

published for comment in the **Federal Register** on March 28, 2022.<sup>3</sup>

Section 19(b)(2) of the Act<sup>4</sup> provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is May 12, 2022.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designates June 26, 2022, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSEAMER-2022-15).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94866; File No. SR-MEMX-2021-10]

### Self-Regulatory Organizations; MEMX LLC; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Establish a Retail Midpoint Liquidity Program

May 6, 2022.

#### I. Introduction

On August 18, 2021, MEMX LLC (“MEMX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act

of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish a Retail Midpoint Liquidity Program (“Program”). The proposed rule change was published for comment in the **Federal Register** on September 8, 2021.<sup>3</sup> On October 19, 2021, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>4</sup> On December 7, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>5</sup> to determine whether to approve or disapprove the proposed rule change.<sup>6</sup> On January 27, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which supersedes the original filing in its entirety, and on February 14, 2022, the Commission published for comment Amendment No. 1 and designated a longer period for Commission action on the proposed rule change.<sup>7</sup> The Commission received comments on the proposed rule change,<sup>8</sup> and the Exchange submitted a response to comments at the time it filed Amendment No. 1.<sup>9</sup>

This order disapproves the proposed rule change, as modified by Amendment No. 1, because, as discussed below, the Exchange has not met its burden under the Act and the Commission’s Rules of Practice to demonstrate that its proposal is consistent with the requirements of the Act, including, in particular, the requirements in Section 6(b)(5) of the Act that the rules of a national securities exchange be designed to promote just and equitable principles of trade and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers<sup>10</sup> and the objectives in Section 11A of the Exchange Act, including the

maintenance of fair and orderly markets.<sup>11</sup>

#### II. Description of the Proposal

The Exchange proposes to establish a Retail Midpoint Liquidity Program to provide retail investors with price improvement opportunities at or better than the midpoint of the national best bid and offer (“Midpoint Price”). Specifically, the Exchange proposes to allow Retail Member Organizations (“RMOs”)<sup>12</sup> to submit a new type of order on behalf of retail investors that is designed to execute at the Midpoint Price or better (a “Retail Midpoint Order”).<sup>13</sup> Contra-side liquidity would be provided by (i) a new non-displayed Midpoint Peg order that would be restricted to interacting only with incoming Retail Midpoint Orders through the proposed Program (“Retail Midpoint Liquidity Order” or “RML Order”)<sup>14</sup> as well as (ii) resting liquidity on the Exchange’s order book that would offer greater price improvement than the Midpoint Price,<sup>15</sup> and (iii) regular non-restricted Midpoint Peg orders that users designate as also eligible to interact with Retail Midpoint Orders (“Eligible Midpoint Peg Orders”).<sup>16</sup>

MEMX would disseminate a Retail Liquidity Identifier through its proprietary market data feeds, MEMOIR Depth<sup>17</sup> and MEMOIR Top,<sup>18</sup> and the appropriate securities information processor (“SIP”) when RML Order interest aggregates to form at least one round lot for a particular security, provided that such interest is resting at the Midpoint Price<sup>19</sup> and is priced at

<sup>11</sup> 15 U.S.C. 78k-1(a)(1)(C).

<sup>12</sup> See MEMX Rule 11.21(a)(1).

<sup>13</sup> A Retail Midpoint Order would have a Midpoint Peg instruction (*i.e.*, to re-price to the Midpoint Price in response to changes in the national best bid and offer). As proposed, a Retail Midpoint Order must have a time-in-force instruction of Immediate-or-Cancel. See MEMX Rule 11.6(o)(1) (defining Immediate-or-Cancel). See also MEMX Rules 11.6(h)(2) (defining Midpoint Peg) and 11.21(a) (defining Retail Order).

<sup>14</sup> See proposed MEMX Rule 11.22(a)(2).

<sup>15</sup> See *infra* note 24.

