

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101338; File No. SR-MEMX-2024-38)

October 15, 2024

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule Concerning Options Transaction Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 30, 2024, 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 Members³ pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the MEMX Options Fee Schedule (the “Options Fee Schedule”) pursuant to this proposal immediately. 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 proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

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 purpose of the proposed rule change is to amend the Options Fee Schedule to increase the transaction rebate for executions of contracts where the underlying security of the applicable option is not in the Penny Interval program (“Non-Penny options”)⁴ which add liquidity to the MEMX Options Book⁵ and which are made in the Customer capacity (“Customer”)⁶, as further described below.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is one of only 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than approximately 17% of the market share and currently the Exchange represents only approximately 3% of the market share.⁷ In such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to

⁴ MEMX Options provides Fee Code “N” for transactions in Non-Penny options. Fee Codes are provided by the Exchange on the monthly invoices provided to Options Members.

⁵ MEMX Options provides Fee Code “D” for transactions which add liquidity to the MEMX Options Book.

⁶ Customer capacity applies to any order for the account of a Priority Customer. “Priority Customer” means any person or entity that is neither a broker or dealer in securities nor a Professional. See Rule 16.1 of the MEMX Rulebook. MEMX Options provides fee qualifier “c” for Customer transactions.

⁷ Market share percentage calculated as of September 30, 2024. The Exchange receives and processes data made available through the consolidated data feeds (i.e., OPRA).

month demonstrates that market participants can shift order flow, discontinue, or reduce use of certain categories of products in response to fee changes. Accordingly competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange's Fee Schedule sets forth standard rebates and rates applied per contract.

Increased Transaction Rebate for Executions of Non-Penny Options in the Customer Capacity Which Add Liquidity to the MEMX Options Book

Currently, the Exchange provides a standard transaction rebate of \$1.15 per contract on Non-Penny options (as defined above) in the Customer capacity which add liquidity to the MEMX Options Book. Now, the Exchange proposes to amend the standard transaction rebate on such contracts from \$1.15 per contract to \$1.19 per contract. The purpose of increasing the rebate is to incentivize Members to execute additional contracts in Non-Penny names in the Customer capacity which add liquidity. The Exchange's proposal is designed to encourage the execution of additional contracts on the Exchange in order to enhance volume, deepen liquidity and promote price discovery on the MEMX Options platform. The Exchange believes that the increased rebate is in line with or exceeds the rebates provided by other national securities exchanges and will incentivize Members to route additional order flow to the Exchange.⁸

2. Statutory Basis

The Exchange believes that its proposal to amend its Options Fee Schedule

⁸ See, e.g., note 10 of the of the Nasdaq Options Market trading fee schedule on its public website (available at: <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-options-7>) which reflects a \$1.15 per contract Rebate to Add Liquidity in Non-Penny Symbols as Customer for Nasdaq Options Market participants who meet certain volume requirements on the Nasdaq Options Market. As MEMX Options is a comparatively new market, the Exchange believes that providing a higher rebate (\$1.19) for Customer executions which add liquidity in Non-Penny options without requiring Members to achieve specific volume requirements will incentivize additional order flow to the Exchange.

is consistent with the provisions of Section 6 of the Act,⁹ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Options Members and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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, or dealers.

MEMX Options operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹¹

Accordingly, competitive forces constrain the Exchange’s transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

¹¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

reasonable and competitive pricing structure which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants.

The Exchange believes that the proposed change to increase the rebate for executions on Non-Penny options in the Customer capacity that add liquidity to the Exchange to \$1.19 per contract is reasonable and equitable because it is designed to incentivize Members to submit additional liquidity-adding orders in Non-Penny options to the Exchange in the Customer capacity, which would enhance liquidity on the Exchange and promote price discovery and price formation, and would be applicable to all Members. The Exchange further believes the proposed increased rebate is appropriate because it exceeds or is comparable to, and competitive with, the rebates provided by other exchanges for executions in the Customer capacity in Non-Penny options which add liquidity.¹²

Further, the Exchange believes it is reasonable, equitable, and not unfairly discriminatory for Members to receive a higher rebate for executions of contracts in Non-Penny options in the Customer capacity which add liquidity to the Exchange, as compared to the rebate provided for executions of contracts in Non-Penny options in non-Customer capacities (i.e., Market Maker, Professional, Firm, Away Market Maker, or Broker-Dealer capacities) which add liquidity to the Exchange. The securities markets generally, and the Exchange in particular, have historically aimed to improve markets for investors and develop various features within the market structure for the benefit of public customers (i.e., the Customer capacity on the Exchange) who are not professionals.¹³ The Exchange believes it promotes the best interests of investors to charge lower

¹² See supra note 8.

