

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-99259; File No. SR-MEMX-2023-38)

January 2, 2024

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Establish an Options Regulatory Fee ("ORF")

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 December 20, 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) to establish an Options Regulatory Fee ("ORF") that would automatically sunset on May 31, 2024. The Exchange proposes to implement the changes to the 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

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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).

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

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

1. Purpose

The Exchange proposes to establish an ORF in the amount of \$0.0015 per contract side, effective immediately.<sup>4</sup> The amount of the proposed fee is based on historical industry volume, projected volumes on the Exchange, and projected Exchange regulatory costs. The Exchange’s proposed ORF should balance the Exchange’s regulatory revenue against the anticipated regulatory costs. As discussed more fully below, the Exchange proposes that the ORF will automatically sunset on May 31, 2024.

MEMX previously filed a proposal to establish an ORF in the amount of \$0.0015 per contract side on September 27, 2023 (the “Initial ORF Filing”),<sup>5</sup> which was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>6</sup> The Initial ORF Filing was published for comment in the Federal Register on October 4, 2023.<sup>7</sup> The Commission received no comments on the Initial ORF Filing before November 24, 2023. On that

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<sup>4</sup> The Exchange initially filed the proposed Fee Schedule changes on December 1, 2023 (SR-MEMX-2023-33). On December 13, 2023, the Exchange withdrew that filing and submitted SR-MEMX-2023-34. On December 19, 2023, the Exchange withdrew SR-MEMX-2023-34 and submitted SR-MEMX-2023-36. On December 20, 2023, the Exchange withdrew SR-MEMX-2023-36 and submitted this filing.

<sup>5</sup> See Securities Exchange Act Release No. 98585 (September 28, 2023), 88 FR 68692 (October 4, 2023) (SR-MEMX-2023-25).

<sup>6</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>7</sup> See supra note 5.

date, the Commission issued a 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”) and requested public comment and additional information on various aspects of the Initial ORF Filing.<sup>8</sup> To date, the Commission has received no comment letters in response to the OIP. The Exchange withdrew the Initial ORF Filing on December 1, 2023 and submitted a new proposal for immediate effectiveness (“Second ORF Filing”). In order to make certain clarifying changes, the Exchange withdrew the Second ORF Filing on December 13, 2023, and submitted a third proposal for immediate effectiveness (“Third ORF Filing”). Again, in order to make certain clarifying changes, the Exchange withdrew the Third ORF Filing on December 19, 2023, and submitted a fourth proposal for immediate effectiveness (“Fourth ORF Filing”). Finally, on December 20, 2023, in order to correct an inadvertent administrative error, the Exchange withdrew the Fourth ORF Filing and submitted this proposal for immediate effectiveness (“Fifth ORF Filing”). The Second, Third, Fourth, and this Fifth ORF Filing propose the same fee as in the Initial ORF Filing, but with a modified sunset date of May 31, 2024, which is four months prior to the proposed sunset date in the Initial ORF Filing. Additionally, this filing responds to certain questions and points raised in the OIP.

As explained in the Initial ORF Filing, the per-contract ORF will be collected by the Options Clearing Corporation (“OCC”) on behalf of the Exchange for each options transaction,

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<sup>8</sup> See Securities Exchange Act Release No. 99017 (November 24, 2023), 88 FR 83590 (November 30, 2023) (SR-MEMX-2023-25). Additionally, on November 24, 2023, solely for the purposes of consistent billing for the entire month of November 2023, the Exchange filed SR-MEMX-2023-31 with the Commission, which proposed to keep the Initial ORF rate of \$0.0015 per contract side that had been charged since September 27<sup>th</sup> in place for November 24 through November 30, 2023. See Securities Exchange Act Release No. 99112 (December 7, 2023) (SR-MEMX-2023-31). The Exchange notes that in connection with this filing, it is removing language from its Fee Schedule indicating the Initial ORF rate would be in place through November 30, as this language is now obsolete.

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>9</sup> for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm<sup>10</sup> for the transaction.

To illustrate how the ORF will be 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 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.

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<sup>9</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>10</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.

