



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-102650; File No. 10-247]

In the Matter of the Application of MX2 LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission
March 13, 2025.

I. Introduction and Procedural History

On September 19, 2024, MX2 LLC (“MX2” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a Form 1 application under the Securities Exchange Act of 1934 (“Act”), seeking registration as a national securities exchange under Section 6 of the Act.¹ On November 29, 2024, MX2 submitted Amendment No. 1 to the application.² Notice of the application, as amended, was published for comment in the Federal Register on December 17, 2024.³ The Commission received one comment on the application.⁴

The Commission has reviewed the Exchange’s registration application, as amended, together with the comment letter received, in order to make a determination whether to grant such registration. For the reasons set forth below, and based on the representations set forth in MX2’s Form 1, as amended, this order approves MX2’s Form 1 application, as amended, for registration as a national securities exchange.

II. Statutory Standards

¹ 15 U.S.C. 78f. See also 15 U.S.C. 78s(a)(1) (stating that the Commission shall, “[w]ithin ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents),” grant the registration or institute proceedings to determine whether the registration should be denied).

² In Amendment No. 1, MX2 submitted updated portions of its Form 1, including Exhibits C (information regarding subsidiaries or affiliates), C-2 (Seventh Amended and Restated LLC Agreement of MEMX Holdings LLC), C-3 (Eighth Amended and Restated LLC Agreement of MEMX Holdings LLC), C-16 (Second Amended and Restated LLC Agreement of MEMX LLC), E (description of the proposed operation of the exchange) and J (list of officers, governors, members of all standing committees, or persons performing similar functions).

³ See Securities Exchange Act Release No. 101884 (Dec. 11, 2024), 89 FR 102214 (“Notice”).

⁴ Comments received in response to the Notice are available at <https://www.sec.gov/comments/10-247/10-247.htm>.

Pursuant to Sections 6(b) and 19(a) of the Act,⁵ the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.⁶

As discussed in greater detail below, the Commission finds that MX2's application, as amended, for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MX2 are consistent with Section 6 of the Act in that, among other things, they are designed to: (1) assure fair representation of the exchange's members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer;⁷ (2) prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system;⁸ (3) not permit unfair discrimination between customers, issuers, or dealers;⁹ and (4) protect investors and the public interest.¹⁰ The Commission also finds that the proposed rules of MX2 are consistent with Section 11A of the Act.¹¹ Finally, the Commission finds that MX2's

⁵ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

⁶ See also supra note 1 (discussing the time for Commission action following publication of notice of an application for exchange registration)

⁷ See U.S.C. 78f(b)(3).

⁸ See U.S.C. 78f(b)(5).

⁹ See id.

¹⁰ See id.

¹¹ 15 U.S.C. 78k-1.

proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹²

III. Discussion

As proposed, MX2 would be substantively identical to its affiliated national securities exchange, MEMX LLC (“MEMX”), with the same governance structure and a substantively identical rulebook.¹³ One commenter, stating that “there appears to be nothing unique about this exchange application,” further stated that MX2 would “contribute to the fragmentation problem” that “adds costs and doesn’t help transparency or liquidity” and “does nothing for overall market quality.”¹⁴ The commenter stated that it is “not in favor of new exchanges being approved unless they can bring a value-added innovation to the market” and further stated that “[w]hile MX2 may still be planning something innovative, it’s not in the documents that were filed with the [Commission].”¹⁵

As explained above in section II, the Act states the Commission shall grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. As stated above and for the reasons discussed throughout this order, the

¹² 15 U.S.C. 78f(b)(8).

¹³ As discussed below, MX2 proposes to incorporate by reference most chapters of the MEMX rulebook except MEMX Chapter 1 (Adoption, Interpretation and Application of Rules, and Definitions), Chapter 2 (Members of the Exchange), Rule 8.15 in Chapter 8 (Imposition of Fines for Minor Violation(s) of Rules), Chapter 11 (Trading Rules), and Chapter 15 (Dues, Fees, Assessments and Other Charges, Effective Date). See also supra note 191 (concerning rules incorporated by reference). The chapters that are not incorporated by reference are substantively identical to the corresponding rules of MEMX. References to MX2 rules discussed herein include those rules contained in the MX2 proposed rulebook as well as those corresponding MEMX rules that MX2 proposes to incorporate by reference.

¹⁴ Letter from Joseph Saluzzi, Themis Trading LLC, dated Jan. 31, 2025, available at <https://www.sec.gov/comments/10-247/10247-563415-1614842.pdf>. The commenter stated that “[e]xchange medallions are very valuable since they can generate data related fees including a share of the SIP tape revenue pool”. Id. The commenter stated that MEMX earned in 2023 \$23 million from the equities market data plans, which the commenter estimates exceeded the trading fees MEMX may have earned that year. See id.

¹⁵ Id. at 2.

Commission finds that MX2’s application, as amended, for exchange registration meets the requirements of the Act and the rules and regulations thereunder and accordingly grants the application for registration.¹⁶

While MX2’s Form 1 application does not contain any novel features when compared to MEMX, the Exchange Act does not require that a new exchange be novel or that it provide innovation to the market. While adding another exchange to the national market system can impose costs to the industry, including specifically to those market participants that become members of MX2, the Commission is required to consider a Form 1 application for consistency with statutory standards and the record does not support a denial of MX2’s Form 1 application as inconsistent with the Exchange Act.

A. Governance of MX2

MX2 will be owned by MEMX Holdings LLC (“MEMX Holdings”), a Delaware limited liability company. In turn, MEMX Holdings is owned by a group of investors that include broker-dealers and banks.

1. MX2 Board of Directors

The board of directors of MX2 (“Exchange Board”)¹⁷ will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of MX2 as a self-regulatory organization (“SRO”).¹⁸ Specifically:

- the Exchange Board initially will be composed of 10 directors;¹⁹
- one director will be the Chief Executive Officer of MX2;²⁰

¹⁶ The Commission similarly granted the Form 1 application for exchange registration of MEMX, whose governing documents, rules, forms, and application were substantively identical to those of MX2. See Securities Exchange Act Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (File No. 10-237) (order granting exchange registration of MEMX LLC) (“MEMX Order”).

¹⁷ A Director may not be subject to statutory disqualification. See First Amended and Restated Limited Liability Company Agreement of MX2 (“MX2 LLC Agreement”), Article VII, Section 7.6(d).

¹⁸ See MX2 LLC Agreement, Article VII, Section 7.2. See also Form 1, Exhibit J.

¹⁹ See MX2 LLC Agreement, Article VII, Section 7.3(a).

²⁰ See MX2 LLC Agreement, Article VII, Section 7.3(b)(i).

- the number of Non-Industry Directors²¹ will equal or exceed the sum of the number of Industry Directors²² and Member Representative Directors;²³
- at least two of the Non-Industry Directors shall also qualify as Independent Directors;²⁴
- at least one of the Non-Industry Directors shall be representative of issuers and investors and not associated with an Exchange Member, a broker, or a dealer; and
- at least 20% of the directors on the Exchange Board will be Member Representative Directors.²⁵

The initial directors of the Exchange Board will be appointed by MEMX Holdings and will serve until the first annual meeting of Company Members.²⁶ The first annual meeting of Company Members will be held within 90 days after the Commission grants MX2's exchange registration.²⁷

In addition, MEMX Holdings will appoint the initial Nominating Committee and Member Nominating Committee, consistent with each committee's compositional requirements,

²¹ "Non-Industry Director" means a Director who is an Independent Director or any other individual who would not be an Industry Director. See MX2 LLC Agreement, Article I, Section 1.1.

²² "Industry Director" means, among other criteria, a Director who is or has been within the prior three years an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer. See MX2 LLC Agreement, Article I, Section 1.1., for a description of all of the circumstances regarding when a Director would be considered an Industry Director.

²³ See MX2 LLC Agreement, Article VII, Section 7.3(b)(ii)(A). "Member Representative Director" means a Director who has been appointed as such to the initial Exchange Board pursuant to Section 7.4 of the MX2 LLC Agreement or elected by MEMX Holdings after having been nominated by the Member Nominating Committee or by an Exchange member pursuant to the MX2 LLC Agreement and confirmed as the nominee of Exchange members after majority vote of Exchange members, if applicable. A Member Representative Director must be an officer, director, employee, or agent of an Exchange member that is not a Unitholder Exchange Member. See MX2 LLC Agreement, Article I, Section 1.1.

²⁴ "Independent Director" means a Director who has no material relationship with the Exchange or any affiliate of the Exchange or any Exchange Member or any affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of MX2, MEMX, or MEMX Holdings. See MX2 LLC Agreement, Article I, Section 1.1.

²⁵ See MX2 LLC Agreement, Article VII, Section 7.3(b)(ii)(D).

²⁶ See MX2 LLC Agreement, Article VII, Section 7.3(f). "Company Members" means MEMX Holdings. See MX2 LLC Agreement, Article I, Section 1.1.

²⁷ See MX2 LLC Agreement, Article VII, Section 7.3(f).

to nominate candidates for election to the Exchange Board.²⁸ The Nominating Committee and Member Nominating Committee, after completion of their respective duties for nominating directors for election to the Board for that year, will recommend candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable.²⁹ MX2 members will have rights to nominate and elect additional candidates for the Member Nominating Committee pursuant to a petition process.³⁰

The Nominating Committee will nominate candidates for election to the Board.³¹ For Member Representative Director positions, the Member Nominating Committee, composed solely of Member Representative Committee or Panel Members,³² will solicit input from MX2 members and members may submit petition candidates.³³ If no candidates are nominated pursuant to a petition process, then the initial nominees approved and submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee.³⁴ If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MX2 members for election to determine the final designees for any open Member Representative Director positions.³⁵ In the event of a contested election, the candidates who receive the most votes will be selected as the Member Representative Director designees by the Member Nominating Committee.³⁶

²⁸ See MX2 LLC Agreement, Article VIII, Section 8.7(b).

