



REPUBLIC OF KENYA

REGULATORY IMPACT ASSESSMENT FOR

**MINING (GEMSTONE IDENTIFICATION AND VALUE ADDITION) (FEES)
REGULATIONS, 2023**

NOVEMBER, 2023

This Regulatory Impact Assessment (RIA) has been prepared by the State Department for Mining under Sections 6 and 7 of the Statutory Instruments Act (No. 23 of 2013).

Abbreviations

RIA - Regulatory Impact Assessment

RIS- Regulatory Impact Statement

SIA - Statutory Instruments Act

AMV - Africa Mining Vision

SDG - Sustainable Development Goals

UNEP - United Nations Environment Programme

BETA - Bottom-up Economic Transformation Agenda

1. INTRODUCTION

1.1 Regulatory-making Authority and the Legal Mandate

The Mining Act under Section 12 empowers the Cabinet Secretary responsible for Mining with the general administration of the Act. The mandatory requirement upon the Cabinet Secretary is to respect and uphold the principles and values enshrined in Article 201 (c) and (d); and Article 69 (1) (a) and (h) of the Constitution. The Regulatory Making Authority in the instant case is the Ministry of Mining, Blue Economy and Maritime Affairs, and specifically the State Department for Mining. The Mining Act mandates the Cabinet Secretary to make regulations to prescribe the procedure for consideration of the applications made under the Act; and negotiation, grant, revocation, suspension, or renewal of mineral rights hence the development of the draft Royalty Collection and Management Regulations.

1.2 Requirements of the Statutory Instruments Act

The Statutory Instruments Act, No. 23 of 2013 (SIA) is the legal framework governing the conduct of Regulatory Impact Statement (RIS) in Kenya. Sections 6 and 7 require that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, before making the statutory instrument, prepare a regulatory impact statement about the instrument.

The Act further sets out certain key elements that must be contained in the Regulatory Impact Assessment (RIA) namely:

- (a) a statement of the objectives of the proposed legislation and the reasons;
- (b) a statement explaining the effect of the proposed legislation;
- (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and

(e) the reasons why the other means are not appropriate.

Section 5 of SIA requires that a regulation-making authority conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content.

1.3 What is a Regulatory Impact Statement?

Regulatory Impact Statement is a systematic policy tool used to examine and measure the likely benefits, costs, and effects of new or existing regulations. A RIS is an analytical report to assist decision-makers in arriving at an informed policy decision. As an aid to decision making RIS includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIS should contain the following elements:

- (a) title of the proposal;
- (b) the objective and intended effect of the regulatory policy;
- (c) an evaluation of the policy issue;
- (d) consideration of alternative options;
- (e) assessment of all their impacts distribution;
- (f) results of public consultation;
- (g) compliance strategies, and
- (h) processes for monitoring and evaluation.

RIA is usually conducted before a new government regulation is introduced to provide a detailed and systematic appraisal of the potential impact of a new regulation to assess whether the regulation is likely to achieve the desired objectives. RIS promotes evidence-based policymaking as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, the RIA should confirm whether a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. RIS therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation; and enhancing governmental accountability.

2.0 PURPOSE AND OBJECTS OF THE PROPOSED REGULATIONS

The purpose of the "Mining (Gemstone Identification and Value Addition) (Fees) Regulations, 2023" is to promote transparency, standardization, and revenue generation in the gemstone sector while ensuring consumer protection and supporting the growth of the industry.

- a) **Fee Structure:** These regulations establish a fee structure for various services related to gemstone identification and value addition. The fees are designed to cover the costs associated with these services and provide a source of revenue for the government.
- b) **Standardization:** By defining the fees for gemstone identification and value-addition services, these regulations help standardize and regulate the industry. They ensure that operators in the gemstone sector are aware of the costs associated with these services, promoting transparency and fairness.
- c) **Consumer Protection:** The regulations help protect consumers and gemstone traders by requiring gemstone identification services to provide identification certificates. This ensures that the characteristics of gemstones are accurately determined and reported, reducing the risk of fraud or misrepresentation in the market.
- d) **Supporting the Gemstone Industry:** The regulations support the gemstone industry by facilitating the identification, processing, and value addition of gemstones. This can encourage the growth of the gemstone sector in the Republic of Kenya and contribute to its economic development.

2.1 Realization of Kenya's Mineral Potential

2.2 Scope

The scope of the proposed Regulations is to:

- a) Establish fees for gemstone identification and value-addition services.
- b) Provide clear definitions for key terms related to the gemstone industry.

- c) Promote consumer protection by requiring identification certificates with complete lab reports on gemstone characteristics.

