

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94332; File No. SR-MEMX-2021-22)

February 28, 2022

Self-Regulatory Organizations; MEMX LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees

I. Introduction

On December 30, 2021, MEMX LLC ("MEMX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (File Number SR-MEMX-2021-22) to amend the Exchange's Fee Schedule ("Fee Schedule") to adopt certain connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on January 14, 2022.<sup>4</sup> The Commission received one comment letter on the proposed rule change.<sup>5</sup> Under Section

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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). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization." 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 93937 (January 10, 2022), 87 FR 2466 ("Notice").

<sup>5</sup> See Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, dated January 26, 2022. The commenter asserts that the Exchange did not address the Exchange's ownership structure (where a number of broker-dealers own interests in the holding company that controls the Exchange), which the commenter states can result in Member-owners recouping the costs of the new fees, as well as the additional revenues collected from non-owners, which the commenter characterized as a "disparate impact."

19(b)(3)(C) of the Act,<sup>6</sup> the Commission is hereby: (i) temporarily suspending File Number SR-MEMX-2021-22; and (ii) instituting proceedings to determine whether to approve or disapprove File Number SR-MEMX-2021-22.

## II. Description of the Proposed Rule Change

MEMX provides Members and certain non-Members (i.e., service bureaus and extranets) with physical connectivity and application sessions (also known as “logical ports”) to access and participate on its market (collectively, “connectivity services”). Prior to implementation of the proposed rule change, the Exchange did not impose a fee for such connectivity services.<sup>7</sup> The Exchange now proposes to amend its Fee Schedule to adopt fees for connectivity services. Specifically, the Exchange proposes to charge \$6,000 per month for each physical connection in the data center where the Exchange primarily operates under normal market conditions (“Primary Data Center”) and \$3,000 per month for each physical connection in the Exchange’s backup data center (“Secondary Data Center”).<sup>8</sup> In addition, the Exchange proposes to charge a fee of \$450 per month for each application session used for order entry (“Order Entry Port”) and \$450 per month for each application session used for receipt of drop copies (“Drop Copy Port”) in the Exchange’s Primary Data Center.<sup>9</sup> As proposed, fees for connectivity services would be

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<sup>6</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>7</sup> See Notice at 2466. The Exchange explained that “[t]he objective of this approach was to eliminate any fee-based barriers to connectivity for Members when MEMX launched as a national securities exchange in 2020, and it was successful in achieving this objective in that a significant number of Members are directly or indirectly connected to the Exchange.” Id. at 2467.

<sup>8</sup> See id. at 2467.

<sup>9</sup> See id. The Exchange is not proposing to charge for: (1) Order Entry Ports or Drop Copy Ports in the Secondary Data Center, or (2) Test Facility Ports or MEMOIR Gap Fill Ports. Id. at 2470. A “drop copy” refers to information on trades executed on the Exchange.

assessed based on each active connectivity service product at the close of business on the first day of each month.<sup>10</sup> The Exchange represents that it will periodically review the costs applicable to providing connectivity services and propose changes to its fees as appropriate.<sup>11</sup>

While the Exchange states its belief that there is “competition for connectivity to the Exchange” that acts to constrain its ability to set pricing for connectivity services,<sup>12</sup> it also believes that “each exchange should take extra care to be able to demonstrate that [fees for connectivity services] are based on its costs and reasonable business needs.”<sup>13</sup>

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>14</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>15</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

The Exchange states that the proposal “reflects a simple, competitive, reasonable, and

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<sup>10</sup> See id. at n.12. If a product is cancelled by a Member’s submission of a written request or via the MEMX User Portal prior to such fee being assessed then the Member will not be obligated to pay the applicable product fee. See id.

<sup>11</sup> See id. at 2469.

<sup>12</sup> See id. at 2472.

<sup>13</sup> See id. at 2466.

<sup>14</sup> 15 U.S.C. 78s(b)(3)(C).