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>11</sup>

As a practical matter, when a transaction that is subject to the ORF is not executed on the Exchange, the Exchange lacks the information necessary to identify the order entering member for that transaction. There are countless order entering market participants, and each day such participants can drop their connection to one market center and establish themselves as participants on another. For these reasons, it is not possible for the Exchange to identify, and thus assess fees such as an ORF, on order entering participants on away markets on a given trading day.

Clearing members, however, are distinguished from order entering participants because they remain identified to the Exchange on information the Exchange receives from the OCC regardless of the identity of the order entering participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the operation of the Exchange and for the marketplace as a whole to collect the ORF from clearing members. Additionally, this collection method was originally instituted for the benefit of clearing

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<sup>11</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).

firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction. The clearing firms may then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms.

As discussed below, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to a Member's activities support applying the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member enters an order that executes or clears a transaction executed on behalf of another party. The Exchange will regularly review all such activities, including performing surveillance for position limit violations, end of day and intra-day manipulation, front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

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 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 notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority (“FINRA”) under a 17d-2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation. Finally, the Exchange notes that it takes into account all regulatory sources of funding, including fines collected by the Exchange in connection with disciplinary matters, when determining the appropriate ORF rate.

The Exchange will monitor 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 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. Going forward, the Exchange will notify Members of adjustments to the ORF via regulatory circular at least 30 calendar days prior to the effective date of the change.

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for customer options transactions regardless of the exchange on which the transactions

occur. The Exchange has a statutory obligation to enforce compliance by Members and their associated persons under the Act and the rules of the Exchange and to surveil for other manipulative conduct by market participants trading on the Exchange. The Exchange will not be able to effectively surveil for such conduct without looking at and evaluating activity across all options markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, end of day and intra-day manipulation, front-running and contrary exercise advice violations/expiring exercise declarations. While much of this activity relates to the execution of orders, the ORF is assessed on and collected from clearing firms. The Exchange, because it lacks access to information on the identity of the entering firm for executions that occur on away markets, believes it is appropriate to assess the ORF on its Members' clearing activity, based on information the Exchange receives from the OCC, including for away market activity. Among other reasons, doing so better and more accurately captures activity that occurs away from the Exchange but which may relate to activity occurring on the Exchange. Without reviewing activity on a market-wide basis, the Exchange would not be able to effectively identify potentially problematic cross-market activity, with a portion occurring on other options exchanges and a portion on the Exchange. Again, the Exchange reiterates that it will not *collect* the ORF on executions that occur on away markets that are cleared by non-Members, except for the limited scenario where a Member clears a transaction and ultimately "gives-up" the trade to a non-Member via CMTA.<sup>12</sup> The Exchange believes that *assessing* the ORF on Member clearing firms equitably distributes the collection of the ORF in a fair and reasonable manner.

In addition to its own surveillance programs, the Exchange will work with other SROs

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<sup>12</sup> To reiterate, in this instance, the ORF would be collected from the non-Member ultimate CMTA clearing firm but assessed to the Member executing clearing firm.

and exchanges on intermarket surveillance related issues in connection with its regulatory program for options. Specifically, the Exchange and other options exchanges are required to populate a consolidated options audit trail (“COATS”)<sup>13</sup> system in order to surveil a Member’s activities across markets. Further, through its participation in the Intermarket Surveillance Group (“ISG”),<sup>14</sup> the Exchange will share information and coordinate inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. The Exchange’s participation in ISG helps it to satisfy the requirement that it has coordinated surveillance with markets on which security futures are traded and markets on which any security underlying security futures are traded to detect manipulation and insider trading.<sup>15</sup>

The Exchange believes that charging the ORF across markets will avoid having Members direct their trades to other markets in order to avoid the fee and to thereby avoid paying for their fair share for regulation. If the ORF did not apply to activity across markets then a Member would send their orders to the least cost, least regulated exchange (to the extent permissible under the Options Linkage plan, which, among other requirements, prohibits trading through of better priced quotations). Other exchanges do impose a similar fee on their members’ activity, and their fees will extend to include the activities of their own members on the Exchange. In other words, since MEMX Options launched on September 27, 2023, other exchanges have charged the ORF for executions occurring on MEMX Options cleared by their customers.<sup>16</sup> In

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<sup>13</sup> COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct the market promptly to effectively surveil certain rules.

<sup>14</sup> ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by co-operatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG’s information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

<sup>15</sup> See Section 6(h)(3)(I) of the Act.

