

February 24, 2023

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-03);¹ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-14);² Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-19);³ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-28);⁴ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No.

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-94614, Apr. 5, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94614.pdf> ("Initial MEMX Market Data Filing"). The Initial MEMX Market Data Filing was withdrawn May 23, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95027, June 2, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95027.pdf>.

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95036, June 3, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95036.pdf> ("Second MEMX Market Data Filing") (containing typo suggesting it was filed on March 24th, when subsequent documents suggest it was filed on May 23rd). The Second MEMX Market Data Filing was withdrawn July 21, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95400, Aug. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95400.pdf>.

³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95420, Aug. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95420.pdf> ("Third MEMX Market Data Filing"). The Third MEMX Market Data Filing was withdrawn on September 20, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95917, Sept. 27, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95917.pdf>.

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95981, Oct. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95981.pdf> ("Fourth MEMX Market Data Filing"). The Fourth MEMX Market Data Filing was withdrawn on November 18, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96453, Dec. 6, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96453.pdf>.



SR-MEMX-2022-32);⁵ and Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2023-02)⁶

Dear Ms. Countryman:

The Healthy Markets Association⁷ writes to object to the Sixth MEMX Market Data Filing for the same reasons as we did to its predecessors. Attached as **Exhibit A** are copies of our prior objection letters.

The Sixth MEMX Market Data Filing – like all five of its predecessor filings – does not provide the Commission or staff with sufficient information to conclude that MEMX has met its obligations under the Exchange Act and Commission Rules. Put simply, the Sixth MEMX Market Data Filing fails to provide factual information sufficient to conclude that MEMX’s market data fees are reasonable, equitably allocated, non-discriminatory, and not undue burdens on competition.⁸

We write to highlight three additional concerns.

I. The Sixth MEMX Market Data Filing Is Nearly Identical to the Fifth MEMX Market Data Filing

This Sixth MEMX Market Data Filing offers no new material information despite being classified as new.⁹ It is not “new” but a minimally amended version of the prior filings. The Exchange has not bothered to make any material changes since the filing it withdrew on the same day it made the instant filing.

⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96430, Dec. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96430.pdf> (“Fifth MEMX Market Data Filing”). The Fifth MEMX Market Data Filing was withdrawn on January 20, 2023. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96720, Jan. 20, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-96720.pdf>.

⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96775, Jan. 30, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-96775.pdf> (“Sixth MEMX Market Data Filing”).

⁷ The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. HMA members are directly and indirectly impacted by the now long-implemented fees. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁸ *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“2019 Staff Guidance”).

⁹ Notably, the Commission staff has previously suggested that it would consider recommending Commission action to address the issue of repeated submissions of substantially similar fee filings, which, it argued can “unnecessarily exhaust Commission resources.” 2019 Staff Guidance, n.15. That has obviously not occurred.

A few new sentences essentially arguing that access to the MEMX Market Data is “optional for Trading Platforms” is not new, material information. And noting that some ATSS and exchanges don’t currently pay the nearly year-old fees is also irrelevant to the Exchange’s compliance with the statutory requirements that its fees generally be (1) reasonable, (2) equitably allocated, (3) not undue burdens on competition, and (4) non-discriminatory.

Rather than even attempt to provide sufficient factual information to support its fees, the Exchange has essentially continued to leave the substance of the Initial MEMX Market Data Filing undisturbed throughout its five subsequent iterations.

II. MEMX’s Yo-Yo Pattern of Filings and Withdrawals Injures Investors and Other Market Participants

The Exchange’s pattern of filing, withdrawing, and refiling the Market Data Filings denies market participants the opportunity to dispute or challenge the fees the Exchange is collecting.

While the Exchange has referred to the fees it has been charging market participants pursuant to its Second, Third, Fourth, Fifth, and now Sixth MEMX Market Data Filings as putting forward “proposals,” they were not “proposals.” The filings were about fees that were being assessed starting with the instant the filings were made. Put simply, the Filings reflect trivially amended variations of the same rule imposing fees that have been collected from market participants for nearly a year, and will continue to be collected, absent Commission intervention.

The Commission has now permitted the Exchange to impose market data fees for over 300 days and counting, collecting thousands of dollars each month on a broad swath of market participants. As demonstrated below, this has been done without ever adhering to the law or allowing market participants to challenge them. The Commission has allowed the Exchange to avoid this accountability by simply permitting the Exchange to file to impose the fees, withdrawing the objectionable filing immediately before a “final action” is take for administrative law purposes, and then re-submitting a nearly identical document just before the end of the 60-day statutory timeframe, during which the Commission can promptly suspend the filings.¹⁰

MEMX’s pattern of filing “new” rule proposals, withdrawing them before the timing has run, and then refiling to impose the same fees is unmistakable.

¹⁰ See Exchange Act Section 19(b)(3)(C) (stating that the Commission may “temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this chapter. . .”).

Filing	Effective Dates	Length of Effectiveness
Initial MEMX Market Data Fee Filing	3/24/22 – 5/23/22	60 days
Second MEMX Market Data Fee Filing	5/23/22 – 7/21/22	59 days
Third MEMX Market Data Fee Filing	7/22/22 – 9/20/22	60 days
Fourth MEMX Market Data Fee Filing	9/20/22 – 11/18/22	60 days
Fifth MEMX Market Data Fee Filing	11/18/22 – 1/17/23	60 days
Sixth MEMX Market Data Fee Filing	1/17/23 – current	

Given this disturbing record, we predict that on or around St. Patrick's Day, the Exchange will withdraw the current proposal and file its Seventh Market Data Fee Filing. At that point, we might expect the Exchange staff to celebrate with a pint, given that the Exchange will have successfully collected hundreds of thousands of dollars per month from a broad swath of market participants for nearly a year, despite never meaningfully establishing compliance with the law.

But perhaps most disturbingly, this process deprives market participants of having a final “action” by the agency to challenge in court. By the time the clock has run on one filing, and market participants may arguably resort to recourse in the courts, the filing is withdrawn and replaced, and the time clock begins anew. As a result, the Exchange – with the knowledge of and enabled by the Commission staff – is continuously depriving market participants of their money and legal rights to challenge the fees.

This process is inconsistent with protecting investors; fair, orderly, and efficient markets; as well as the plain intent of the law. The Commission must stop this abusive process.

III. MEMX’s Yo-Yo Pattern of Filings and Withdrawals Raises Questions About Undisclosed Communications

The pattern of filings accompanied by largely immaterial revisions raises questions about the extent of undisclosed communication between the Commission staff and the Exchange. It seems possible that the Commission staff may be discreetly encouraging the Exchange to make improvements to its filings while informally blessing the Exchange’s collection of improper fees, all without making any final determination of the filings’ compliance with the law.

Unfortunately, none of those oral or written communications have been included in the public record. As a result, other market participants, HMA, and the public are effectively denied the opportunity to understand the Commission staff’s thinking regarding



compliance with the Exchange Act and Commission Rules. For example, it is impossible to assess whether the Commission's action (or inaction) is arbitrary and capricious.

We note that the Second MEMX Market Data Filing was 64 pages, while the subsequent filing was 50 pages long. How does removing arguments or information improve the Commission or staff's consideration of the filing for compliance with the Exchange Act or Commission Rules? Further, we struggle to see how any of the differences between the Third (50 pages), Fourth (47 pages), and Fifth MEMX Market Data Filings (50 pages) could materially impact any Commission analysis. The Sixth MEMX Market Data Filings spans 50 pages as well. After analyzing the two most recent proposals and comparing them, we saw no changes sufficient to justify withdrawing and resubmitting the substantively identical proposal.¹¹ None of the changes appear to materially impact any reasonable analysis of whether the new filings meet their burdens.

Due to the Commission's inability or failure to carry out its statutory mandate to review the Exchange's filings and confirm their compliance with the law, MEMX's six market data filings have already imposed substantial expenses on market participants over the past ten months. Moreover, by implicitly permitting this abusive process to continue indefinitely, the Commission has empowered the Exchange to effectively deprive market participants of their rights to challenge the fees independently.

The Commission should suspend the Sixth MEMX Market Data Filing, initiate proceedings to disapprove it, and immediately suspend any similar filings from the Exchange until a determination has been made.

Thank you for your consideration.

Sincerely,

Tyler Gellasch
President and CEO

Cc: Hon. Gary Gensler, Chair
Haoxiang Zhu, Director, Division of Trading and Markets
Megan Barbero, General Counsel

¹¹ A PDF comparison of MEMX's Fifth and Sixth filings has been attached to this letter as **Exhibit B**.

December 12, 2022

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-03);¹ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-14);² Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-19);³ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-28);⁴ and Notice of Filing and Immediate Effectiveness of a Proposed

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-94614, Apr. 5, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94614.pdf> ("Initial MEMX Market Data Filing"). The Initial MEMX Market Data Filing was withdrawn May 23, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95027, June 2, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95027.pdf>.

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95036, June 3, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95036.pdf> ("Second MEMX Market Data Filing") (containing typo suggesting it was filed on March 24th, when subsequent documents suggest it was filed on May 23rd). The Second MEMX Market Data Filing was withdrawn July 21, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95400, Aug. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95400.pdf>.

³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95420, Aug. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95420.pdf> ("Third MEMX Market Data Filing"). The Third MEMX Market Data Filing was withdrawn on September 20, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95917, Sept. 27, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95917.pdf>.

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95981, Oct. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95981.pdf> ("Fourth MEMX Market Data Filing"). The Fourth MEMX Market Data Filing was withdrawn on November 18, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96453, Dec. 6, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96453.pdf>.



Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-32)⁵

Dear Ms. Countryman:

The Healthy Markets Association⁶ writes to object to the Fifth MEMX Market Data Filing for the same reasons as we did to its predecessors. Attached as **Exhibit 1** are copies of our prior objection letters.

The Fifth MEMX Market Data Filing – like all four of its predecessor filings – does not provide the Commission or staff with sufficient information to conclude that MEMX has met its obligations under the Exchange Act and Commission Rules, nor does the filing meet the guidance provided by the Commission staff in 2019.⁷ The defective filing should be immediately suspended and proceedings initiated for its disapproval.

We write to highlight three additional concerns.

First, the Fifth MEMX Market Data Filing is nearly identical to the Fourth MEMX Market Data Filing and offers no new material information, yet the filing is classified as a new filing.⁸ It is not “new”, but rather a minimally amended version of the prior filings. Further, we note that the Exchange refers to the Second, Third, Fourth, and Fifth MEMX Market Data Filings as putting forward “proposals.” They are not “proposals.” They are very slight variations of the same rule imposing fees that have been and will continue to be collected from market participants.

Second, by serially filing and withdrawing the filings to impose market data fees, MEMX is effectively denying market participants the opportunity to dispute or challenge the fees collected. The rules changes, and fees, are effective upon filing. Because the

⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96430, Dec. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96430.pdf> (“Fifth MEMX Market Data Filing”).

⁶ The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁷ *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“2019 Staff Guidance”).

⁸ 2019 Staff Guidance, n.15 (“[T]he staff urges SROs not to make substantially similar immediately effective Fee Filings while the Commission's proceedings are underway. This process can unnecessarily exhaust Commission resources. If necessary, the staff will recommend to the Commission action to address the issue of repeated submissions of substantially similar fee filings.”).



Commission or staff hasn't acted to suspend or disapprove any of the filings, the fees have been and are continuing to be collected.