2.3 General Objective

The general objective of the proposed Regulations is to give full effect to the Mining Act No. 12 of 2016 by providing a framework to ensure sustainable management and development of Kenya's Mineral wealth.

2.4 Specific Objectives

The specific objectives of the "Mining (Gemstone Identification and Value Addition) (Fees) Regulations, 2023" are:

- a) **Fee Standardization:** To establish standardized fees for gemstone identification and value-addition services.
- b) **Transparency:** To ensure transparency in the gemstone industry by specifying costs for various services.
- c) **Consumer Protection:** To protect consumers and traders by requiring identification certificates with accurate gemstone characteristics.
- d) **Industry Support:** To support the growth of the gemstone sector in Kenya by facilitating gemstone identification, processing, and value addition.

3. BACKGROUND AND CONTEXT OF THE PROPOSED REGULATIONS

3.1 Background of Kenya's Mining Industry

The mining sector dates back to the colonial period where the sector was for a long time operated within a legal framework enacted way back in 1940. The Mining Act no.12 of 2016 revoked the law (1940) consequently opening the sector to more players, in particular recognizing artisanal mining as a game changer for economic growth at the grass root. Mineral royalty collection has been operating without a clear legal framework and for this reason, the current proposed Royalty collection Regulation seeks to provide a clear framework within which this is done.

3.2 International and Regional Context of the Mining Sector

3.2.1 Africa Mining Vision (AMV)

Africa Mining Vision aims to create "a transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development". The Vision was adopted by Heads of State at the February 2009 AU summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development. It is Africa's response to tackling the paradox of great mineral wealth existing side by side with pervasive poverty. It recognizes 6 intervention areas namely: 1) fiscal regime and revenue management; 2) geological and mineral information systems; 3) building human and institutional capacity; 4) artisanal and small-scale mining; 5) mineral sector governance; 6) linkages, investment, and diversification.

3.2.2 Sustainable Development Goal (SDG)

The United Nations Member States in 2015 adopted 17 Sustainable Development Goals (SDGs) that are to guide poverty eradication, improve health and education, reduce inequality, and spur economic growth – strategies all while tackling climate change and working to preserve oceans and forests. Out of the 17 sustainable development goals, numbers 7, 8, 9, and 13 have been identified as those relating to the mining sector. Affordable and clean energy, decent work and economic growth, industrial innovation,

and infrastructure climate Action. All these speak to the optimal and sustainable mining sector.

3.3 Local Context of the Mining Sector

3.3.1 Bottom-up Economic Transformation Agenda (BETA)

In recognition of the potential contribution of the Mining sector to job creation, the Government under the BETA approach has earmarked the formalization of artisanal mining which provides livelihoods for over 800,000 people. This sub-sector can create more decent jobs with the adoption of safe and sustainable mining techniques with guaranteed markets. On the same note, mineral value addition has also been identified as a game changer in maximizing the full worth of a mineral resource along the whole value chain.

3.3.2 Kenya Vision 2030

The economic pillar, one of the enablers of the vision, is set to be actualized by a wide range of sectors; mining being one of them. Efficient royalty collection will guarantee the country maximum benefit from its mineral wealth.

3.3.4 Strategic Plans

The just-ended Strategic Plan for the State Department for Mining provided a roadmap for implementing the Mineral Resources Sector Plan which is one of the priority sectors under the Economic Pillar of Vision 2030. The Plan provided an important framework for realizing the government's commitment to a transformative and competitive extractive industry as a key driver of the effective implementation of Kenya Vision 2030 and positioned Kenya as a regional focal point and a frontier for foreign direct investment in the Mining Sector.

3.3.5 Mining and Minerals Policy

The Mining and Minerals Policy was developed in 2016. The rationale behind the policy was to provide a framework to give clear guidance for sustainable mineral resources development, to address gaps that existed in the mining sector, form the basis for a review of the outdated Mining Act of 1940, and align the industry's

strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. In addition, to strengthen the institutional framework and address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building, and mainstream artisanal and small-scale mining. The policy will promote the use of appropriate technology including Geo-spatial technology and airborne geophysical surveying to enhance information on the country's mineral potential and increase investment in mining. The policy led to the development of the Mining Act, 2016

4.0 RATIONALE AND JUSTIFICATION FOR THE PROPOSED REGULATIONS

4.1 Policy Issue

The enactment of the Mining Act in 2016 was a significant milestone in Kenya's mining and minerals sector, as it established a comprehensive legal and regulatory framework. However, there are pressing policy issues that require immediate attention. One such issue is the need to maximize the socio-economic benefits derived from the mining sector. The mining industry has the potential to significantly contribute to Kenya's socio-economic development but to achieve this, it is crucial to develop strategies that create more local employment opportunities and ensure that the communities affected by mining activities directly benefit from these operations. Additionally, it is imperative to establish effective revenue-sharing mechanisms that direct a substantial portion of mining proceeds toward local development initiatives, including infrastructure improvements and educational programs.