²⁹ See id.

³⁰ See MX2 LLC Agreement, Article VII, Section 7.4

³¹ See MX2 LLC Agreement, Article VII, Section 7.4(a).

³² "Member Representative Committee or Panel Members" means a member of any Committee or hearing panel who is an officer, director, employee or agent of an Exchange Member that is not a Unitholder Exchange Member. See MX2 LLC Agreement, Article I, Section 1.1.

³³ See MX2 LLC Agreement, Article VII, Section 7.4(a). See also MX2 LLC Agreement, Article VII, Section 8.7(c).

³⁴ See MX2 LLC Agreement, Article VII, Section 7.4(e).

³⁵ See id.

³⁶ See MX2 LLC Agreement, Article VII, Section 7.4(f).

The MX2 governance provisions are consistent with the Act. In particular, the requirement that the number of Member Representative Directors must be at least 20% of the Board and the means by which they will be chosen by MX2 members provides for the fair representation of members in the selection of directors and the administration of MX2 and therefore are consistent with Section 6(b)(3) of the Act.³⁷ As the Commission has previously stated, this requirement helps to ensure that members have a voice in an exchange's self-regulatory program, and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.³⁸

In addition, with respect to the requirements that the number of Non-Industry Directors equal or exceed the sum of the number of Industry Directors and Member Representative Directors, that at least two Non-Industry Directors shall also qualify as Independent Directors, and that at least one of the Non-Industry Directors shall be representative of issuers and investors and not associated with an Exchange Member, a broker, or a dealer, the proposed composition of the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,³⁹ which require in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission previously has stated that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.⁴⁰ Further,

³⁷ 15 U.S.C. 78f(b)(3).

³⁸ See, e.g., MEMX Order, supra note 16; Securities Exchange Act Release Nos. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10-234) (order granting exchange registration of Long Term Stock Exchange, Inc.) ("LTSE Order"); 79543 (Dec. 13, 2016), 81 FR 92901, 92903 (Dec. 20, 2016) (File No. 10-227) (order granting exchange registration of MIAX PEARL, LLC) ("MIAX PEARL Order"); 68341 (Dec. 3, 2012), 77 FR 73065, 73067 (Dec. 7, 2012) (File No. 10-207) (order granting exchange registration of Miami International Securities Exchange, LLC ("MIAX Exchange")) ("MIAX Order"); 58375 (Aug. 18, 2008), 73 FR 49498, 49501 (Aug. 21, 2008) (File No. 10-182) (order granting exchange registration of BATS Exchange, Inc.) ("BATS Order"); and 53128 (Jan. 13, 2006), 71 FR 3550, 3553 (Jan. 23, 2006) (File No. 10-131) (order granting exchange registration of Nasdaq Stock Market, Inc.) ("Nasdaq Order").

³⁹ 15 U.S.C. 78f(b)(3).

⁴⁰ See, e.g., MEMX Order, supra note 16, at 27452; LTSE Order, supra note 38, at 21843; MIAX PEARL Order, supra note 38, at 92903; MIAX Order, supra note 38, at 73067; BATS Order, supra note 38, at 49501; and Nasdaq Order, supra note 38, at 3553.

the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. Public directors can provide unbiased perspectives, which may enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.

2. Interim Board

MEMX Holdings will hold a special meeting to appoint Interim Directors of the Board (“Interim Board”), which will include Interim Member Representative Directors.⁴¹ Upon appointment of the Interim Directors, the Interim Board will meet the Board composition requirements set forth in the MX2 LLC Agreement.⁴² The Interim Board members will serve only until the first annual meeting of Company Members, which will be held within 90 days after the Commission grants the Exchange’s registration as a national securities exchange.⁴³ The Exchange represents that it will complete the full nomination, petition, and voting process set forth in the MX2 LLC Agreement, which will provide persons that are approved as MX2 members after the date that the Commission grants the Exchange’s registration as a national securities exchange with the opportunity to participate in the selection of Member Representative Directors as promptly as possible after the effective date of the MX2 LLC Agreement.⁴⁴

3. Exchange Committees

⁴¹ See Form 1, Exhibit J.

⁴² See *id.* See also MX2 LLC Agreement, Article VII, Section 7.3.

⁴³ See MX2 LLC Agreement, Article VII, Section 7.3(f).

⁴⁴ See Form 1, Exhibit J.

MX2 has proposed to establish several named committees of the Exchange Board, including: an Appeals Committee⁴⁵ and a Regulatory Oversight Committee,⁴⁶ as well as the Nominating Committee and Member Nominating Committee, discussed above.⁴⁷

The Appeals Committee will consist of two Independent Directors, and one Member Representative Director.⁴⁸ Each member of the Regulatory Oversight Committee must be an Independent Director.⁴⁹

The MX2 proposed named committees, which are similar to the named committees maintained by other exchanges,⁵⁰ are designed to help enable the Exchange to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁵¹

B. MEMX Holdings and Regulation of the Exchange

When MX2 commences operations as a national securities exchange, it will have all of the attendant regulatory obligations under the Act. In particular, MX2 will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in both the MX2 and MEMX Holdings governing documents are designed to

⁴⁵ See MX2 LLC Agreement, Article VIII, Section 8.1. The Appeals Committee will preside over all appeals related to disciplinary and adverse action determinations in accordance with MX2 rules. See MX2 LLC Agreement, Article VIII, Section 8.6.

⁴⁶ See MX2 LLC Agreement, Article VIII, Section 8.1. The Regulatory Oversight Committee will be responsible for establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer and for recommending personnel actions involving the Chief Regulatory Officer and senior regulatory personnel. See MX2 LLC Agreement, Article VIII, Section 8.8(c).

⁴⁷ The Exchange Board could also establish additional committees. See MX2 LLC Agreement, Article VIII, Section 8.1. All committees of the Board will be subject to the control and supervision of the Board. See *id.*

⁴⁸ See MX2 LLC Agreement, Article VIII, Section 8.6.

⁴⁹ See MX2 LLC Agreement, Article VIII, Section 8.8(e).

⁵⁰ See, e.g., MEMX Order, *supra* note 16, at 27453. See also Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10-222) (order granting exchange registration of Investors' Exchange, LLC) ("IEX Order"); Article IV, Section 4.1 of the Eleventh Amended and Restated Bylaws of Cboe Exchange, Inc.

⁵¹ 15 U.S.C. 78f(b)(1).

facilitate the ability of MX2 to fulfill its regulatory obligations and to help facilitate Commission oversight of MX2. The discussion below summarizes some of these key provisions.

1. Ownership Structure; Ownership and Voting Limitations

As stated above, MX2 will be owned by MEMX Holdings. The proposed Eighth Amended and Restated Limited Liability Company Agreement of MEMX Holdings (“MEMX Holdings LLC Agreement”) includes restrictions on the ability to own and vote units representing a fractional part of the interest in MEMX Holdings (“Units”).⁵² These limitations are designed to prevent any party to the MEMX Holdings LLC Agreement from exercising undue control over the operation of the Exchange and to ensure that the Exchange and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as MEMX Holdings shall control, directly or indirectly, MX2, no person,⁵³ either alone or together with its related persons,⁵⁴ will be permitted to beneficially own, directly or indirectly, of record or beneficially, shares constituting more than 40% of any class of Units.⁵⁵ A more restrictive condition will apply to the broker-dealer members of the Exchange, who will be prohibited from beneficially owning, directly or indirectly, either alone or together with their related persons, more than 20% of any class of Units.⁵⁶ If any party to the

⁵² “Unit” is defined in Article I, Section 1.1 of the MEMX Holdings LLC Agreement. These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. See, e.g., MEMX Order, supra note 16, IEX Order, supra note 50, and LTSE Order, MIAx PEARL Order, MIAx Order, and BATS Order, supra note 38; see also Securities Exchange Act Release Nos. 76998 (Jan. 29, 2016), 81 FR 6066 (Feb. 4, 2016) (File No. 10-221) (order granting exchange registration of ISE Mercury, LLC) (“ISE Mercury Order”); 70050 (July 26, 2013), 78 FR 46622, 46624 (Aug. 1, 2013) (File No. 10-209) (order granting exchange registration of ISE Gemini, LLC) (“ISE Gemini Order”); 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE-2008-88) (Cboe demutualization order); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03) (NSX demutualization order); 51149 (Feb. 8, 2005), 70 FR 7531 (Feb. 14, 2005) (SR-CHX-2004-26) (CHX demutualization order); and 49098 (Jan. 16, 2004), 69 FR 3974 (Jan. 27, 2004) (SR-Phlx-2003-73) (Phlx demutualization order).

⁵³ See MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “Person”).

⁵⁴ See id. (defining “Related Persons”).

⁵⁵ See MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(i). There are limited exceptions to these prohibitions. See infra notes 63-65 and accompanying text.

⁵⁶ See MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(ii). This restriction, unlike others discussed below (see infra note 63 and accompanying text), cannot be waived. See MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii).

