as a conditional question on the SF 85P.

U.S. Office of Personnel Management.

John Berry,
Director.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67660; File No. 10–207]

Miami International Securities Exchange, LLC; Notice of Filing of Application for Registration as a National Securities Exchange Under Section 6 of the Securities Exchange Act of 1934

August 15, 2012.

On April 26, 2012, Miami International Securities Exchange, LLC (“MIAX”) submitted to the Securities and Exchange Commission (“Commission”) a Form 1 application under the Securities Exchange Act of 1934 (“Exchange Act”), seeking registration as a national securities exchange under Section 6 of the Exchange Act. MIAX’s Form 1 application provides detailed information on how it proposes to satisfy the requirements of the Exchange Act.

The Commission is publishing this notice to solicit comments on MIAX’s Form 1 application. The Commission will take any comments it receives into consideration in making its determination about whether to grant MIAX’s request to be registered as a national securities exchange. The Commission will grant the registration if it finds that the requirements of the Exchange Act and the rules and regulations thereunder with respect to MIAX are satisfied.¹

MIAX would be wholly owned by its parent company, Miami International Holdings, Inc. (“Miami Holdings”). If approved, MIAX would commence operation of a fully automated electronic trading platform for the trading of standardized options with a continuous, automated matching function. MIAX would not have a

physical trading floor. Liquidity would be derived from orders to buy and orders to sell submitted to MIAX electronically by its registered broker-dealer members, as well as from quotes submitted electronically by market makers.

A description of the manner of operation of MIAX’s proposed system can be found in Exhibit E to MIAX’s Form 1 application. The proposed rulebook for the proposed MIAX exchange can be found in Exhibit B to MIAX’s Form 1 application, and the governing documents for both MIAX and Miami Holdings can be found in Exhibit A. A listing of the officers and directors of MIAX can be found in Exhibit J to MIAX’s Form 1 application. MIAX’s Form 1 application, including all of the Exhibits referenced above, is available online at www.sec.gov/rules/other.shtml as well as at the Commission’s Public Reference Room.

With respect to MIAX’s proposed trading rules, some of the notable features proposed by MIAX are highlighted below. For example, in certain circumstances where MIAX could not fully execute an incoming Priority Customer order,² it has proposed to use mechanisms and route timers that would expose the incoming order to the MIAX market for up to one second before routing the order to away markets or otherwise handling the order in accordance with its proposed trading rules.³ In addition, in limited circumstances, certain orders that are eligible for routing could be routed immediately, at least in part, without being subject to a one second route timer, if they meet a number of criteria.⁴

MIAX has proposed three different classes of market makers that would operate on MIAX: Primary Lead Market Makers; Lead Market Makers; and Registered Market Makers. The different classes of market makers would be subject to varying levels of affirmative and negative market making obligations.

Notably, MIAX would allow market makers to use a variety of quote types, some of which would have a specific time in force and would be analogous to

orders (MIAX refers to such order types as “eQuotes,” and market makers would be able to enter these orders through their quotation infrastructure).⁵ Specifically, MIAX has proposed rules to allow market makers to submit any of the following “quote” types: Standard quote; Day eQuote; Immediate or Cancel eQuote; Fill or Kill eQuote; Intermarket Sweep eQuote; Auction or Cancel eQuote; and Opening Only eQuote.⁶ While market makers could only have one Standard quote active at any one time, they would be permitted to have multiple types of eQuotes active in a single series.⁷

MIAX’s proposed rules also provide for the categorization of certain market maker quotes as “priority” quotes and “non-priority” quotes.⁸ Use of priority quotes, which need to meet certain bid/ask differential requirements, would entitle market makers to precedence over all other professional interest (*i.e.*, non-Priority Customer orders and market maker orders and non-priority quotes) on MIAX at the same price.⁹

Interested persons are invited to submit written data, views, and arguments concerning MIAX’s Form 1, including whether the application is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number 10–207 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number 10–207. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/other.shtml>). Copies of the

² See proposed MIAX Rule 100 (defining “Priority Customer” as a person or entity that is not a broker or dealer in securities and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts).

³ See proposed MIAX Rules 515 and 529. See also Exhibit E to MIAX’s Form 1 submission, at 5–7.

⁴ See proposed MIAX Rule 529. In short, an order would be eligible for immediate routing if (1) it is a customer order significantly greater in size than the size of the NBBO posted at away markets, and (2) it arrives at a time when MIAX has significant interest posted at one minimum price variation inferior to the NBBO at away markets.

⁵ See Exhibit E to MIAX’s Form 1 submission, at 3.

⁶ See proposed MIAX Rule 517.

⁷ If its application ultimately is approved by the Commission, MIAX does not expect to make Day eQuotes available for use upon first commencing operations. See Exhibit E to MIAX’s Form 1 submission.

⁸ See proposed MIAX Rule 517.

⁹ See *id.*

¹ 15 U.S.C. 78s(a).