



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90660; File No. SR-MEMX-2020-15]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule

December 14, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 4, 2020, MEMX LLC ("MEMX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing with the Commission a proposed rule change to amend the fee schedule applicable to Members³ pursuant to Exchange Rules 15.1(a) and (c) in order to modify its pricing for transactions in securities priced below \$1.00 per share that are executed on the Exchange. The text of the proposed rule change is provided in Exhibit 5.

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to modify its fee schedule to modify the fees and rebates applicable to transactions in securities priced below \$1.00 per share ("Sub-Dollar Securities") that are executed on the Exchange, effective as of December 4, 2020.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.⁴ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow.

The Exchange recently adopted a proposal⁵ to charge a standard fee of 0.30% of the total dollar value of any transaction in Sub-Dollar Securities that removes liquidity from the Exchange ("Removed Sub-Dollar Volume").⁶ The Exchange also adopted pricing to provide a standard rebate of 0.30% of the total dollar value of any transaction in Sub-Dollar Securities that adds liquidity, displayed or non-displayed, to the Exchange ("Added Sub-Dollar Volume").⁷

⁴ Market share percentage calculated as of December 3, 2020. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

⁵ See Securities Exchange Act Release No. 90555 (December 3, 2020) (SR-MEMX-2020-13) [sic].

⁶ This pricing is referred to by the Exchange on the fee schedule under the existing description "Removed volume from MEMX Book" with a fee code of "RB" or "RrB", as applicable, assigned by the Exchange.

⁷ This pricing is referred to by the Exchange on the fee schedule under "Added displayed volume", "Added non-displayed volume" or "Added displayed volume, Retail Order", as

The current rebate for executions of Added Sub-Dollar Volume was adopted to increase order flow in Sub-Dollar Securities to the Exchange by incentivizing Members to increase the liquidity-providing orders in Sub-Dollar Securities they submit to the Exchange, which would support price discovery on the Exchange and provide additional liquidity for incoming orders. The current fee for executions of Removed Sub-Dollar Volume, in turn, was intended to be a direct offset of the rebate provided for Added Sub-Dollar Volume so that the Exchange could remain revenue neutral with respect to such transactions while attempting to compete with other venues to attract this order flow. While the pricing adopted by the Exchange was successful in attracting liquidity, based on activity that has occurred on the Exchange in the first several days of such pricing, the Exchange believes that a rebate of 0.30% of the total dollar value of any transaction might provide an out-sized incentive to trade certain high-volume Sub-Dollar Securities, particularly those with a lower bid-ask spread. Accordingly, the Exchange is proposing to modify its rebate for Added Sub-Dollar Volume to provide a rebate of 0.05% of the total dollar value of any transaction. The Exchange still believes that providing a rebate is important to attract displayed liquidity in Added Sub-Dollar Volume but is reducing the amount of the rebate in order to further analyze the optimal way to attract on-exchange order flow in Sub-Dollar Securities. In connection with this change, the Exchange proposes to maintain a revenue-neutral fee structure for executions in Sub-Dollar Securities, and thus proposes to reduce the fee to for Removed Sub-Dollar Volume to 0.05% of the total dollar value of any transaction.

The proposed pricing for Removed Sub-Dollar Volume and Added Sub-Dollar Volume would only apply to transactions that are executed on the Exchange, and as such there would continue to be no fee charged or rebate provided for transactions in Sub-Dollar Securities that are routed to and executed at another market center. The proposed rule change does not include different fees or rebates for Sub-Dollar Securities that depend on the amount of orders submitted

applicable, with a fee code of “BB”, “BrB”, “DB”, “DrB”, “JB”, “JrB”, “HB”, “HrB”, “MB” or “MrB”, as applicable, assigned by the Exchange.

to, and/or transactions executed on or through, the Exchange. Accordingly, all fees and rebates described above are applicable to all Members, regardless of the overall volume of a Member's trading activities on the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,⁹ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."¹⁰

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(4) and (5).

¹⁰ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to transactions in Sub-Dollar Securities, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposed rule change reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members and investors. The Exchange notes that the proposal does not include different fees or rebates for transactions in Sub-Dollar Securities depending on the amount of orders submitted to, and/or transactions executed on or through, the Exchange. Accordingly, the proposed pricing structure is applicable to all Members, regardless of the overall volume of a Member's trading activities on the Exchange.