MEMX Holdings LLC Agreement purports to transfer⁵⁷ any Units or Unit Equivalents⁵⁸ in violation of these ownership limits, MEMX Holdings will be required (to the extent funds are legally available) to redeem the Units in excess of the applicable ownership limit.⁵⁹

In addition, no person, alone or together with its related persons, may, directly, indirectly, or pursuant to any agreement, vote or cause the voting of Units or give any consent or proxy with respect to Units representing more than 20% of the voting power of the then issued and outstanding Units (“Voting Limitation”).⁶⁰ Further, no person, either alone or together with its related persons, may enter into any agreement, plan or other arrangement with any other person, either alone or together with its related persons, under circumstances that would result in the Units that are subject to such agreement, plan, or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan, or other arrangement would be to enable any person, either alone or together with its related persons, to vote, possess the right to vote, or cause the voting of Units that would represent more than 20% of the voting power of the then issued and outstanding Units.⁶¹

⁵⁷ See MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “transfer” in this context).

⁵⁸ See *id.* (defining “Unit Equivalents”).

⁵⁹ See MEMX Holdings LLC Agreement, Article III, Section 3.7(c). The price of the redeemed Units or Unit Equivalents is also prescribed in the MEMX Holdings LLC Agreement. See *id.* The number of Units or Unit Equivalents to be redeemed is to be calculated after taking into account that the redeemed Units or Unit Equivalents will become treasury shares and will no longer be deemed to be outstanding. See *id.* It is further provided in the MEMX Holdings LLC Agreement that any Units or Unit Equivalents that have been called for redemption may not be deemed outstanding Units or Unit Equivalents if a sum sufficient to redeem the Units or Unit Equivalents has been irrevocably deposited or set aside to pay the redemption price. From and after the redemption date (unless MEMX Holdings defaults in providing funds for the payment of the redemption price), the redeemed Units or Unit Equivalents that have been redeemed will become treasury shares, and all rights of the holder of the redeemed Units or Unit Equivalents in MEMX Holdings (except the right to receive from MEMX Holdings the redemption price against delivery to MEMX Holdings of evidence of ownership of the shares) will cease. See *id.* In addition, in the event that any redemption has resulted in any person owning such number of Units or Unit Equivalents that is in violation of the ownership limits, MEMX Holdings will be required to redeem those Units or Unit Equivalents pursuant to the limitation provisions. See *id.*

⁶⁰ See MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(iii).

⁶¹ See *id.* In addition, the quorum requirements of the MEMX Holdings board of directors (“MEMX Holdings Board”) will require the presence of (1) a Market Maker Director, (2) a Bank Director, (3) a Buy Side Director, and (4) a Retail Broker Director. See MEMX Holdings LLC Agreement, Article VIII, Section 8.6(a)(i). See also MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining Market

The MEMX Holdings Board will be permitted to waive the 40% ownership limitation and the 20% Voting Limitation pursuant to a resolution duly adopted by the MEMX Holdings Board by Supermajority Board Vote,⁶² if it makes certain determinations.⁶³ Any such waiver will not be effective unless and until approved by the Commission.⁶⁴

Any person that proposes to own Units in excess of the 40% ownership limitation, or to vote or grant any proxies or consents with respect to Units constituting more than 20% of the voting power of the then outstanding Units, will be required to deliver written notice to the MEMX Holdings Board of its intention.⁶⁵ The notice must be delivered to the MEMX Holdings Board not less than 45 days (or any shorter period to which the Board expressly consents) before the proposed ownership of such Units or the proposed vote.⁶⁶

The MEMX Holdings LLC Agreement also contains provisions that are designed to further safeguard the ownership and voting limitations described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons beneficially owns, directly or indirectly (whether by acquisition or a change in the number of Units outstanding), of record or beneficially 5% or more of the then

Maker Director, Bank Director, Buy Side Director, and Retail Broker Director). This quorum provision will guard against undue influence over the affairs of MEMX Holdings by any particular category of MEMX Holdings investor.

⁶² See MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “Supermajority Board Vote”).

⁶³ See MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii). See also *supra* note 56 (concerning the inability to waive restrictions for broker-dealer members of the Exchange). The required determinations are that such waiver will not impair the ability of the Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder; that such waiver is otherwise in the best interests of MEMX Holdings, its stockholders, and the Exchange; that such waiver will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and that such Person and its Related Persons are not subject to any applicable “statutory disqualification” within the meaning of Section 3(a)(39) of the Act. See *id.* See also MEMX Holdings LLC Agreement, Article III, Section 3.5(c). These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. See, e.g., MEMX Order, *supra* note 16, IEX Order, *supra* note 50, ISE Mercury Order and ISE Gemini Order, *supra* note 52; LTSE Order, MIAx PEARL Order, MIAx Order, and BATS Order, *supra* note 38; and Securities Exchange Act Release No. 61698 (Mar. 12, 2010), 75 FR 13151 (Mar. 18, 2010) (File Nos. 10-194 and 10-196) (order granting exchange registration of DirectEdge exchanges) (“DirectEdge Exchanges Order”).

⁶⁴ See MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii).

⁶⁵ See MEMX Holdings LLC Agreement, Article III, Section 3.5(d).

⁶⁶ See *id.*

outstanding Units will be required to notify the MEMX Holdings Board in writing of such ownership.⁶⁷ Thereafter, such persons will be required to update MEMX Holdings of any increase or decrease of 1% or more in their previously reported ownership percentage.⁶⁸ Further, in the event of a merger or affiliation between MEMX Holdings members, the surviving member or surviving affiliated group will (1) if both such members had nominated a director that is serving on the MEMX Holdings Board at the time of their merger or affiliation, remove or cause the removal of one of such directors effective upon the consummation of such merger or affiliation, and (2) thereafter have the right to nominate only one director and the number of directors shall be reduced accordingly.⁶⁹

The Exchange's LLC Agreement does not include the same change of control provisions that are present in the MEMX Holdings LLC Agreement because the MX2 LLC Agreement instead explicitly identifies its owner (MEMX Holdings) by name as the Company Member of MX2.⁷⁰ Thus, any changes in the ownership of MX2 would require the MX2 LLC Agreement to be amended. Any amendment to the MX2 LLC Agreement, including to ownership of the Exchange, would constitute a proposed rule change under Section 19(b) of the Act⁷¹ and Rule 19b-4⁷² thereunder that will be required to be filed with, or filed with and approved by, the Commission.⁷³ Moreover, pursuant to the MX2 LLC Agreement itself, any transfer of limited

⁶⁷ See MEMX Holdings LLC Agreement, Article III, Section 3.6(a). The notice will require the Person's full legal name; the Person's title or status and the date on which such title or status was acquired; the Person's and its Related Person's) approximate ownership interest in MEMX Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of MEMX Holdings, whether through ownership of securities, by contract or otherwise. See id.

⁶⁸ See MEMX Holdings LLC Agreement, Article III, Section 3.6(b). Changes of less than 1% must also be reported to MEMX Holdings if they result in such Person crossing a 20% or 40% ownership threshold. See id. In addition, the Exchange's rules also impose limits on affiliation between the Exchange and a member of the Exchange. See MX2 Rule 2.10 (No Affiliation between Exchange and any Member).

⁶⁹ See MEMX Holdings LLC Agreement, Article VIII, Section 8.17(a). See also MX2 LLC Agreement, Article VII, Section 7.3(c)(v).

⁷⁰ See MX2 LLC Agreement, Schedule 1.

⁷¹ 15 U.S.C. 78s(b).

⁷² 17 CFR 240.19b-4.

⁷³ See MX2 LLC Agreement, Article XVIII, Section 18.2.

liability company interests of MX2 will be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act.⁷⁴

Although MEMX Holdings is not directly responsible for regulation, its activities with respect to the operation of MX2 must be consistent with, and must not interfere with, the self-regulatory obligations of MX2.⁷⁵ As described above, the provisions applicable to direct and indirect changes in control of MEMX Holdings and MX2, as well as the voting limitation imposed on owners of MEMX Holdings who also are MX2 members, are designed to help prevent any owner of MEMX Holdings from exercising undue influence or control over the operation of the Exchange and to help ensure that the Exchange retains a sufficient degree of independence to effectively carry out its regulatory obligations under the Act.

In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. As the Commission has stated in the past, a member's ownership interest in an entity that controls an exchange could become so large as to cast doubt on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.⁷⁶ A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

⁷⁴ See MX2 LLC Agreement, Article XV, Section 15.1(a).

⁷⁵ See, e.g., IEX Order, supra note 50.

⁷⁶ See, e.g., MEMX Order, supra note 16; ISE Mercury Order, supra note 52; IEX Order, supra note 50; LTSE Order, MIAx PEARL Order, MIAx Order, and BATS Order, supra note 38; and DirectEdge Exchanges Order, supra note 63.

The Commission has recognized that “to be effective, an SRO must be structured in such a way that regulatory staff is unencumbered by inappropriate business pressure” that could “inhibit effective regulation and discourage vigorous enforcement against members.”⁷⁷ To help ensure independent and empowered SRO regulatory operations, MX2 has, among other things, adopted a governance structure designed to mitigate the inherent conflict. Specifically, MX2 has an independent Chief Regulatory Officer that oversees the exchange’s regulatory operations and that reports to an independent Regulatory Oversight Committee of the exchange board of directors. In addition, MX2 has a majority independent board of directors with other key independent board committees, such as the Regulatory Oversight Committee.⁷⁸

Ownership and voting limits in the governing documents of the exchange and/or its holding company further protects the status of SRO independence. The provisions that MX2 has proposed, which are consistent with those in place across all exchanges today, are designed to prevent any direct or indirect owner from exercising control over the operation of the exchange as well as to ensure that the exchange and the Commission are able to carry out their regulatory obligations under the Act. These provisions impose limits on voting and ownership of exchange holding companies, with more stringent ownership limits imposed on member owners.⁷⁹

As a registered exchange, MX2 will be subject to the same regulatory standards applicable to any other exchange regardless of the identity of the ultimate owners of that exchange. As discussed above and further below, MX2 has proposed to adopt industry-standard protections in a governance structure for itself and its holding company that is designed to

⁷⁷ See, e.g., Securities Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004) (Concept Release Concerning Self-Regulation). Nevertheless, the federal securities laws require member involvement in the overall governance and administration of an exchange. See, e.g., 15 U.S.C. 78f(b)(3) (requiring an exchange, among other things, to provide to its broker-dealer members “a fair representation of its members in the selection of its directors and administration of its affairs”).