<sup>16</sup> The Exchange proposes to revise MEMX Rule 11.6(h)(2)’s definition of Midpoint Peg to provide that a Midpoint Peg order (other than a RML Order) would generally not be eligible to execute against a Retail Midpoint Order, provided, however, that a user submitting a Midpoint Peg order would be able to include an instruction that such order is eligible to execute against a Retail Midpoint Order through the execution process described in proposed MEMX Rule 11.22(c).

<sup>17</sup> See MEMX Rule 13.8(a).

<sup>18</sup> See MEMX Rule 13.8(b).

<sup>19</sup> The Exchange explains that a RML Order could have a limit price that is less aggressive than the Midpoint Price, in which case it would not be eligible to trade with an incoming Retail Midpoint Order and therefore would not be included for

<sup>3</sup> See Securities Exchange Act Release No. 94487 (Mar. 22, 2022), 87 FR 17349 (Mar. 28, 2022).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> *Id.*

<sup>6</sup> 17 CFR 200.30-3(a)(31).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 92844 (September 1, 2021), 86 FR 50411 (September 8, 2021).

<sup>4</sup> See Securities Exchange Act Release No. 93383 (October 19, 2021), 86 FR 58964 (October 25, 2021).

<sup>5</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>6</sup> See Securities Exchange Act Release No. 93727 (December 7, 2021), 86 FR 70874 (December 13, 2021) (“Order Instituting Proceedings”).

<sup>7</sup> See Securities Exchange Act Release No. 94189 (February 8, 2022), 87 FR 8305 (February 14, 2022).

<sup>8</sup> All comments received by the Commission on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-memx-2021-10/srmemx202110.htm>.

<sup>9</sup> See Letter from Adrian Griffiths, Head of Market Structure, MEMX, dated January 27, 2022 (“MEMX Letter”).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

least \$0.001 better than the national best bid (“NBB”) or national best offer (“NBO”).<sup>20</sup> The Retail Liquidity Identifier would reflect the symbol and the side (buy and/or sell) of the RML Order interest but would not include the price or size of that interest.<sup>21</sup>

#### Priority and Order Execution

Proposed MEMX Rule 11.22(c) sets forth the execution priority rules for the Program. First, an incoming Retail Midpoint Order would execute against resting liquidity priced more aggressively than the Midpoint Price. Specifically, proposed MEMX Rule 11.22(c)(2) provides that if there is: (1) A Limit Order<sup>22</sup> of Odd Lot<sup>23</sup> size that is displayed by the MEMX system (“Displayed Odd Lot Order”) and that is priced more aggressively than the Midpoint Price and/or (2) an order that is not displayed by the MEMX system (“Non-Displayed Order”) and that is priced more aggressively than the Midpoint Price, resting on the MEMX Book,<sup>24</sup> an incoming Retail Midpoint Order would first execute against any such orders pursuant to the Exchange’s standard price/time priority in accordance with MEMX Rules 11.9 and

purposes of Retail Liquidity Identifier dissemination since it would not reflect interest available to trade with Retail Midpoint Orders. See Amendment No. 1, *supra* note 7, at 8308.

<sup>20</sup> The Exchange explains that because RML Orders are proposed to be only Midpoint Peg orders, they would always represent at least \$0.001 price improvement over the NBB or NBO, with two exceptions: (1) In a locked or crossed market; and (2) a sub-dollar security when the security’s spread is less than \$0.002. See *id.* The Exchange would only disseminate the Retail Liquidity Identifier for sub-dollar securities if the spread in the security is greater than or equal to \$0.002, meaning the Midpoint Price represents at least \$0.001 price improvement over the NBB or NBO. See *id.*

<sup>21</sup> The Exchange would remove the Retail Liquidity Identifier when remaining RML Order interest no longer aggregates to form at least one round lot, or in situations where there is no actionable RML Order interest (such as when the market is locked or crossed). See *id.* at 8308–09. A limited exception for some exchange retail liquidity programs from the Quote Rule has been granted to allow those exchanges to disseminate identifiers including symbol and side, but not price or size, to attract retail interest and provide them with price improvement over displayed prices. See, e.g., Securities Exchange Act Release No. 93217 (September 30, 2021) (Order Granting Application of Investors Exchange LLC for a Limited Exemption from Rule 602 of Regulation NMS for its Retail Price Improvement Program).

