

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-99112; File No. SR-MEMX-2023-31)

December 7, 2023

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt a Temporary Options Regulatory Fee

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 November 24, 2023, MEMX LLC ("MEMX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 amend the Exchange's fee schedule applicable to Members<sup>3</sup> (the "Fee Schedule") pursuant to Exchange Rules 15.1(a) and (c) relating to the Options Regulatory Fee. The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on November 24, 2023. The text of the proposed rule change is provided in Exhibit 5.

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

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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> See Exchange Rule 1.5(p).

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 the Fee Schedule to revise the ORF charged solely for the dates of November 24 through November 30, 2023.

**Background**

By way of background, the per-contract ORF is collected by the Options Clearing Corporation (“OCC”) on behalf of the Exchange for each options transaction, cleared or ultimately cleared by an Exchange member in the “customer” range, regardless of the exchange on which the transaction occurs. The ORF is collected from either: (1) a Member that was the ultimate clearing firm<sup>4</sup> for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm<sup>5</sup> for the transaction.

To illustrate how the ORF is assessed and collected, the Exchange provides the following set of examples.

1. For all transactions executed on the Exchange, if the ultimate clearing firm is a Member of the Exchange, the ORF is assessed to and collected from that Member. If the ultimate clearing firm is not a Member of the Exchange, the ORF is collected

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<sup>4</sup> The Exchange takes into account any CMTA transfers when determining the ultimate clearing firm for a transaction. CMTA or Clearing Member Trade Assignment is a form of “give up” whereby the position will be assigned to a specific clearing firm at the OCC.

<sup>5</sup> Throughout this filing, “executing clearing firm” means the clearing firm through which the entering broker indicated that the transaction would be cleared at the time it entered the original order which executed, and that clearing firm could be a designated “give up”, if applicable. The executing clearing firm may be the ultimate clearing firm if no CMTA transfer occurs. If a CMTA transfer occurs, however, the ultimate clearing firm would be the clearing firm that the position was transferred to for clearing via CMTA.

from that non-Member clearing firm but assessed to the executing clearing firm.

2. If the transaction is executed on an away exchange, the ORF is only assessed and collected if either the executing clearing firm or ultimate clearing firm are Members of the Exchange. If the ultimate clearing firm is a Member of the Exchange, the ORF is assessed to and collected from that ultimate clearing firm. If the ultimate clearing firm is not a Member of the Exchange, the ORF is assessed to the executing clearing firm (again, only if that executing clearing firm is a Member of the Exchange), and collected from the ultimate clearing firm. Thus, to reiterate, if neither the executing clearing firm nor the ultimate clearing firm are members of the Exchange, no ORF is assessed or collected.

Finally, the Exchange will not assess the ORF on outbound linkage trades. “Linkage trades” are tagged in the Exchange’s system, so the Exchange can distinguish them from other trades. A customer order routed to another exchange results in the appearance of two customer trades, one from the originating exchange and one from the recipient exchange. Charging ORF on both trades could result in double-billing of ORF for a single customer order, thus the Exchange will not assess ORF on outbound linkage trades in a linkage scenario.<sup>6</sup>

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Members’ customer options business, including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement

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<sup>6</sup> To clarify, as stated previously, the Exchange will assess and collect the ORF for each customer options transaction that is cleared by a Member of the Exchange, regardless of where the transaction occurs. As such, transactions may fall into this category that originated from customer orders entered on the Exchange that were routed to and executed on an away market pursuant to the Options Linkage Plan. However, the Exchange will not assess the ORF in this instance on the original entering broker on MEMX Options, which would result in a potential double billing. Instead, the Exchange will only assess and collect from the ultimate clearing firm, and only if the ultimate clearing firm or the executing clearing firm is a MEMX Options Member (because the transaction ultimately occurs on an away market).

activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. Regulatory costs include direct regulatory expenses and certain indirect expenses for work allocated in support of the regulatory function. The direct expenses include in-house and third- party service provider costs to support the day-to-day regulatory work such as surveillance, investigations and examinations. The indirect expenses include support from personnel in such areas as human resources, legal, information technology, facilities and accounting as well as shared costs necessary to operate the Exchange and to carry out its regulatory function, such as hardware, data center costs and connectivity. The Exchange acknowledges that these indirect expenses are also allocated towards other business operations, such as providing connectivity and market data services, for which the Exchange has also conducted a cost-based analysis. As such, when analyzing the indirect expenses associated with its regulatory program, the Exchange did not double-count any expenses, but instead, allocated a portion of the cost not already allocated to other fees imposed by the Exchange. Indirect expenses are anticipated to be approximately 24% of the total regulatory costs for 2023 and 2024. Thus, direct expenses are anticipated to be approximately 76% of the total regulatory costs for 2023 and 2024.

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. More specifically, the Exchange will ensure that revenue generated from ORF not exceed more than 75% of total annual regulatory costs. The Exchange will monitor regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The

Exchange will also notify Members of adjustments to the ORF via regulatory circular, including for the change being proposed herein.<sup>7</sup> In preparation for the launch of the Exchange’s options market (“MEMX Options”),<sup>8</sup> the Exchange proposed to establish an ORF in the amount of \$0.0015 per contract side, effective September 27, 2023.<sup>9</sup> The amount of the proposed fee was based on historical industry volume, projected volumes on the Exchange, and projected Exchange regulatory costs. Additionally, the Exchange proposed that the ORF would automatically sunset on September 30, 2024.