⁷⁸ Each member of the Regulatory Oversight Committee will be an Independent Director. See Article VIII, Section 8.8(e) of the MX2 LLC Agreement.

⁷⁹ See supra notes 53-74 and accompanying text.

preserve MX2's self-regulatory independence by protecting MX2 from inappropriate business pressures.

MX2's and MEMX Holdings' proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁸⁰ In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

2. Regulatory Independence and Oversight

Although MEMX Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MX2 must be consistent with, and must not interfere with, MX2's self-regulatory obligations. In this regard, MX2 and MEMX Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MX2. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.⁸¹ Specifically:

- the directors, officers, employees, and agents of MEMX Holdings must give due regard to the preservation of the independence of the self-regulatory function of MX2 and to its obligations to investors and the general public and must not take actions which would interfere with the effectuation of decisions by the Exchange Board relating to its regulatory functions (including disciplinary matters) or which

⁸⁰ 15 U.S.C. 78f(b)(1).

⁸¹ See, e.g., MEMX Order, supra note 16; IEX Order, supra note 50; LTSE Order and MIAX Order, supra note 38; and DirectEdge Exchanges Order, supra note 63.

would interfere with MX2's ability to carry out its responsibilities under the Act.⁸²

- MEMX Holdings must comply with the federal securities laws and the rules and regulations promulgated thereunder, and must cooperate with the Commission, MX2, Financial Industry Regulatory Authority, Inc. ("FINRA"), and any other SROs of which MEMX Execution Services LLC ("MEMX ES") is a member, pursuant to and to the extent of their respective regulatory authority.⁸³ In addition, MEMX Holdings' officers, directors, employees, and agents must comply with the federal securities laws and the rules and regulations promulgated thereunder and are deemed to agree to cooperate with: (1) the Commission and MX2 in respect of the Commission's oversight responsibilities regarding MX2 and the self-regulatory functions and responsibilities of MX2; and (2) FINRA, any other SROs of which MEMX ES is a member, and MEMX ES in respect of FINRA's and any such other SRO's oversight responsibilities regarding MEMX ES.⁸⁴ MEMX Holdings must take reasonable steps necessary to cause its officers, directors, employees and agents to so cooperate.⁸⁵

⁸² See MEMX Holdings LLC Agreement, Article VIII, Section 8.18(b). Similarly, Article VII, Section 7.2(b) of the MX2 LLC Agreement requires the Exchange Board and each Director, when managing the business and affairs of MX2, to consider the requirements of Section 6(b) of the Act and requires each Director, officer, or employee of MX2 to comply with the federal securities laws and regulations thereunder and cooperate with the Commission, and MX2 pursuant to its regulatory authority. Article VII, Section 7.2(c) of the MX2 LLC Agreement also requires the Exchange Board, when evaluating any proposal to take into account all factors that the Exchange Board deems relevant, including, without limitation, to the extent deemed relevant: the potential impact on the integrity, continuity and stability of the national securities exchange operated by MX2 and the other operations of MX2, on the ability to prevent fraudulent and manipulative acts and practices, and on investors and the public, and whether such proposal would promote just and equitable principles of trade, foster cooperation and coordination with Persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

⁸³ See MEMX Holdings LLC Agreement, Article XI, Section 11.3(h). MEMX ES is a subsidiary of MEMX Holdings that is a broker-dealer and a member of FINRA. See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

- MEMX Holdings, and its officers, directors, employees, and agents must submit to the jurisdiction of the U.S. federal courts, the Commission, and MX2, for purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, MX2 activities.⁸⁶
 - All books and records of MX2 reflecting confidential information pertaining to the self-regulatory function of MX2 (including but not limited to disciplinary matters, trading data, trading practices, and audit information) must be retained in confidence by MX2 and its personnel, including directors, Board observers, officers, employees, and agents, and will not be used by MX2 for any non-regulatory purposes and shall not be made available to any person (including, without limitation, any MX2 member) other than to personnel of the Commission, personnel of another self-regulatory organization performing regulatory services on behalf of MX2, a processor operating pursuant to an effective national market system plan (i.e., the Consolidated Audit Trail processor), and those personnel of MX2, members of committees of the Exchange Board, members of the Exchange Board, or hearing officers and other agents of MX2, to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of MX2.⁸⁷
- Similar provisions apply to MEMX Holdings and its directors, officers, employees, and agents.⁸⁸

⁸⁶ See MEMX Holdings LLC Agreement, Article XV, Section 15.12(b).

⁸⁷ See MX2 LLC Agreement, Article XIII, Section 13.1. See also MX2 LLC Agreement, Article VII, Section 7.3(c)(ix) (discussing the rights of MEMX Holdings investors to appoint non-voting observers to the Exchange Board).

⁸⁸ The MEMX Holdings LLC Agreement provides that all books and records of MX2 reflecting confidential information pertaining to the self-regulatory function of MX2 that come into the possession of MEMX Holdings, and the information contained in those books and records, will be subject to confidentiality restrictions and will not be used for any non-regulatory purposes. See MEMX Holdings LLC Agreement, Article XII, Section 12.2(c). The MX2 and MEMX Holdings governing documents acknowledge that requirements to keep such information confidential shall not limit or impede the rights of the Commission to access and examine such information or limit the ability of officers, directors, employees, or agents of

- The books and records of MX2 and MEMX Holdings must be maintained in the United States⁸⁹ and, to the extent they are related to the operation or administration of MX2, MEMX Holdings' books and records will be subject at all times to inspection and copying by the Commission and MX2.⁹⁰
- Furthermore, to the extent they are related to the operation or administration of MX2, the books, records, premises, officers, directors, employees, and agents of MEMX Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MX2, for purposes of, and subject to oversight pursuant to, the Act.⁹¹
- MEMX Holdings will take reasonable steps necessary to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) with MEMX Holdings to consent in writing to the applicability of provisions regarding non-interference, confidentiality, books and records, compliance and cooperation, jurisdiction, and regulatory obligations, with respect to their activities related to MX2.⁹²
- The MEMX Holdings LLC Agreement requires that, so long as MEMX Holdings controls MX2, any changes to that document must be submitted to the Exchange Board for approval, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations

MX2 or MEMX Holdings to disclose such information to the Commission or MX2. See MX2 LLC Agreement, Article XIII, Section 13.1 and MEMX Holdings LLC Agreement, Article XII, Section 12.2(c).

⁸⁹ See MX2 LLC Agreement, Article XIII, Section 13.1; and MEMX Holdings LLC Agreement, Article XII, Section 12.2(a).

⁹⁰ See MEMX Holdings LLC Agreement, Article XII, Section 12.2(b).

⁹¹ See id.

⁹² See MEMX Holdings LLC Agreement, Article VIII, Section 8.18(b).

thereunder, such change shall not be effective until filed with and effective by operation of law, or filed with, and approved by, the Commission.⁹³

The provisions discussed in this section, which are designed to help ensure the independence of MX2's regulatory function and facilitate the ability of MX2 to carry out its regulatory responsibilities under, and operate in a manner consistent with, the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁹⁴

Further, Section 19(h)(1) of the Act⁹⁵ provides the Commission with the authority "to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance . . . " with any such provision by its members (including associated persons thereof). If the Commission were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1),⁹⁶ these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

Even in the absence of the governance provisions described above, under Section 20(a) of the Act,⁹⁷ any person with a controlling interest in MX2 would be jointly and severally liable with and to the same extent that MX2 is liable under any provision of the Act, unless the

⁹³ See MEMX Holdings LLC Agreement, Article XV, Section 15.9(a).

⁹⁴ 15 U.S.C. 78f(b)(1).

⁹⁵ See 15 U.S.C. 78s(h)(1).

⁹⁶ 15 U.S.C. 78f(b)(1); 15 U.S.C. 78s(g)(1).

⁹⁷ 15 U.S.C. 78t(a).

controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act⁹⁸ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act⁹⁹ authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to MEMX Holdings.

3. Regulatory Oversight Committee

The regulatory operations of MX2 will be monitored by the Regulatory Oversight Committee of the Exchange Board. As mentioned above, the Regulatory Oversight Committee will consist only of Independent Directors.¹⁰⁰ The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MX2’s regulatory and SRO responsibilities, assessing MX2’s regulatory performance, and assisting the Exchange Board (and committees of the Exchange Board) in reviewing MX2’s regulatory plan and the overall effectiveness of MX2’s regulatory functions.¹⁰¹

Further, the Chief Regulatory Officer (“CRO”) of MX2 will have general supervision over MX2’s regulatory operations, including responsibility for overseeing MX2’s surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another SRO to which MX2 is a party.¹⁰² The Regulatory Oversight Committee, in consultation with the Chief Executive Officer of MX2, will be responsible for

⁹⁸ 15 U.S.C. 78t(e).

⁹⁹ 15 U.S.C. 78u-3.

¹⁰⁰ See supra note 49 and accompanying text.

¹⁰¹ See MX2 LLC Agreement, Article VIII, Section 8.8(a).