<sup>22</sup> See MEMX Rule 11.8(b).

<sup>23</sup> See MEMX Rule 11.6(q)(2).

<sup>24</sup> The Exchange states that Displayed Odd Lot Orders and Non-Displayed Orders are the only types of orders that could rest on the MEMX Book at a price that is more aggressive than the Midpoint Price, as any displayed buy (sell) order that is at least one round lot in size would be eligible to form the NBB (NBO). See Amendment No. 1, *supra* note 7, at 8309 n.41.

11.10 before executing against resting RML Orders.<sup>25</sup>

Second, after executing against resting liquidity priced more aggressively than the Midpoint Price, proposed MEMX Rule 11.22(c)(3) states that any unfilled portion of a Retail Midpoint Order would next execute against RML Orders at the Midpoint Price in time priority.

Third, proposed MEMX Rule 11.22(c)(4) states that after executing against all liquidity that is priced more aggressively than the Midpoint Price and all RML Orders, Retail Midpoint Orders would execute against Eligible Midpoint Peg Orders at the Midpoint Price in time priority.<sup>26</sup>

### III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,<sup>27</sup> the Commission shall approve a proposed rule change of a self-regulatory organization (“SRO”) if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to such organization.<sup>28</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>29</sup> The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the [Exchange] Act and the rules and regulations issued

<sup>25</sup> MEMX initially proposed that execution of a Retail Midpoint Order against such Displayed Odd Lot Orders and Non-Displayed Orders would have executed at the Midpoint Price irrespective of the prices at which such orders were ranked. Thus, any additional price improvement over the Midpoint Price would not have accrued to the retail investor’s Retail Midpoint Order, but rather would have accrued to the Displayed Odd Lot Order or Non-Displayed Order. The Exchange subsequently revised its proposal to accrue any price improvement to the incoming Retail Midpoint Order. See also MEMX Letter at 4.

<sup>26</sup> MEMX initially proposed to execute Retail Midpoint Orders only against RML Orders, to the exclusion of any other available Midpoint Peg order. Two commenters objected to that treatment and were critical of those aspects of the proposal that would have limited the ability of retail orders to access all available midpoint interest and the extent to which that could have harmed retail investors. See Letter from Joseph Saluzzi and Sal Arnuk, Themis Trading LLC, dated December 20, 2021, and Letter from Sean Paylor, Acadian Asset Management LLC, dated January 10, 2022. MEMX subsequently submitted Amendment No. 1 to its proposal to allow Eligible Midpoint Peg Orders to participate in the Program. Another commenter expressed concern about a lack of transparency in the rebate and fee tiering structure behind the proposed Program. See Letter from Reginald Neumann Maximillian Smythers, dated April 1, 2022. The Exchange has not yet filed an accompanying filing to propose a fee schedule in connection with this proposal.

<sup>27</sup> See 15 U.S.C. 78s(b)(2)(C).

<sup>28</sup> See 15 U.S.C. 78s(b)(2)(C)(i).

<sup>29</sup> See 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3).

thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”<sup>30</sup>

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>31</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>32</sup> Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.<sup>33</sup>

For the reasons discussed below, the Commission is disapproving the proposed rule change, as modified by Amendment No. 1, because the information before the Commission is insufficient to support a finding that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.

In summary, MEMX has an existing Midpoint Peg order type and is proposing a new Midpoint Peg order type (*i.e.*, RML Orders) as part of the proposed Program. From the perspective of an incoming Retail Midpoint Order, the current and proposed Midpoint-priced order types are indistinguishable because, under the proposed Program, both would result in a midpoint execution for the Retail Midpoint Order. From the perspective of market participants posting each order type, however, MEMX proposes to treat them differently by providing RML Orders with execution priority over Eligible Midpoint Peg Orders. This proposed disparate treatment raises concerns about whether the proposed Program is consistent with the Act.

