

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 93683; File No. SR-MEMX-2021-15)

November 30, 2021

Self-Regulatory Organizations; MEMX LLC; Order Granting Accelerated Approval of a Proposed Rule Change to Amend the Corporate Documents of the Exchange's Parent Company

On October 22, 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 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend and restate the limited liability company agreement of MEMX Holdings LLC ("Holdco"), the parent company of the Exchange. The proposed rule change was published for comment in the Federal Register on November 3, 2021.³ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change on an accelerated basis.

I. Summary of the Proposed Rule Change⁴

The Exchange filed a proposed rule change to reflect certain changes to the Fifth Amended and Restated Limited Liability Company Agreement of Holdco that resulted in the restatement of that agreement as the Sixth Amended and Restated Limited Liability Company Agreement of Holdco ("Sixth Amended Holdco LLC Agreement"). Specifically, the Sixth Amended Holdco LLC Agreement reflects the following substantive amendments: (1) the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 93452 (October 28, 2021), 86 FR 60683 ("Notice").

⁴ A full description of the proposed rule change is provided in the Notice.

creation of the Class C Units⁵ and the Common Units⁶ in connection with the sale by Holdco of Class C Units to certain LLC Members⁷ in a capital raise transaction (“Transaction”); (2) provisions that address certain LLC Members’ BHCA⁸ considerations, particularly in light of recent amendments to BHCA regulations, to facilitate their continued compliance with requirements and restrictions under the BHCA regarding investments in nonbanking companies;⁹ and (3) Holdco governance changes in connection with the Transaction.¹⁰ The Exchange expects the Transaction to close shortly after this proposed rule change is approved. The Exchange represents that none of the proposed changes will affect the governance of the Exchange.¹¹

⁵ As proposed, “Class C Units” means Class C-1 Units and Class C-2 Units; the term “Class C-1 Units” means the Units having the privileges, preference, duties, liabilities, obligations and rights specified with respect to “Class C-1 Units” in the Sixth Amended Holdco LLC Agreement; and the term “Class C-2 Units” means the Units having the privileges, preference, duties, liabilities, obligations and rights specified with respect to “Class C-2 Units” in the Sixth Amended Holdco LLC Agreement.

⁶ As proposed, the term “Common Units” means the Units having the privileges, preference, duties, liabilities, obligations and rights specified with respect to “Common Units” in the Sixth Amended Holdco LLC Agreement. Common Units are divided into the Voting Common Units and the Nonvoting Common Units.

⁷ A “LLC Member” is a person (i.e., an individual or entity) that owns one or more Units and is admitted as a limited liability company member of Holdco.

⁸ “BHCA” refers to the United States Bank Holding Company Act of 1956, as amended and the rules and regulations thereunder. Certain LLC Members are subject to requirements and restrictions under the BHCA, including recent amendments to BHCA regulations regarding the determination of control over investments in nonbanking companies that became effective on September 30, 2020. See Notice, supra note 3, 86 FR at 60684.

⁹ See id.

¹⁰ The Sixth Amended Holdco LLC Agreement also reflects various clarifying, updating, conforming, and other non-substantive amendments. For example, the Exchange proposes to delete provisions and language that are now obsolete due to the passage of time or the occurrence of certain events.

¹¹ See id. at 60684. Under the current Holdco LLC Agreement, LLC Members do not have any voting or management rights, except in certain very limited circumstances; the authority to manage and control the business and affairs of Holdco is vested in the Holdco Board. In connection with the Transaction, three LLC Members that do not

Currently there are two classes of Units:¹² Class A Units, which are divided into the Class A-1 Units and the Class A-2 Units;¹³ and Class B Units. The Exchange proposes to create two new classes Units: Class C Units and Common Units, each of which is divided into a voting series and a non-voting series. Holdco will sell Class C Units pursuant to the Transaction and will use the proceeds from the sale for general corporate expenses, including support of the operations and regulation of the Exchange. Class C Units are convertible into Common Units,¹⁴ and generally will have the same rights and obligations as Class A Units. While each LLC Member's proportionate ownership of Holdco will change because of the Transaction, no LLC Member will own, directly or indirectly, Units constituting more than 20% of any class of Units

currently have the right to nominate a director ("Director") to the Holdco Board – Citicorp North America, Inc., UBS Americas Inc., and Wells Fargo Central Pacific Holdings, Inc. – will receive the right to nominate a Director, thereby increasing the size of the Holdco Board from 11 to 14 Directors.