As shown below, the Exchange has been permitted by the Commission to continue charging market data fees without ever complying with the law by simply withdrawing the offending filing and refiling a document that is the same in all material respects just prior to the close of the 60-day, statutory window within which the Commission may summarily suspend the filings.⁹

Filing	Effective Dates	Length of Effectiveness
Initial MEMX Market Data Fee Filing	3/24/22 - 5/23/22	60 days
Second MEMX Market Data Fee Filing	5/23/22 - 7/21/22	59 days
Third MEMX Market Data Fee Filing	7/22/22 - 9/20/22	60 days
Fourth MEMX Market Data Fee Filing	9/20/22 - 11/18/22	60 days
Fifth MEMX Market Data Fee Filing	11/18/22 - current	

Put simply, by the time the clock has run on one filing, and market participants may arguably resort to recourse in the courts, the filing is withdrawn and replaced, and the process begins anew. This is not a coincidence. As a result, the Exchange – with the knowledge of and enabled by the Commission staff – is depriving market participants of both their money and their legal rights.

This process is inconsistent with protecting investors, fair orderly and efficient markets, and the plain intent of the law. The Commission must stop this abusive process.

Third, the mere fact that each iterative filing contains several changes (albeit, immaterial ones) suggests strongly that there are numerous undisclosed communications between the Commission staff and the Exchange. It appears as though the Commission staff has been secretly nudging the Exchange to arguably “improve” its filings, while nevertheless permitting the Exchange to continuously collect the fees – all without the Commission or the staff ever passing final judgment of the filings’ compliance with the law.

Unfortunately, none of those communications – whether oral or written – have been included in the public record. Other market participants, HMA, and the public are

⁹ See Exchange Act Section 19(b)(3)(C).



effectively denied the opportunity to understand the Commission staff's thinking regarding compliance with the Exchange Act and Commission Rules. It is impossible to assess, for example, whether the Commission's action (or inaction) is arbitrary and capricious.

We note that the Second MEMX Market Data Filing was 64 pages, while the subsequent filing was merely 50 pages in length. How does removing arguments or information improve the Commission or staff's consideration of the filing for compliance with the Exchange Act or Commission Rules? Further, we struggle to see how any of the differences between the Third (50 pages), Fourth (47 pages), and Fifth MEMX Market Data Filings (50 pages) could materially impact any Commission analysis. The changes were not intuitively obvious upon our reading of the filings, and so we purchased document comparison software to compare each filing. None of the changes appear to materially impact any reasonable analysis of whether the new filings have met their burdens.

As a result of the Commission's failure to fulfill its statutory mandate to review the Exchange's filings and ensure that they comply with the law, MEMX's five market data filings have already extracted significant costs from market participants over the past eight months. Worse, by tacitly permitting this abusive process, the Commission has enabled the Exchange to effectively deprive market participants of their rights to challenge the fees independently.

The Commission should suspend the Fifth MEMX Market Data Filing, initiate proceedings to disapprove it, and immediately suspend any similar filings from the Exchange until a determination has been made.

Thank you for your consideration.

Sincerely,

Christopher Nagy
Research Director

Cc: Hon. Gary Gensler, Chair
Haoxiang Zhu, Director, Division of Trading and Markets
Dan Berkowitz, General Counsel

August 19, 2022

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. SR-MEMX-2022-17¹ and File No. SR-MEMX-2022-19²

Dear Ms. Countryman:

The Healthy Markets Association³ writes to object to the Fourth MEMX Connectivity Filing and Third MEMX Market Data Filing for the same reasons as we did to their predecessors. Attached as **Exhibit 1** are copies of our prior objection letters.

The Fourth MEMX Connectivity Filing and Third MEMX Market Data Filing – like all five of their predecessor filings – do not provide the Commission or staff with sufficient information to conclude that MEMX has met its obligations under the Exchange Act and Commission Rules, and the filings should therefore be suspended and proceedings initiated for their disapproval.

The Initial MEMX Connectivity filing was made in December 2021.⁴ It was suspended by the Commission staff and proceedings were initiated to approve or disapprove it in February.⁵ Since then, the filing has been withdrawn, modestly modified in non-substantive ways, and refiled three more times. Most recently, following HMA's

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule Concerning Connectivity Fees*, SEC, Exch. Act Rel. No. 34-95299, July 15, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95299.pdf> ("Fourth MEMX Connectivity Filing").

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95420, July 22, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95420.pdf> ("Third MEMX Market Data Filing").

³ Healthy Markets Association ("HMA") engages asset owners, asset managers, brokers, exchanges, data providers, policymakers, regulators, and other stakeholders to increase capital markets transparency and reduce conflicts of interest, risks, and costs for investors. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-93937, Jan. 10, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf>.

⁵ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94332, Feb. 28, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf>.



objection to the Third MEMX Connectivity Filing,⁶ MEMX withdrew it,⁷ re-filed a substantively similar Fourth MEMX Connectivity Filing.⁸

Despite never providing the Commission with sufficient information with which to ensure the connectivity offering and fees comply with the Exchange Act, and despite the Commission staff's suspension of the filing in February, the Exchange has continued to collect tens of thousands of dollars in connectivity fees from each of its connectivity customers.

Similarly, following HMA's objection to the Second MEMX Market Data Filing, MEMX withdrew it,⁹ only to file the substantively similar Third MEMX Market Data Filing the very next day.

The Exchange is highly incentivized to continue playing this ludicrous game of "Whack-a-Mole:" Collectively, MEMX's four connectivity and three market data filings have already extracted millions of dollars from market participants over the past eight months.

Market participants generally do not have the time or resources to continue to follow and file objections to all of these filings. Worse, even those that do have the resources and have been able to engage in the process have been essentially ignored. The Exchange has been permitted by the Commission to continue charging connectivity and market data fees without ever complying with the law by simply withdrawing the offending filings and refileing substantively the same filings to replace them immediately thereafter. Even a Commission staff order suspending one of the filings and initiating proceedings to disapprove it hasn't stopped the Exchange from continuing to collect connectivity fees.

We understand why MEMX and other exchanges will engage in these processes, if permitted. However, market participants should not be compelled to pay unreasonable, inequitable, discriminatory, or anti-competitive fees simply because an exchange is able to refile and reimpose the fees immediately after the same fees are suspended or rejected by the Commission or its staff, or withdrawn by the exchange itself. The

⁶ Letter from Christopher Nagy, HMA, to Secretary, SEC, June 28, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/06/6-28-22-MEMX-Connectivity-and-Data-FINAL1.pdf>.

⁷ Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Connectivity Fees, SEC, Exch. Act Rel. 34-95202, July 6, 2022, available at, <https://www.sec.gov/rules/sro/memx/2022/34-95202.pdf>.

⁸ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule Concerning Connectivity Fees, SEC, Exch. Act Rel. No. 34-95299, July 15, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95299.pdf>.

⁹ Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees, SEC, Exch. Act Rel. No. 34-95400, Aug. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95400.pdf>.



Commission has the ability to act to immediately suspend these filings and we respectfully request that the Commission use its authority.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at (402) 312-7918.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Chris Nagy', is written over a light blue horizontal line.

Christopher Nagy
Research Director

Cc: Honorable Gary Gensler, Chair

June 28, 2022

Via Electronic Mail (rule-comments@sec.gov)

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. SR-MEMX-2022-13¹ and File No. SR-MEMX-2022-14²

Dear Secretary:

The Healthy Markets Association (HMA)³ writes to object to the two above-referenced filings submitted by MEMX LLC for connectivity and market data, respectively.

The Third MEMX Connectivity Filing and Second MEMX Market Data Filing do not provide the Commission or staff with sufficient information to conclude that MEMX has met its obligations under the Exchange Act and Commission Rules, and the filings should therefore be suspended and proceedings initiated for their disapproval.

Further, as we described in our October petition for Commission rulemaking,⁴ we are concerned with the apparent inconsistency and inequity of the Commission's scrutiny of exchange filings. While Chair Gensler has argued to treat like cases alike,⁵ that doesn't seem to be happening now.

Many legacy exchanges currently assess fees that, if scrutinized, would likely be found to be discriminatory, undue burdens on competition, inequitably allocated, and unreasonable. And while we welcome the Commission's and staff's newfound interest in enforcing the requirements of the Exchange Act and Commission Rules, when combined with the reality that other exchanges are already imposing similar fees, the impact is to unfairly impede competition and innovation by newer exchanges, while also creating risks that the Commission's actions are arbitrary and capricious. Accordingly, we reiterate our

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94924, May 16, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94924.pdf> ("Third MEMX Connectivity Filing").

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95036, Jun. 3, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95036.pdf> ("Second MEMX Market Data Filing").

³ To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁴ See Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Oct 29, 2021, available at <https://www.sec.gov/rules/petitions/2021/petn4-778.pdf>

⁵ See, e.g., Remarks of Hon. Gary Gensler, SEC, before the Healthy Markets Association 2021 Virtual Conference, Dec 9, 2021, available at <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.



request for the Commission to adopt new rules or clear guidance to assist it with the review and assessment of all new exchange filings, but also existing exchange rules.

Market participants shouldn't have to continue to endure existing exchange rules that violate the law simply because the Commission and its staff didn't fulfill their responsibilities three, five, ten, or fifteen years ago. At the same time, those rules (including fees), should not be used to justify new rules by other exchanges that similarly fail to meet the Exchange Act's requirements.

Legal Standards for Filings

First and foremost, the Exchange Act requires that an exchange's rules:

- provide for an equitable allocation of reasonable dues, fees, and other charges;⁶
- be designed to not "permit unfair discrimination between customers, issuers, brokers, or dealers";⁷ and
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.⁸

MEMX is well aware of these requirements, and has recently asserted them in its objections to market data plan fee filings.⁹

Unfortunately, the specifics of these requirements have not been deeply fleshed out by Commission rule or guidance. While the Commission staff attempted to provide some valuable guidance several years ago,¹⁰ it has since appeared to abandon it.

While a handful of exchange filings appear to seek to follow the Guidance, many exchange filings today appear to essentially ignore it.¹¹ Further, some filings appear to provide much more detailed and useful information with which to assess them than others. However, whether the filings are permitted to become effective does not appear to be meaningfully tied to the quantity or quality of disclosures, or impacts of the proposed changes.

⁶ 15 U.S.C. § 78f(b)(4).

⁷ 15 U.S.C. § 78f(b)(5).

⁸ 15 U.S.C. § 78f(b)(8).

⁹ See, e.g., Letter from Adrian Griffiths, MEMX, to Vanessa Countryman, SEC, at 3 Nov. 8, 2021, available at <https://memx.com/wp-content/uploads/MEMX-Comment-Letter-Proposed-SIP-Fees.pdf>.

¹⁰ See, *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> ("SRO Fee Filing Guidance").

¹¹ See, e.g., *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Relating to the Sale of Open-Close Volume Data*, SEC, Exch. Act Rel. No. 34-94911, May 13, 2022, available at <https://www.sec.gov/rules/sro/cboebzx/2022/34-94911.pdf>.



MEMX Connectivity Filings

Pursuant to a filing made on December 30, 2021, on January 3, 2022, MEMX began charging \$6,000 per connection per month for connectivity to its primary data center and \$3,000 per connection per month for its secondary data center.¹² Additionally, MEMX began charging \$450 a month per port to its primary data center and a \$450 per month charge for drop copy ports.¹³

HMA objected to that filing.¹⁴

On February 28, 2022, the Commission staff suspended the filing and initiated proceedings to approve or disapprove it.¹⁵ We might have thought that MEMX would then stop collecting the connectivity fees until those proceedings were resolved. That's not what happened.