As part of its filing, MEMX bears the burden to provide a sufficient legal analysis to demonstrate how its proposed rules are consistent with the Act, which requires, among other

<sup>30</sup> See 17 CFR 201.700(b)(3).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> *Susquehanna Int’l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017).

things, that MEMX's rules be designed to promote just and equitable principles of trade and to protect investors and the public interest, and not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>34</sup>

To demonstrate how providing RML Orders with execution priority over Eligible Midpoint Peg Orders is consistent with the Act, MEMX asserts the following: (1) Because RML Orders will contribute to the Retail Liquidity Identifier, which is designed to attract retail orders to the Exchange, RML Orders deserve the same priority advantage that MEMX provides to displayed orders to reward displayed orders for contributing to price discovery; (2) because the Retail Liquidity Identifier would signal the presence of a buyer or seller at the Midpoint Price, awarding higher priority to RML Orders would balance the risks and incentives associated with entering RML Orders; and (3) market participants that post Midpoint Peg orders can avoid losing priority to RML Orders when trading with Retail Midpoint Orders by switching to RML Orders.

The Commission is disapproving this proposed rule change, as modified by Amendment No. 1, because, as discussed in detail below, MEMX has not met its burden under the Act and the Commission's Rules of Practice to demonstrate how its proposal to provide RML Orders with execution priority over Eligible Midpoint Peg Orders is consistent with the requirements of the Act, including, in particular, the requirements in Section 6(b)(5) of the Act that a national securities exchange's rules be designed to promote just and equitable principles of trade and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and the objectives in Section 11A of the Exchange Act, including the maintenance of fair and orderly markets.

#### 1. Price-Time Priority

The rules of a national securities exchange specify the priority of orders for execution in its matching engine. When exchange rules award higher execution priority to one type of order over another, they must do so in a manner that is consistent with the Act. One reason to provide execution priority to one liquidity-providing order type over another may be that the favored order is more aggressive and takes more risk in a way that provides benefits to the market and liquidity

seekers. An exchange may seek to attract those types of orders because they directly improve the exchange's market quality and increase trading volume. Offering a priority advantage to the more aggressive order is an incentive to attract those types of orders to the exchange and may be justified as promoting just and equitable principles of trade, avoiding unfair discrimination between broker-dealers and between their customers, and contributing to the maintenance of fair and orderly markets to the extent the priority advantage rewards those liquidity providers for the risks they take and benefits they provide to the market when they are the first to provide the most aggressive widely-available best prices to the broadest population of liquidity seekers.

MEMX Rule 11.9 establishes the priority of orders and describes how MEMX uses "price-time" priority to rank orders for execution priority. Under its price-time priority rule, MEMX affords priority to the highest-priced order to buy (or lowest-priced order to sell) over orders with less aggressive prices.<sup>35</sup> For equally priced orders, MEMX's rules specify that it will rank them in time priority (*i.e.*, with the first order entered into the MEMX system having priority over later-arriving orders)<sup>36</sup> and it also generally awards priority to displayed orders over non-displayed orders.<sup>37</sup>

However, for its proposed Program, MEMX would deviate from its price-time priority rule by always awarding priority to the RML Orders (*i.e.*, Midpoint Peg orders that can only trade against Retail Midpoint Orders) over Eligible Midpoint Peg Orders (*i.e.*, Midpoint Peg orders that will trade with any counterparty, including Retail Midpoint Orders), even though both orders are equally priced at the Midpoint Price and would otherwise execute in time priority outside the proposed Program.<sup>38</sup> For the reasons further explained below, the Commission finds that MEMX has not met its burden to support a finding that

<sup>35</sup> See MEMX Rule 11.9(a)(1).

<sup>36</sup> See MEMX Rule 11.9(a)(2)(A) ("Where orders to buy (sell) are entered into the System at the same price, the order clearly established as the first entered into the System at such particular price shall have precedence at that price, up to the number of shares of stock specified in the order.").

<sup>37</sup> See, *e.g.*, MEMX Rule 11.9(a)(2)(A)(i) and (ii).