¹⁰² See MX2 LLC Agreement, Article IX, Section 9.3.

establishing the goals, assessing the performance, and fixing the compensation of the CRO and for recommending personnel actions involving the CRO and senior regulatory personnel.¹⁰³

4. Regulatory Funding and Services

As a prerequisite for the Commission's granting of an exchange's application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act.¹⁰⁴ Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and rules thereunder and the rules of the exchange.¹⁰⁵ The discussion below summarizes how MX2 proposes to conduct and structure its regulatory operations.

a. Regulatory Funding

To help ensure that MX2 has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MX2 states that, if the Commission approves MX2's application for registration as a national securities exchange, MEMX Holdings will allocate sufficient assets to MX2 to enable the Exchange's operation.¹⁰⁶ Specifically, MX2 represents that MEMX Holdings will make a cash contribution to MX2 of \$5,000,000, "in addition to any previously-provided in-kind contributions, such as legal, regulatory, and infrastructure-related services."¹⁰⁷ MX2 also represents that such cash and in-kind contributions from MEMX Holdings will be adequate to operate MX2, including the regulation of the Exchange, and that MEMX Holdings and MX2 will enter into an agreement that requires MEMX Holdings to

¹⁰³ See MX2 LLC Agreement, Article VIII, Section 8.8(c). To the extent that the Chief Executive Officer of MX2 has any indirect supervisory responsibility for the role or function of the CRO, including but not limited to, implementation of the budget for the regulatory function or regulatory personnel matters, the Regulatory Oversight Committee will take all steps reasonably necessary to ensure that the Chief Executive Officer does not compromise the regulatory autonomy and independence of the CRO or the regulatory function. See MX2 LLC Agreement, Article VIII, Section 8.8(d).

¹⁰⁴ See 15 U.S.C. 78f(b)(1).

¹⁰⁵ See *id.* See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

¹⁰⁶ See Form 1, Exhibit I.

¹⁰⁷ See *id.*

provide adequate funding for the Exchange's operations, including the regulation of the Exchange.¹⁰⁸

Further, any "Regulatory Funds" received by MX2 will not be used for non-regulatory purposes or distributed, advanced or allocated to MEMX Holdings, but rather will be applied to fund the regulatory operations of MX2, or, as applicable, used to pay restitution and disgorgement to customers.¹⁰⁹ Any excess non-regulatory funds, as solely determined by MX2, will be remitted to MEMX Holdings in accordance with the MX2 LLC Agreement.¹¹⁰

b. Regulatory Contract with FINRA

Although MX2 will be an SRO with all of the attendant regulatory obligations under the Act, it has represented to the Commission that it intends to enter into a regulatory services agreement ("RSA") with FINRA, under which FINRA as a regulatory services provider will perform certain regulatory functions on MX2's behalf.¹¹¹ Specifically, MX2 expects that such services will include performance of investigation, disciplinary, and hearing services.¹¹² Notwithstanding the RSA, MX2 will retain legal responsibility for the regulation of its members and its market and the performance of FINRA as its regulatory services provider. Because MX2 anticipates entering into an RSA with FINRA, it has not made provisions to fulfill the regulatory

¹⁰⁸ See id. MX2 represents that this agreement will provide that MX2 will receive all fees, including regulatory fees and trading fees, payable by MX2's members, as well as any funds received from any applicable market data fees and tape revenue, and will further provide that MEMX Holdings will reimburse MX2 for its costs and expenses to the extent that the Exchange's assets are insufficient to meet its costs and expenses. See id.

¹⁰⁹ See MX2 LLC Agreement, Article XVII, Section 17.4(b). Article I, Section 1.1 of the MX2 LLC Agreement defines "Regulatory Funds" as "fees, fines, or penalties derived from the regulatory operations of [MX2]," but such term does not include "revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of [MX2], even if a portion of such revenues are used to pay costs associated with the regulatory operations of [MX2]." This definition is consistent with the rules of other SROs. See, e.g., MEMX LLC Agreement, Article XVII, Section 17.4(b); LTSE Bylaws, Article I(bb); Amended and Restated By-Laws of MIAX Exchange, Article 1(II); By-Laws of NASDAQ PHLX LLC, Article I(ii); and By-Laws of NASDAQ BX, Inc., Article I(ii).

¹¹⁰ See Form 1, Exhibit I.

¹¹¹ See Form 1, Exhibit L. See also MX2 Rule 9.8.

¹¹² See Form 1, Exhibit L.

services that will be undertaken by FINRA. Accordingly, the Commission is conditioning the operation of MX2 on a final RSA that specifies the services that will be provided to MX2.

It is consistent with the Act for MX2 to contract with FINRA to perform certain examination, enforcement, and disciplinary functions.¹¹³ These functions are fundamental elements of a regulatory program and constitute core self-regulatory functions. FINRA has the expertise and experience to perform these functions for MX2.¹¹⁴ However, MX2, unless relieved by the Commission of its responsibility, bears the self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MX2's behalf.¹¹⁵ In performing these regulatory functions, however, FINRA may nonetheless bear liability for causing or aiding and abetting the failure of MX2 to perform its regulatory functions.¹¹⁶ Accordingly, although FINRA will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for MX2, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws or rules thereunder by MX2.¹¹⁷

c. Rule 17d-2 Agreements

Section 19(g)(1) of the Act,¹¹⁸ among other things, requires every SRO registered as either a national securities exchange or national securities association to comply with the Act, the

¹¹³ For example, MEMX, LTSE, IEX, MIAX Exchange, MIAX PEARL, LLC, Nasdaq MRX, LLC, Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. ("Cboe EDGX"), and Cboe BZX Exchange, Inc. have entered into RSAs with FINRA.

¹¹⁴ See, e.g., MEMX Order, supra note 16; LTSE Order, supra note 38; IEX Order, supra note 50; DirectEdge Exchanges Order, supra note 63; and Nasdaq Order, supra note 38. The Commission is not approving the RSA or any of its specific terms.

¹¹⁵ See 15 U.S.C. 78s(g)(1).

¹¹⁶ For example, if failings by FINRA have the effect of leaving MX2 in violation of any aspect of MX2's self-regulatory obligations, MX2 would bear direct liability for the violation, while FINRA may bear liability for causing or aiding and abetting the violation. See, e.g., MEMX Order, supra note 16; LTSE Order, supra note 38; IEX Order, supra note 50; Nasdaq Order and BATS Order, supra note 38; and DirectEdge Exchanges Order, supra note 63.

¹¹⁷ See, e.g., MEMX Order, supra note 16; LTSE Order, supra note 38; IEX Order, supra note 50; and Nasdaq Order, supra note 38.

¹¹⁸ 15 U.S.C. 78s(g)(1).

rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members.¹¹⁹ Rule 17d-2 of the Act permits SROs to propose joint plans to allocate regulatory responsibilities amongst themselves for their common rules with respect to their common members.¹²⁰ These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. For example, the Commission recently declared effective a plan to allocate regulatory responsibilities between FINRA and MEMX pursuant to which FINRA assumes examination and enforcement responsibility for broker-dealers that are members of both FINRA and MEMX with respect to the rules of MEMX that are substantially similar to the applicable rules of FINRA, as well as certain specified provisions of the federal securities laws.¹²¹

A Rule 17d-2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.¹²² MX2 has represented to the Commission that it will join all applicable plans, including Rule 17d-2 plans

¹¹⁹ 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

¹²⁰ See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

¹²¹ See Securities Exchange Act Release No. 96101 (Oct. 18, 2022), 87 FR 64280 (Oct. 24, 2022) (File No. 4-762). See also, e.g., Securities Exchange Act Release Nos. 86587 (Aug. 7, 2019), 84 FR 39883 (Aug. 12, 2019) (File No. 4-747) (FINRA/LTSE); 83696 (July 24, 2018), 83 FR 35682 (July 27, 2018) (File No. 4-678) (FINRA/MIAX Exchange/MIAX PEARL); 77321 (Mar. 8, 2016), 81 FR 13434 (Mar. 14, 2016) (File No. 4-697) (FINRA/ISE Mercury, LLC); 73641 (Nov. 19, 2014), 79 FR 70230 (Nov. 25, 2014) (File No. 4-678) (FINRA/MIAX Exchange); 70053 (July 26, 2013), 78 FR 46656 (Aug. 1, 2013) (File No. 4-663) (FINRA/Topaz Exchange n/k/a ISE Gemini, LLC); 59218 (Jan. 8, 2009), 74 FR 2143 (Jan. 14, 2009) (File No. 4-575) (FINRA/Boston Stock Exchange, Inc. ("BSE")); 58818 (Oct. 20, 2008), 73 FR 63752 (Oct. 27, 2008) (File No. 4-569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4-536) (National Association of Securities Dealers, Inc. ("NASD") n/k/a FINRA) and Chicago Board of Options Exchange, Inc. concerning the CBOE Stock Exchange, LLC); 55367 (Feb. 27, 2007), 72 FR 9983 (Mar. 6, 2007) (File No. 4-529) (NASD/International Securities Exchange, LLC); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4-517) (NASD/Nasdaq).

¹²² See Securities Exchange Act Release No. 12935 (Oct. 28, 1976), 41 FR 49091 (Nov. 8, 1977) (Rule 17d-2 Adopting Release).

for the allocation of regulatory responsibilities.¹²³ Similar to other exchanges, the Commission understands from MX2 that it will enter into a bilateral Rule 17d-2 agreement covering common members of MX2 and FINRA. This agreement will allocate to FINRA regulatory responsibility, with respect to common members, for specified regulatory and enforcement matters arising out of specified common rules and specified provisions of the Act and the rules and regulations thereunder. In addition, the Commission is conditioning operation of MX2 as an exchange on MX2 first joining the applicable multilateral Rule 17d-2 plans, including the multi-party Rule 17d-2 plan for the allocation of regulatory responsibilities with respect to certain Regulation NMS and Consolidated Audit Trail Rules and the multi-party Rule 17d-2 plan for the surveillance, investigation, and enforcement of common insider trading rules.¹²⁴

Because MX2 anticipates entering into these Rule 17d-2 agreements, it has not made provision to fulfill the regulatory obligations that will be undertaken by FINRA and other SROs under these agreements with respect to common members.¹²⁵ Accordingly, the Commission is conditioning the operation of MX2 on approval by the Commission of a Rule 17d-2 agreement that allocates the above specified matters to FINRA, and the approval of an amendment to the existing multi-party Rule 17d-2 plans specified above to add MX2 as a party.