¹² A "Unit" is a unit representing a fractional part of the membership interests of the members of Holdco.

¹³ The Exchange proposes to re-characterize Class A-1 Units and Class A-2 Units as separate "series" rather than "classes" of Units. The Exchange represents that the Holdco Board asserts that this is appropriate because such Units have identical privileges, preference, duties, liabilities, obligations, and rights under the Sixth Amended Holdco LLC Agreement, and the only difference between such Units is the original purchase price paid by the applicable LLC Members. See id. at 60683, n.10.

¹⁴ Common Units will be issuable only in connection with an investment in Holdco or upon optional or mandatory conversion of Class C Units. No Common Units will be sold in connection with the Transaction, and none are currently issued and outstanding. In the event of a conversion to Common Units, Class C-1 Units will be converted into Voting Common Units, and Class C-2 Units will be converted into Nonvoting Common Units. The Exchange states that this conversion structure is designed to keep the same voting construct in place with respect to the Common Units that are issued upon the conversion of any Class C Units in a manner consistent with BHCA considerations. See id., 86 FR at 60685.

or will otherwise exceed any ownership or voting limitation applicable to the LLC Members set forth in the current Holdco LLC Agreement after giving effect to the Transaction.¹⁵

The Exchange also proposes a number of changes to facilitate certain LLC Members' continued compliance, particularly in light of recent amendments to the BHCA regulations, with requirements and restrictions under the BHCA regarding investments in nonbanking companies. For example, the Exchange proposes to divide the existing series of Class A Units into voting and non-voting series in a manner consistent with the proposed voting structure of the Class C Units and the Common Units, and prescribe certain matters on which such series are entitled to vote.¹⁶ The Exchange also proposes to allow LLC Members to specify a maximum voting percentage for Voting Class A and Class C-1 Units.¹⁷

Additionally, the Exchange proposes a number of Holdco governance changes in connection with the Transaction. For example, the Exchange proposes to amend the definition of Supermajority Board Vote, which currently refers to the affirmative vote of at least 77% of the votes of all Directors then entitled to vote on the matter under consideration and who have not recused themselves, whether or not present at the applicable meeting of the Board,¹⁸ and the current definition also provides that if the affirmative vote threshold results in the necessity of

¹⁵ See Section 3.5 of the Sixth Amended Holdco LLC Agreement. See also Notice, supra note 3, 86 FR at 60684.

¹⁶ The Exchange states that the sole purpose of these changes is to facilitate certain LLC Members' continued compliance with requirements and restrictions under the BHCA regarding investments in nonbanking companies. See Notice, supra note 3, 86 FR at 60684.

¹⁷ The Exchange represents that the proposed amendments to the current Holdco LLC Agreement are simply an expansion of existing provisions allowing LLC Members to specify a maximum voting percentage and are designed to facilitate certain LLC Members' compliance with the BHCA. See id. at 60692.

¹⁸ This aspect of the definition is not changing.

the affirmative vote of all such Directors with respect to such matter, that an affirmative vote of all but one of such Directors shall instead be required.¹⁹ Instead, the Exchange proposes that, if the affirmative vote threshold results in the necessity of the affirmative vote of eight Directors or fewer, an affirmative vote of all but two such Directors shall be required with respect to such matter.²⁰ The Exchange also proposes to allow a meeting of the LLC Members to be called by the Class C Members holding, in the aggregate, at least 20% of the aggregate then-outstanding Class C Units, and to include a reference to Class C Units in the provision governing quorum for the transaction of business by the LLC Members. Further, the Exchange proposes that the dissolution and winding up of the affairs of Holdco be approved by holders of the various series of Units in addition to the approval of the Holdco Board by Supermajority Board Vote.

II. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,²² which requires that a national securities exchange be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply

¹⁹ MEMX states that this provision is intended to cover situations where a large number of Directors are recused from voting on a matter or the size of the Board is such that a Board vote would require unanimity and instead allows a matter to be approved so long as all but one Director is in favor of a particular voting matter. See id. at 60690.

²⁰ According to the Exchange, the proposed change will ensure that a more consistent voting structure is maintained even if several Directors are recused from voting on a particular matter. See id.

²¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²² 15 U.S.C. 78f(b)(1).

with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

The Commission believes that the proposed updates and clarifying changes reflected in the Sixth Amended Holdco LLC Agreement will not materially alter Holdco's governance with respect to the Exchange or adversely impact governance of the Exchange itself²³ and will continue to enable the Exchange to be organized to have the capacity to carry out the purposes of the Act and to comply with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Sixth Amended Holdco LLC Agreement does not amend Section 3.5 (Limitations on Ownership), which imposes an ownership limit of "twenty percent (20%) of any class of Units" and a voting limit of "twenty percent (20%) of the voting power of the then issued and outstanding Units."²⁴ Though Holdco will have two new classes of shares and some LLC Members will make additional investments as part of the Transaction, the 20% ownership limit will apply to those new series, and the 20% voting limit will continue to apply to all issued and outstanding Units collectively. These limitations are designed to address the conflicts of interests that might result from a broker-dealer member of a national securities exchange owning

²³ The protections against any particular Holdco shareholder exerting undue influence over the affairs of Holdco – and indirectly the affairs of the Exchange – remain in place. See supra note 15 and accompanying text. See also note 11 and accompanying text.

²⁴ Section 3.5(a)(ii) provides that "[n]o Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, Units constituting more than twenty percent (20%) of any class of Units" and Section 2.5(a)(iii) provides that "[n]o Person, either alone or together with its Related Persons, at any time may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, vote or cause the voting of Units or give any consent or proxy with respect to Units representing more than twenty percent (20%) of the voting power of the then issued and outstanding Units...."

interests in an entity that controls that exchange.²⁵ The Commission believes that these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Act. In addition, other provisions that recognize the unique and important regulatory nature of MEMX as a national securities exchange and self-regulatory organization under the Act similarly will not be substantively altered by the proposed amendments, including but not limited to Sections 15.12 (Submission to Jurisdiction), 15.9 (Amendments), 12.2 (Inspection Rights; Books and Records), and 8.18 (Governance of Company Subsidiaries; Certain Agreements Related to the Exchange Board). Rather, the proposed amendments accommodate the Transaction, facilitate LLC Members' continued compliance with requirements and restrictions under the BHCA regarding investments in nonbanking companies (i.e., Holdco), and make non-substantive changes that do not alter the important protections that Holdco has adopted to protect MEMX's regulatory independence and ability to operate in a manner consistent with the Act as a registered a national securities exchange.

²⁵ As the Commission has previously explained, an exchange member's ownership interest in an entity that controls an exchange could become so large as to cast doubt on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member. An exchange member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. See, e.g., Securities Exchange Act Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (In the Matter of the Application of MEMX LLC for Registration as a National Securities Exchange).

III. Accelerated Approval of the Proposed Rule Change

The Commission finds good cause to approve the proposed rule change prior to the thirtieth day after the date of publication of notice in the Federal Register.²⁶ The Exchange states that approval of the proposed rule change on an accelerated basis will facilitate certain LLC Members' continued compliance with requirements and restrictions under the BHCA regarding investments in nonbanking companies. As discussed above, because the proposed changes do not impact Holdco's ownership of the Exchange, alter LLC Members' ownership and voting limits, or otherwise alter any existing provision that would adversely impact the Exchange, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²⁷ to approve the proposed rule change on an accelerated basis.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-MEMX-2021-15), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

J. Matthew DeLesDernier
Assistant Secretary

²⁶ The 21-day comment period for this proposed rule change expired on November 24, 2021 (see Notice, supra note 3, 86 FR at 60693) and no comments were received.

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ Id.

²⁹ 17 CFR 200.30-3(a)(12).