<sup>38</sup> See MEMX Rule 11.9(a)(2)(A)(iv). As proposed, if MEMX has a 90 share Eligible Midpoint Peg Order resting on its order book and later receives a 90 share RML Order, it would execute an incoming 20 share Retail Midpoint Order against the later-arriving RML Order even though the Eligible Midpoint Peg Order arrived first in time (and even though the 90 share RML Order was not of sufficient size to trigger the Retail Liquidity Identifier).

providing RML Orders with execution priority over Eligible Midpoint Peg Orders under the circumstances MEMX proposes is consistent with the Act.

#### a. Analogizing Non-Displayed Orders to Displayed Orders

MEMX analogizes RML Orders to fully displayed orders (*e.g.*, a limit order whose price and size is published by the Exchange) because they would contribute to the Retail Liquidity Identifier. Specifically, MEMX states that "it is appropriate to execute RML Orders, which contribute to the dissemination of the Retail Liquidity Identifier, ahead of Eligible Midpoint Peg Orders, which do not contribute to the dissemination of the Retail Liquidity Identifier and are not displayed on the MEMX Book."<sup>39</sup> MEMX asserts that such treatment is "consistent with general principles of order priority on the Exchange . . . [where] orders that contribute to price discovery receive priority ahead of non-displayed orders that do not contribute to market transparency."<sup>40</sup> "As such," the Exchange continues, it "does not believe that the proposed order priority under the RML Program raises any novel issues for the Commission to consider."<sup>41</sup>

MEMX's proposal does present a novel issue because MEMX seeks to award execution priority to a new type of Midpoint Peg order (*i.e.*, RML Orders) over an existing type of Midpoint Peg order (*i.e.*, Eligible Midpoint Peg Orders). First, both Eligible Midpoint Peg Orders and RML Orders would be classified as pegged orders under MEMX rules and MEMX's rules specifically provide that pegged orders cannot be displayed.<sup>42</sup> Second, RML Orders would not contribute to market transparency or price discovery in the same way that displayed orders do because RML Orders are pegged to the Midpoint Price that solely is derived from displayed quotes and does not impact or contribute to those displayed quotes. The information conveyed by the Retail Liquidity Identifier (*i.e.*, the existence of one round lot of RML Order interest at the Midpoint Price) is different than the information on price and size that displayed orders provide to inform price discovery. Displayed orders help establish the best available

<sup>39</sup> See Amendment No. 1, *supra* note 7, at 8309.

<sup>40</sup> See *id.* at 8310.

<sup>41</sup> See *id.*

<sup>42</sup> See MEMX Rule 11.8(c)(3). Because they are pegged to a reference price (the Midpoint Price), RML Orders would be classified as Pegged Orders under MEMX rules and MEMX's Pegged Order rule specifically provides that "Pegged Orders are not eligible to include a Displayed instruction." *Id.*

<sup>34</sup> 15 U.S.C. 78f(b)(5).

prices in the market, which broadly benefits investors, serves the public interest, and facilitates fair and orderly markets by informing not only trading decisions but also security and portfolio valuation, prices of derivative securities like listed options, and the calculation of market indices. MEMX's comparison of the broad benefits that displayed orders contribute to the market to the narrow benefit that the Retail Liquidity Identifier would provide to RMOs to justify endowing RML Orders with the same exception to its price-time execution priority rule that MEMX provides to displayed orders, without more, does not sufficiently address how the proposal would promote just and equitable principles of trade, be consistent with the maintenance of fair and orderly markets, and not permit unfair discrimination between customers, issuers, brokers, or dealers.