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

equitable pricing structure designed to permit the Exchange to cover certain fixed costs that it incurs for providing connectivity services, which are discounted when compared to products and services offered by competitors.”<sup>16</sup> With respect to competition, the Exchange states that it “believes that competitive forces are in effect and that if the proposed fees for connectivity services were unreasonable that the Exchange would lose current or prospective Members and market share.”<sup>17</sup> For example, the Exchange cites the example of extranets and service bureaus that compete with MEMX to provide Members and non-Members with physical connectivity to the Exchange. MEMX notes that “nearly half of the Exchange’s Members do not have a physical connection provided by the Exchange and instead must use a third party provider,” though MEMX acknowledges that application sessions are necessary to submit orders to MEMX such that indirectly connected users still will need to pay the application session fee to the Exchange or through the vendor.<sup>18</sup>

In further support of the proposal, the Exchange presents information on its costs and expected revenues from connectivity services, which the Exchange uses to support its position that the proposed fees for connectivity services are consistent with Section 6(b)(4) of the Act because they would permit the Exchange to recover the costs of providing connectivity services to Members and non-Members.<sup>19</sup> In its filing, MEMX provides a breakdown and summary of

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<sup>16</sup> Notice, supra note 4 at 2471.

<sup>17</sup> Id. at 2473. The Exchange represents that because it has not previously charged fees for connectivity and logical ports, it does not have comprehensive exchange-specific data to determine the impact of the proposed fees and will not have such data until the fees are actually imposed. However, the Exchange states that it understands that certain Members may be considering modifying the way that they connect to the Exchange in response to the proposed fees. See id.

<sup>18</sup> See id. at 2472.

<sup>19</sup> Id. at 2473.

the costs of providing physical connectivity and application sessions and describes the various line-items that it classifies into several “cost drivers.” MEMX represents that it allocated such expenses “without double-counting any expenses.”<sup>20</sup> Specifically, MEMX details its direct and allocated costs categorized according to those seven cost drivers, which result in a combined aggregate monthly cost of \$1,143,715 (\$795,789 for physical connectivity and \$347,926 for application sessions).<sup>21</sup> The Exchange states that the proposed fees would “not result in excessive pricing or supracompetitive profit,” as it projects a “modest profit” with revenue of \$1,233,750 based on current connectivity services usage,<sup>22</sup> representing a markup of approximately 8%.<sup>23</sup>

MEMX states that its proposed fees are designed “to cover the aggregate costs of providing connectivity services [to Members and non-Members] and to recoup some of the costs already born by the Exchange to create and offer its services....”<sup>24</sup> The Exchange further states that the proposed fees, specifically charging per connection, constitute an equitable allocation of

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<sup>20</sup> Id. at 2469.

<sup>21</sup> Id. at 2467-68. MEMX notes that since its inception it has borne 100% of the connectivity costs because it currently offers connectivity services for free. Id.

<sup>22</sup> Id. at 2473-74. The Exchange asserts that it has four primary sources of revenue from which it can potentially fund operations: transaction fees, connectivity services fees, membership and regulatory fees, and market data fees. The Exchange further states it must cover its expenses from one of these four sources. Id.

<sup>23</sup> Id. at 2473-74. The Exchange notes that it “anticipates (and encourages) Members and non-Members to more closely evaluate their connectivity services usage” once MEMX begins charging for the services. Id. As a result, the Exchange notes, actual Exchange revenue resulting from the proposed fees may be less than the Exchange’s estimate. See id.

<sup>24</sup> Id. The Exchange asserts that its proposed fees do not yet constitute a true “markup” because the Exchange has not recovered the initial costs of building the network and infrastructure necessary to offer connectivity services, as it did not previously charge any fees for connectivity services since it began operations. See id. at 2469.

reasonable fees because the Exchange’s “incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange.”<sup>25</sup> Additionally, the Exchange explains that these Members consume the most bandwidth<sup>26</sup> of the network and transact the “vast majority” of Exchange volume.<sup>27</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>28</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”<sup>29</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to, among other things, (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;<sup>30</sup> (2) perfect the

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<sup>25</sup> Id. at 2470.