<sup>16</sup> See Securities Exchange Act Release Nos. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008) (SR-CBOE-2008-05) (notice of filing and immediate effectiveness of Cboe Exchange, Inc. (“CBOE”) adopting an ORF applicable to transactions across all options exchanges); 61133 (December 9, 2009), 74

fact, all sixteen (16) registered options exchanges currently impose ORF on their members, and, similar to the Exchange, the majority of the options exchanges launched over the last decade have implemented an ORF on the day of launch or shortly thereafter in order to properly fund their regulatory programs.<sup>17</sup>

The Exchange notes that there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee<sup>18</sup> and the ORF assessed by other options

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FR 66715 (December 16, 2009) (SR-Phlx-2009-100) (notice of filing and immediate effectiveness of Nasdaq PHLX LLC ("Phlx") adopting an ORF applicable to transactions across all options exchanges); 61154 (December 11, 2009), 74 FR 67278 (December 18, 2009) (SR-ISE-2009-105) (notice of filing and immediate effectiveness of Nasdaq ISE, LLC ("ISE") adopting an ORF applicable to transactions across all options exchanges); 61388 (January 20, 2010), 75 FR 4431 (January 27, 2010) (SR-BX-2010-001) (notice of filing and immediate effectiveness of Nasdaq OMX BX, Inc. ("BX") adopting an ORF applicable to transactions across all options exchanges); 70200 (August 14, 2013) 78 FR 51242 (August 20, 2013)(SR-Topaz-2013-01) (notice of filing and immediate effectiveness of Nasdaq GEMX, LLC ("GEMX"), formerly known as ISE Gemini and Topaz Exchange, adopting an ORF applicable to transactions across all options exchanges); 64400 (May 4, 2011), 76 FR 27118 (May 10, 2011) (SR-NYSEAmex-2011-27) (notice of filing and immediate effectiveness of NYSE Amex LLC ("NYSE AMEX") adopting an ORF applicable to transactions across all options exchanges); 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (SR-NYSEArca-2011-20) (notice of filing and immediate effectiveness of NYSE Arca, Inc. ("NYSE Arca") adopting an ORF applicable to transactions across all options exchanges); 65913 (December 8, 2011), 76 FR 77883 (December 14, 2011) (SR-NASDAQ-2011-163) (notice of filing and immediate effectiveness of Nasdaq Options Market ("NOM") adopting an ORF applicable to transactions across all options exchanges); 66979 (May 14, 2012), 77 FR 29740 (May 18, 2012) (SR-BOX-2012-002) (notice of filing and immediate effectiveness of BOX Options Exchange LLC ("BOX") adopting an ORF applicable to transactions across all options exchanges); 67596 (August 6, 2012), 77 FR 47902 (August 10, 2012) (SR-C2-2012-023) (notice of filing and immediate effectiveness of C2 Options Exchange, Inc. ("C2") adopting an ORF applicable to transactions across all options exchanges); 68711 (January 23, 2013) 78 FR 6155 (January 29, 2013) (SR-MIAX-2013-01) (notice of filing and immediate effectiveness of Miami International Securities Exchange LLC ("MIAX") adopting an ORF applicable to transactions across all options exchanges); 74214 (February 5, 2015), 80 FR 7665 (February 11, 2015) (SR-BATS-2015-08) (notice of filing and immediate effectiveness of Cboe BZX Exchange, Inc. ("BZX") formerly known as BATS, adopting an ORF applicable to transactions across all options exchanges); 80025 (February 13, 2017) 82 FR 11081 (February 17, 2017) (SR-BatsEDGX-2017-04) (notice of filing and immediate effectiveness of Cboe EDGX Exchange, Inc. ("EDGX") formerly known as Bats EDGX Exchange, Inc., adopting an ORF applicable to transactions across all options exchanges); 80875 (June 7, 2017) 82 FR 27096 (June 13, 2017) (SR-PEARL-2017-26) (notice of filing and immediate effectiveness of MIAX Pearl, LLC ("MIAX Pearl") adopting an ORF applicable to transactions across all options exchanges); 85127 (February 13, 2019) 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03) (notice of filing and immediate effectiveness of Nasdaq MRX, LLC ("MRX") adopting an ORF applicable to transactions across all options exchanges); 85251 (March 6, 2019) 84 FR 8931 (March 12, 2019) (SR-EMERALD-2019-01) (notice of filing and immediate effectiveness of MIAX Emerald LLC ("MIAX Emerald") adopting an ORF applicable to transactions across all options exchanges).