Third, Midpoint Peg orders are not eligible to be displayed for a number of reasons, including, among others, prohibitions on the display of quotes in subpenny increments,<sup>43</sup> requirements to avoid locking the market,<sup>44</sup> and the impact that a displayed Midpoint Peg order would have on the Midpoint Price. Thus, MEMX proposes to reward RML Orders for doing something (*i.e.*, contributing to the Retail Liquidity Identifier) that Eligible Midpoint Peg Orders simply are not permitted to do. Without more, MEMX has not sufficiently explained how providing a priority advantage to one type of Midpoint Peg order (RML Orders) over another (Eligible Midpoint Peg Orders), based on something that Eligible Midpoint Peg Orders are not permitted to do, promotes just and equitable principles of trade, is consistent with the maintenance of fair and orderly markets, and does not permit unfair discrimination between customers, issuers, brokers, or dealers.

#### b. Balancing the Risks and Incentives Associated With Entering RML Orders

MEMX also states that "entering RML Orders involves some additional risk for those market participants as the Retail Liquidity Identifier will signal that there is a buyer or seller that is willing to trade with retail investors at the Midpoint Price."<sup>45</sup> "Thus," the Exchange states, "the RML Program seeks to balance the risks and incentives associated with entering RML Orders. . . ." <sup>46</sup> Consequently, MEMX proposes to reward RML Orders with

execution priority over Eligible Midpoint Peg Orders to the same extent that it rewards displayed orders with priority over non-displayed orders.

In general, some market participants may be hesitant to display regular limit orders on an exchange's order book because of the potential for adverse selection when trading against counterparties more associated with price movements and the inability to avoid interacting with those counterparties. To encourage display of trading interest on its order book in light of those risks, an exchange might offer displayed orders enhanced execution priority over non-displayed orders. Rewarding displayed orders with priority over non-displayed orders compensates them for the risks they take in displaying prices that are available for any liquidity taker and for the chance of adverse selection when trading with certain counterparties.

However, market participants posting RML Orders would face little risk (if any) from the Retail Liquidity Identifier because RML Orders are uniquely counterparty-restricted whereas displayed orders are not so restricted. In other words, RML Orders would experience significantly different risk compared to displayed orders on MEMX's order book because MEMX would restrict the counterparties with which an RML Order could trade to only permit executions against retail orders to the exclusion of all other types of orders and counterparties. Market participants placing RML Orders would be specifically seeking to interact exclusively with retail customers because they likely regard retail customers to be attractive counterparties that submit smaller-sized orders that typically are less predictive of very short-term price movements.<sup>47</sup>

Despite this significant difference, MEMX proposes to confer the same execution priority benefit to restricted RML Orders that it grants to unrestricted displayed limit orders. However, MEMX's proposal is designed to effectively eliminate the risk of adverse selection when trading with non-retail counterparties more associated with price movements and RML Orders would not be exposed to a level of execution risk in the Program that is comparable to what displayed orders face on MEMX's order book. The Retail Liquidity Identifier and counterparty

restriction would be a benefit to RMOs that permit an otherwise non-displayed order to advertise its presence to the very counterparty with which the poster seeks to trade (and is only permitted to trade with by the terms of the RML Order). Compounding advantages does not appear to balance the risks and incentives of entering RML Orders that MEMX said it seeks to balance.

Accordingly, the Exchange's assertion that the Program "seeks to balance the risks and incentives" is misplaced because the Retail Liquidity Identifier should not generate additional risks to RMOs commensurate with the risks experienced by market participants posting regular displayed orders on MEMX's order book. Moreover, as stated above, market participants placing RML Orders would instead benefit from the Retail Liquidity Identifier because it is intended to attract the desirable retail counterparties with whom they specifically seek to trade and with whom, aside from the proposed Program, they may have fewer opportunities to interact.

Consequently, MEMX is proposing to reward counterparty-restricted RML Orders for contributing to a Retail Liquidity Identifier that benefits them and MEMX has not sufficiently explained why those compounded benefits are consistent with the Act. Further, MEMX has not sufficiently explained why that different treatment proposed between brokers, dealers, or customers when such brokers, dealers, or customers post each different order type is not unfairly discriminatory. Without more, MEMX has not carried its burden to sufficiently analyze how its proposed disparate treatment in execution priority between two types of Midpoint Peg orders promotes just and equitable principles of trade, protects investors and the public interest, contributes to the maintenance of fair and orderly markets, and is not designed to permit unfair discrimination.