<sup>26</sup> The Exchange states that although it offers physical connections of different bandwidths (10Gb, 25Gb, 40Gb, and 100Gb), it does not propose to charge different prices for such connections and it does not believe its costs increase incrementally based on the size of the physical connection. It instead believes that “individual connections and the number of separate and disparate connections are the primary drivers” of the Exchange’s costs. Id. at 2474 n. 29.

<sup>27</sup> The Exchange also notes that those users require high-touch network support services, including network monitoring, reporting, and support services. Id. at 2473.

<sup>28</sup> 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”).

<sup>29</sup> Id.

<sup>30</sup> 15 U.S.C. 78f(b)(4).

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 discrimination between customers, issuers, brokers, or dealers;<sup>31</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>32</sup>

In temporarily suspending the Exchange's fee changes, the Commission intends to further consider whether the proposal to establish fees for connectivity to the Exchange is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>33</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.<sup>34</sup>

#### IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

In addition to temporarily suspending the proposal, the Commission also hereby institutes

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<sup>31</sup> 15 U.S.C. 78f(b)(5).

<sup>32</sup> 15 U.S.C. 78f(b)(8).

<sup>33</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>34</sup> For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

proceedings pursuant to Sections 19(b)(3)(C)<sup>35</sup> and 19(b)(2)(B)<sup>36</sup> of the Act to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>37</sup> the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),<sup>38</sup> 6(b)(5),<sup>39</sup> and 6(b)(8)<sup>40</sup> of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among

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<sup>35</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>36</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>37</sup> 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

<sup>38</sup> 15 U.S.C. 78f(b)(4).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> 15 U.S.C. 78f(b)(8).

its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposals and asks commenters to submit data where appropriate to support their views:

1. Cost Estimates and Allocation. MEMX argues that competition acts to constrain its proposed fees but also presents a cost-based analysis of its proposed fees because MEMX says it believes that exchanges should meet “very high standards of transparency” when demonstrating why a new fee or fee increase is consistent with the Exchange Act.<sup>41</sup> The Exchange states specifically that an exchange should take “extra care” to “demonstrate that these fees are based on its costs and reasonable business needs.”<sup>42</sup> MEMX believes that it has attempted to be “especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related

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<sup>41</sup> Id. at 2466.

<sup>42</sup> Id.

service....”<sup>43</sup> According to the Exchange, it employed a methodology that “narrowly limits the aggregate cost elements considered to those closely and directly related to the particular product offering.”<sup>44</sup> MEMX classified its connectivity services expenses according to the following cost drivers: human resources (i.e., personnel), infrastructure and connectivity technology (servers, switches, etc.), data center costs, hardware and software licenses, monthly depreciation, allocated shared expenses.<sup>45</sup> It then applied an estimated allocation of each cost driver to each connectivity service, determining that the total monthly cost was \$795,789<sup>46</sup> to offer physical connectivity and \$347,926 to offer application services.<sup>47</sup> The Exchange lists the individual line-item costs in its filing, and describes some of the criteria included in each cost driver.<sup>48</sup> Do commenters believe that the cost drivers the Exchange has considered are sufficiently clear and complete? Do commenters believe that the Exchange should consider additional cost drivers or clarify the cost drivers it identified? If so, which ones? Do commenters believe that the

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<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id. at 2468-69.

