

December 20, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission 100 F. Street N.E.
Washington, D.C. 20549-1090

RE: Release No. 34-92844; File No. SR-MEMX-2021-10 - Proposed Rule Change to Establish a Retail Midpoint Liquidity Program

Dear Ms. Countryman:

Themis Trading appreciates the opportunity to comment on the above referenced proposed rule change in which MEMX proposes to establish a Retail Midpoint Liquidity Program. After reviewing the [SEC's Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Establish a Retail Midpoint Liquidity Program](#), there are a number of issues that concern us. According to the SEC order, MEMX has proposed:

"The Exchange proposes to allow Retail Member Organizations ("RMOs") to submit a new type of order on behalf of retail investors that is designed to execute at the Midpoint Price (a "Retail Midpoint Order"). Contra-side liquidity would be provided almost exclusively by a new order type, called a Retail Midpoint Liquidity Order ("RML Order"), which any Exchange user would be permitted to submit....Retail Midpoint Orders would not be eligible to execute against other types of midpoint interest, such as Midpoint Peg Orders."

The SEC has pointed out a number of concerns with the MEMX RLP that we think should concern all market participants:

1- Mid-point orders that are not RML orders would not be allowed to interact with the Retail Midpoint Orders.

"Because Retail Midpoint Orders are only eligible to execute against RML Orders and orders priced more aggressively than the Midpoint Price, other types of orders resting at the Midpoint Price that may be present on MEMX (including those with time priority over an RML Order) would not be allowed to execute against a Retail Midpoint Order and retail investors would not

get the benefit of being able to access that additional midpoint liquidity through the Retail Midpoint Order type."

2 -Non-displayed orders and displayed odd-lot orders that are resting on the MEMX book and are priced more aggressively than the mid-point would receive a more favorable mid-point price if they execute with a Retail Midpoint order.

"As proposed, any additional price improvement over the Midpoint Price **would not accrue to the retail investor's** Retail Midpoint Order but rather would accrue to the Displayed Odd Lot Order or Non-Displayed Order because those orders would execute at the Midpoint Price, which is less aggressive than the price at which they were resting on the MEMX Book."

The SEC has asked commenters to review the RLP proposal with these questions in mind:

*1. What are commenters' views on the treatment of orders priced more aggressively than the Midpoint Price when executing against Retail Midpoint Orders? In allowing Retail Midpoint Orders to first execute against orders on MEMX that are priced more aggressively than the Midpoint Price, the Exchange states that it seeks to ensure that the priority of more aggressively priced orders over less aggressively priced orders is maintained on the Exchange, consistent with Exchange Rule 11.9.30. However, the Exchange proposes that Retail Midpoint Orders execute against any such Displayed Odd Lot Orders and/or Non-Displayed Orders at the Midpoint Price instead of the more aggressive prices at which such orders were ranked. **The Exchange's proposal could deny the retail investor a further opportunity for price improvement** as it would instead award that further price improvement to the resting Displayed Odd Lot Orders and/or Non-Displayed Orders.*

Themis Response:

Before we respond, we think it's best to review [FINRA Rule 5310](#):

"FINRA Rule 5310 (Best Execution): (a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."

With their proposed RLP program, MEMX seems to be trying to encourage retail brokers to check their exchange before they route an order to a market maker that pays them for the order flow. We think this is a good thing since better prices may exist on their exchange and

also since it allows the retail order to interact with other market participants rather than just market makers. However, we believe that the MEMX RLP program might violate FINRA Rule 5310 since the price the retail investor receives might not be "as favorable as possible". If orders exist on the MEMX book that are more favorable than the midpoint price, then to comply with FINRA Rule 5310, we believe that MEMX should be giving the retail investor the better price.

2. What are commenters' views on proposed Exchange Rule 11.22(c)(2) and (3), which would only allow Retail Midpoint Orders to execute against RML Orders (and orders priced more aggressively than the Midpoint Price) but would not allow Retail Midpoint Orders to execute against other interest resting at the Midpoint Price, even if, for example, those orders have time priority over the RML Order(s)?

*In other words, the proposed rule would bypass a non-RML Midpoint Peg Order with time priority to execute the Retail Midpoint Order against an RML Order (which also is a Midpoint Peg Order, but one that is "less aggressive" in that it is not willing to trade with any incoming order but instead is limited to only trading with retail interest submitted as Retail Midpoint Orders). **The proposal would prohibit Retail Midpoint Orders from interacting with non-RML Midpoint Peg Orders at the Midpoint Price, thus potentially limiting retail investors' opportunities to obtain meaningful price improvement.***

Themis Response:

We believe that this is another design flaw in the MEMX RLP program. Rather than allow **all midpoint orders** to interact with retail order flow, MEMX has restricted order interaction to only orders that are entered as RML orders. In other words, suppose an institutional investor is utilizing a broker algorithm that places non-RML midpoint orders on MEMX. These orders will not have the chance to interact with inbound retail orders since they are not marked as RML orders. Not allowing two orders that are priced at the midpoint to trade with each other is harming the price discovery process. Why would MEMX do this? Wouldn't they want as much order flow as possible to be matched?

We're glad that the SEC is taking a closer look at the MEMX Retail Midpoint Liquidity Program. When the program was initially proposed in September, there were no comment letters written. We think most investors hadn't noticed that a new RLP plan that potentially violates FINRA Rule 5310 had been proposed. Thankfully, the SEC has made the investment community aware of this proposal and now it's our job to comment and let our concerns be known.



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Sincerely,

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Partners, Themis Trading LLC