#### 2. Choosing Between Two Types of Midpoint Peps

MEMX states that its users are free to select which Midpoint Peg order type they wish to submit if they want to interact with Retail Midpoint Orders, and would do so knowing their advantages and disadvantages, thus making its proposal to award RML Orders with execution priority over Eligible Midpoint Peg Orders not unfairly discriminatory.<sup>48</sup> As discussed above, MEMX is proposing disparate treatment between two Midpoint Peg

<sup>47</sup> See, e.g., Amendment No. 1, *supra* note 7, at 8306 ("[T]he Exchange believes that market makers and other sophisticated market participants generally value interacting with retail orders because they are smaller and not likely to be part of a larger parent order that can move a stock price, causing a loss to the market maker.")

<sup>48</sup> See Amendment No. 1, *supra* note 7, at 8313.

<sup>43</sup> See 17 CFR 242.612.

<sup>44</sup> See 17 CFR 242.610(d).

<sup>45</sup> See Amendment No. 1, *supra* note 7, at 8313.

<sup>46</sup> See *id.*

order types by proposing to reward RML Orders with execution priority over Eligible Midpoint Peg Orders when interacting with Retail Midpoint Orders. MEMX cannot resolve potential unfair discrimination in favor of RML Orders over Eligible Midpoint Peg Orders by relying on the fact that users can instead use RML Orders; doing so does not convert unfair discrimination into fair discrimination. When MEMX chooses to offer two Midpoint Peg order types but treats them differently, each order type must independently be consistent with the Act and any discriminatory treatment must also be consistent with the Act. The consistency of one order type with the requirements of the Act is independent of, and cannot be contingent on, the existence of a substitute.

### 3. MEMX Has Failed To Meet Its Burden

When assessing this proposed rule change, as modified by Amendment No. 1, the Commission must consider its consistency with the Act and the applicable rules and regulations issued thereunder. As stated above, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."<sup>49</sup> For the foregoing reasons, the Exchange has not met its burden to demonstrate that it would be consistent with the Act for the Exchange to provide a priority advantage to one type of midpoint peg (RML Orders) over another type of midpoint peg (Eligible Midpoint Peg Orders). As a result, the Commission does not have sufficient information to find that the Exchange's proposal would promote just and equitable principles of trade and protect investors and the public interest, not permit unfair discrimination between customers, issuers, brokers, or dealers, and promote the maintenance of fair and orderly markets. Accordingly, the Commission must disapprove the proposal because the Exchange has not met its burden to demonstrate that the proposal is consistent with the Act, including Section 6(b)(5) and Section 11A of the Act.<sup>50</sup>

### IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to

Section 19(b)(2) of the Act, that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Act.<sup>51</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>52</sup> that the proposed rule change (SR-MEMX-2021-10), as modified by Amendment No. 1, is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>53</sup>

**J. Matthew DeLesDernier**,

*Assistant Secretary*.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94863; File No. SR-MEMX-2022-11]

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

May 6, 2022.

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 April 29, 2022, 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). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on

May 2, 2022. 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 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 Fee Schedule to: (i) Adopt a new volume-based pricing incentive, referred to by the Exchange as the Step-Up Additive Rebate, in which a qualifying Member will receive an additive rebate for executions of certain orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange; (ii) reduce the rebate provided under Liquidity Provision Tier 1 for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange; and (iii) reduce the rebate provided under DLI Tier 2 for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange.

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. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.<sup>4</sup> Thus, in such a low-concentrated and highly competitive market, no single equities

<sup>49</sup> Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

<sup>50</sup> In disapproving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>51</sup> 15 U.S.C. 78f(b)(5).

<sup>52</sup> 15 U.S.C. 78s(b)(2).

<sup>53</sup> 17 CFR 200.30-3(a)(12).

<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).

<sup>4</sup> Market share percentage calculated as of April 27, 2022. The Exchange receives and processes data made available through consolidated data feeds (*i.e.*, CTS and UTDF).