C. MX2 Trading System

MX2 will operate a fully automated electronic order book and will not maintain or operate a physical trading floor. Only broker-dealer members of MX2 and entities that enter into market access arrangements with members (collectively, “Users”) will have access to the MX2

¹²³ See Form 1, Exhibit E.

¹²⁴ See Securities Exchange Act Release Nos. 100636 (Aug. 1, 2024), 89 FR 64517 (Aug. 7, 2024) (File No. 4-618) (multiparty plan concerning covered Regulation NMS and Consolidated Audit Trail rules); and 89972 (Sept. 23, 2020), 85 FR 61062 (Sept. 29, 2020) (File No. 4-566) (multiparty plan for insider trading rules).

¹²⁵ For common members, the regulatory obligations will be covered by the Rule 17d-2 agreements, and for MX2 members that are not also members of FINRA, the regulatory obligations will be covered by the RSA.

system.¹²⁶ Users will be able to electronically submit orders to buy or sell securities traded on the Exchange through a variety of systems.¹²⁷ MX2 will allow firms to register as market makers with affirmative and negative market making obligations.¹²⁸

Users may submit orders to the Exchange as Limit Orders, Market Orders, or Pegged Orders.¹²⁹ Orders may be submitted with the following time-in-force instructions, as applicable: Immediate-or-Cancel; Day; Fill-or-Kill; Good ‘til Time, and Regular Hours Only.¹³⁰ Users may submit orders with the display instructions of Displayed or Non-Displayed.¹³¹ A Limit Order with a Displayed instruction also may include a Reserve Quantity.¹³² Displayed orders will be displayed on an anonymous basis at a specified price.¹³³ Orders may be entered as a Round Lot, Odd Lot, or Mixed Lot.¹³⁴ In addition, a User may attach a Minimum Execution Quantity instruction to the order.¹³⁵ Users also may choose to designate orders as Book Only or Post Only.¹³⁶ MX2’s proposed order types and instructions are similar to order types and instructions approved by the Commission and currently available on other national securities exchanges.¹³⁷

¹²⁶ To obtain authorized access to the MX2 system, each User must enter into a User Agreement with MX2. See MX2 Rule 11.3(a).

¹²⁷ For a discussion of the means of access to MX2, see MX2 Form 1, Exhibit E, Section 1.

¹²⁸ See MX2 Rules 11.17 through 11.20. MX2’s rules relating to market makers are similar to the rules of other national securities exchanges. See, e.g., MEMX Rules 11.17 through 11.20 and Cboe EDGX Rules 11.17 through 11.20.

¹²⁹ See MX2 Rule 11.8(a)-(c). Limit Orders may be designated as Intermarket Sweep Orders. See MX2 Rule 11.8(b)(5). Pegged Orders may be designated as either a Primary Peg or a Midpoint Peg. See MX2 Rules 11.6(h) and 11.8(c).

¹³⁰ See MX2 Rules 11.6(o) and 11.8.

¹³¹ See MX2 Rules 11.6(c) and 11.8(a)-(c). Market Orders and Pegged Orders are not eligible for display. See MX2 Rules 11.8(a)(3) and 11.8(c)(3).

¹³² See MX2 Rules 11.6(k), and 11.8(b)(4).

¹³³ See MX2 Rule 11.10(b).

¹³⁴ See MX2 Form 1, Exhibit E, Section 2, and MX2 Rules 11.6(q) and 11.8(a)-(c).

¹³⁵ See MX2 Rules 11.6(l) and 11.8(a)-(c).

¹³⁶ See id.

¹³⁷ See, e.g., MEMX Rules 11.6 and 11.8 and Cboe EDGX Rules 11.6 and 11.8. While MX2 Rule 11.10, Interp .02(b), which offers batch cancel functionality, is similar to Cboe EDGX Rule 11.10, Interp .02(b), MX2 uses the term “batch cancel functionality,” while Cboe EDGX uses the term “purge port” and Cboe EDGX specifies that a user can “simultaneously cancel all or a subset of its orders in one or more symbols across multiple logical ports,” while MX2’s provision specifies that a user can “simultaneously cancel all or a subset of its orders in one or more symbols.”

Like MEMX, MX2 will offer a Random Replenishment instruction in connection with a Limit Order submitted with a Reserve Quantity instruction.¹³⁸ In addition to randomizing the size of the refreshed displayed portion, this instruction will allow the User to elect to have the MX2 system randomly replenish the displayed replenishment quantity at different time intervals ranging up to one millisecond following each execution that triggers replenishment.¹³⁹

The MX2 system will continuously and automatically match orders pursuant to price/time priority. For equally-priced trading interest in time priority, MX2 will give first priority to the portion of a Limit Order with a displayed instruction over Limit Orders with a non-displayed instruction, Pegged Orders, and Reserve Quantity of Limit Orders.¹⁴⁰ With respect to the price of executions that would occur on MX2, the MX2 system is designed to comply with the order protection requirements of Rule 611 of Regulation NMS¹⁴¹ by requiring that, for any execution to occur on MX2 during regular trading hours, the price must be equal to, or better than, the Protected NBBO unless an exception to Rule 611 applies.¹⁴² Orders may be executed on the Exchange during the Market Session or during Pre- and Post-Market Sessions;¹⁴³ however, some order types and functionality are available only during the Market Session.¹⁴⁴

In addition, MX2's rules are designed to address locked and crossed markets, as required by Rule 610(d) of Regulation NMS,¹⁴⁵ in that they are designed not to disseminate interest that would lock or cross a protected quote, require Users to reasonably avoid displaying interest that

¹³⁸ See MX2 Form 1, Exhibit E, Section 2(a), and MX2 Rule 11.6(k)(1)(A).

¹³⁹ See id.

¹⁴⁰ See MX2 Rule 11.9(a)(2). The highest-priced order to buy (lowest-priced order to sell) will have priority over all other orders to buy (sell) in all cases. Rule 11.9 describes how orders will be ranked based on time when orders to buy (sell) are entered into the MX2 system at the same price.

¹⁴¹ 17 CFR 242.611.

¹⁴² See MX2 Rules 1.5 (defining "Protected NBBO") and 11.10(a)(2).

¹⁴³ MX2's Market Session will run from 9:30am ET to 4:00pm ET, its Pre-Market Session will run from 7:00am ET to 9:30am ET, and its Post-Market Session will run from 4:00pm ET to 8:00pm ET. See MX2 Rule 1.5.

¹⁴⁴ See MX2 Rules 11.8(a)-(c).

¹⁴⁵ 17 CFR 242.610(d).

locks or crosses any protected quotation, and are reasonably designed to assure the reconciliation of locked or crossed interest.¹⁴⁶

In addition, MX2 will offer outbound routing functionality through its affiliated routing broker-dealer, MEMX ES.¹⁴⁷ A member's use of the order routing functionality provided by the Exchange's affiliated routing broker-dealer is entirely optional and members may use other broker-dealers to route out to other market centers.¹⁴⁸

The Commission finds that MX2's trading rules are consistent with the Act and, in particular, the Section 6(b)(5) requirement that an exchange's rules be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and protect investors and the public interest.¹⁴⁹

As stated above, MX2 proposes to offer routing services to its Users through its affiliated broker-dealer, MEMX ES.¹⁵⁰ The Commission previously has stated that an exchange-affiliated outbound router, as a "facility" of the exchange, will be subject to the exchange's and the Commission's regulatory oversight, and that the exchange will be responsible for ensuring that the affiliated outbound routing function is operated consistent with Section 6 of the Act and the exchange's rules.¹⁵¹ For example, in approving an exchange with an affiliated outbound routing broker, the Commission previously stated that "[a] conflict of interest would arise if the national securities exchange (or an affiliate) provided advantages to its broker-dealer that are not

¹⁴⁶ See MX2 Rule 11.10(f). See also MX2 Rule 11.6(a) (allowing Users to attach a Cancel Back instruction to immediately cancel an order when, if displayed, it would create a violation of Rule 610(d) of Regulation NMS, 17 CFR 242.610(d)), and MX2 Rules 11.6(j) and 11.8(b)(8) (relating to price sliding functionality to avoid violations of Rule 610(d) of Regulation NMS, 17 CFR 242.610(d)).

¹⁴⁷ See MX2 Rule 2.11.

¹⁴⁸ See *id.*

¹⁴⁹ See 15 U.S.C. 78f(b)(5). MX2's trading rules, including its rules relating to market makers, order types and instructions, priority, execution, and opening processes, are similar to existing exchanges' trading rules. See, e.g., Chapter XI of the MEMX rulebook and Chapter XI of the Cboe EDGX rulebook.

¹⁵⁰ See MX2 Rule 2.11.

