

**SECURITIES AND EXCHANGE COMMISSION**  
(Release No. 34-89899; File No. SR-MEMX-2020-07)

September 16, 2020

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Manner in which the Exchange will Designate Members to Participate in its Mandatory Disaster Recovery Testing for Calendar Year 2020

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 4, 2020, MEMX LLC (“MEMX” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing with the Commission a proposed rule change to proposed rule change to amend the manner in which the Exchange will designate certain Members to participate in its mandatory disaster recovery testing, pursuant to Regulation SCI and MEMX Rule 2.4 for calendar year 2020. The text of the proposed rule change is provided in Exhibit 5.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

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

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

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

#### 1. Purpose

The Exchange proposes to amend MEMX Rule 2.4, Mandatory Participation in Testing of Backup Systems, so as to revise how the Exchange will designate certain Members to participate in mandatory disaster recovery pursuant to Regulation SCI and MEMX Rule 2.4 for calendar year 2020. Regulation SCI requires MEMX, as an SCI entity, to maintain business continuity and disaster recovery plans that provide for resilient and geographically diverse backup and recovery capabilities that are reasonably designed to achieve two-hour resumption of critical SCI systems and next business day resumption of other SCI systems following a wide-scale disruption.<sup>5</sup>

Regulation SCI and MEMX Rule 2.4 also require MEMX to designate certain Members<sup>6</sup>

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<sup>5</sup> Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014).

<sup>6</sup> The term “Member” refers to any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a member of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. See MEMX Rule 1.5(p).

to participate in business continuity and disaster recovery testing in a manner specified by MEMX and at a frequency of not less than once every 12 months.<sup>7</sup> Such testing is part of an industry-wide test, which is next scheduled for October 24, 2020.

MEMX Rule 2.4 governs mandatory participation in testing of the Exchange's backup systems, and states that the Exchange will designate Members that account for a specified percentage of executed volume on MEMX as required to connect to the Exchange's backup systems and participate in functional and performance testing of such system.<sup>8</sup> MEMX is not currently operational and is not expecting to have sufficient trading data on which to base its Member designation prior to the October 24, 2020 test. Thus, as currently written, Rule 2.4 would not permit the Exchange to designate any Members to participate in the industry-wide test for 2020 because no Members will have sufficient trading volume on MEMX upon which a designation can be based.

To address the unique circumstances for disaster recovery testing in 2020, the year in which MEMX will become operational, the Exchange proposes to add new paragraph (c). Proposed paragraph (c) would provide that for calendar year 2020, notwithstanding paragraph (b) which assigns the Exchange responsibility of "identifying Members that account for a meaningful percentage of the Exchange's overall volume," the Exchange will instead designate at least three Members who have a meaningful percentage of trading volumes in NMS Stocks on other equity exchanges. This would allow the Exchange to identify Members for industry-wide disaster recovery testing in the absence of metrics that will be used in ordinary course to designate such firms.

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<sup>7</sup> MEMX Rule 2.4(a) and (b).

<sup>8</sup> Id.

MEMX believes that designating at least three Members who are likely already to be participating in the industry-wide test by virtue of their trading activities on other exchanges is likely to reduce the burdens associated with being designated for disaster recovery testing by MEMX in absence of significant trading volumes on the Exchange. Moreover, to reduce the burdens on designated Members the Exchange proposes, where possible, to designate firms that have already established connections to its backup systems. This is intended to address the “notice” requirements in the existing Rule 2.4.<sup>9</sup> The Exchange believes that designating three or more such firms is reasonably designed to provide the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans. The Exchange notes that the Long-Term Stock Exchange, Inc. (“LTSE”) has adopted a similar rule for 2020 given its recent launch and the same inability to follow its normal designation procedures.<sup>10</sup>

MEMX intends to notify Members of their designation for disaster recovery testing no later than September 10, 2020. With respect to industry-wide disaster recovery testing in 2021 and beyond, the Exchange will issue one or more regulatory circulars establishing the standards to be used for determining which Members contribute a meaningful percentage of the Exchange’s overall volume and thus are required to participate in functional and performance testing. Such standards will be informed by the Exchange’s actual market and trading data, in accordance with MEMX Rule 2.4(b).

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>11</sup> in

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<sup>9</sup> Pursuant to Rule 2.4(b), after 2020, the Exchange will provide at least six months prior notice to a Member that is designated for mandatory testing. See MEMX Rule 2.4(b).

<sup>10</sup> See LTSE Rule 2.250(d).

<sup>11</sup> 15 U.S.C. 78f(b).

general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>12</sup> in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

MEMX believes that, in the absence of sufficient trading data on the Exchange, its proposed methodology of designating Members who have meaningful levels of trading activity on other exchanges and who have established connectivity to the Exchange's backup systems is consistent with the protection of investors and the public interest. The Exchange further believes that the proposed rule change will ensure that the Members necessary to ensure the maintenance of fair and orderly markets in the event of the activation of the Exchange's disaster recovery plans have been designated consistent with MEMX Rule 2.4 and Rule 1004 of Regulation SCI. Specifically, the proposal will address the unique circumstances of industry-wide testing taking place within a short time of when the Exchange commences operations. The Exchange believes that the proposed rule change balances the objectives of having Members participate in industry-wide disaster recovery testing, including MEMX's backup systems, and the burdens on such Members who, at the time of designation, will not have traded on MEMX.

As set forth in the SCI Adopting Release, "SROs have the authority, and legal responsibility, under Section 6 of the Exchange Act, to adopt and enforce rules (including rules to comply with Regulation SCI's requirements relating to BC/DR testing) applicable to their members or participants that are designed to, among other things, foster cooperation and

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.”<sup>13</sup> The Exchange believes that this proposal is consistent with such authority and legal responsibility.

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

The Exchange believes its proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed rule change promotes fair competition among brokers and dealers and exchanges by ensuring the Exchange can designate Members to participate in mandatory disaster recovery testing pursuant to Regulation SCI for calendar year 2020. The Exchange believes that designating three or more such firms is reasonably designed to provide the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans, thereby promoting intermarket competition between exchanges in furtherance of the principles of Section 11(a)(1) of the Act.<sup>14</sup> The Exchange notes that the LTSE has adopted a similar rule for 2020.<sup>15</sup>

With respect to intramarket competition, the proposed rule change seeks to reduce the burdens on Members by only designating Members who are likely already participating in the industry-wide test by virtue of their trading activities on other exchanges. Under the proposed rule change, the Exchange will designate firms that have already established connections to the

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<sup>13</sup> See supra note 5 at 72350.

<sup>14</sup> 15 U.S.C. 78k-1(a)(1).

<sup>15</sup> See supra note 10.

Exchange's backup systems. Consequently, MEMX does not believe that the proposed rule change would impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the Act.

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

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

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>18</sup> normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>19</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to permit the Exchange to notify Members of their designation earlier than would be possible without a waiver of the operative delay. The Commission believes that waiver of the

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>18</sup> 17 CFR 240.19b-4(f)(6).

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

operative delay is consistent with the protection of investors and the public interest because it would provide designated members additional time to receive notice of their designation, and thus prepare for disaster recovery testing with the Exchange's backup systems. Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.<sup>20</sup>

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

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MEMX-2020-07 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission,

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<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MEMX-2020-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make

available publicly. All submissions should refer to File Number SR-MEMX-2020-07 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).