### **OIP and Current Proposal**

As noted above, on September 27, 2023, the Exchange filed to establish an ORF in the amount of \$0.0015 per contract side (the “initial ORF filing”) and began assessing and collecting the ORF as proposed in the initial ORF filing. However, on November 24, 2023, the Commission issued the Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule to Establish an Options Regulatory Fee (“the OIP”).<sup>10</sup> As a result of the OIP, on November 24, 2023, the Exchange would revert back to not charging the ORF.

To ensure consistency of ORF assessments for the full month of November 2023, the Exchange proposes to modify the Fee Schedule to specify that the amount of the ORF that will be collected by the Exchange through November 30, 2023 (i.e., the last trading day of the month

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<sup>7</sup> See Exchange Regulatory Notice 23-22, located at: <https://info.memxtrading.com/category/alerts-notices/reg/>

<sup>8</sup> On August 8, 2022, the Commission approved SR-MEMX-2022-10, which proposed rules for the trading of options on the Exchange. See Securities Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (SR-MEMX-2022-010). The Exchange launched MEMX Options on September 27, 2023.

<sup>9</sup> See Securities Exchange Act Release No. 98585 (September 28, 2023), 88 FR 68692 (October 4, 2023) (SR-MEMX-2023-25).

<sup>10</sup> See Securities Exchange Act Release No. 99017 (November 24, 2023) (SR-MEMX-2023-25).

of November), will be \$0.0015 per contract side (the “Initial ORF Rate”).<sup>11</sup> The Exchange believes that revenue generated from the ORF as adopted on September 27, 2023 will continue to cover a material portion, but not all, of the Exchange’s regulatory costs.

In general, the Exchange endeavors to notify Members of any change in the amount of the ORF at least 30 calendar days prior to the effective date of the change via regulatory notice; however, the Exchange notes that as a result of the OIP, such notice in this instance could not be given 30 days in advance. Lastly, since the proposed ORF will only be charged up through November 30, 2023, the Exchange proposes to delete the bullet point on the Fee Schedule that indicates that the ORF will automatically sunset on September 30, 2024, given that this sunset provision no longer applies and conflicts with the proposal herein.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>12</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>13</sup> in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act<sup>14</sup> in that it is designed 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 is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

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<sup>11</sup> This proposal is not intended to be responsive to any issues that may be raised in the OIP, but to instead address the immediate issue of billing for November 24 – 30<sup>th</sup>.

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

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

### The Proposal is Reasonable

The Exchange believes that the proposed Initial ORF Rate of \$0.0015 is reasonable because it would help maintain fair and orderly markets and benefit investors and the public interest because it would ensure transparency and consistency of the ORF for the entire month of November 2023. Specifically, the proposal would ensure that the amount of ORF collected by the Exchange for the trading days of November 24<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, and 30<sup>th</sup>, 2023 will be the same rate collected on every other trading day since the ORF was implemented. The Exchange's by-laws state in Section 17.4(b): "[a]ny Regulatory Funds shall not be used for non-regulatory purposes or distributed, advanced or allocated to any Company Member, but rather, shall be applied to fund regulatory operations of the Company (including surveillance and enforcement activities)..."<sup>15</sup>. In this regard, the Exchange believes that the amount of the fee is reasonable. The Exchange also believes the proposal to delete the bullet point in the Fee Schedule that indicates the ORF will automatically sunset on September 24, 2024 is reasonable because such sunset provision is no longer applicable and conflicts with the proposal herein that the ORF apply up through November 30, 2023.

### The Proposed Fee is an Equitable Allocation of Fees

The Exchange believes its proposal is an equitable allocation of fees among its market participants. The Exchange believes that the proposed Initial ORF Rate would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from Member clearing firms by the OCC on behalf of the Exchange, the Exchange believes that using

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<sup>15</sup> See MEMX LLC – LLC Agreement at <https://info.memxtrading.com/regulation/governance/>.

options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such Members. In addition, the Exchange notes that the regulatory costs relating to monitoring Members with respect to Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program. Thus, the Exchange believes the Initial ORF Rate would be equitably allocated in that it is charged to all Members on all their transactions that clear in the Customer range at the OCC.

#### The Proposed Fee is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes that the Initial ORF Rate would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from Member clearing firms by the OCC on behalf of the Exchange, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such Members. In addition, the Exchange notes that the regulatory costs relating to monitoring Members with respect to



Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program. Thus, the Exchange believes the Initial ORF Rate (like the rate assessed for every other day since the ORF was implemented), is not unfairly discriminatory because it is charged to all Members on all their transactions that clear in the Customer range at the OCC.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange believes the proposed change will change will not impose an undue burden on competition as it is charged to all Members on all their transactions that clear in the Customer range at the OCC; thus, the amount of ORF imposed is based on the amount of Customer volume transacted. The Exchange believes that the proposed ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. In addition, because the ORF is collected from Member clearing firms by the OCC on behalf of the Exchange, the Exchange

believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such Members.

#### Intermarket Competition

The proposed fee change is not designed to address any competitive issues. Rather, the proposed change is designed to help the Exchange adequately fund its regulatory activities while seeking to ensure that total regulatory revenues do not exceed total regulatory costs.

#### 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>16</sup> and Rule 19b-4(f)(2)<sup>17</sup> thereunder.

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 shall 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:

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

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

Electronic comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>);  
or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-MEMX-2023-31 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-2023-31. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-MEMX-2023-31 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>18</sup> 17 CFR 200.30-3(a)(12).