¹⁵¹ See, e.g., Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010) (order granting exchange registration of BATS Y Exchange, Inc.).

available to other members.”¹⁵² The Commission further explained that “advantages, such as greater access to information, improved speed of execution, or enhanced operational capabilities in dealing with the exchange, might constitute unfair discrimination under the Act.”¹⁵³

MX2’s proposed outbound routing rule is similar to rules the Commission has approved for other exchanges that utilize affiliated routing brokers.¹⁵⁴ In particular, MX2’s affiliated broker-dealer does not have any structural or informational advantages in its provision of routing services as compared to a third-party broker-dealer member of MX2 performing a similar function for itself or others.¹⁵⁵ Accordingly, the outbound routing functionality of MX2 is consistent with the Act and, in particular, the Section 6(b)(5) requirement that an exchange’s rules be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not permit unfair discrimination between customer, issuers, brokers or dealers.¹⁵⁶

As a national securities exchange, MX2 will be a trading center whose quotations can be “automated quotations” under Rule 600(b)(6).¹⁵⁷ MX2 has designed itself to qualify by being an “automated trading center” under Rule 600(b)(7) whose best-priced, displayed quotation will be a “protected quotation” under Rules 600(b)(81) and 600(b)(82), and for purposes of Rule 611.¹⁵⁸

To meet their regulatory responsibilities under Rule 611(a) of Regulation NMS, other trading centers will be required to have sufficient notice of new protected quotations, as well as

¹⁵² Securities Exchange Act Release No. 44983 (Oct. 25, 2001), 66 FR 55225, 55233 (Nov. 1, 2001) (PCX-00-25) (order approving Archipelago Exchange (“ArcaEx”) as the equities trading facility of PCX Equities, Inc.) (“ArcaEx Order”).

¹⁵³ Id.

¹⁵⁴ See, e.g., MEMX Rule 2.11 and Cboe EDGX Rule 2.11.

¹⁵⁵ See MX2 Rule 2.11. For example, MX2’s rule provides that the Exchange shall have procedures and controls to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities, including MEMX ES. See MX2 Rule 2.11(a)(5).

¹⁵⁶ See 15 U.S.C. 78f(b)(5).

¹⁵⁷ See MX2 Rule 11.10(b).

¹⁵⁸ See 17 CFR 242.600(b)(81)-(82) and 17 CFR 242.611.

all necessary information and technical specifications.¹⁵⁹ It would be a reasonable policy and procedure under Rule 611(a) to require that industry participants begin treating MX2's best bid and best offer as a protected quotation as soon as possible but no later than 90 days after the date of this order, or such later date as MX2 begins operation as a national securities exchange. The Commission has taken the same position with other new equities exchanges.¹⁶⁰

D. Discipline and Oversight of Members

As stated above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.¹⁶¹ Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the federal securities laws and rules thereunder and the rules of the exchange.¹⁶² As also stated above, pursuant to an RSA with FINRA, FINRA will perform many of the initial disciplinary processes on behalf of MX2.¹⁶³ For example, FINRA will investigate potential securities laws violations, issue complaints, and conduct hearings pursuant to MX2 rules. Appeals from disciplinary decisions will be heard by the MX2 Appeals Committee,¹⁶⁴ and the MX2 Appeals Committee's decision shall be final.¹⁶⁵ In addition, the Exchange Board on its own initiative may order review of a disciplinary decision.¹⁶⁶

¹⁵⁹ See Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038, 30041 (May 24, 2006) (File No. S7-10-04) (extending the compliance dates for Rule 610 and Rule 611 of Regulation NMS under the Act).

¹⁶⁰ See, e.g., MEMX Order, supra note 16, at 27461; BATS Order, supra note 38, at 49505; and DirectEdge Exchanges Order, supra note 63, at 13163.

¹⁶¹ See 15 U.S.C. 78f(b)(1).

¹⁶² See id.

¹⁶³ See supra notes 111-112 and accompanying text. See also MX2 Rule 9.8 (stating that MX2 and FINRA are parties to a regulatory contract, pursuant to which FINRA will perform certain functions described in Chapter 9 on behalf of MX2).

¹⁶⁴ See MX2 Rule 8.10(b).

¹⁶⁵ See id.

¹⁶⁶ See MX2 Rule 8.10(c).

The MX2 LLC Agreement and MX2 rules provide that the Exchange has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws and rules.¹⁶⁷ The Exchange's rules also permit MX2 to sanction members for violations of its rules and violations of the federal securities laws and rules by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member, or any other fitting sanction.¹⁶⁸ MX2's rules also provide for the imposition of fines for certain minor rule violations in lieu of commencing disciplinary proceedings.¹⁶⁹ Accordingly, as a condition to the operation of MX2, a Minor Rule Violation Plan ("MRVP") filed by MX2 under Act Rule 19d-1(c)(2) must be declared effective by the Commission.¹⁷⁰

The Commission finds that the MX2 LLC Agreement and rules concerning its disciplinary and oversight programs are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act¹⁷¹ in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the rules of MX2 provide it with the ability to comply, and with the ability to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of MX2.¹⁷²

E. Trading on MX2 Pursuant to Unlisted Trading Privileges

MX2 does not intend to be a primary listing market for securities. Accordingly, MX2 has not proposed rules that would allow it to primarily list any securities at this time. Instead, MX2

¹⁶⁷ See generally MX2 LLC Agreement, Article XVII and MX2 Rules Chapters 7 and 8.

¹⁶⁸ See MX2 Rule 8.1(a).

¹⁶⁹ See MX2 Rule 8.15.

¹⁷⁰ 17 CFR 240.19d-1(c)(2).

¹⁷¹ 15 U.S.C. 78f(b)(6) and (b)(7).

¹⁷² See 15 U.S.C. 78f(b)(1).

has proposed to trade securities pursuant to unlisted trading privileges (“UTP”). MX2 Rule 14.1 establishes the Exchange’s authority to trade securities on a UTP basis. MX2 Rule 14.1(a) provides that MX2 may extend UTP to any security that is an NMS stock that is listed on another national securities exchange or with respect to which UTP may otherwise be extended in accordance with Section 12(f) of the Act.¹⁷³ MX2 Rule 14.1(a) further provides that any such security would be subject to all MX2 rules applicable to trading on MX2, unless otherwise noted.

MX2 Rule 14.1(b) establishes additional rules for trading of UTP Exchange Traded Products, which are defined in MX2 Rule 1.1. MX2 Rule 14.1(b) provides that MX2 will distribute an information circular prior to the commencement of trading in a UTP Exchange Traded Product that generally would include the same information as the information circular provided by the listing exchange, including (a) the special risks of trading the Exchange Traded Product, (b) the Exchange’s rules that would apply to the Exchange Traded Product and (c) information about the dissemination of value of the underlying assets or indices. MX2 Rule 14.1(b)(2) establishes certain requirements for members that have customers that trade UTP Exchange Traded Products.¹⁷⁴ MX2 Rule 14.1(b)(4) also establishes certain requirements for any member registered as a market maker in a UTP Exchange Traded Product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index composed of currencies or commodities. MX2 Rule 14.1(b)(5) provides that the Exchange will enter into comprehensive surveillance sharing agreements with markets that trade components of the index or portfolio on which the UTP

¹⁷³ 15 U.S.C. 78l(f).

¹⁷⁴ MX2 Rule 14.1(b)(2)(A) states that MX2 Rule 14.1(b)(2) applies to UTP Exchange Traded Products that are the subject of an order by the Commission exempting the series from certain prospectus delivery requirements under Section 24(d) of the 1940 Act, and are not otherwise subject to prospectus delivery requirements under the Securities Act. MX2 Rule 14.1(b)(2)(B) requires members to provide a written description of the terms and characteristics of UTP Exchange Traded Products to purchasers of such securities, not later than the time of confirmation of the first transaction, and with any sales materials relating to UTP Exchange Traded Products. MX2 Rule 14.1(b)(2)(C) requires members to provide a prospectus to a customer requesting a prospectus.

Exchange Traded Product is based to the same extent as the listing exchange's rules require the listing exchange to enter into comprehensive surveillance sharing agreements with such markets.

The Commission finds that the Exchange's proposed approach to the trading of securities on a UTP basis, as set forth in MX2 Rule 14.1, is consistent with Section 12(f) of the Act and Rule 12f-5 thereunder.¹⁷⁵ Rule 12f-5 under the Act requires an exchange that extends unlisted trading privileges to securities to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.¹⁷⁶ MX2 Rule 14.1 includes a provision that any security traded UTP on the Exchange "shall be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted." The provisions in MX2 Rule 14.1 are substantively the same as the existing rules of NYSE National, Inc.¹⁷⁷ Accordingly, pursuant to Section 12(f) of the Act and Rule 12f-5 thereunder, MX2 will be permitted to extend unlisted trading privileges to securities of the same class, subject to the trading rules of the Exchange.

F. Section 11(a) of the Act

Section 11(a)(1) of the Act¹⁷⁸ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, "covered accounts"), unless an exception applies. Rule 11a2-2(T) under the Act,¹⁷⁹ known as the "effect versus execute" rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2-2(T)'s conditions, a member: (i) must

¹⁷⁵ 15 U.S.C. 78j(f); 17 CFR 240.12f-5.

¹⁷⁶ See 17 CFR 240.12f-5. See also Securities Exchange Act Release No. 35737 (Apr. 21, 1995), 60 FR 20891 (Apr. 28, 1995) (File No. S7-4-95) (adopting Rule 12f-5 under the Act).

¹⁷⁷ See NYSE National Rule 5.1.

¹⁷⁸ 15 U.S.C. 78k(a)(1).

¹⁷⁹ 17 CFR 240.11a2-2(T).

transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;¹⁸⁰ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the rule.

In a letter to the Commission, MX2 requested that the Commission concur with MX2's conclusion that MX2 members that enter orders into the MX2 trading system satisfy the conditions of Rule 11a2-2(T).¹⁸¹ For the reasons set forth below, MX2 members entering orders into the MX2 trading system could satisfy the conditions of Rule 11a2-2(T).

