



111 Town Square Place, Suite 520
Jersey City, NJ 07310

February 11, 2020

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

Re: MEMX LLC; Notice of Filing of Application, as Amended, for Registration as a National Securities Exchange under Section 6 of the Securities Exchange Act of 1934 (the “Exchange Act”)

Dear Ms. Countryman:

MEMX LLC (“MEMX” or the “Exchange”) writes this letter in connection with the application filed by MEMX with the Securities and Exchange Commission (“SEC” or “Commission”) for registration as a national securities exchange pursuant to Section 6 of the Exchange Act (the “Form 1 Application”).¹ The Commission received one comment letter on MEMX’s Form 1 Application prior to the end of the comment period;² MEMX responded to the Nasdaq Letter on January 16, 2020. The Commission also received a second comment letter on the MEMX Form 1 Application, filed by NYSE Group, Inc. (“NYSE”).³ MEMX appreciates the opportunity to briefly respond to the comment letter submitted by NYSE.

Access to Trading and Regulatory Records

The NYSE Letter highlights that MEMX will be a member-owned exchange and suggests clarification of the bounds of MEMX’s member-owners’ ability to access the trading and regulatory records of MEMX. With respect to access to trading and regulatory records of MEMX, NYSE concludes this portion of its comment by saying that “[w]hile MEMX’s confidentiality provision limits the *use* of information accessed, NYSE group believes that this apparent unfettered *access* to the records and facilities of MEMX by Company Members – who

¹ See Securities Exchange Act Release No. 87436 (October 31, 2019), 84 FR 59854 (November 6, 2019).

² See Letter from John Zecca, Chief Legal Officer and Chief Regulatory Officer, Nasdaq, Inc. to Vanessa Countryman, Secretary, SEC dated December 19, 2019 (“Nasdaq Letter”).

³ See Letter from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange to Vanessa Countryman, Secretary, SEC dated January 15, 2020 (“NYSE Letter”).

directly compete with other exchange members – could pose significant conflicts of interest.”⁴ This conclusion is wrong. Member-owners will not have unfettered access to the records and facilities of MEMX and this assertion conflicts with confidentiality provisions contained in the proposed MEMX governance documents actually quoted by NYSE in its Letter. Specifically, Section 13.1 of the proposed Second Amended and Restated Limited Liability Company Agreement of MEMX LLC provides that:

[a]ll books and records of the Company reflecting confidential information pertaining to the self-regulatory function of the Company (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by the Company and its personnel, including its Directors, Board Observers, Officers, employees and agents, and shall not be used by the Company for any non-regulatory purposes and shall not be made available to any person (including, without limitation, any Exchange Member) other than to personnel of the SEC, and those personnel of the Company, members of Committees, members of the Board, hearing officers and other agents of the Company to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of the Company.

MEMX does not know how much clearer it could be that no member of the Exchange, including members that indirectly own the Exchange, will have access to regulatory and trading records of the Exchange. The language above, which was directly quoted in footnote 3 of the NYSE Letter, says that such information shall “not be made available to any person” – i.e., no one can *access* such information. The language further states that this limitation applies to, “without limitation, any Exchange Member,” – i.e., it applies to everyone, including non-members, Exchange members that also indirectly hold an ownership interest in the Exchange, and Exchange members that do not indirectly hold such an ownership interest. As the provision goes on, the only parties who will have access, unfettered or otherwise, to the regulatory and trading records of the Exchange are personnel of the SEC and the personnel, officers, directors, and agents of the Exchange who need to have such access to such information in order to operate the exchange as a self-regulatory organization. MEMX notes that under the proposed governance documents for MEMX LLC, the Exchange board will have two directors who are associated with member-owners of the Exchange. However, the only directors of the Exchange that may need access to such regulatory and trading information in order to discharge the self-regulatory responsibilities of the Exchange are the independent directors serving on the Exchange’s Regulatory Oversight Committee, none of whom will also be associated with members or member-owners of the Exchange. Thus, despite NYSE’s request for clarification, MEMX believes the bounds of the related confidentiality provision are clear and unambiguous. There are no other provisions contained within MEMX’s governance documents that supersede such bounds.

In addition, the fact that MEMX will be member-owned is not a novel concept nor are the governance provisions at issue with respect to such a member-owned exchange novel in any way

⁴ Id. (emphasis in original).

– rather, the Commission has previously approved multiple member-owned exchanges with identical governance provisions, including BATS Exchange, Inc. and the exchanges operated by Direct Edge Holdings LLC.⁵ Identical confidentiality language to that quoted above was contained in the bylaws of each of these member-owned exchanges previously approved by the Commission.⁶ Today, certain of the exchanges operated by Miami International Holdings, Inc. (“MIAX”) operate equity rights programs that allow exchange members to obtain ownership interests in MIAX if they pre-pay certain exchange fees and achieve certain volume thresholds. MIAX too maintains a confidentiality provision identical to the language quoted above.⁷ Accordingly, not only is MEMX clearly prohibited from sharing regulatory and trading data with its member-owners but the language used to make this clear is the same language that has been consistently used by member-owned exchanges previously approved by the Commission.