<sup>17</sup> MIAX Options – effective 1/2/13, launch 12/7/12; ISE Topaz – effective 8/5/13, launch same; MIAX Pearl – effective 2/6/17, launch same; MIAX Emerald – effective 3/1/19, launch same.

<sup>18</sup> See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003) (SR-NASD-

exchanges including, but not limited to, NYSE Amex, NYSE Arca, Cboe, BZX, EDGX, Phlx, Nasdaq ISE, Nasdaq GEMX, MIAX and BOX.<sup>19</sup> While the Exchange does not have all the same regulatory responsibilities as FINRA, the Exchange believes that, like other exchanges that have adopted an ORF, its broad regulatory responsibilities with respect to a Member's activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike FINRA's Trading Activity Fee, the ORF would apply only to a Member's customer options transactions.

Additionally, the Exchange proposes to specify in the Fee Schedule that the Exchange may only increase or decrease the ORF semi-annually. In addition to submitting a proposed rule change to the Commission as required by the Act to increase or decrease the ORF, the Exchange will notify participants via a Regulatory Circular of any anticipated change in the amount of the fee at least 30 calendar days prior to the effective date of the change. The Exchange believes that by providing guidance on the timing of any changes to the ORF, the Exchange would make it easier for participants to ensure their systems are configured to properly account for the ORF.

Lastly, the Exchange recognizes that in 2019, the Commission issued suspensions of and orders instituting proceedings to determine whether to approve or disapprove a proposed rule change to modify the Options Regulatory Fee of NYSE American, NYSE Arca, MIAX, MIAX Pearl, MIAX Emerald, Cboe, Cboe EDGX Options, and C2.<sup>20</sup> Each of those exchanges had filed

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2002-148).

<sup>19</sup> See supra note 16.

<sup>20</sup> See Securities Exchange Act Release No. 87168 (September 30, 2019), 84 FR 53210 (October 4, 2019) (SR-Emerald-2019-29); Securities Exchange Act Release No. 87167 (September 30, 2019), 84 FR 53189 (October 4, 2019) (SR-PEARL-2019-23); Securities Exchange Act Release No. 87169 (September 30, 2019), 84 FR 53195 (October 4, 2019) (SR-MIAX-2019-35); Securities Exchange Act Release No. 87170 (September 30, 2019), 84 FR 53213 (October 4, 2019) (SR-CBOE-2019-040); Securities Exchange Act Release No. 87172 (September 30, 2019) 84 FR 53192 (October 4, 2019) (SR-CboeEDGX-2019-051); Securities Exchange Act Release No 87171 (September 30, 2019), 84 FR 53200 (October 4, 2019) (SR-C2-2019-018); Securities Exchange Act Release No. 86832 (August 30, 2019), 84 FR 46980 (September 6,

to increase their ORF, and the Commission indicated that each of those filings lacked detail and specificity, signaling that more information was needed to speak to whether the proposed increased ORFs were reasonable, equitably allocated and not unfairly discriminatory, particularly given that the ORF is assessed on transactions that clear in the “customer” range and regardless of the exchange on which the transaction occurs. The Commission also noted that the filings provided only broad general statements regarding options transaction volume and did not provide any information on those exchanges’ historic or projected options regulatory costs (including the costs of regulating activity that cleared in the “customer” range and the costs of regulating activity that occurred off exchange), the amount of regulatory revenue they had generated and expected to generate from the ORF as well as other sources, or the “material portion” of options regulatory expenses that they sought to recover from the ORF. Each of those exchanges withdrew their filings, but continue charging ORF today as discussed above. Since that time, MEMX Options is the first new options exchange to launch and as noted previously, its Initial ORF Filing was also suspended.<sup>21</sup> Unlike its competitors noted above, however, the Exchange is the only exchange that does not have a previously implemented ORF to continue charging notwithstanding said suspensions. As such, the Exchange would be at an unfair competitive disadvantage if it were not allowed to charge the ORF to recover a material portion, but not all, of the Exchange’s regulatory costs for the supervision and regulation of activity of its Members which as noted above, is charged by all sixteen (16) currently operating options exchanges.