First, Rule 11a2-2(T) requires that orders for covered accounts be transmitted from off the exchange floor. In the context of automated trading systems, the Commission has found that the off-floor transmission condition is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.¹⁸² MX2 has represented that MX2 does not have a physical trading floor, and the MX2 trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces.¹⁸³ The MX2 trading system satisfies this off-floor transmission condition.

¹⁸⁰ This prohibition also applies to associated persons. See 15 U.S.C. 78f(b)(8). The member may, however, participate in clearing and settling the transaction. See Securities Exchange Act Release No. 14563 (Mar. 14, 1978), 43 FR 11542 (Mar. 17, 1978) (regarding the NYSE's Designated Order Turnaround System) ("1978 Release").

¹⁸¹ See Letter from Anders Franzon, General Counsel, MX2, dated Mar. 4, 2025 ("MX2 11(a) Letter").

¹⁸² See, e.g., Nasdaq Order, supra note 38; ArcaEx Order, supra note 152; Securities Exchange Act Release Nos. 61419 (Jan. 26, 2010), 75 FR 5157 (Feb. 1, 2010) (SR-BATS-2009-031) (approving BATS options trading); 59154 (Dec. 23, 2008), 73 FR 80468 (Dec. 31, 2008) (SR-BSE-2008-48) (approving equity securities listing and trading on BSE); 57478 (Mar. 12, 2008), 73 FR 14521 (Mar. 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (approving Nasdaq Options Market options trading); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR-NYSE-90-52 and SR-NYSE-90-53) (approving NYSE's Off-Hours Trading Facility); and 15533 (Jan. 29, 1979), 44 FR 6084 (Jan. 31, 1979) ("1979 Release").

¹⁸³ See MX2 11(a) Letter, supra note 181.

Second, Rule 11a2-2(T) requires that the member and any associated person not participate in the execution of its order after the order has been transmitted. MX2 represented that at no time following the submission of an order is a member or an associated person of the member able to acquire control or influence over the result or timing of the order's execution.¹⁸⁴ According to MX2, the execution of a member's order is determined solely by what quotes and orders are present in the system at the time the member submits the order, and the order priority based on the MX2 rules.¹⁸⁵ Accordingly, a MX2 member and its associated persons do not participate in the execution of an order submitted to the MX2 trading system.¹⁸⁶

Third, Rule 11a2-2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this condition is satisfied when automated exchange facilities, such as the MX2 trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.¹⁸⁷ MX2 has represented that the design of the MX2 trading system ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to MX2.¹⁸⁸ Based on MX2's representation, the MX2 trading system satisfies this condition.

¹⁸⁴ See id. MX2 states that a member may cancel or modify the order, or modify the instructions for executing the order, after the order has been transmitted, provided that such cancellations or modifications are transmitted from off an exchange floor. See id. The Commission has stated that the non-participation condition is satisfied under such circumstances so long as such modifications or cancellations are also transmitted from off the floor. See 1978 Release, supra note 180 (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

¹⁸⁵ See MX2 11(a) Letter, supra note 181.

¹⁸⁶ See, e.g., BATS Order, supra note 38, at 49505; and DirectEdge Exchanges Order, supra note 63, at 13164.

¹⁸⁷ See, e.g., BATS Order at 49505, supra note 38, at 49505; and DirectEdge Exchanges Order, supra note 63, at 13164. In considering the operation of automated execution systems operated by an exchange, the Commission stated that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution condition of Rule 11a2-2(T). See 1979 Release, supra note 182.

¹⁸⁸ See MX2 11(a) Letter, supra note 181.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T) thereunder.¹⁸⁹ MX2 members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.¹⁹⁰

G. Exemption from Section 19(b) of the Act With Regard to FINRA Rules Incorporated by Reference

MX2 proposes to incorporate by reference certain FINRA rules and MEMX rules as MX2 rules.¹⁹¹ Thus, for those MX2 rules, Exchange members will comply with the MX2 rule by complying with the FINRA rule or MEMX rule referenced therein. In connection with its proposal to incorporate FINRA rules and MEMX rules by reference, MX2 requested, pursuant to

¹⁸⁹ See, e.g., BATS Order, *supra* note 38, at 49505; and DirectEdge Exchanges Order, *supra* note 63, at 13164. In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member or any associated person thereof in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, *supra* note 180 (stating “[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests”).

¹⁹⁰ MX2 represented that it will advise its membership through the issuance of an Information Circular that those members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption. See MX2 11(a) Letter, *supra* note 181.

¹⁹¹ See Letter from Anders Franzon, General Counsel, MX2, dated Mar. 4, 2025 (“Exemption Request Letter”). MX2 proposes to incorporate by reference the definition of “Retail Order” in FINRA Rule 5320.03, via MX2 Rule 11.21(a)(2). In addition, MX2 proposes to incorporate by reference the following MEMX rules: MEMX Chapter 3 (“Rules of Fair Practice”) via MX2 Chapter 3; MEMX Chapter 4 (“Books and Records”) via MX2 Chapter 4; MEMX Chapter 5 (“Supervision”) via MX2 Chapter 5; MEMX Chapter 6 (“Extensions of Credit”) via MX2 Chapter 6; MEMX Chapter 7 (“Suspension by Chief Regulatory Officer”) via MX2 Chapter 7; MEMX Chapter 8 (“Discipline”) via MX2 Chapter 8; MEMX Chapter 9 (“Arbitration”) via MX2 Chapter 9; MEMX Chapter 10 (“Adverse Action”) via MX2 Chapter 10; MEMX Chapter 12 (“Trading Practice Rules”) via MX2 Chapter 12; MEMX Chapter 13 (“Miscellaneous Provisions”) via MX2 Chapter 13; and MEMX Chapter 14 (“Trading on an Unlisted Trading Privileges Basis”) via MX2 Chapter 14.

Rule 240.0-12,¹⁹² an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to those MX2 rules that are effected solely by virtue of a change to a cross-referenced FINRA or MEMX rule.¹⁹³ MX2 represents in its letter that, as a condition to the exemption, it will provide written notice to its members whenever a proposed rule change to a FINRA rule or MEMX rule that is incorporated by reference is proposed and whenever any such proposed change is approved by the Commission or otherwise becomes effective.¹⁹⁴

Using its authority under Section 36 of the Act,¹⁹⁵ the Commission is hereby granting MX2's request for an exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MX2 proposes to incorporate by reference.¹⁹⁶ This exemption is conditioned upon MX2 providing written notice to its members whenever FINRA or MEMX proposes to change a rule that MX2 has incorporated by reference. This exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on simultaneous changes to identical rules of more than one SRO.

H. Conclusion

IT IS ORDERED that the application of MX2 for registration as a national securities exchange be, and it hereby is, granted.

¹⁹² See 17 CFR 240.0-12.

¹⁹³ See Exemption Request Letter, supra note 191.

¹⁹⁴ See Exemption Request Letter, supra note 191. MX2 will provide such notice through a posting on the same website location where MX2 posts its own rule filings pursuant to Rule 19b-4 under the Act, within the required time frame. The website posting will include a link to the location on the FINRA website or MEMX website where FINRA's or MEMX's proposed rule change is posted. See id.

¹⁹⁵ 15 U.S.C. 78mm.

¹⁹⁶ The Commission previously exempted other exchanges from the requirement to file proposed rule changes under Section 19(b) of the Act. See, e.g., MEMX Order, supra note 16; IEX Order, supra note 50; ISE Mercury Order, supra note 52; MIAAX Order, MIAAX Pearl Order, and BATS Order, supra note 38; DirectEdge Exchanges Order, supra note 63.

IT IS FURTHERED ORDERED that operation of MX2 is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans. MX2 must join the CT Plan, the Consolidated Tape Association Plan, the Consolidated Quotation Plan, and the Nasdaq UTP Plan (or any successors thereto); the National Market System Plan Establishing Procedures Under Rule 605 of Regulation NMS; the Regulation NMS Plan to Address Extraordinary Market Volatility; the Plan for the Selection and Reservation of Securities Symbols; and the National Market System Plan Governing the Consolidated Audit Trail.

B. Intermarket Surveillance Group. MX2 must join the Intermarket Surveillance Group.

C. Minor Rule Violation Plan. A MRVP filed by MX2 under Rule 19d-1(c)(2) must be declared effective by the Commission.¹⁹⁷

D. Rule 17d-2 Agreement. An agreement pursuant to Rule 17d-2¹⁹⁸ that allocates regulatory responsibility for those matters specified above¹⁹⁹ must be declared effective by the Commission, or MX2 must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

E. Participation in Multi-Party Rule 17d-2 Plans. MX2 must become a party to the multi-party Rule 17d-2 agreement concerning the surveillance, investigation, and enforcement of common insider trading rules and the agreement concerning certain Regulation NMS and Consolidated Audit Trail rules.

F. RSA. MX2 must finalize the provisions of the RSA with its regulatory services provider, as described above, that will specify the MX2 and Commission rules for which the

¹⁹⁷ 17 CFR 240.19d-1(c)(2).

¹⁹⁸ 17 CFR 240.17d-2.

¹⁹⁹ See supra notes 123-124 and accompanying text.

regulatory services provider will provide certain regulatory functions, or MX2 must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

IT IS FURTHER ORDERED, pursuant to Section 36 of the Act,²⁰⁰ that MX2 shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the FINRA rules and MEMX rules that MX2 proposes to incorporate by reference into MX2's rules, subject to the conditions specified in this Order.

By the Commission.

Vanessa A. Countryman,

Secretary.

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