Environmental sustainability and safety standards are also paramount policy issues. It is essential to enforce stringent environmental protection regulations to safeguard the environment and ensure the health and safety of miners. Achieving this requires continuous monitoring, strict enforcement, and adherence to best practices to mitigate the environmental impact of mining activities. Furthermore, transparency, accountability, and good governance are critical for the long-term success of the sector. To combat corruption, revenue leakage, and mismanagement, it is essential to implement robust regulatory frameworks. These frameworks should include mechanisms to track mining activities, production, and sales to reduce the information gap and ensure proper taxation and regulation.

Support for artisanal and small-scale miners is another vital policy issue. These miners play a crucial role in the growth and sustainability of the sector. Supporting them involves enhancing their capacity and competitiveness through skills

development, technology adoption, and improved market access. This not only benefits these smaller operators but also contributes to creating a dynamic and competitive mining sector, driving economic development and poverty reduction.

4.2 Opportunities for Kenya to realize the full potential in the Mining Sector

Kenya is on the verge of seizing numerous opportunities to unlock the full potential of its mining sector. The country boasts abundant and diverse gemstones, including Tsavorite, ruby, and Sapphire which offer the potential for both domestic consumption and exports, thereby driving economic growth through increased revenue from mineral exports.

The 2016 Mining Act has laid the foundation for a responsive legal and regulatory framework. This framework enhances clarity and transparency in mineral rights allocation and mining operations, attracting both local and foreign investors who have confidence in the sector.

Kenya's emphasis on local value addition and beneficiation within the mining sector creates opportunities to process and manufacture minerals locally. This leads to the creation of higher-value products, increased employment, and reduced reliance on raw mineral exports.

The government's commitment to promoting the mining sector, coupled with Kenya's strategic location in East Africa, creates an attractive investment environment. Infrastructure development, including roads, railways, and ports, enhances the country's connectivity and accessibility, further bolstering investment prospects.

Kenya's focus on environmental sustainability and responsible mining practices aligns the country with international standards, making it an appealing destination for investors who prioritize sustainability, thereby attracting increased investment in the sector.

Inclusive growth through artisanal and small-scale mining (ASM) is a significant opportunity. Proper regulations and support for these miners can improve their

livelihoods and contribute to the broader economy, fostering economic diversification and poverty reduction.

CONCLUSION

The proposed regulations represent a pivotal step in reinforcing the legal and institutional framework necessary to unlock the full potential of Kenya's mining sector, especially the gemstone industry. By addressing these policy issues and capitalizing on these opportunities, Kenya can anticipate increased revenue collection, expanded job opportunities, and infrastructure development, all in alignment with the principles of a bottom-up economic agenda and contributing substantially to the nation's development objectives.

5.0. POLICY AND LEGAL FRAMEWORK FOR THE PROPOSED REGULATIONS

5.1 The Constitution of Kenya, 2010

Part 2 Article 69 (1) (a) of the Constitution provides that the State shall ensure sustainable exploitation, utilization, management, and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefit. This regulation will provide a framework for the management and utilization of minerals for current and future generations.

5.2. The Mining Act of 2016

The legal framework for the governance of the Mining sector in Kenya is primarily under the Mining Act, No. 12 of 2016. The Act outlines the rights and obligations of mineral rights holders, establishes the process for granting mineral rights and dealers rights, and defines the regulatory framework for mining operations and all other related activities in the sector. Further, the Mining Act under Section 223(1) gives the Cabinet Secretary the power to make the regulations necessary for the proper administration and implementation of the Act. Several regulations have been developed to aid in the implementation of the Mining Act 2016.

5.3 Mining and Minerals Policy

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6.0. PUBLIC PARTICIPATION AND CONSULTATIONS

Public Participation refers to the process by which citizens, as individuals, groups, or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representatives.

It is a constitutional requirement that policy and law-making should be done openly and transparently, with appropriate procedures for effective and timely input from professionals and persons affected by the policy instruments.

6.1 Legal Basis for Public Participation and Consultation

Participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever the State or public officer applies the Constitution, enacts any law, or makes or implements a public policy. This requirement is premised on the sovereignty principle, which vests all sovereign power to the people of Kenya. This power entitles the people to unfettered access to the process of making public decisions through their involvement.

