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March 2, 2022

VIA EMAIL

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **Securities Exchange Act Release No. 34-94223 (February 10, 2022), 87 FR 8891 (February 16, 2022) (SR-NYSE-2022-07)**

Dear Ms. Countryman:

The New York Stock Exchange LLC (the "NYSE" or "Exchange") appreciates the opportunity to write in support of the above-referenced immediately effective rule change to amend the Exchange's Price List (the "Fee Filing") and in response to the comment letter submitted by MEMX LLC ("MEMX").[1] For the reasons set forth in the Fee Filing and herein, the Exchange believes that the Fee Filing meets all of the statutory requirements of the Securities Exchange Act of 1934 (the "Act") and that no further action by the Securities and Exchange Commission ("Commission") is required.

The Exchange Met its Requirements Under the Act

The Exchange provided the required detailed and specific statement supporting the Fee Filing's basis under the Act and the rules and regulations thereunder applicable to the Exchange.[2] Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[3] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair

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1 *See* Letter from Adrian Griffiths, Head of Market Structure, to Vanessa Countryman, Secretary, Securities and Exchange Commission, dated February 17, 2022.

2 *See* 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

3 15 U.S.C. § 78f(b)(4).

discrimination between customers, issuers, brokers, or dealers;[4] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[5] The Fee Filing satisfied each of these standards.

MEMX raises no objections to the majority of the Exchange's changes in the Fee Filing.[6] Rather, MEMX focuses solely on the Exchange's fees for market at-the-close ("MOC") orders, and more specifically, the associated discounts available for the new tiered rates for MOC orders that are intended as a reasonable attempt to increase liquidity on the Exchange and improve the Exchange's market share relative to its competitors. As explained in the Exchange's filing, the proposal aligned the tiered rate fees for MOC and LOC orders by reverting the tiered rates for MOC orders to four-year old levels. In addition, the Exchange provided incremental per share discounts that would allow member organizations to qualify for reduced MOC Tier pricing. As the Exchange pointed out in the Fee Filing, even without the discounts, the proposed rates for MOC orders under Tier 1 and Tier 2, are still *lower* than or equal to the best applicable rate on other primary listing exchanges for similar orders.[7]

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4 15 U.S.C. § 78f(b)(5).

5 15 U.S.C. § 78f(b)(8).

6 These include the revision of the rate for all other orders swept into the close; the credits for removing liquidity from the Exchange in Tape C securities; the Tier 1 Adding Credits in Tape C securities or the revised requirements for Adding Tier 2 in Tape B and C securities; or the Adding Tier in Tape C securities. MEMX does not claim that any of these fees or credits are unreasonable or burdensome.

7 For example, the highest applicable fee on the NASDAQ Stock Market, LLC ("Nasdaq") is $0.0016 per executed share, with the lowest possible rate available on Nasdaq of $0.0008 per executed share, which is available only if a firm adds liquidity in all Tapes above 1.75% of Consolidated Volume or MOC/LOC volume above 0.50% of Consolidated Volume. *See* NASDAQ Price List, available at https://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2. The closing auction fee on Cboe BZX for listed securities is $0.00100. *See* Cboe BZX Fee Schedule, available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/. The Exchange notes that the NASDAQ requirements for MOC/LOC volume is a percentage of the consolidated average daily volume ("CADV") of all Tapes, whereas the NYSE requirement is all close (MOC/LOC and other orders at the close) as a percentage of just Tape A CADV. MEMX sidesteps these facts by suggesting that Nasdaq's longstanding fees may also be inconsistent with the Act.

MEMX's characterizes the revised tiered rates for MOC orders as the result of an absence of competition at the close. However, with respect to MOC Orders, competition is fierce, not only because of the availability of the Cboe Exchange, Inc. ("Cboe") Market Close,[8] but also, and more relevant, because of the internalization of MOC order flow by some of the largest broker-dealers (many of which are also MEMX's owners).[9] The revised tiered rates in 2018 were designed in part to address that competitive landscape. However, the 2018 fee changes did not have a material impact on the competitive landscape with respect to internalized MOC order flow, which has continued to grow steadily.[10]

The Exchange does not have a monopoly over where MOC orders in NYSE-listed securities are executed; to the contrary, there is a crowded field of marketplaces and others[11] where competition for order flow goes on robustly throughout the trading day, including at the close. In the prevailing competitive environment, no exchange has more than 20% of the market,[12] and no exchange therefore possesses significant pricing power in the execution of equity order flow, at the close or at any other time.

Moreover, as noted in the Fee Filing, the Exchange offers its member organizations numerous ways to access the close, and is competitive even within its own marketplace. For example, market participants -- including member organizations -- can use a Floor broker to enter MOC Orders on their behalf, and the rate for such orders is $0.0005. In addition, market participants can use Floor brokers to enter Closing D Orders on their behalf which, when better-priced, function similarly to MOC Orders because they are guaranteed to participate in the close. The pricing for Closing D Orders is highly competitive. For instance, member organizations entering Closing D Orders last modified (as defined in the Price List) earlier than 25 minutes

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8 In addition, there are at least seven broker-dealer sponsored products competing for volume at the close, including Credit Suisse's CLOSEX; Instinet's Market-on-Close Cross; Morgan Stanley's Market-on-Close Aggregator (MOCHA); Bank of America's Instinct X® and Global Conditional Cross; JP Morgan's JPB-X; Piper Sandler's On-Close Match Book; and Goldman Sachs' One Delta Close Facility (ODCF).