In the OIP, the Commission emphasized the potential lack of sufficiently detailed “quantitative and qualitative evidence” in support of the Exchange’s proposal. As an example, as

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2019) (SR-NYSEArca-2019-49); Securities Exchange Act Release No. 86833 (August 30, 2019) 84 FR 47029 (September 6, 2019) (SR-NYSEAMER-2019-27).

<sup>21</sup> See supra note 8.

it relates to the Exchange’s imposition of ORF on executions cleared in a customer capacity, the Commission suggested the Exchange provide, amongst other data points, the percentage of volume expected to clear in the customer range both on and off Exchange compared to the percentage of volume expected to clear in a range other than customer both on and off Exchange; the percentage of the Exchange’s regulatory budget that would be attributable to the regulation of orders that are expected to clear in the customer-range compared to the percentage of the Exchange’s regulatory budget that would be attributable to orders that are expected to clear in a range other than customer; and the anticipated percentage of the Exchange’s regulatory level of effort that would be attributable to the regulation of orders that are expected to clear in the customer range compared to the regulatory level of effort that would be attributable to orders that are expected to clear in a range other than customer.<sup>22</sup> While the Exchange could endeavor to “project” data points such as execution volumes separated by capacity on and off the Exchange and percentages of regulatory effort dedicated to the like, such an exercise would be futile. As a newly launched exchange, the Exchange simply does not have sufficient data (i.e., fulsome execution records and regulatory surveillance data) in order to accurately make the projections noted by the Commission at this time. Again, however, while the Exchange commits to gathering this and other relevant data to inform its approach to the ORF after the sunset period, not being able to charge the ORF in the meantime puts the Exchange at an unfair disadvantage and ultimately discourages competition in the space.

As such, the Exchange proposes that the ORF proposed herein will automatically sunset on May 31, 2024, approximately six months after the operative date of this filing. The Exchange believes this will allow it the time to gather the necessary data, including its actual regulatory

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<sup>22</sup> See OIP, supra note 8, at 13 and 14.

costs and revenues, as well as the cost of regulating executions that clear in a customer capacity and executions that occur on away markets, while also allowing it to adequately cover a portion of the projected costs associated with the regulation of its Members and avoid the unfair competitive disadvantage it would be placed at if it were disallowed to collect ORF during the time period needed to assess and collect data it does not have as a new options exchange. Such a process will inform the Exchange's approach to the ORF after the sunset date. To reiterate, as a new exchange, not having the opportunity to fund its regulatory program through the same regulatory fee charged by every other options exchange would place an undue competitive disadvantage upon the Exchange's regulatory program and options business as a whole. Further, the Exchange emphasizes that other exchanges will be charging ORF for transactions occurring on MEMX Options, and as such, it follows that the Exchange that is primarily responsible for monitoring those transactions should also be able to charge the ORF for activity occurring on its own market, as well as transactions it surveils on away markets.

The Exchange is proposing to establish an ORF in the amount of \$0.0015 per contract side, to be operative immediately, and that will automatically sunset on May 31, 2024. The amount of the proposed fee is based on historical industry volume, projected volumes on the Exchange, and projected Exchange regulatory costs. As noted above, the Exchange will continually gather relevant data throughout the sunset period and review its ORF to ensure that the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange believes that this proposal will permit the Exchange to cover a material portion of its regulatory costs, while not exceeding regulatory costs, and gather the necessary data to provide the Commission evidence to inform its approach to the ORF after the sunset period.

The Exchange notified current and future Members via a Regulatory Circular of the

proposed ORF at least 30 calendar days prior to the proposed operative date, on August 1, 2023,<sup>23</sup> as well as on November 27, 2023<sup>24</sup>, as was necessary in light of the OIP. The Exchange believes that the prior notification to future market participants will ensure that the future market participants are prepared to configure their systems to properly account for the proposed ORF.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>25</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>26</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>27</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.