Transparency of public finances and performance is ensured through rules, mechanisms, and capacities for sharing information on government programs, budgets, expenditures, and results with citizens.¹⁰ Participation mechanisms enable citizens to participate in setting budget priorities, monitor expenditures, and assess service delivery performance. They also include feedback systems, which provide citizens with the opportunity to provide comments and grievances. Accountability mechanisms include both direct and indirect relationships, where service providers are sanctioned if they fail to meet an established standard.

The objects of devolution give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State in making decisions affecting them and recognizing the rights of communities to manage their affairs and to further their development. The values and principles of public service require the involvement of the

people in the process of policymaking and include transparency and provision to the public of timely and accurate information.

Regarding the subsidiary legislation-making process, the Statutory Instruments Act, Section 15 requires that the regulatory-making authority shall undertake public consultations before making statutory instruments (Regulations), particularly, where the proposed Regulations are likely to have a direct or substantial indirect effect on business or restrict competition.

The Act provides that in determining whether any consultation that was undertaken is appropriate, the regulation-making authority shall have regard to all relevant matters, including the extent to which the consultation: drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

The Statutory Instruments Act further requires that the persons to be consulted should either directly or by advertisement through representative organizations be invited to make submissions by a specified date, which should not be less than fourteen days, or be invited to participate in public hearings concerning the proposed instrument.

6.2 The Process of Public Participation and Consultations

According to section 5 of the Statutory Instruments Act, the Ministry of Mining Blue Economy and Maritime Affairs identified specific stakeholders with whom it engaged in a consultative process.

6.2.1 Stakeholders Mapping

The stakeholders identified for purposes of developing the proposed Regulations included:

- i. Kenya Chamber of Mines
- ii. Kenya Private Sector Alliance
- iii. National Treasury
- iv. Council of Governors

- v. Mineral Rights Holders
- vi. County Associations of Artisanal Miners
- vii. Communities living around Mining Operations/Activities
- viii. Mineral Rights Holders
- ix. Academia
- x. Researchers
- xi. Interested members of the public
- xii. Mining Investors in Kenya

6.2.2 Public Consultation Approach and Methodology

The Ministry adopted the following methodology for purposes of public participation and inclusivity:

- a) The Draft Mining (Gemstone Identification and Value Addition)(Fees) Regulations, 2023 was posted on the Ministry's website inviting representations generally and specifically from the identified stakeholders;
- b) A newspaper advert was published inviting all persons to submit their views; and
- c) Physical and virtual meetings with select stakeholders were held to discuss the drafts.
- d) Sensitization by Regional Mining Officers
- e) Emails

Based on the above approach, a total of 10 meetings were held between the Ministry and key stakeholders. The Ministry also received written representations. The following is the full list of the 43 counties invited for public participation.

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REGION COUNTIES)	(CLUSTERED	MEETING VENUE	DATE	TIME
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<i>Nairobi, Machakos, Makeni, Kajiado, Kiambu, Kitui</i>	<i>National Industrial Training Authority- Machakos County</i>	<i>4th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Nakuru, Uasin Gishu, Elgeyo Marakwet, Samburu, Nandi, Turkana, West Pokot, Baringo</i>	<i>Rift Valley Technical Training Institute- Eldoret</i>	<i>4th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Mombasa, Taita Taveta, Kwale, Kilifi, Voi, Lamu</i>	<i>Mombasa Beach Hotel- Mombasa</i>	<i>6th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Homabay, Kisumu, Siaya, Kakamega, Vihiga, Bungoma</i>	<i>Kisumu Hotel- Kisumu</i>	<i>6th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Garissa, Wajir, Mandera, Tana River</i>	<i>Garissa Farmers Training Centre- Garissa</i>	<i>11th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Kericho, Bomet, Narok, Kisii, Migori</i>	<i>Maasai Mara University- Narok</i>	<i>11th September, 2023</i>	<i>9.00 am - 4.00 pm</i>
<i>Embu, Kirinyaga, Nyeri, Murang'a, Mbeere, Tharaka Nithi, Meru, Isiolo Marsabit</i>	<i>Kenya School of Government - Embu</i>	<i>13th September, 2023</i>	<i>9.00 am - 4.00 pm</i>

6.2.3 Report on Stakeholder Consultative Process

The report is attached to this Regulatory Impact Assessment.

7.0. AN OVERVIEW OF THE PROPOSED MINING (GEMSTONE IDENTIFICATION AND VALUE ADDITION) (FEES) REGULATIONS, 2023

The proposed Mining (Gemstone Identification and Value Addition) (Fees) Regulations define key gemstone value addition terms, and classification of gemstones and provide a schedule for the fee charges on the various value addition services in the government gemstone value addition centers.