Instead, on March 1, 2022, MEMX filed to reinstate collections of the exact same connectivity fees.¹⁶ On April 29, 2022, after collecting fees for two months pursuant to this second filing, MEMX withdrew the Second MEMX Connectivity Filing.¹⁷

On May 6, 2022, MEMX then filed to instate for a third time the same connectivity fees that had already been suspended and withdrawn.¹⁸

As a result, since January 3, 2022, MEMX has been able to continue to collect hundreds of thousands of dollars from market participants for connectivity fees, despite the fact that the fees have subsequently been suspended and withdrawn, and despite clear evidence that such fees are likely inconsistent with the Exchange Act's requirements.

¹² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-93937, Jan. 10, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf> ("Initial MEMX Connectivity Filing").

¹³ Initial MEMX Connectivity Filing.

¹⁴ See Letter from Tyler Gellasch, HMA, to Securities and Exchange Commission, SEC, January 26, 2019, available at <https://www.sec.gov/comments/sr-iex-2021-14/sriex202114-20112947-265551.pdf>.

¹⁵ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94332, Feb. 28, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf> ("MEMX Connectivity Suspension Order").

¹⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94419, Mar. 15, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94419.pdf> ("Second MEMX Connectivity Filing").

¹⁷ *Notice of Withdrawal of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94841, May 3, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94841.pdf>.

¹⁸ Third MEMX Connectivity Filing. That same day, it also withdrew the then-suspended Initial MEMX Connectivity Filing. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-94957, May 20, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94957.pdf>.

MEMX Connectivity Filings Considerations

Each of the MEMX connectivity filings provides insufficient information for the Commission to conclude that the exchange has met its obligations under the Exchange Act.

The Commission Cannot Conclude That The Fees Are Reasonable Because MEMX’s Costs Are Insufficiently Detailed and Inflated

In an attempt to demonstrate that its connectivity fees are reasonable, MEMX asserted that its monthly costs for offering the connectivity and application services were over \$1.1 million per month, including nearly eight hundred thousand dollars per month to offer just the connectivity products, which it broke down as follows.¹⁹

COSTS DRIVERS	COSTS
Human Resources	\$262,129
Infrastructure and Connectivity Technology (servers, switches, etc.)	\$162,000
Data Center Costs	\$219,000
Hardware and Software Licenses	\$4,507
Monthly Depreciation	\$99,328
Allocated Shared Expenses	\$48,826
TOTAL	\$795,789

²⁰

The details of these line items were not, however, well-described. In suspending the Initial MEMX Connectivity Filing, Commission staff understandably asked for more details and justifications.²¹

We have questions, too. How does the operation of physical connections require \$262,129 in monthly “Human Resources” costs? What is the methodology for making that determination, including the job titles, responsibilities, services performed, hours spent, and salaries of persons whose costs were allocated? Unfortunately, the other line items, such as the nearly \$100,000 per month in “depreciation” are also unexplained in any useful way.

Oddly, in addition to the specific costs, MEMX also attempts to justify the fees with “general shared expenses include general expenses of the Exchange, including office space and office expenses, utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services, and telecommunications costs.”²²

¹⁹ Initial MEMX Connectivity Filing.

²⁰ Initial MEMX Connectivity Filing at 6.

²¹ MEMX Connectivity Suspension Order.

²² Initial MEMX Connectivity Filing at 7-8.



MEMX appears to have a fundamental misunderstanding of the Commission’s role in reviewing its fee filings. The Commission is obligated to ensure that an exchange complies with the law, not that the exchange is profitable.

Were the Commission to erroneously consider information outside the scope of costs reasonably tied to the connectivity products, the Exchange Act’s requirements would be rendered essentially meaningless.

For example, let’s assume HMA opens a new coffee shop (“HMA Coffee Shop”), and our per cup cost of production, including coffee beans, water, cups, equipment, and staffing to make a cup of coffee, totals \$1. But HMA faces competition. A coffee shop across the street charges \$1.25 for a cup of coffee. What will happen if the HMA Coffee Shop charges \$20 per cup to its patrons? Would that price be “reasonable”? How?

What is “reasonable” is often a subjective measure, based, in part, upon comparisons to other things. The HMA Coffee Shop charging \$20 per cup when a place across the street charges \$1.25 for similar coffee makes the former appear less reasonable.

Similarly, in 2018, one prominent trading firm executive stood on the stage at the Commission’s auditorium and explained:

The exchanges charge my firm a total of \$1.188 million per year each and every year for six cross connects. A cross-connect is simply a cable that plugs into an exchange. This is literally the cable that they use. It is provided by a vendor in Hicksville, Long Island, right near where I grew up. We contacted them and purchased this spool for \$189. It’s literally the Nasdaq cable. It is 328 feet of wire. Because we are Virtu, we shopped around and found the exact same spool cheaper on Amazon for \$88.²³

MEMX didn’t exist when Cifu made this colorful declaration. But now, it is attempting to do the exact same thing to its customers. And in a thinly veiled attempt to justify its imposition facially outrageous fees, MEMX is seeking to expand its purported costs well beyond its costs of production in a transparent attempt to artificially inflate its costs.

Going back to the HMA Coffee Shop, do we think customers would be persuaded that our \$20 cost for a cup of coffee was reasonable if we explained that we were simply charging \$20 for coffee to recoup our separately incurred costs of writing comment letters to the Commission? Or would the analysis change if we explained that we had paid \$2 million for a world renowned pastry chef? Or we wanted to pay higher compensation to our Executive Director?

²³ Remarks of Doug Cifu, Virtu Financial, before the Roundtable on Market Data Products, Market Access Services, and Their Associated Fees, SEC, at 28, Oct. 25, 2018, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>.



Of course not.

Whether we try to justify the inflated cost with our other expenses for writing letters or for a pastry chef or a bonus for our Executive Director, the question is about whether the cost for coffee charged by HMA Coffee Shop is reasonable.

We suspect very few people would likely view \$20 as a reasonable price for our coffee, and most customers would likely go across the street for their coffee.

But what if people were required – by rules and business competition – to buy coffee from the HMA Coffee Shop? What if they can't simply go across the street?

That's what happens with the exchanges, and it leads to predictable results. As Cifu explained in 2018,

No market participant that desires to route an order effectively and consistent with its best execution obligations either as a principal or an agent can do so without paying for full depth of book market data from 11 exchanges and connectivity from them all.²⁴

Notably, it's exceedingly difficult to compare the relative costs of different exchanges who are providing remarkably similar connectivity services. HMA has attempted to do that, however, based on our reading of the limited information provided in recent filings by some exchanges.²⁵ MEMX has claimed annual costs of \$13,724,580,²⁶ while another similarly situated exchange (BOX) claims costs of \$8,900,000,²⁷ and yet another similarly situated exchange (MIAX) claims costs of \$19,666,270.²⁸ The extreme variation in these

²⁴ Remarks of Doug Cifu, Virtu Financial, before the Roundtable on Market Data Products, Market Access Services, and Their Associated Fees, SEC, at 28 Oct. 25, 2018, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>.

²⁵ See, **Exhibit 1**.

²⁶ MEMX Third Connectivity Filing, at 9 and 12. There appears to be negligible rounding error in the summation of costs and annualized fees of \$12.

²⁷ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Exch. Act Rel. No. 34-88161, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/box/2020/34-88161.pdf>. We note that the filing summarizes annualized costs in one year, 2018, as being approximately \$8.9 million, while the specific itemized numbers sum to \$8.7 million.

²⁸ *Notice of Filing of a Proposed Rule Change to Amend the MIAX Fee Schedule to Increase Certain Connectivity Fees; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change*, SEC, Exch. Act. Rel. No. 34-94719, Apr. 14, 2022, available at <https://www.sec.gov/rules/sro/miax/2022/34-94719.pdf>.



numbers suggests that each may be including a very different scope of what they view as relevant and appropriate costs.²⁹

The Commission is obligated to ensure the reasonableness of MEMX's proposed costs, and the limited information made available to the Commission in the filing is insufficiently detailed and clearly inflated. The cost information provided by MEMX would be insufficient for the Commission or staff to conclude that these connectivity fees are reasonable.

The Commission Cannot Conclude that MEMX's Connectivity Fees Are Not Discriminatory, Undue Burdens on Competition, or Equitably Allocated

There is no competition for direct connectivity products.³⁰ Nevertheless, MEMX asserts that it faces connectivity competition from its own customers, who may resell their exchange connectivity to MEMX.³¹ Of course, these pass-through connectivity services introduce different risks, latencies, and challenges. None of MEMX's three connectivity filings identifies, attempts to quantify, or analyzes these material differences or their impacts on customers of different types.

As has been proven time and again, as prices for connectivity and other products rise, some firms (typically, smaller firms) will inevitably find that they cannot afford an expensive direct connection, and will seek out a lower cost alternative through a reseller or they will simply exit the business. In either option, however, their timely, direct access to information (and ability to compete in the marketplace) is decreased. MEMX ignores this competitive impact entirely.

That said, given the regulatory and business pressure to remain directly connected to the exchange, we would predict that nearly all customers would continue to subscribe, despite the impositions of these new, enormous fees.

At the same time, we would also expect some smaller customers to be essentially forced out of the market, as they opt for slower, less competitive options or exit the market entirely. Not shockingly, the limited data MEMX has provided in this Third MEMX Connectivity Filing supports exactly this understanding of market forces. The imposition of new, massive fees resulted in just 6% of connections been severed,³² some of which were smaller trading firms.³³ Of the canceling customers,

²⁹ That said, the expenses for a single exchange with very low quotation and execution volumes might be different from the costs for an operator of several exchanges with higher volumes. Unfortunately, given the lack of details provided, we simply don't know.

³⁰ Remarks of Doug Cifu, Virtu Financial, before the Roundtable on Market Data Products, Market Access Services, and Their Associated Fees, SEC, at 28 Oct. 25, 2018, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>.

³¹ Third MEMX Connectivity Filing, at 34.

³² Third MEMX Connectivity Filing, at 27-28.

³³ Third MEMX Connectivity Filing, at 28.

two (2) customers canceled services entirely, three (3) maintained at least one physical connection provided directly by the Exchange, and the remaining four (4) customers migrated to alternative sources of connectivity through a third-party provider.³⁴

No other relevant information is provided.

One concern that we highlighted in our Initial Comment Letter, which is how the costs disparately benefit some market participants (aka, the owners of MEMX), remains largely unaddressed.³⁵ In its Second MEMX Connectivity Filing, the exchange asserted

that the ownership of an exchange by members is not unprecedented and that the ownership structure of the Exchange and related issues were addressed during the process of the Exchange's registration as a national securities exchange. ... [and that] The Exchange does not believe that the Initial Proposal or this proposal raises any new issues that have not been previously addressed.³⁶

We have yet to see where these issues have been addressed. To the contrary, the Limited Liability Agreement for MEMX, which was included in its exchange application, makes it extremely clear that the Board can authorize distributions to the exchange members.³⁷ It does not, of course, make any statements about how the funds used to make such distributions were collected or whether the collection or distributions are consistent with the Exchange Act's obligations. Put another way, if three members of a group collect all the revenues from imposing a fee on one hundred members of a group, then the net impact on the three members is very different than it is on the other ninety-seven.

Interestingly, the Exchange Act's requirements that fees be reasonable, equitably allocated, non-discriminatory, and not unduly burdensome on competition were enacted precisely to address concerns that exchanges might devise fees to benefit their members to the detriment of other market participants or the markets overall. This is exactly what is happening here.

A small subset of firms seeking to access MEMX as purchasers of the connectivity products are also owners of the exchange. While these member/owners may be assessed the same fees as other connectivity product purchasers, they are also the beneficiaries of the revenues generated by all connectivity purchasers. There is a facially

³⁴ Third MEMX Connectivity Filing, at 28.