9 MEMX's ownership includes the largest broker-dealer internalizers of order flow.

10 In 2018, the percentage of volume at the NYSE closing price in NYSE-listed securities executed off-exchange was 21.3%. In 2019, the percentage increased to 23.5%. After dipping briefly to 22.1% in 2020, the percentage resumed its upward trend and increased to 25.2% in 2021. Year to date, the percentage stands at 30.7%, the highest level since 2018.

11 As noted in the Fee Filing, the current landscape comprises 16 registered equity exchanges, 31 alternative trading systems, and numerous broker-dealer internalizers and wholesalers. *See also* note 8, *supra*.

12 *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

before the scheduled close of trading are charged a $0.0003 rate, which is lower than the lowest proposed MOC/LOC Tier 1 rate. D Orders entered between 3:35 up to 3 minutes before the close are eligible for a $0.0007 rate, which is in line with MOC/LOC Tier 1 and lower than the other two MOC/LOC Tiers. In addition, the first 750,000 average daily volume ("ADV") of D Orders are free. Finally, member organizations can also get free execution using closing offset orders. MEMX ignores *all* of these facts.

Raising base rates and offering incentives to members who support the venue is not an unreasonable stance in a competitive marketplace. In fact, it is the approach that MEMX itself has taken with respect to its own fee schedule repeatedly over the past year.[13] Similarly, in this competitive marketplace, there is nothing unreasonable in establishing incentives for one type of activity on the Exchange that considers other facets of Exchange participation. Again, MEMX does this itself: its "Liquidity Removal Tier" was constructed deliberately to provide discounts for taking liquidity (including when accessing its protected quote) to those firms that post orders on its venue.[14]

Just as MEMX's own cross-order type incentive structure is not inconsistent with the Act, neither is the Exchange's. In fact, providing incremental per share discounts for tiered MOC

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[13] For example, notwithstanding the competitive environment for transaction services, over the past year, MEMX has been raising rates. *See, e.g.*, Securities Exchange Act Release No. 91094 (February 10, 2021), 86 FR 9963 (February 17, 2021) (SR-MEMX-2021-02) (Notice) (increasing, among other things, the standard rebate for executions of orders (other than Retail Orders) in securities priced at or above $1.00 per share that add displayed liquidity, and the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity); Securities Exchange Act Release No. 92150 (June 10, 2021), 86 FR 32090 (June 16, 2021) (SR-MEMX-2021-07) (among other things, increasing the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity); Securities Exchange Act Release No. 92896 (September 8, 2021), 86 FR 51210 (September 14, 2021) (SR-MEMX-2021-11) (Notice) (among other things, increasing the fee under the Liquidity Removal Tier for executions of orders in securities priced at or above $1.00 per share that remove liquidity); Securities Exchange Act Release No. 93554 (November 10, 2021), 86 FR 64248 (November 17, 2021) (SR-MEMX-2021-16) (Notice) (increasing the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity); and Securities Exchange Act Release No. 93949 (January 11, 2022), 87 FR 2655 (January 18, 2022) (SR-MEMX-2021-21) (Notice) (increasing the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity). Indeed, a little more than a week after submitting its comment letter, MEMX filed to (among other changes) increase its standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity from MEMX, effective March 1, 2022. *See* SR-MEMX-2022-01.

[14] *See* MEMX Fee Schedule, available at https://info.memxtrading.com/fee-schedule/

rates based on a firm's intraday volumes are neither new nor anticompetitive, and therefore are reasonable. For example, Nasdaq offers discounts on its MOC rates if its members meet a specified intraday add volume requirement.[15] Similarly, on NYSE Arca, Inc., ETP Holders that qualify for Tier 1, Tier 2, or Tier 3 Adding Tiers, which are based on intraday adding volume, are also eligible for discounted rates for Closing orders.[16] MEMX's claim that this type of pricing forces smaller member organizations to pay more at the close is belied by the fact that such member organizations have competitive options available to access the close, including, as noted, using Floor brokers to enter either MOC Orders or Closing D Orders on their behalf.

In short, for the foregoing reasons and the reasons set forth in the Fee Filing, the proposed rule changes does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[17] Indeed, the Exchange believes that the proposed increased fees and incentives for fee discounts for MOC orders, which contribute meaningfully to the price and size discovery, encourage additional competition and thereby increase the amount of order flow to transparent and well-regulated exchanges consistent with the purposes of the Act. As such, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."[18]

Finally, as previously noted, the Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and non-exchange trading venues that are not subject to the same transparency or statutory standards applicable to exchanges relating to setting fees. Because competitors are free to modify their own fees and credits in response, some without the requirement of making a filing with the Commission, and because market participants may readily adjust their order routing practices, the Exchange believes that any degree to which fee changes in this market may impose any burden on competition would be extremely limited. MEMX's comment letter ignores these realities of today's equities marketplace, and is equally silent in the face of the fact that, as a result of all of these considerations, the Fee Filing did not impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets, both with respect to execution of MOC Orders and intraday trading.

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15 *See* note 7, *supra*.

16 *See* NYSE Arca Equities Fees and Charges, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf.

17 *See* 83 FR at 46980.

18 *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule) ("Regulation NMS").

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The Exchange appreciates the opportunity to respond to MEMX's comment letter and respectfully requests the Commission take no action with respect to the Fee Filing.

Respectfully submitted,

David De Gregorio

cc: Hon. Gary Gensler, Chair
Hon. Hester M. Peirce, Commissioner
Hon. Allison Herren Lee, Commissioner
Hon. Caroline A. Crenshaw, Commissioner
Haoxiang Zhu, Director of the Division of Trading and Markets