The Exchange believes that establishing an ORF in the amount of \$0.0015 is reasonable because the Exchange's collection of ORF needs to be balanced against the amount of projected

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<sup>23</sup> See MEMX Options Regulatory Notice 23-07, <https://info.memxtrading.com/regulatory-notice-23-07-memx-options-options-regulatory-fee/>, MEMX Options Regulatory Notice 23-10, <https://info.memxtrading.com/regulatory-notice-23-10-options-regulatory-fee-effective-date/>, and MEMX Options Regulatory Notice 23-15, <https://info.memxtrading.com/regulatory-notice-23-15-options-regulatory-fee-effective-date/>.

<sup>24</sup> See MEMX Options Regulatory Notice 23-22, <https://info.memxtrading.com/regulatory-notice-23-22-memx-options-options-regulatory-fee/>.

<sup>25</sup> 15 U.S.C. 78f(b).

<sup>26</sup> 15 U.S.C. 78f(b)(4).

<sup>27</sup> 15 U.S.C. 78f(b)(5).

regulatory costs incurred by the Exchange. The Exchange believes that the amount proposed herein will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs. Moreover, the proposed amount is lower than the amount of ORF assessed on other exchanges.<sup>28</sup> The Exchange notes that while certain options exchanges do charge a lower ORF than that proposed by the Exchange, each of these options exchanges is part of an exchange "group" (i.e., affiliated with other options exchanges). In turn, each of these exchange groups charges more than two (2) to five (5) times the amount of ORF as a group when compared to the Exchange's proposed ORF rate.<sup>29</sup> While the Exchange understands and agrees that each additional options exchange is its own legal entity with regulatory obligations under the Act to regulate its members, the Exchange also believes that there is significant scale that can be achieved for an exchange group that operates multiple exchanges, including with respect to regulation, and that it is this scale that allows such options exchanges to operate with such a low assessment of ORF. In other words, the initial fixed costs associated with implementing an exchange group's options regulatory program are scalable as additional options exchanges are launched by that exchange group.

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<sup>28</sup> See, e.g., NYSE Arca Options Fees and Charges, Options Regulatory Fee ("ORF") and NYSE American Options Fees Schedule, Section VII(A), which provide that ORF is assessed at a rate of \$0.0055 per contract for each respective exchange. See also Nasdaq PHLX, Options 7 Pricing Schedule, Section 6(D), which provides for an ORF rate of \$0.0034 per contract, Cboe Options Fee Schedule, which provides an ORF rate of \$0.0017 per contract, Nasdaq Options Market, Options 7 Pricing Schedule, Section 5, which provides an ORF rate of \$0.0016 per contract, BOX Options Fee Schedule Section II(C), which provides an ORF rate of \$0.00295 per contract, MIAX Options Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0019 per contract, MIAX Pearl Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0018 per contract.

<sup>29</sup> Each of MIAX Emerald, Cboe BZX Options, Cboe C2 Options, Cboe EDGX Options, Nasdaq ISE Gemini, Nasdaq ISE and Nasdaq BX Options charges a lower rate than \$0.0015 per contract, which is the rate proposed by the Exchange. However, the Cboe exchanges, comprised of four options exchanges, charges an aggregate ORF rate of \$0.0021 per contract (more than the Exchange's proposed rate), the MIAX exchanges, comprised of three options exchanges, charges an aggregate ORF rate of \$0.0043 per contract (nearly 3 times the Exchange's proposed rate); and the Nasdaq exchanges, comprised of six options exchanges, charges an aggregate ORF rate of \$0.0084 per contract (nearly 6 times the Exchange's proposed rate). The Exchange notes that the NYSE exchanges, comprised of two options exchanges, charges an aggregate ORF rate of \$0.011 per contract (over 7 times the Exchange's proposed rate).

The Exchange believes the proposed ORF is equitable and not unfairly discriminatory because it is objectively allocated to Members in that it is charged to all Members on all their transactions that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing fees to those Members that are directly based on the amount of customer options business they conduct. Regulating customer trading activity is generally more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity 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. Again, the Exchange intends to quantify the amount of time and resources spent on customer trading activity during the sunset period and take into account that information in order to inform its approach to the ORF thereafter.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive, and enforcement activities. The Exchange will monitor 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. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than 75% of the Exchange's regulatory costs, which is consistent with the Exchange's by-laws that 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>30</sup>. In this regard, the Exchange believes that the amount of the fee is reasonable.