³⁵ See Letter from Tyler Gellasch, HMA, to Securities and Exchange Commission, SEC, at 2-3, Jan. 26, 2022, available at <https://www.sec.gov/comments/sr-iex-2021-14/sriex202114-20112947-265551.pdf>.

³⁶ Second MEMX Connectivity Filing, at 2, n.4.

³⁷ Sixth Amended and Restated Limited Liability Company Agreement of MEMX Holdings LLC, MEMX, Apr. 5, 2021, available at <https://www.sec.gov/rules/sro/memx/2021/34-93452-ex5.pdf>.



disparate impact on them: the owners, who may be a small subset of customers, receive a net windfall, while the other customers get the bill.

But even more directly, MEMX has some of the most generous rebates in the industry for high-volume traders.³⁸ At times, the exchange intentionally loses money on trades (collecting less in transaction fees than it pays in rebates).³⁹ Where does the money come from? To whom does it go?

It appears that MEMX has devised a system – not unlike some of its fellow exchanges⁴⁰ – wherein it taxes a broad swath of connectivity and market data customers, and then funnels those revenues back to its highest volume rebate traders and the exchange owners.

Put simply, at MEMX, it appears as though the smallest market participants are generally subsidizing the largest ones – and generating any remaining net revenues for the exchange owners. To ignore this discrimination, inequity, and enormous burden on competition would be to ignore the plain meaning of those terms.

Thus, the limited information provided in the Third MEMX Connectivity Filing is still insufficient for the Commission or staff to conclude that the proposed rule change (which has led to fees being applied since January) is consistent with the Exchange Act.

Concerns with MEMX’s Abuse of SEC Process and Selective Exploitation of Data

For over a century, courts have recognized a “fruit of the poisonous tree” doctrine, which generally holds that the government can’t rely on, or admit into evidence, information illegally obtained.⁴¹ To permit otherwise would be to perversely promote illegal actions.

Unfortunately, that’s precisely what MEMX is doing with these filings.

Specifically, MEMX is now attempting to use some statistics from its collection of fees pursuant to its suspended and subsequently withdrawn Initial MEMX Connectivity Filing, as well as its two subsequent filings. The exchange is arguing that despite the fact that its imposition of these fees was suspended once and withdrawn twice, it continued to collect them anyways, and the Commission should now listen to the exchange as to why the fees aren’t so bad.

³⁸ See, e.g., MEMX Fee Schedule, Exhibit 5, available at <https://www.sec.gov/rules/sro/memx/2022/34-95058-ex5.pdf> (reflecting rebates as high as 35 cents per 100 shares, or nearly 17% above the regulatorily imposed take fee cap).

³⁹ *Id.*

⁴⁰ See, *Remarks of Chris Concannon, Cboe, before the Roundtable on Market Data Products, Market Access Services, and Their Associated Fees*, SEC, at 74-75, Oct. 25, 2018, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf> (“Five out of the top 10 get a check from us after the costs of their connectivity and market data. So we are cutting them a check monthly after their costs.”).

⁴¹ See, *Silverthorne Lumber Co., Inc. v. U.S.*, 251 U.S. 385 (1920).



This Machiavellian outcome is contrary to the law, Commission rules, and public policy. But worse, if the Commission were to accept it, this appears to reward the relatively new exchange practice of filing, charging, and refiling rules despite objections from market participants or even the Commission itself.⁴²

MEMX Market Data Filings

On March 24, 2022, MEMX filed to begin charging market data fees, effective April 1, 2022.⁴³ The charges range in price depending on the nature of use and the product utilized. The MEMX Market Data Filing covers three market data products, MEMOIR Depth, MEMOIR Top, and MEMOIR Last Sale.

On April 1, 2022, MEMX filed with the Commission to “Clarify the Information Disseminated in the MEMOIR Top Data Feed.”⁴⁴ On May 23rd, MEMX withdrew the filing to implement the fees,⁴⁵ and filed another “initial” filing to implement the same fees.⁴⁶ While the Second MEMX Market Data Filing release by the Commission is 10 pages longer than the Initial MEMX Market Data Filing, the fees charged seem to be unchanged.

The exchange is charging \$1500 per month for “any data recipient that receives a data feed of the MEMOIR Depth feed for purposes of internal distribution.”⁴⁷ For firms who wish to redistribute the MEMOIR Depth feed externally, the access fee is \$2,500 per month.⁴⁸

In addition to access fees, the exchange also initiates Non-Display Usage Fees for “a Firm that uses MEMOIR Depth in connection with the operation of one or more Trading Platforms (but not for other purposes)” of \$4,000 per month. However, the Non-Display Usage Fees for “a Firm that uses MEMOIR Depth for non-display purposes other than operating a Trading Platform and for the operation of one or more Trading Platforms is \$5,500 per month.”⁴⁹

⁴² See Letter from Tyler Gellasch, HMA, to Securities and Exchange Commission, SEC, Aug. 5, 2019, available at <https://www.sec.gov/comments/sr-box-2019-22/srbox201922-5915669-189027.pdf>.

⁴³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-94614, Apr. 5, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94614.pdf> (“Initial MEMX Market Data Filing”).

⁴⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Clarify the Information Disseminated in the MEMOIR Top Data Feed*, SEC, Exch. Act Rel. No. 34-94653, Apr. 8, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94653.pdf>.

⁴⁵ *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95027, June, 2, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95027.pdf>.

⁴⁶ Second MEMX Market Data Filing.

⁴⁷ Initial MEMX Market Data Filing, at 3; Second MEMX Market Data Filing, at 3.

⁴⁸ Initial MEMX Market Data Filing, at 4; Second MEMX Market Data Filing, at 4.

⁴⁹ Initial MEMX Market Data Filing, at 5; Second MEMX Market Data Filing, at 6.

The exchange also implements user fees for displayed usage, which are \$30 per month per user for professionals and \$3 per month per user.⁵⁰ Lastly, “[t]he Exchange proposes to establish a fee of \$5,000 per month for a Digital Media Enterprise license to the MEMOIR Depth feed.”⁵¹

For access to the MEMOIR Top data feed, if it is used for internal distribution, then the fee is \$750 per month.⁵² For those using it for external distribution, the access fee is \$2,000 per month.⁵³ Additionally, as with the other feeds, the exchange is imposing user-based distribution fees of \$0.01 per month per user for each of the “pro” and “non-pro” users.⁵⁴ As an alternative to professional or non-professional user fees, “[t]he exchange proposes to establish a fee of \$10,000 per month for an Enterprise license to the MEMOIR Top feed.”⁵⁵ Finally, “[t]he Exchange proposes to establish a fee of \$2,000 per month for a Digital Media Enterprise license to the MEMOIR Top feed,” to be used only for non-trading purposes.⁵⁶

Lastly, for the MEMOIR Last Sale feed, if it is used for internal distribution, the receipt of access fee is \$500 per month.⁵⁷ For those using it for external distribution, the access fee is \$2,000 per month.⁵⁸ Additionally, “[t]he Exchange proposes to charge a Professional User Fee (per User) of \$0.01 per month and a Non-Professional User Fee (per User) of \$0.01 per month.”⁵⁹ As an alternative to paying professional or non-professional user fees, “[t]he exchange proposes to establish a fee of \$10,000 per month for an Enterprise license to the MEMOIR Last Sale feed.”⁶⁰ Finally, “[t]he Exchange proposes to establish a fee of \$2,000 per month for a Digital Media Enterprise license to the MEMOIR Last Sale feed,” to be used only for non-trading purposes.⁶¹

Second MEMX Market Data Filing Considerations

The Second MEMX Market Data Filing does not contain sufficient information for the Commission or staff to conclude that the exchange has met its burden demonstrate that

⁵⁰ Initial MEMX Market Data Filing, at 5; Second MEMX Market Data Filing, at 6. We note that MEMX does not describe or provide any information as to what qualifications constitute a professional and what qualifications constitute a non-professional.

⁵¹ Initial MEMX Market Data Filing, at 6-7; Second MEMX Market Data Filing, at 7.

⁵² Initial MEMX Market Data Filing, at 7; Second MEMX Market Data Filing, at 7.

⁵³ Initial MEMX Market Data Filing, at 7; Second MEMX Market Data Filing, at 7.

⁵⁴ The exchange states they will not audit users regarding pro/non-pro status but the filing contains no sample agreement to validate this claim. Initial MEMX Market Data Filing, at 8 n.12; Second MEMX Market Data Filing, at 8 n.12.

⁵⁵ Initial MEMX Market Data Filing, at 8-9; Second MEMX Market Data Filing, at 8-9.

⁵⁶ Initial MEMX Market Data Filing, at 9; Second MEMX Market Data Filing, at 9.

⁵⁷ Initial MEMX Market Data Filing, at 9; Second MEMX Market Data Filing, at 9.

⁵⁸ Initial MEMX Market Data Filing, at 9; Second MEMX Market Data Filing, at 9.

⁵⁹ Initial MEMX Market Data Filing, at 10; Second MEMX Market Data Filing, at 10.

⁶⁰ Initial MEMX Market Data Filing, at 11; Second MEMX Market Data Filing, at 11 (revised slightly).

⁶¹ Initial MEMX Market Data Filing, at 11; Second MEMX Market Data Filing, at 11 (revised slightly).



the fees are [reasonable, equitably allocated, non-discriminatory, and not undue burdens on competition.

Contrary to self-interested exchange statements, pricing for MEMX market data does not appear to be subject to robust competition. As a basic matter, the market data being sold – which is the collection of market participants’ submitted orders and messages – is originally collected by the exchange itself. The consolidated view of activity on an exchange is available to the exchange – and only the exchange – first. Thereafter, the exchange controls how it is disseminated to the marketplace (through its own proprietary products or the public market data streams).

The various market data fees appear to readily discriminate in favor of larger firms. For example, enterprise caps facially lower the per-user market data-related costs for larger firms. Ultimately, many market participants need timely access to essential market data, and the fastest way to get the information is directly from MEMX. Timely access to essential market data is both a regulatory and basic competitive requirement for broker-dealers and investors. It’s essential for best execution.⁶²

Nevertheless, following the announcement of the new MEMX Market Data Filing fees, fifteen out of seventy-nine subscribers to the MEMX Market Data offerings modified or canceled their subscriptions before the fees went into effect.⁶³ Eleven subscribers canceled all of their MEMX Market Data subscriptions, with five of those reporting that they would instead begin to rely upon the slower, less informative information provided by the securities information processor.⁶⁴

Again, these firms are essentially withdrawing from being competitive for trading on MEMX, and may be sacrificing their overall competitiveness.

Unlike a franchisee selecting between different franchise opportunities (such as Chick-fil-a versus Domino’s Pizza),⁶⁵ market participants cannot generally substitute one option for another. To remain competitive, firms need to have a timely, comprehensive view of the markets, and that generally requires buying each exchange’s proprietary market data.

The Commission Cannot Conclude That The Fees Are Reasonable Because MEMX’s Costs Are Insufficiently Detailed and Inflated

The Second MEMX Market Data Filing boldly asserts that

it is difficult, if not impossible, to purely split the costs of generating and producing market data and the costs associated with operation of the system that processes (and

⁶² See FINRA NTM 15-46, fn 12 & 33.

⁶³ Second MEMX Market Data Filing, at 15.

⁶⁴ Second MEMX Market Data Filing, at 15.

⁶⁵ See, Letter from Erika Moore, Nasdaq, to Vanessa Countryman, SEC, at 3, Jan. 27, 2022, *available at* <https://www.sec.gov/comments/sr-iex-2021-14/sriex202114-20113079-265642.pdf>.

displays through market data) orders, cancellations, and transactions and performs related functions (collectively, together with market data, “Transaction Services”). Instead, as described below, the Exchange believes its costs for providing Transaction Services, including market data, are inextricably linked, and thus the cost analysis below and corollary margin discussion includes all Transaction Services.⁶⁶

MEMX’s claim that it can’t separate the costs of distributing market data from the costs of its order and trading systems is utter nonsense.