¹³ The Exchange notes that, since the inception of MEMX Options, it has historically imposed different, and higher, transaction fees for executions in the non-Customer capacity than for executions in the Customer capacity. Similarly, since the inception of MEMX Options, the Exchange has historically provided

transaction costs and provide higher rebates for Customers, who are not Professionals, and that the Exchange's proposed fee structure provides right-sized incentives which will continue to attract Customer order flow to the Exchange.

For the reasons discussed above, the Exchange submits that its proposed change to the Options Transaction Fee Schedule satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act¹⁴ in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and are not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed rebate described herein is appropriate to address such forces.

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

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As a relatively new entrant in the already highly competitive environment for options trading, the Exchange believes that the proposed change would encourage the submission of additional order flow to the

different, and lower, rebates for executions in the non-Customer capacity than in the Customer capacity. See Securities Exchange Act Release No. 34-98533 (September 26, 2023), 88 FR 67846 (October 2, 2023) (adopting a \$1.10 per contract fee for non-Customers (Market Makers, Professionals, Firms, Away Market Makers, and Broker-Dealers) to remove liquidity in Non-Penny options as compared to a \$0.85 per contract fee for Customers to remove liquidity in Non-Penny options, and a \$0.80 per contract rebate for non-Customers to add liquidity in Non-Penny options as compared to a \$1.04 per contract rebate for Customers to add liquidity in Non-Penny options. The Exchange notes that similar fee structures are common at other options exchanges. See, e.g., the Cboe BZX Options fee schedule on its public website (available at: https://www.cboe.com/us/options/membership/fee_schedule/bzx/), which reflects a higher \$1.15 fee for Professional, Firm, Broker-Dealer, JBO, Market Maker, and Away Market Maker executions which remove liquidity in Non-Penny options and a lower \$0.85 fee for Customer executions which remove liquidity in Non-Penny options. The Cboe BZX Options fee schedule also reflects lower rebates ranging from \$0.30 to \$0.88 for non-Customer executions which add liquidity in non-Penny options and a higher \$1.05 rebate for Customer executions which add liquidity in Non-Penny options.

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

Exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. Further, MEMX Options' proposed modified transaction rebate exceeds or is comparable to the transaction rebates assessed by other options exchanges.¹⁵ As a result, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁶

Intramarket Competition

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rebate applies equally to all Options Members. The proposed pricing structure is intended to encourage participants to trade on MEMX Options by providing rebates that are comparable to those offered by other exchanges as well as providing competitive fees. The Exchange believes that the proposed rebate will help to encourage Options Members to send orders to the Exchange to the benefit of all Exchange participants. As the proposed rebate is equally applicable to all market participants, the Exchange does not believe there is any burden on intramarket competition.

Intermarket Competition

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed pricing structure will increase

¹⁵ See supra note 8.

¹⁶ See supra note 11.

competition and is intended to encourage market participants to trade on the exchange by providing rebates that are comparable to those offered by other exchanges, which the Exchange believes will help to encourage Members to send orders to the Exchange to the benefit of all Exchange participants. As the proposed rebate is equally applicable to all market participants, the Exchange does not believe there is any burden on intramarket competition.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁷ The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. SEC, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁸ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule

¹⁷ See supra note 11.

¹⁸ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

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 Act¹⁹ and Rule 19b-4(f)(2)²⁰ 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:

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. Please include file number SR-MEMX-2024-38 on the subject line.

Paper Comments:

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁰ 17 CFR 240.19b-4(f)(2).

- 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-2024-38. 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-2024-38 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.²¹

Sherry R. Haywood,

Assistant Secretary.

²¹ 17 CFR 200.30-3(a)(12).