<sup>46</sup> Id. at 2467-68. The Exchange allocates the following amounts to each cost driver for providing physical connectivity: \$262,129 for Human Resources, \$162,000 for Infrastructure and Connectivity Technology, \$219,000 for Data Center Costs, \$4,507 for Hardware and Software Licenses, \$99,328 for Monthly Depreciation, and \$48,826 for Allocated Shared Expenses. For application sessions, the Exchange allocated \$147,029 for Human Resources, \$33,358 for Infrastructure and Connectivity Technology, \$108,138 for Hardware and Software Licenses, and \$59,400 for Allocated Shared Expenses.

<sup>47</sup> Id.

<sup>48</sup> Id. For example, the Exchange stated that Infrastructure and Connectivity Technology cost includes servers, switches and related hardware required to provide physical access to the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes.

Exchange has provided sufficient detail about how it allocated costs to connectivity services? Across all costs, what are commenters' views on whether the Exchange has provided sufficient detail on the elements that go into its connectivity costs, including how it allocated shared costs to connectivity, to permit an independent review of its costs and meaningfully assess the reasonableness of the proposed fees and the corresponding profit margin?

In allocating cost drivers, the Exchange states that it allocated a total of 21.5% of Human Resources expense to provide connectivity services, consisting of 13.8% of its personnel costs to provide physical connections and 7.7% to application sessions.<sup>49</sup> The Exchange provides similar information for depreciation and amortization expense, noting that it allocated approximately 27% of the Exchange's overall depreciation and amortization expense to connectivity services (19% to physical connections and 8% to application sessions).<sup>50</sup> Do commenters believe that the Exchange sufficiently explained the principles that it applied in making these determinations, or is further explanation necessary? For personnel costs, for instance, the Exchange did not provide the job titles and salaries of persons whose time was accounted for, nor did it explain the methodology used to determine how much of an employee's time is devoted to that specific activity.

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<sup>49</sup> Id. at 2468. The Exchange explained that in calculating the Human Resource cost to be allocated to physical connections, the Exchange allocated "network infrastructure personnel with a high percentage of the cost of such personnel (75%) given their focus on functions necessary to provide physical connections" and a smaller percentage (19%) of the cost associated with certain personnel who "work closely with and support network infrastructure personnel." The Exchange also stated that for application sessions, it allocated "much smaller percentages (11% or less)" of Human Resources costs across a wider range of personnel groups because a "much wider range of personnel" are involved in providing application sessions but it is not a primary or full-time function for them.

<sup>50</sup> Id.

Should the Exchange identify to which services the remaining percentage of un-allocated expenses are attributable (e.g., what services or fees are associated with the 73% of applicable depreciation and amortization expenses the Exchange does not allocate to connectivity services)?

MEMX states it calculated the Human Resources cost using a “blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.”<sup>51</sup> Do commenters believe that those are the appropriate criteria? In particular, is it appropriate to include stock compensation and annual cash bonuses in a blended compensation rate for the purpose of assessing connectivity costs if those items are based on an exchange’s overall profitability or performance and not the individual employee’s performance in providing connectivity services (and thus not directly attributable to connectivity)?

The Exchange notes that its cost analysis was based on its first year of operations and projections for next year and states that it believes that its costs will remain similar in future years.<sup>52</sup> The Exchange recognizes, however, the possibility that costs may increase or decrease.<sup>53</sup> Do commenters expect costs incurred based on MEMX’s first year of operations to be generally representative of an exchange’s expected costs going forward, or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along with the cost estimates? The Exchange also states that it seeks to “recoup some of the costs already borne by the Exchange to create

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51 Id.

52 Id. at 2469.

53 Id.

and offer its services”<sup>54</sup> but does not distinguish between current-year costs and the “already borne” costs it seeks to recover or provide detail on those prior costs.<sup>55</sup> Do commenters think MEMX should elaborate on how and to what extent the proposed fees recoup past expenses?