The costs of people and systems to collect and match orders is facially distinct in form and function to systems that disseminate information out to proprietary data product subscribers and the public.

There is no reasonable justification to lump the costs of people and order intake systems and matching engines (aka the business of trading) with the costs of distributing selected slices of market data. The only plausible justification is to wildly inflate its costs – which it clearly does. Using this cost-inflation methodology, the exchange estimated that its “Transaction Services” costs total nearly \$33.6 million per year!⁶⁷ How much of that has absolutely nothing to do with distribution of the three distinct products subject to the Second MEMX Market Data Filing? Not shockingly the exchange offers no insights.

Interestingly, the exchange seems to recognize its own wild overreach, noting that it “expects to recoup the majority of this cost from transaction fees and revenues from the public data feeds in which the Exchange participates and receives revenues (i.e., the SIPs).”⁶⁸ The exchange then attempts to solicit acceptance of its forbearance for not charging “higher fees for the Exchange Data Feeds than proposed, but instead [proposing] what it believes are relatively low-cost options to receive and use Exchange Data Feeds.”⁶⁹

However, rather than address the specific costs for its market data products, the exchange details all of its omnibus “Transaction Services” costs, which includes 72% of the entire firm’s human resources costs, as well as nearly one-fourth of its connectivity costs (which are notably part of MEMX’s separate efforts to justify its separate, enormous new connectivity fees), and “shared expenses.”⁷⁰ Aside from including facially inapplicable line items, each of the detailed line items provided appears to be facially inflated.

⁶⁶ Second MEMX Market Data Filing, at 23.

⁶⁷ Second MEMX Market Data Filing, at 24.

⁶⁸ Second MEMX Market Data Filing, at 24.

⁶⁹ Second MEMX Market Data Filing, at 24.

⁷⁰ Second MEMX Market Data Filing, at 25.



Similar to how different exchanges appear to be including very different things in their “cost” determinations for their connectivity products, different exchanges have reported far different costs regarding their remarkably similar proprietary market data products. And again, this is likely caused by the exchanges including very different sets of costs.

Attached as **Exhibit 2** is our attempt to compare the market data-related costs across different exchanges. While MEMX impermissibly seeks to include unrelated costs into its analysis of the costs of providing its three proprietary data products, and has thus managed to inflate the combined annual costs to nearly \$33.6 million, another similarly situated exchange has asserted that its annual costs of providing its similar data products is \$2,483,644.⁷¹

MEMX is claiming that the pool of relevant costs to be considered is a whopping thirteen times the pool of costs that IEX considered for its analogous products. The two exchanges are obviously not performing the same good-faith analysis of their costs.

Given these red flags, it is clear that the Commission cannot simply rely on the exchanges’ claims. The Commission must gather the relevant evidence, and make its own determination as to whether the exchange has met its burden.⁷² Given the limited facts at hand regarding the Second MEMX Market Data Filing, the Commission and staff would appear to have no basis to conclude that the fees for these products meet the exchange’s burden.

Data Audits

Interestingly, despite its low-cost initial branding, MEMX appears to have adopted a suite of complex market data offering products akin to those offered by other exchanges. Setting aside the explicit costs of these products, the Initial MEMX Market Data Filing and the Second MEMX Market Data Filing each impose significant costs on firms who acquire the data. Those firms must – in perpetuity – monitor who uses the data, for what purpose, when the data is used.

We note that these “pro” versus “non-pro” distinctions facially discriminate between different types of users of data, create significant administrative burdens on third-party data providers who may be directly serving these customers, and have created ambiguities and abuses by exchanges in the past, including through the use of “audits.” For example, we are aware of instances where one exchange has sought to audit its customers’ use, and then used that information to demand higher fees or directly engage in the anti-competitive practice of pitching its products to its customers’ customers.

While the Second MEMX Market Data Filing explains that it “will not audit Firms based on [the pro versus non-pro] distinction, it will request reporting of each distinct category for

⁷¹ Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees, SEC, Exch. Act Rel. No. 34-94630; File No. SR-IEX-2022-02, Apr. 7, 2022, available at <https://www.sec.gov/rules/sro/iex/2022/34-94630.pdf>.

⁷² See, e.g., *Susquehanna Int’l Group v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).



informational purposes.”⁷³ This promise by MEMX is cold comfort to firms that have to build the systems to comply with the non-audit reporting, and must acknowledge that MEMX will be incentivized to impose audits in the future.

Conclusion

At its launch, MEMX asserted that the new exchange would increase competition, improve operational transparency, reduce fixed costs, and simplify equity trading in the U.S.⁷⁴ Since its launch, MEMX has picked up modest market share, but rather than reducing costs, MEMX is instead imposing new ones on market participants. With its connectivity and market data filings, MEMX has simply joined the ranks of the larger incumbents, extracting essentially compulsory fees from a broad swath of market participants to benefit its ownership. And while its ownership structure is different from other current exchanges, its incentives generally aren't.

More disappointingly, MEMX now appears to be following another path blazed by a handful of its peer exchanges, seeking to avoid Commission scrutiny of its filings by refiling instantly effective rules, which have either been withdrawn or blocked.

While we applaud MEMX for at least putting forth the effort to provide some data, neither the Third MEMX Connectivity Filing nor the Second MEMX Market Data Filing meet the exchange's burden under the Exchange Act and Commission Rules, and so should be suspended. Further, we remain deeply concerned that other exchanges are already imposing fees based on far less information. For example, just last week, three other exchanges submitted filings that appeared to provide nothing to justify the prices they have applied as complying with the Exchange Act's requirements and Commission Rules.

The handling of these filings and the SRO filing process in general demonstrates the need for the Commission to improve its review process and bolster its guidance as we recommended in our petition. In the absence of Commission action, we continue to suggest that significant improvements could be made by simply subjecting differing exchanges to the same level of scrutiny for compliance with the Exchange Act and Commission rules, and following the SRO Fee Filing Guidance.

The Commission should seek to reconcile its rules and guidance so as to mitigate the risks in the future of different exchanges including very different “costs” in their disclosures. As part of that process, we recommend that the Commission instruct exchanges to engage independent third parties to assess their cost structures and assertions.

⁷³ Initial MEMX Market Data Filing, at 8 n.12; Second MEMX Market Data Filing, at 8 n.12.

⁷⁴ PR Newswire - *MEMX aims to increase competition, improve operational transparency, and lower costs*, Jan. 7, 2019 available at <https://www.prnewswire.com/news-releases/group-of-leading-retail-brokers-financial-services-firms-banks-and-global-market-makers-plan-to-launch-the-only-member-owned-equities-exchange-memx-members-exchange-300773713.html>



While an exchange may be able to establish that its fees for market data products are fair and reasonable through a market-based approach showing that the fees are constrained by competition or a cost-based analysis,⁷⁵ in this instance, MEMX has demonstrated neither. Obviously, exchange fees of different types may allow for investment, competition, and innovation. But they must nevertheless meet the requirements of the Exchange Act. These filings have not met their burdens under the law or Commission Rules. As a result, the Third MEMX Connectivity Filing and Second MEMX Market Data Filing should be suspended and ultimately rejected.

Lastly, as we have stated before, the Commission should take action against exchanges that abuse its filing processes to keep collecting fees that have already been suspended or disapproved. Market participants should not be compelled to pay unreasonable, inequitable, discriminatory, or anti-competitive fees simply because an exchange is able to refile and reimpose the fees immediately after the same fees are suspended or rejected by the Commission or its staff, or withdrawn by the exchange itself.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at [REDACTED]

Sincerely,

Christopher Nagy
Research Director

Cc: Honorable Gary Gensler, Chair
Haoxiang Zhu, Director of the Division of Trading and Markets

⁷⁵ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (where the courts upheld the Commission's reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of fees for proprietary market data).

Exhibit 1

MEMX Stated Connectivity Costs*	Yearly Cost	% of Total
Human Resources	\$4,909,896	35.77%
Connectivity (external fees, cabling, switches, etc.)	\$2,010,240	14.65%
Data Center	\$2,717,544	19.80%
External Market Data	\$128,808.00	0.94%
Hardware and Software Licenses	\$507,336	3.70%
Monthly Depreciation	\$1,730,052	12.61%
Allocated Shared Expenses	\$1,720,716	12.54%
Total of Disclosed Costs	\$13,724,592	

*Third MEMX Connectivity Filing.

BOX Stated Connectivity Costs**	Yearly Cost	% of Total
Space Rental, Power Usage, etc	\$2,800,000	32.18%
Data Center Support & Management of Vendors	\$1,100,000	12.64%
Technological Improvements	\$700,000	8.05%
Technical and Operations Services	\$1,400,000	16.09%
Market Data Connectivity Fees	\$400,000	4.60%
Employee Compensation and Benefits	\$1,000,000	11.49%
Hardware/Software Depreciation	\$1,000,000	11.49%
Office Space Rent	\$100,000	1.15%
Audit Costs, Misc	\$200,000	2.30%
Total of Disclosed Costs	\$8,700,000	

**<https://www.sec.gov/rules/sro/box/2020/34-88161.pdf>.

MIAX Stated Connectivity Costs***	Yearly Cost	% of Total
External Expenses	\$4,382,307	22.28%
Employee Compensation	\$7,063,801	35.92%
Depreciation & Amortization	\$4,184,851	21.28%
Occupancy	\$701,437	3.57%
Allocated Shared Expenses	\$3,333,874	16.95%
Total of Disclosed Costs	\$19,666,270	

***<https://www.sec.gov/rules/sro/miax/2022/34-94719.pdf>.

Exhibit 2

MEMX Stated Market Data Costs*	Annual Costs	% of total
Human Resources	\$17,769,864	52.94%
Connectivity	\$581,760	1.73%
Data Center	\$786,456	2.34%
External Market Data	\$1,599,192	4.76%
Hardware/ Software /Consulting	\$3,980,664	11.86%
Depreciation	\$4,725,960	14.08%
Allocated Shared Expense	\$4,123,284	12.28%
Total of Disclosed Costs	\$33,567,180	

*Second MEMX Market Data Filing.

IEX Stated Market Data Costs**	Annual Costs	% of total
Servers	\$26,696	0.31%
Network Infrastructure & Admin	\$152,783	1.76%
Monitoring	\$213,109	2.45%
Data Center (Space, Power, Security)	\$79,142	0.91%
DEEP Snapshot (Enhancement)	\$95,974	1.10%
TOPS Snapshot (Enhancement)	\$95,974	1.10%
Capacity Planning (Enhancement)	\$232,856	2.68%
Monitoring Tools (Enhancement)	\$49,609	0.57%
Ongoing Personnel Costs	\$1,537,500	17.67%
Total of Disclosed Costs	\$2,483,643	

**<https://www.sec.gov/rules/sro/iex/2022/34-94630.pdf>.

EXHIBIT B

2/17/23, 1:56:58 PM

Compare Results

Old File:

MEMX Fifth Data.pdf

50 pages (376 KB)

12/1/22, 5:24:57 PM

versus

New File:

MEMX Sixth.pdf

50 pages (382 KB)

1/30/23, 4:01:50 PM

Total Changes

217

Content

38 Replacements

41 Insertions

44 Deletions

Styling and Annotations

83 Styling

11 Annotations

[Go to First Change \(page 1\)](#)

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96775; File No. SR-MEMX-2023-02)

January 30, 2023

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data 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 January 17, 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 Members³ and non-Members (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 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

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

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

1. Purpose

Background

The purpose of the proposed rule change is to amend the Fee Schedule to adopt fees the Exchange will charge to Members and non-Members for each of its three proprietary market data feeds, namely MEMOIR Depth, MEMOIR Top, and MEMOIR Last Sale (collectively, the “Exchange Data Feeds”). The Exchange is proposing to implement the proposed fees immediately.