The Exchange believes that the proposal to limit changes to the ORF to twice a year with advance notice is reasonable because it will give participants certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers. The Exchange believes that limiting changes to the ORF to twice a year is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee.

The Exchange believes that the proposal to collect the ORF from non-Members when such non-Members ultimately clear the transaction (that is, when the non-Member is the “ultimate clearing firm” for a transaction in which a Member was assessed the ORF), is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange notes that there is a material distinction between “assessing” the ORF and “collecting” the ORF. The Exchange does not assess the ORF to non-Members in any instance. For all executions, regardless of where they occur, the ORF is collected from the ultimate clearing firm, regardless of whether that clearing firm is a Member, but only if the original executing clearing firm is a Member. If the original executing clearing firm is a not a Member, no ORF is assessed or collected. If the original executing clearing firm is a Member, while the ORF may be collected from the ultimate non-Member clearing firm, the ORF is assessed to the Member executing clearing firm. The Exchange believes that this collection practice is reasonable and appropriate, given its broad regulatory responsibilities with

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<sup>30</sup> See MEMX LLC – LLC Agreement at <https://info.memxtrading.com/regulation/governance/>.

respect to its Members activity, as well as the fact that this collection method was originally instituted for the benefit of clearing firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction.

The Exchange believes that implementing the proposed ORF with a sunset date of approximately six months after the operative date is reasonable because it will give the Exchange adequate time to collect and analyze pertinent data while ensuring the Exchange, as a new entrant into equity options trading, is able to adequately fund its regulatory program to the same extent as its competitors. As noted above, the Exchange emphasizes that other exchanges will be charging ORF for transactions occurring on MEMX Options, and as such, it follows that the Exchange that is primarily responsible for monitoring those transactions should also be able to charge the ORF for activity occurring on its own market, as well as transactions it surveils on away markets.

The Exchange believes that implementing the ORF with the sunset provision is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and the Exchange will provide such Members with advance notice of any changes to the ORF imposed by the Exchange.

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. This proposal will not create an unnecessary or inappropriate intra-market burden on competition because the ORF will apply to all customer activity, and is designed to enable the Exchange to recover a material portion of the Exchange's cost related to its regulatory activities. This proposal will not create an unnecessary or inappropriate inter-market burden on competition because it will be a regulatory fee that supports regulation and customer protection in furtherance of the purposes of

the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange's proposed ORF, as described herein, is lower than or comparable to fees charged by other options exchanges (though as noted above, some exchange groups do have options exchanges operating with a lower ORF on a standalone basis). The proposal to limit the changes to the ORF to twice a year with advance notice is not intended to address a competitive issue but rather to provide Members with better notice of any change that the Exchange may make to the ORF.

The Exchange notes that while it does not believe that its proposed ORF will impose any burden on inter-market competition, the Exchange not charging an ORF or being precluded from charging an ORF would, in-fact, represent a significant burden on competition. As noted above, the Exchange is a new entrant in the highly competitive environment for equity options trading. As also noted above, all sixteen (16) registered options exchanges currently impose the ORF on their members, and, similar to the Exchange, the majority of the options exchanges launched over the last decade have implemented an ORF on the day of launch or shortly thereafter.<sup>31</sup> Such ORF fees imposed by other options exchanges currently do and will continue to extend to executions occurring on the Exchange. The Exchange believes that in order to compete with these existing options exchanges, it must, in fact, impose an ORF on its Members, and that the inability to do so would result in an unfair competitive disadvantage to the Exchange. Given the Commission's questions, as articulated in various orders instituting proceedings and the OIP, the Exchange has proposed its ORF with a sunset that will allow the Exchange the time to gather the necessary data, including its actual regulatory costs and revenues, as well as the cost of

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<sup>31</sup> See supra, note 17.

regulating executions that clear in the customer capacity and executions that occur on away markets, while also allowing it to adequately cover a portion of the projected costs associated with the regulation of its Members.

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>32</sup> and Rule 19b-4(f)(2)<sup>33</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:

Electronic comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>);
- or

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<sup>32</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>33</sup> 17 CFR 240.19b-4(f)(2).

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-MEMX-2023-38 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-2023-38. 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-2023-38 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.<sup>34</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>34</sup> 17 CFR 200.30-3(a)(12).