The Exchange believes that the proposed changes with respect to pricing for executions of transactions in Sub-Dollar Securities would continue to incentivize submission of additional liquidity in Sub-Dollar Securities to the Exchange through the proposed rebate of 0.05% of the total dollar value of any Added Sub-Dollar Volume transactions, thereby promoting price discovery and transparency, and enhancing order execution opportunities for all Members. The Exchange believes that the proposed rebate for Added Sub-Dollar Volume is reasonable because it would continue to incentivize Members to direct order flow in Sub-Dollar Securities to the Exchange. The Exchange notes that at least one other exchange provides tiered rebates for liquidity-adding transactions in Sub-Dollar Securities equal to and better than the proposed rebate.¹¹

¹¹ See the NYSE Arca, Inc. ("NYSE Arca") equities trading fee schedule on its public website (available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf), which reflects a standard rebate of \$0.00004 per share for liquidity-adding transactions in securities priced below \$1.00 per share; the NYSE Arca equities trading fee schedule also permits participants to qualify for tiered rebates reflected as a percentage of the total dollar value of such transactions enabling participants to receive a rebate of 0.05% of the total dollar value per transaction (i.e., the

The Exchange also believes that the proposed fee for Removed Sub-Dollar Volume is reasonable because it is in lower than¹² or within the range of¹³ fees charged by other exchanges for liquidity-removing transactions in Sub-Dollar Securities. The Exchange believes that, given the competitive environment in which the Exchange currently operates, the proposed pricing structure, with an offsetting fee and rebate with respect to executions of transactions in Sub-Dollar Securities, is a reasonable attempt to encourage liquidity in Sub-Dollar Securities on the Exchange while remaining revenue neutral with respect to such transactions.

The Exchange also believes that the proposed fee and rebate structure applicable to executions of transactions in Sub-Dollar Securities is equitably allocated and not unfairly discriminatory because it applies equally to all Members and is reasonably related to the value of the Exchange's market quality associated with higher volume. A number of Members currently transact in Sub-Dollar Securities and they, along with additional Members that choose to direct order flow in Sub-Dollar Securities to the Exchange, would all qualify for the proposed fee and

same rebate proposed by the Exchange) or higher rebates ranging from 0.10% to 0.15% of the total dollar value per transaction.

¹² See, e.g., the Cboe EDGX Exchange, Inc. equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects a fee of 0.30% of the total dollar value of the transaction for liquidity-removing transactions in securities priced below \$1.00 per share; the NYSE Arca equities trading fee schedule on its public website (available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf), which reflects a fee of 0.295% of the total dollar value of the transaction for liquidity-taking transactions in securities priced below \$1.00 per share.

¹³ See, e.g., the Cboe BYX Exchange, Inc. equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/byx/), which reflects a fee of 0.10% of the total dollar value of the transaction for liquidity-removing transactions in securities priced below \$1.00 per share; the Cboe EDGA Exchange, Inc. equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edga/), which reflects no fee or rebate for liquidity-removing transactions in securities priced below \$1.00 per share; the NYSE National, Inc. equities trading fee schedule on its public website (available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf), which reflects no fee or rebate for liquidity-removing transactions in securities priced below \$1.00 per share.

rebate. The Exchange still believes that providing a rebate is important to attract displayed liquidity in Added Sub-Dollar Volume but is reducing the amount of the rebate in order to further analyze the optimal way to attract on-exchange order flow in Sub-Dollar Securities. The Exchange believes that maintaining competitive pricing for transactions in Sub-Dollar Securities would benefit all investors by deepening the Exchange's liquidity pool, which would support price discovery, promote market transparency and improve investor protection, further rendering the proposed changes reasonable and equitable.

In conclusion, the Exchange also submits that its proposed fee structure satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act for the reasons discussed above in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing, including with respect to transactions in Sub-Dollar Securities, is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the continued submission of orders in Sub-Dollar Securities to the Exchange, thereby promoting market depth, enhanced execution opportunities, as well as price discovery and transparency for all Members. Furthermore, the Exchange believes that the proposed changes would allow the Exchange to continue to compete with other execution venues by providing competitive pricing for transactions in Sub-Dollar Securities, thereby making it a desirable destination venue for its customers. As a result, the Exchange believes that the proposed change furthers the

Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁴

Intramarket Competition

The Exchange believes that the proposed changes would continue to incentivize market participants to direct order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all Members. The proposed fees and rebates for transactions in Sub-Dollar Securities would be available to all market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As such, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect

¹⁴ See supra note 10.

to transactions in Sub-Dollar Securities, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes are competitive proposals through which the Exchange is seeking to encourage certain order flow to be sent to the Exchange.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁵ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. SEC*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁶ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

¹⁵ See supra note 10.

¹⁶ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁷ and Rule 19b-4(f)(2)¹⁸ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the 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 e-mail to rule-comments@sec.gov. Please include File Number SR-MEMX-2020-15 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-MEMX-2020-15. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁸ 17 CFR 240.19b-4(f)(2).

comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2020-15 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,

Assistant Secretary.

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¹⁹ 17 CFR 200.30-3(a)(12).