2. Profit Margin. The Exchange states its proposed fees would not result in supracompetitive profits,<sup>56</sup> and projects an 8% profit margin resulting from costs to provide connectivity services of \$1,143,715 and projected revenue of approximately \$1,233,750.<sup>57</sup> The Exchange believes that this is a “modest profit”<sup>58</sup> that represents a “reasonable markup” over cost given factors that include the “lack of other costs to participate on the Exchange” and the Exchange maintaining a high performing and stable platform.<sup>59</sup> In arriving at its revenue estimate (and 8% profit margin), the Exchange has assumed that the current number of physical connections (143)<sup>60</sup> and application sessions (835)<sup>61</sup> will remain constant once the proposed fees are in place. Also, it assumes that all 143 physical connections will be to the Primary Data Center, for the proposed fee of \$6,000 per connection. The profit margin is dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. Further, the margin may fluctuate due to changes in the

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<sup>54</sup> Id. at 2467.

<sup>55</sup> Id.

<sup>56</sup> Id. at 2473.

<sup>57</sup> Id. at 2474.

<sup>58</sup> Id.

<sup>59</sup> Id. at 2469.

<sup>60</sup> Id. at 2468.

<sup>61</sup> Id.

number of connections purchased and increases or decreases in costs. Do commenters find the Exchange's estimated revenue and profit margin and the assumptions on which they are based to be appropriate? Do commenters agree that the Exchange's estimated profit margin would constitute a reasonable rate of return over costs? What are commenters' views regarding what factors should be considered in determining what constitutes a reasonable rate of return for connectivity fees? Do commenters believe that it is relevant to an assessment of reasonableness that the Exchanges' proposed fees are lower than those of other exchanges to which the Exchange has compared its fees? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered and why? Should the Exchange provide more information on the number of physical connections and application sessions it expects to maintain when it begins charging for connectivity that was previously provided for free, and an estimate of the potential change in each when MEMX begins charging for them broken down by the type of user?

MEMX also has proposed to charge a fee of \$3,000 per connection to the Secondary Data Center, which is 50% less than the fee for a connection to the Primary Data Center. The Exchange's explanation for the difference in fees is that certain Members are required to participate in mandatory testing of the Exchange's backup systems, which would require them to connect to the Secondary Data Center.<sup>62</sup> The Exchange did not provide a separate estimate of the number of firms it expects to be subject to the Secondary Data Center fee or how much revenue it expects to earn from the fee, nor did the Exchange allocate its connectivity costs between the Primary and Secondary Data Centers. The

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<sup>62</sup> Id. at 2469.

Exchange notes that its proposed physical connectivity fee for the Secondary Data Center is “well below the cost of providing such services” and the Exchange will not recoup the full amount of its costs.<sup>63</sup> Do commenters believe that the Exchange should provide information on its connectivity costs specifically for the Secondary Data Center as well as additional information to support its assertion that it will not recover its costs of providing connectivity services to its backup data center? In addition, should the Exchange clarify how charging a lower fee for the Secondary Data Center would affect its projected revenue? Do commenters believe that competitive forces exist for physical connectivity to the Secondary Data Center, particularly for those firms that MEMX requires to connect?

3. Periodic Reevaluation. The Exchange represents that it will “periodically review the costs applicable to providing connectivity services and to propose changes to its fees as appropriate.”<sup>64</sup> However, the Exchange has not addressed whether it believes a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that the number of users paying for connectivity services has on connectivity profit margins, and the potential for costs to decrease (or increase) over time, what are commenters’ views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that they stay in line with their stated profitability target and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and

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<sup>63</sup> Id. MEMX is not proposing fees for application sessions in the Secondary Data Center.