The Exchange previously filed the proposal on March 24, 2022 (SR-MEMX-2022-03) (the “Initial Proposal”). The Exchange withdrew the Initial Proposal and replaced the proposal with SR-MEMX-2022-14 (the “Second Proposal”). The Exchange withdrew the Second Proposal and replaced the proposal with SR-MEMX-2022-19 (the “Third Proposal”). The Exchange withdrew the Third Proposal and replaced the proposal with SR-MEMX-2022-28 (the “Fourth Proposal”). The Exchange withdrew the Fourth Proposal and replaced the proposal with SR-MEMX-2022-32 (the “Fifth Proposal”). The Exchange recently withdrew the Fifth Proposal and is replacing it with the current proposal (SR-MEMX-2023-02).

The Exchange notes that it has previously included a cost analysis in connection with the proposed fees for the Exchange Data Feeds, however, the prior cost analysis coupled costs related to operating its trading system, or transaction services, with costs of producing market data. As described more fully below, in the Fifth Proposal and this filing, the Exchange provides

an updated cost analysis that focuses solely on costs related to the provision of the Exchange Data Feeds (the “Cost Analysis”). Although the baseline Cost Analysis used to justify the fees was made with the Fifth Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange’s cost of producing the Exchange Data Feeds with a reasonable mark-up over those costs. Before setting forth the additional details regarding the proposal as well as the updated Cost Analysis conducted by the Exchange, immediately below is a description of the proposed fees.

Proposed Market Data Pricing

The Exchange offers three separate data feeds to subscribers – MEMOIR Depth, MEMOIR Top and MEMOIR Last Sale. The Exchange notes that there is no requirement that any Firm subscribe to a particular Exchange Data Feed or any Exchange Data Feed whatsoever, but instead, a Firm may choose to maintain subscriptions to those Exchange Data Feeds they deem appropriate based on their business model. The proposed fee will not apply differently based upon the size or type of Firm, but rather based upon the subscriptions a Firm has to Exchange Data Feeds and their use thereof, which are in turn based upon factors deemed relevant by each Firm. The proposed pricing for each of the Exchange Data Feeds is set forth below.

MEMOIR Depth

The MEMOIR Depth feed is a MEMX-only market data feed that contains all displayed orders for securities trading on the Exchange (i.e., top and depth-of-book order data), order executions (i.e., last sale data), order cancellations, order modifications, order identification numbers, and administrative messages.⁴ The Exchange proposes to charge each of the fees set forth below for MEMOIR Depth.

⁴ See MEMX Rule 13.8(a).

1. Internal Distribution Fee. For the receipt of access to the MEMOIR Depth feed, the Exchange proposes to charge \$1,500 per month. This proposed access fee would be charged to any data recipient that receives a data feed of the MEMOIR Depth feed for purposes of internal distribution (i.e., an “Internal Distributor”). The Exchange proposes to define an Internal Distributor as “a Distributor that receives an Exchange Data product and then distributes that data to one or more data recipients within the Distributor’s own organization.”⁵ The proposed access fee for internal distribution will be charged only once per month per subscribing entity (“Firm”). The Exchange notes that it has proposed to use the phrase “own organization” in the definition of Internal Distributor and External Distributor because a Firm will be permitted to share data received from an Exchange Data product to other legal entities affiliated with the Firm that have been disclosed to the Exchange without such distribution being considered external to a third party. For instance, if a company has multiple affiliated broker-dealers under the same holding company, that company could have one of the broker-dealers or a non-broker-dealer affiliate subscribe to an Exchange Data product and then share the data with other affiliates that have a need for the data. This sharing with affiliates would not be considered external distribution to a third party but instead would be considered internal distribution to data recipients within the Distributor’s own organization.

2. External Distribution Fee. For redistribution of the MEMOIR Depth feed, the Exchange proposes to establish an access fee of \$2,500 per month. The proposed

⁵ See Market Data Definitions under the proposed MEMX Fee Schedule. The Exchange also proposes to adopt a definition for “Distributor”, which would mean any entity that receives an Exchange Data product directly from the Exchange or indirectly through another entity and then distributes internally or externally to a third party.

redistribution fee would be charged to any External Distributor of the MEMOIR Depth feed, which would be defined to mean “a Distributor that receives an Exchange Data product and then distributes that data to a third party or one or more data recipients outside the Distributor’s own organization.”⁶ The proposed access fee for external distribution will be charged only once per month per Firm. As noted above, while a Firm will be permitted to share data received from an Exchange Data product to other legal entities affiliated with the Firm that have been disclosed to the Exchange without such distribution being considered external to a third party, if a Firm distributes data received from an Exchange Data product to an unaffiliated third party that would be considered distribution to data recipients outside the Distributor’s own organization and the access fee for external distribution would apply.

3. Non-Display Use Fees. The Exchange proposes to establish separate non-display fees for usage by Trading Platforms and other Users (i.e., not by Trading Platforms).⁷ Non-Display Usage would be defined to mean “any method of accessing an Exchange Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”⁸ For Non-Display Usage of the MEMOIR Depth feed not by Trading Platforms, the Exchange proposes to establish a fee

⁶ See Market Data Definitions under the proposed MEMX Fee Schedule.

⁷ The Exchange proposes to define a Trading Platform as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).” See Market Data Definitions under the proposed MEMX Fee Schedule.

⁸ See Market Data Definitions under the proposed MEMX Fee Schedule.

of \$1,500 per month.⁹ For Non-Display Usage of the MEMOIR Depth feed by Trading Platforms, the Exchange proposes to establish a fee of \$4,000 per month. The proposed fees for Non-Display Usage will be charged only once per category per Firm.¹⁰ In other words, with respect to Non-Display Usage Fees, a Firm that uses MEMOIR Depth for non-display purposes but does not operate a Trading Platform would pay \$1,500 per month, a Firm that uses MEMOIR Depth in connection with the operation of one or more Trading Platforms (but not for other purposes) would pay \$4,000 per month, and a Firm that uses MEMOIR Depth for non-display purposes other than operating a Trading Platform and for the operation of one or more Trading Platforms would pay \$5,500 per month.

4. User Fees. The Exchange proposes to charge a Professional User¹¹ Fee (per User) of \$30 per month and a Non-Professional User¹² Fee (per User) of \$3 per month. The

⁹ Non-Display Usage not by Trading Platforms would include trading uses such as high frequency or algorithmic trading as well as any trading in any asset class, automated order or quote generation and/or order pegging, price referencing for smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management.

¹⁰ The Exchange proposes to adopt note 1 to the proposed Market Data fees table, which would make clear to subscribers that use of the data for multiple non-display purposes or operate more than one Trading Platform would only be charged once per category per month. Thus, the footnote makes clear that each fee applicable to Non-Display Usage is charged per subscriber (e.g., a Firm) and that each of the fees represents the maximum charge per month per subscriber regardless of the number of non-display uses and/or Trading Platforms operated by the subscriber, as applicable.

¹¹ As proposed, a Professional User is any User other than a Non-Professional User. See infra note 12.

¹² As proposed, a Non-Professional User is a natural person or qualifying trust that uses Exchange Data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association,

proposed User fees would apply to each person that has access to the MEMOIR Depth feed for displayed usage. Thus, each Distributor's count will include every individual that accesses the data regardless of the purpose for which the individual uses the data. Internal Distributors and External Distributors of the MEMX Depth feed must report all Professional and Non-Professional Users in accordance with the following:

- In connection with a Distributor's distribution of the MEMOIR Depth feed, the Distributor must count as one User each unique User that the Distributor has entitled to have access to the MEMOIR Depth feed.
- Distributors must report each unique individual person who receives access through multiple devices or multiple methods (e.g., a single User has multiple passwords and user identifications) as one User.
- If a Distributor entitles one or more individuals to use the same device, the Distributor must include only the individuals, and not the device, in the count. Thus, Distributors would not be required to report User device counts associated with a User's display use of the data feed.

5. Enterprise Fee. Other than the Digital Media Enterprise Fee described below, the Exchange is not proposing to adopt an Enterprise Fee for the MEMOIR Depth feed at this time.

or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States.

6. Digital Media Enterprise Fee. As an alternative to User fees, a recipient Firm may purchase a monthly Digital Media Enterprise license to receive MEMOIR Depth for distribution to an unlimited number of Users for viewing via television, websites, and mobile devices for informational and non-trading purposes only. The Exchange proposes to establish a fee of \$5,000 per month for a Digital Media Enterprise license to the MEMOIR Depth feed.

MEMOIR Top

The MEMOIR Top feed is a MEMX-only market data feed that contains top of book quotations based on equity orders entered into the System as well as administrative messages.¹³

The Exchange proposes to charge each of the fees set forth below for MEMOIR Top.

1. Internal Distribution Fee. For the receipt of access to the MEMOIR Top feed, the Exchange proposes to charge \$750 per month. This proposed access fee would be charged to any data recipient that receives a data feed of the MEMOIR Top feed for purposes of internal distribution (i.e., an Internal Distributor). The proposed access fee for internal distribution will be charged only once per month per Firm.
2. External Distribution Fee. For redistribution of the MEMOIR Top feed, the Exchange proposes to establish an access fee of \$2,000 per month. The proposed redistribution fee would be charged to any External Distributor of the MEMOIR Top feed. The proposed access fee for external distribution will be charged only once per month per Firm.
3. Non-Display Use Fees. The Exchange does not propose to establish non-display fees for usage by Trading Platforms or other Users with respect to MEMOIR Top.

¹³ See MEMX Rule 13.8(b).

4. User Fees. The Exchange proposes to charge a Professional User Fee (per User) of \$0.01 per month and a Non-Professional User Fee (per User) of \$0.01 per month. The proposed User fees would apply to each person that has access to the MEMOIR Top feed that is provided by an External Distributor for displayed usage. The Exchange does not propose any per User fees for internal distribution of the MEMOIR Top feed. Each External Distributor's count will include every individual that accesses the data regardless of the purpose for which the individual uses the data. External Distributors of the MEMOIR Top feed must report all Professional and Non-Professional Users¹⁴ in accordance with the following:

- In connection with an External Distributor's distribution of the MEMOIR Top feed, the Distributor must count as one User each unique User that the Distributor has entitled to have access to the MEMOIR Top feed.
- External Distributors must report each unique individual person who receives access through multiple devices or multiple methods (e.g., a single User has multiple passwords and user identifications) as one User.
- If an External Distributor entitles one or more individuals to use the same device, the Distributor must include only the individuals, and not the device, in the count. Thus, Distributors would not be required to report User device counts associated with a User's display use of the data feed.

¹⁴ The Exchange notes that while it is not differentiating Professional and Non-Professional Users based on fees (in that it is proposing the same fee for such Users) for this data feed, and thus will not audit Firms based on this distinction, it will request reporting of each distinct category for informational purposes.

5. Enterprise Fee. As an alternative to User fees, a recipient Firm may purchase a monthly Enterprise license to receive MEMOIR Top for distribution to an unlimited number of Professional and Non-Professional Users. The Exchange proposes to establish a fee of \$10,000 per month for an Enterprise license to the MEMOIR Top feed.