Rule Clarity

The NYSE Letter also requests clarity regarding various aspects of the proposed rules of MEMX (“MEMX Rules”). First, NYSE requests clarity regarding the way that MEMX intends to aggregate odd lots that it will send to the applicable securities information processor (“SIP”) for publication. While all exchanges do not maintain a rule providing this clarity, MEMX agrees that such clarity is beneficial and will file an amendment to its Form 1 proposing to include such a rule. MEMX notes that it plans to aggregate displayed odd-lot orders on the MEMX order book across price levels for transmission to the SIPs as the MEMX best ranked bid or offer, when applicable. MEMX believes this is the same process now used by most exchanges and the proposed MEMX rule will be based on rules of other exchanges.⁸

The NYSE Letter also suggests that MEMX rules do not specify how resting orders would be processed when locked or crossed by an away market quote. At the outset, MEMX notes that its rules regarding handling of orders when locked and crossed are based on the rules of other approved exchanges, including Cboe EDGA Exchange, Inc. and Cboe EDGX Exchange, Inc. Nonetheless, as demonstrated by its response to the odd lot comment described above, MEMX believes in providing increased transparency and clarity within the MEMX Rules wherever possible. In this instance, MEMX disagrees that its proposed rules lack clarity and does not intend to further modify the MEMX Rules in response to the NYSE Letter.

Turning to the specific examples cited in the NYSE Letter, NYSE first claims that MEMX Rules do not make clear whether resting, displayed orders would stand their ground if

⁵ See Securities Exchange Act Release Nos. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (order approving Form 1 application of BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 12, 2010) (order approving Form 1 application of EDGX Exchange, Inc. and EDGA Exchange, Inc.).

⁶ See, e.g., Article XI, Section 4 of the Amended and Restated Bylaws of BATS Exchange, Inc., *available at*: <https://www.sec.gov/rules/other/2008/batsf1/batsproposedbylaws.pdf>.

⁷ See, e.g., Article X, Section 10.4 of the Second Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC.

⁸ See, e.g., Nasdaq Rule 4756(c)(2); NYSE Arca Rule 7.36-E(b)(3).

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locked or crossed by an away market. To the contrary, proposed MEMX Rule 11.6(j)(1)(A)(ii) states that: “[f]ollowing the initial ranking and display of an order subject to the Display-Price Sliding instruction, an order *will only be re-ranked and re-displayed to the extent it achieves a more aggressive price*, provided, however, that the Exchange will re-rank an order at the same price as the displayed price in the event such order’s displayed price would be a Locking Quotation or Crossing Quotation.” Thus, the proposed rule is clear that an order displayed by MEMX would not be re-priced if another market locked or crossed an order displayed by MEMX, as a locking or crossing quote would not allow MEMX to re-rank and display such an order at a more aggressive price. As is true with respect to NYSE Arca Rule 7.31-E(e)(1)(A)(iii), which was cited by NYSE, proposed MEMX Rule 11.6(j)(1)(A)(ii) also states that the ranked price of an order that is locked or crossed by an away market would be adjusted to a price equal to its display price. The final claim by NYSE is that MEMX Rules do not address whether resting, displayed, depth-of-book orders that have been locked or crossed by an away market and then become the best-ranked orders on MEMX would be transmitted to the SIP at their original price. NYSE did not cite any exchange rules to which MEMX rules should be compared or an example to demonstrate the question. MEMX has searched the rules of NYSE and other exchanges for additional language describing such an example or details regarding special handling in such a scenario, but such search has been fruitless. MEMX has also examined its own proposed rules and believes that the proposed MEMX Rules are clear regarding its dissemination of quotations to the SIP and compliance with SEC Rule 602.⁹

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MEMX appreciates the opportunity to respond to the NYSE Letter. MEMX believes its Form 1 Application is clear and unambiguous as well as consistent with other exchanges previously approved by the Commission. As noted above, MEMX intends to add additional detail to its rules regarding the aggregation of odd lots when sending quotations to the applicable SIP for publication. Based on the Form 1 Application, as amended, as well as its responses to comments received, MEMX respectfully requests the Commission to approve its Form 1 Application.

Please contact me if you have any questions related to this matter.

Sincerely,



Anders Franzon
General Counsel

⁹ Proposed MEMX Rule 11.9(b) states that the “best-ranked order(s) to buy and the best-ranked order(s) to sell that are displayable in the MEMX Book and the aggregate displayed size of such orders associated with such prices shall be collected and made available to quotation vendors for dissemination pursuant to the requirements of Rule 602 of Regulation NMS.”

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cc: The Honorable Jay Clayton, Chairman, SEC
The Honorable Robert J. Jackson, Commissioner, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Elad L. Roisman, Commissioner, SEC
The Honorable Allison Herren Lee, Commissioner, SEC
Brett Redfearn, Director, Division of Trading and Markets, SEC
David Shillman, Associate Director, Division of Trading and Markets, SEC
Richard Holley III, Assistant Director, Division of Trading and Markets, SEC
Jonathan Kellner, Chief Executive Officer, MEMX LLC