The fee charges are different as per the classification of the gemstones and the size of the gemstone since gemstones are valued according to the class whether precious/top gemstone or semi-precious and the size of the gemstones.

7.1 The proposed Regulations provide for the following salient features:

These are regulations are in 4 parts;

1. Citation- These regulations are cited as the Mining (Gemstone Identification and Value Addition) (Fees) Regulations, 2023.
2. Application - The application refers to the jurisdiction to which the regulations shall apply and that is all the gemstone value addition centers within the republic of Kenya.
3. Interpretation - This part gives the definition of key terms under these regulations.
4. Fees- the applicable fees shall be as per the schedule in these regulations.

8.0. CONSIDERATION OF ALTERNATIVES TO THE PROPOSED REGULATIONS

8.1 The Alternatives

8.1.1 *Option One: The Status Quo*

Currently, there are no existing legal instruments prescribing fees and charges for the gemstones value addition center though the services are being offered at the center.

8.1.2 *Option Two: Application of Administrative Measures*

Publishing a catalog prescribing all the fees and charges for various services offered at the Voi Gemstone Value Addition Center.

8.1.3 *Option Three: Adopting the Proposed Regulations.*

The Mining (Gemstone Identification and Value Addition) (Fees) Regulations, 2023 provides fees and charges for all the services offered at the center. Being a center established to support our local gemstone sector, the prescribed rates are highly subsidized to encourage gemstone value addition. This will help SDM in centralizing gemstone trading which is likely to attract artisanal miners. By recording all the production from artisanal miners and processing them into more valuable products such as rings, necklaces, and faceted gems, the amount of royalty payable and foreign exchange will increase exponentially.

8.2 Cost-Benefit Analysis

Option	Description	Costs	Benefits	Impacts and Distribution of Impacts	Risks
<p>Option One: Maintaining Status Quo</p>	<p>Gemstone value-addition services were rendered with no prescribed fees</p>	<p>Loss of revenues; Loss of opportunity for developing the Gemstone Industry;</p> <p>Under development of value addition center due to lack of competitive rates (no public participation);</p> <p>Unpredictability by customers may lead to customer dissatisfaction</p> <p>Little transparency;</p>	<p>Flexibility - Rates charged can be changed easily to respond to market forces;</p>	<p>Under development of the Gemstone Industry; Loss of confidence in the country's to undertake gemstone value addition; Continued exploitation of ASMs by middlemen; Lost opportunities along the gemstone value chain; Loss of revenue collection for the government Lack of trust from consumers as free things might not</p>	<p>Reduced quality in gemstones value addition services; Poor uptake of services offered at the value addition center. Under developed socio-economic status for the mining community; Loss of government revenue</p>

				generally portray quality.	
Option Two: Application of Administrative Measures	Use of a Circular or published catalog	Minimal Cost arising from printing, publication, and circulation.	Flexibility. It is easier to review and publish new fees as market forces demand. The Value additional services are also offered by the private sector, so it is necessary to match the competition; Improved transparency; Improved competitiveness	Continued Service delivery;	Prone to changes every other time due to its dependency on market forces;
Option Three: Adopting the Proposed Regulations	The Mining (Gemstone Identification and Value Addition) (Fees) Regulations , 2023	High Costs associated with the establishment, equipping, and maintenance of the facilities and equipment in the centers; Administrative costs to implement the regulatory provisions; Costs	Increased returns from gemstone mining; Increased revenues from fees for services; Improved Oversight (Greater control over the quality of value addition services);	Loss of Jobs for people offering similar services; Improved livelihood to the artisanal gemstone miners; Increased demand for Government services in gemstone value-addition	Gazetted fees restrict the ability to adapt to market fluctuations hence hampering operational efficiency. Challenges relating to meeting public expectations

		<p>associated with building human capacity (recruitment and training);</p> <p>Fees for value addition</p>		centers;	<p>in regard to services offered at the value addition centers;</p>
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8.3 Conclusion: The Preferred option

The preferred option for SDM is to prescribe the fees through The Mining (Gemstone Identification and Value Addition) (Fees) Regulations, 2023. Adopting this alternative will increase the demand and the efficiency of services offered at the center and management.

9.0 Conclusion and Recommendation

After conforming to the legal obligations and conducting public participation, it is apparent that the necessary measures and implementation safeguards have been dealt with. In view of the three available options, it is recommended that the option of developing the regulations be adopted

ANNEXURES

Annexure 1: Report on Public Participation for the Development of the Mining(Gemstone Identification and Value Addition)(Fees), 2023