6. Digital Media Enterprise Fee. As an alternative to User fees, a recipient Firm may purchase a monthly Digital Media Enterprise license to receive MEMOIR Top for distribution to an unlimited number of Users for viewing via television, websites, and mobile devices for informational and non-trading purposes only. The Exchange proposes to establish a fee of \$2,000 per month for a Digital Media Enterprise license to the MEMOIR Top feed.

MEMOIR Last Sale

The MEMOIR Last Sale feed is a MEMX-only market data feed that contains only execution information based on equity orders entered into the System as well as administrative messages.¹⁵ The Exchange proposes to charge each of the fees set forth below for MEMOIR Last Sale.

1. Internal Distribution Fee. For the receipt of access to the MEMOIR Last Sale feed, the Exchange proposes to charge \$500 per month. This proposed access fee would be charged to any data recipient that receives a data feed of the MEMOIR Last Sale feed for purposes of internal distribution (i.e., an Internal Distributor). The proposed access fee for internal distribution will be charged only once per month per Firm.

2. External Distribution Fee. For redistribution of the MEMOIR Last Sale feed, the Exchange proposes to establish an access fee of \$2,000 per month. The proposed

¹⁵ See MEMX Rule 13.8(c).

redistribution fee would be charged to any External Distributor of the MEMOIR Last Sale feed. The proposed access fee for external distribution will be charged only once per month per Firm.

3. Non-Display Use Fees. The Exchange does not propose to establish separate non-display fees for usage by Trading Platforms or other Users with respect to MEMOIR Last Sale.

4. User Fees. The Exchange proposes to charge a Professional User Fee (per User) of \$0.01 per month and a Non-Professional User Fee (per User) of \$0.01 per month. The proposed User fees would apply to each person that has access to the MEMOIR Last Sale feed that is provided by an External Distributor for displayed usage. The Exchange does not propose any per User fees for internal distribution of the MEMOIR Last Sale feed. Each External Distributor's count will include every individual that accesses the data regardless of the purpose for which the individual uses the data. External Distributors of the MEMOIR Last Sale feed must report all Professional and Non-Professional Users¹⁶ in accordance with the following:

- In connection with an External Distributor's distribution of the MEMOIR Last Sale feed, the Distributor must count as one User each unique User that the Distributor has entitled to have access to the MEMOIR Last Sale feed.
- External Distributors must report each unique individual person who receives access through multiple devices or multiple methods (e.g., a single User has multiple passwords and user identifications) as one User.

¹⁶ See supra note 14.

- If an External Distributor entitles one or more individuals to use the same device, the Distributor must include only the individuals, and not the device, in the count. Thus, Distributors would not be required to report User device counts associated with a User's display use of the data feed.
5. Enterprise Fee. As an alternative to User fees, a recipient Firm may purchase a monthly Enterprise license to receive MEMOIR Last Sale for distribution to an unlimited number of Professional and Non-Professional Users. The Exchange proposes to establish a fee of \$10,000 per month per Firm for an Enterprise license to the MEMOIR Last Sale feed.
6. Digital Media Enterprise Fee. As an alternative to User fees, a recipient Firm may purchase a monthly Digital Media Enterprise license to receive MEMOIR Last Sale for distribution to an unlimited number of Users for viewing via television, websites, and mobile devices for informational and non-trading purposes only. The Exchange proposes to establish a fee of \$2,000 per month per Firm for a Digital Media Enterprise license to the MEMOIR Last Sale feed.

Additional Discussion – Background

In two years, MEMX has grown from 0% to monthly market share ranging between 3-4% of consolidated trading volume. During that same period, the Exchange has had a steady increase in the number of subscribers to Exchange Data Feeds. Until April of 2022, MEMX did not charge fees for market data provided by the Exchange. The objective of this approach was to eliminate any fee-based barriers for Members when MEMX launched as a national securities exchange in 2020, which the Exchange believes has been helpful in its ability to attract order flow as a new exchange. The Exchange also did not initially charge for market data because

MEMX believes that any exchange should first deliver meaningful value to Members and other market participants before charging fees for its products and services. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for providing the Exchange Data Feeds at approximately \$3 million. In order to establish fees that are designed to recover the aggregate costs of providing the Exchange Data Feeds plus a reasonable mark-up, the Exchange is proposing to modify its Fee Schedule, as described above. In addition to the Cost Analysis, described below, the Exchange believes that its proposed approach to market data fees is reasonable based on a comparison to competitors.

Additional Discussion – Comparison with Other Exchanges

The proposed fee structure is not novel but is instead comparable to the fee structure currently in place for the equities exchanges operated by Cboe Global Markets, Inc., in particular BZX.¹⁷ As noted above, in January 2022, MEMX had 4.2% market share; for that same month, BZX had 5.5% market share.¹⁸ The Exchange is proposing fees for its Exchange Data Feeds that are similar in structure to BZX and rates that are equal to, or in most cases lower, than the rates data recipients pay for comparable data feeds from BZX.¹⁹ The Exchange notes that other

¹⁷ See BZX Fee Schedule, available at: https://www.cboe.com/us/equities/membership/fee_schedule/bzx/ (the “BZX Fee Schedule”).

¹⁸ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

¹⁹ The Exchange notes that although no fee proposed by the Exchange is higher than the fee charged for BZX for a comparable data product, under certain fact patterns a BZX data recipient could pay a lower rate than that charged by the Exchange. For instance, while the Exchange has proposed to adopt identical fees to those charged for internal distribution of MEMOIR Top as compared to BZX Top (\$750 per month) and for internal distribution of MEMOIR Last Sale as compared to BZX Last Sale (\$500 per month), BZX permits a data recipient who takes both feeds to pay only one fee and, upon request, to receive the other data feed free of charge. See BZX Fee Schedule, *supra* note 17. Because the Exchange has not proposed such a discount, a data recipient taking both

competitors maintain fees applicable to market data that are considerably higher than those proposed by the Exchange, including NYSE Arca²⁰ and Nasdaq.²¹ However, the Exchange has

MEMOIR TOP and MEMOIR Last Sale would pay more (\$1,250 per month) than they would to take comparable data feeds from BZX (\$750 per month).

²⁰ Fees for the NYSE Arca Integrated Feed, which is the comparable product to MEMOIR Depth, are \$3,000 for access (internal use) and \$3,750 for redistribution (external distribution), compared to the Exchange's proposed fees of \$1,500 and \$2,500, respectively. In addition, for its Integrated Feed, NYSE Arca charges for three different categories of non-display usage, each of which is \$10,500 and each of which can be charged to the same firm more than one time (e.g., a customer operating a Trading Platform would pay \$10,500 compared to the Exchange's proposed fee of \$4,000 but would also pay for each Trading Platform, up to three, if they operate more than one, instead of the single fee proposed by the Exchange; if that customer also uses the data for the other categories of non-display usage they would also pay \$10,500 for each other category of usage, whereas the Exchange would only charge \$1,500 for any non-display usage other than operating a Trading Platform). Finally, the NYSE Arca Integrated Feed user fee for pro devices is \$60 compared to the proposed Professional User fee of \$30 for MEMOIR Depth and the NYSE Arca Integrated user fee for non-pro devices is \$20 compared to the proposed Non-Professional User fee of \$3 for MEMOIR Depth. See NYSE Proprietary Market Data Pricing list, available at:

https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Pricing.pdf.

²¹ Fees for the Nasdaq TotalView data feed, which is the comparable product to MEMOIR Depth, are \$1,500 for access (internal use) and \$3,750 for redistribution (external distribution), compared to the Exchange's proposed fees of \$1,500 and \$2,500, respectively. In addition, for TotalView, Nasdaq charges Trading Platforms \$5,000 compared to the Exchange's proposal of \$4,000, and, like NYSE Arca, charges customers per Trading Platform, up to three, if they operate more than one, instead of the single fee proposed by the Exchange. Nasdaq also requires users to report and pay usage fees for non-display access at levels of from \$375 per subscriber for smaller firms with 39 or fewer subscribers to \$75,000 per firm for a larger firm with over 250 subscribers. The Exchange does not require counting of devices or users for non-display purposes and instead has proposed flat fee of \$1,500 for non-display usage not by Trading Platforms. Finally, the Nasdaq TotalView user fee for professional subscribers is \$76 compared to the proposed Professional User fee of \$30 for MEMOIR Depth and the Nasdaq TotalView user fee for non-professional subscribers is \$15 compared to the proposed Non-Professional User fee of \$3 for MEMOIR Depth. See Nasdaq Global Data Products pricing list, available at:

<http://www.nasdaqtrader.com/TraderB.aspx?id=MDDPricingALLN>.

focused its comparison on BZX because it is the closest market in terms of market share and offers market data at prices lower than several other incumbent exchanges.²²

The fees for the BZX Depth feed—which like the MEMOIR Depth feed, includes top of book, depth of book, trades, and security status messages—consist of an internal distributor access fee of \$1,500 per month (the same as the Exchange’s proposed rate), an external distributor access fee of \$5,000 per month (two times the Exchange’s proposed rate), a non-display usage fee for non-Trading Platforms of \$2,000 per month (\$500 more than the Exchange’s proposed rate), a non-display usage fee for Trading Platforms of \$5,000 per month (\$1,000 more than the Exchange’s proposed rate), a Professional User fee (per User) of \$40 per month (\$10 more than the Exchange’s proposed rate), and a Non-Professional User fee (per User) of \$5 per month (\$2 more than the Exchange’s proposed rate).²³

The comparisons of the MEMOIR Last Sale feed and MEMOIR Top feed to the BZX Last Sale feed and BZX Top feed, respectively, are similar in that BZX generally maintains the same fee structure proposed by the Exchange and BZX charges fees that are comparable to, but in most cases higher than, the Exchange’s proposed fees. Notably, the User fees proposed by the Exchange for External Distributors of MEMOIR Last Sale and MEMOIR Top (\$0.01 for both Professional Users and Non-Professional Users) are considerably lower than those charged by

²² See supra notes 20-21.

²³ See BZX Fee Schedule, supra note 17. The Exchange notes that there are differences between the structure of BZX Depth fees and the proposed fees for MEMOIR Depth, including that the Exchange has proposed a Digital Media Enterprise License for MEMOIR Depth but a comparable license is not available from BZX. Additionally, BZX maintains a general enterprise license for User fees, similar to that proposed by the Exchange for MEMOIR Top and MEMOIR Last Sale, but the Exchange has not proposed adding a general Enterprise license at this time.

BZX for BZX Top and BZX Last Sale (\$4 for Professional Users and \$0.10 for Non-Professional Users).

By charging the same low rate for all Users of MEMOIR Top and MEMOIR Last Sale the Exchange believes it is proposing a structure that is not only lower cost but that will also simplify reporting for subscribers who externally distribute these data feeds to Users, as the Exchange believes that categorization of Users as Professional and Non-Professional is not meaningful for these products and requiring such categorization would expose Firms to unnecessary audit risk of paying more for mis-categorization. However, the Exchange does not believe this is equally true for MEMOIR Depth, as most individual Users of MEMOIR Depth are likely to be Professional Users and the Exchange has proposed pricing for such Users that the Exchange believes is reasonable given the value to Professional Users (i.e., since Professional Users use data to participate in the markets as part of their full-time profession and earn compensation based on their employment). While the Exchange would prefer the simplicity of a single fee, similar to that imposed for Professional Users and Non-Professional Users of the MEMOIR Top and MEMOIR Last Sale feeds, as that would reduce audit risk and simplify reporting, the proposed fee for Professional Users of the MEMOIR Depth feed if also applied to Non-Professional Users of such feed would be significantly higher than other exchanges charge. The Exchange reiterates that it does not anticipate many Non-Professional Users to subscribe to MEMOIR Depth. In fact, the Exchange is only aware of a single Non-Professional User (i.e., one User) that is reported to receive MEMOIR Depth.