<sup>64</sup> Id.

changes in other fees or services? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its costs, subscriber, and revenue estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

4. Competition. The Exchange asserts that its proposed connectivity fees are subject to competition. In support of its claim, the Exchange states that connectivity to the Exchange is optional and says “there is no regulatory requirement that any market participant connect to the Exchange, that any participant connect in a particular manner, or that any participant maintain a certain number of connections to the Exchange,”<sup>65</sup> therefore, if the proposed fees are too high, Members may cease to connect to the Exchange. However, the Exchange acknowledges that “certain Members operate as routing brokers for other market participants . . . [and a]s an equity exchange with 4% volume, these routing brokers likely need to maintain a connection to the Exchange on behalf of their clients.”<sup>66</sup> Further, the Exchange represents that as of November 2021, it had 4.16% of market share and argues that it “is not aware of any evidence that a market share of approximately 4% provides the Exchange with anti-competitive price power because . . . market participants that choose to connect to the Exchange have various choices in determining how to do so, including third party alternatives [e.g., service

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<sup>65</sup> Id. at 2471.

<sup>66</sup> Id.

bureaus, extranet].”<sup>67</sup> The Exchange concludes that “[t]his, in addition to the fact that not all broker-dealers are required to connect of the Exchange, supports the Exchange’s conclusion that its pricing is constrained by competition.”<sup>68</sup> Do commenters agree that the lack of a regulatory requirement to connect to an exchange means that there are sufficient competitive forces to constrain connectivity fees? Are such competitive forces present for service bureaus and extranets, who are in the business of providing connectivity services to trading centers, as well as large market makers? Are competitive forces present when MEMX imposes a regulatory requirement in its rules for certain members to participate in mandatory testing of the Exchange’s backup systems, thus effectively requiring those members to purchase connectivity to the Secondary Data Center? Are there reasons, not presented by the Exchange, why a market participant would need direct connectivity to the Exchange’s Primary Data Center? Do commenters agree that an exchange with only 4% market share lacks pricing power sufficient to charge supracompetitive fees? At what percentage of market share would an exchange have such pricing power? Should exchanges reevaluate their fees as their market share increases?

The Exchange also argues that its connectivity fees are constrained by competitive forces because 44% of its Members do not maintain direct connectivity to the Exchange,<sup>69</sup> but rather connect to the Exchange through a service bureau or extranet.<sup>70</sup> The Exchange

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<sup>67</sup>

Id.

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Id.

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Id. at 2469. The Exchange further explained that 44% of its Members maintain one to two physical ports to connect to the Exchange’s Primary Data Center, while only 12% maintain three or more such ports. Id.

<sup>70</sup>

Id. at 2471-2.

argues that these Non-Members provide competition for connectivity to the Exchange as resellers of MEMX connectivity. The Exchange states that it will not receive any compensation for re-sold physical connectivity, “thus constraining the ability of MEMX to set its connectivity pricing as indirect connectivity is a substitute for direct connectivity.”<sup>71</sup> Do commenters believe that resellers of connectivity to the Exchange provide a competitive restraint on the fees MEMX charges for direct connectivity? Do commenters believe that resellers offer connectivity services to market participants effectively at a lower price than what the Exchange is proposing or do commenters believe that resellers pass-through the fee charged to them by the Exchange to their customers?

While there may be alternatives for physical connectivity (e.g., using a third party service provider), application sessions are not optional for those that do connect to the Exchange. Do commenters believe competition acts as a constraint on application session fees? If so, how?

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>72</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>73</sup> and any failure of an SRO to provide this information may result in the Commission

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<sup>71</sup> Id. at 2472.

<sup>72</sup> 17 CFR 201.700(b)(3).

<sup>73</sup> See id.

not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>74</sup> Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.<sup>75</sup>

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, any potential comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

#### V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange’s statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>76</sup>

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<sup>74</sup> See id.

<sup>75</sup> See Susquehanna Int’l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission’s reliance on an SRO’s own determinations without sufficient evidence of the basis for such determinations).

<sup>76</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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 No. SR-MEMX-2021-22 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MEMX-2021-22. 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those

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comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 filings also will be available for inspection and copying at the principal office of each 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-2021-22 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>77</sup> that File Number SR-MEMX-2021-22 be, and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>78</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>77</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>78</sup> 17 CFR 200.30-3(a)(57) and (58).