Additional Discussion – Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the

Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs. Accordingly, in proposing to charge fees for market data, the Exchange has sought to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members – both generally and in relation to other Members, i.e., to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange does not believe it needs to otherwise address questions about market competition in the context of this filing because the proposed fees are so clearly consistent with the Act based on its Cost Analysis. The Exchange also believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,²⁴ and Rule 19b-4 thereunder,²⁵ with respect to the types of information self-regulatory organizations (“SROs”) should provide when filing fee changes, and Section 6(b) of the Act,²⁶ which requires, among other things, that exchange fees be reasonable and equitably allocated,²⁷ not designed to permit unfair discrimination,²⁸ and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁹ This rule change

²⁴ 15 U.S.C. 78s(b)(1).

²⁵ 17 CFR 240.19b-4.

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ 15 U.S.C. 78f(b)(8).

proposal addresses those requirements, and the analysis and data in this section are designed to clearly and comprehensively show how they are met.³⁰

As noted above, MEMX has conducted and recently updated a study of its aggregate costs to produce the Exchange Data Feeds – the Cost Analysis. The Cost Analysis required a detailed analysis of MEMX’s aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange – transactions, market data, membership services, physical connectivity, and application sessions (which provide order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). MEMX separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (i.e., personnel), and certain general and administrative expenses (“cost drivers”). Next, MEMX adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (e.g., message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (75%), with smaller allocations to logical ports (2.6%), and the remainder to the provision of transaction execution and market data services (22.4%). The allocation methodology was decided through conversations with senior management familiar with each area of the Exchange’s operations. After adopting this allocation methodology, the Exchange

³⁰ In 2019, Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (“Fee Guidance”). While MEMX understands that the Fee Guidance does not create new legal obligations on SROs, the Fee Guidance is consistent with MEMX’s view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) available at <https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees>.

then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, MEMX was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has four primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange generally must cover its expenses from these four primary sources of revenue.

Through the Exchange's extensive Cost Analysis, which was again recently updated to focus solely on the provision of the Exchange Data Feeds, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of the Exchange Data Feeds, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of the Exchange Data Feeds, and thus bears a relationship that is, "in nature and closeness," directly related to the Exchange Data Feeds. Based on its analysis, MEMX calculated its aggregate annual costs for providing the Exchange Data Feeds, at \$3,014,348. This results in an estimated monthly cost for providing Exchange Data Feeds of \$251,196. In order to cover operating costs and earn a reasonable profit on its market data, the Exchange has determined it necessary to charge fees for its proprietary data products, and, as such, the Exchange is proposing to modify its Fee Schedule, pursuant to MEMX Rules 15.1(a) and (c), as set forth above.

Costs Related to Offering Exchange Data Feeds

The following chart details the individual line-item (annual) costs considered by MEMX to be related to offering the Exchange Data Feeds to its Members and other customers as well as

the percentage of the Exchange’s overall costs that such costs represent for such area (e.g., as set forth below, the Exchange allocated approximately 6.9% of its overall Human Resources cost to offering Exchange Data Feeds).

COSTS DRIVERS	COSTS	% OF ALL
Human Resources	\$1,729,856	6.9%
Network Infrastructure (e.g., servers, switches)	\$232,452	8.8%
Data Center	\$318,456	9.8%
Hardware and Software Licenses	\$246,864	9.8%
Depreciation	\$399,911	18.0%
Allocated Shared Expenses	\$86,809	1.8%
TOTAL	\$3,014,348	6.5%

Human Resources

For personnel costs (Human Resources), MEMX calculated an allocation of employee time for employees whose functions include directly providing services necessary to offer the Exchange Data Feeds, including performance thereof, as well as personnel with ancillary functions related to establishing and providing such services (such as information security and finance personnel). The Exchange notes that it has fewer than eighty (80) employees and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing the Exchange Data Feeds, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing the Exchange Data Feeds. The Exchange notes that senior level executives were allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing the Exchange Data Feeds. The Exchange’s cost allocation for employees who perform work in support of generating and disseminating the Exchange Data Feeds arrive at a full time equivalent (“FTE”)

of 5.2 FTEs. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Network Infrastructure

The Network Infrastructure cost includes cabling and switches required to generate and disseminate the Exchange Data Feeds. The Network Infrastructure cost was narrowly estimated by focusing on the servers used at the Exchange's primary and back-up data centers specifically for the Exchange Data Feeds. Further, as certain servers are only partially utilized to generate and disseminate the Exchange Data Feeds, only the percentage of such servers devoted to generating and disseminating the Exchange Data Feeds was included (i.e., the capacity of such servers allocated to the Exchange Data Feeds). From this analysis, the Exchange determined that 9.8% of its servers are used to generate and disseminate the Exchange Data Feeds. When combined with the applicable switches used for Exchange Data Feeds, the Exchange has determined that approximately 8.8% of its overall Network Infrastructure costs are attributable to the Exchange Data Feeds.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide the Exchange Data Feeds in the third-party data centers where the Exchange maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties). As the Data Center costs are primarily for space, power, and cooling of servers, the Exchange applied the same percentage calculated above with respect to servers, i.e. 9.8%, to allocate the applicable Data Center costs for the Exchange Data Feeds. The Exchange believes it is reasonable to apply

the same proportionate percentage of Data Center costs to that of Network Infrastructure.

Hardware and Software Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer the Exchange Data Feeds. Because the hardware and software license fees are correlated to the servers used by the Exchange, the Exchange again applied an allocation of 9.8% of its costs for Hardware and Software Licenses to the Exchange Data Feeds.

Depreciation

The vast majority of the software the Exchange uses with respect to its operations, including the software used to generate and disseminate the Exchange Data Feeds has been developed in-house and the cost of such development is depreciated over time. Accordingly, the Exchange included Depreciation cost related to depreciated software used to generate and disseminate the Exchange Data Feeds. The Exchange also included in the Depreciation costs certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to the Exchange Data Feeds in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to the Exchange Data Feeds.

Allocated Shared Expenses

Finally, certain general shared expenses were allocated to the Exchange Data Feeds. However, contrary to its prior cost analysis, rather than taking the whole amount of general shared expenses and applying an allocated percentage, the Exchange has narrowly selected specific general shared expenses relevant to the Exchange Data Feeds. The costs included in general shared expenses allocated to the Exchange Data Feeds include office space

and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The cost of paying individuals to serve on the Exchange’s Board of Directors or any committee was not allocated to providing Exchange Data Feeds.

Cost Analysis – Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core service and did not double-count any expenses. Instead, as described above, the Exchange identified and allocated applicable cost drivers across its core services and used the same approach to analyzing costs to form the basis of a separate proposal to adopt fees for connectivity services (the “Connectivity Filing”)³¹ and this filing proposing fees for Exchange Data Feeds. Thus, the Exchange’s allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

The Exchange anticipates that the proposed fees for Exchange Data Feeds will generate approximately \$262,500 monthly (\$3,150,000 annually) based on billing and reporting that has taken place since the Exchange commenced billing for such data feeds. The proposed fees for Exchange Data Feeds are designed to permit the Exchange to cover the costs allocated to providing Exchange Data Feeds with a mark-up that the Exchange believes is modest (approximately 4%), which the Exchange believes is fair and reasonable after taking into account the costs related to creating, generating, and disseminating the Exchange Data Feeds and the fact

³¹ See SR-MEMX-2022-26, filed September 15, 2022, available at: <https://info.memxtrading.com/rules-and-filings/>.

that the Exchange will need to fund future expenditures (increased costs, improvements, etc.). The Exchange also reiterates that prior to April of 2022 the Exchange has not previously charged any fees for Exchange Data Feeds and its allocation of costs to Exchange Data Feeds was part of a holistic allocation that also allocated costs to other core services without double-counting any expenses.

The Exchange like other exchanges is, after all, a for-profit business. Accordingly, while the Exchange believes in transparency around costs and potential margins, as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning supra-competitive profits, and the Exchange believes its Cost Analysis and related projections demonstrate this fact.

As a general matter, the Exchange believes that its costs will remain relatively similar in future years. It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of Exchange Data Feeds it will receive additional revenue to offset future cost increases. However, if use of Exchange Data Feeds is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs.³² Similarly, the Exchange expects that it would propose to decrease fees in the event

³² The Exchange notes that it does not believe that a 4% mark-up is necessarily competitive, and instead that this is likely significantly below the mark-up many businesses place on their products and services.

that revenue materially exceeds current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (e.g., to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and expects that it would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)³³ of the Act in general, and furthers the objectives of Section 6(b)(4)³⁴ of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. Additionally, the Exchange believes that the proposed fees are consistent with the objectives of Section 6(b)(5)³⁵ of the Act in that they are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to

³³ 15 U.S.C. 78f.

³⁴ 15 U.S.C. 78f(b)(4).

³⁵ 15 U.S.C. 78f(b)(5).

a free and open market and national market system, and, in general, to protect investors and the public interest, and, particularly, are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.



The Exchange notes prior to addressing the specific reasons the Exchange believes the proposed fees and fee structure are reasonable, equitably allocated and not unreasonably discriminatory, that the proposed definitions and fee structure described above are consistent with the definitions and fee structure used by most U.S. securities exchanges, and Cboe BZX in particular. As such, the Exchange believes it is adopting a model that is easily understood by Members and non-Members, most of which also subscribe to market data products from other exchanges. For this reason, the Exchange believes that the proposed definitions and fee structure described above are consistent with the Act generally, and Section 6(b)(5)³⁶ of the Act in particular.

As noted above, the Exchange's executed trading volume has grown from 0% market share to approximately 3-4% market share in two years and the Exchange believes that it is reasonable to begin charging fees for the Exchange Data Feeds. One of the primary objectives of MEMX is to provide competition and to reduce fixed costs imposed upon the industry. Consistent with this objective, the Exchange believes that this proposal reflects a simple, competitive, reasonable, and equitable pricing structure, with fees that are discounted when compared to comparable data products and services offered by competitors.³⁷

Reasonableness

³⁶ 15 U.S.C. 78f(b)(5).

³⁷ See supra notes 20-21; see supra note 23 and accompanying text.

 *Overall.* With regard to reasonableness, the Exchange understands that the Commission has traditionally taken a market-based approach to examine whether the SRO making the fee proposal was subject to significant competitive forces in setting the terms of the proposal. The Exchange understands that in general the analysis considers whether the SRO has demonstrated in its filing that (i) there are reasonable substitutes for the product or service; (ii) “platform” competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supracompetitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, the Exchange understands that in general the  analysis will next consider whether there is any substantial countervailing basis to suggest the fee’s terms fail to meet one or more standards under the Exchange Act. The Exchange further understands that if the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

The Exchange has not determined its proposed overall market data fees based on assumptions about market competition, instead relying upon a cost-plus model to determine a reasonable fee structure that is informed by the Exchange’s understanding of different uses of the products by different types of participants. In this context, the Exchange believes the proposed fees overall are fair and reasonable as a form of cost recovery plus the possibility of a reasonable return for Exchange’s aggregate costs of offering the Exchange Data Feeds. The Exchange believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup some or all of Exchange’s annual costs of providing market data with a reasonable mark-up. As discussed in the Purpose section, the Exchange estimates this fee filing will result

in annual revenue of approximately \$3.15 million, representing a potential mark-up of just 4% over the cost of providing market data. Accordingly, the Exchange believes that this fee methodology is reasonable because it allows the Exchange to recoup some or all of its expenses for providing market data products (with any additional revenue representing no more than what the Exchange believes to be a reasonable rate of return). The Exchange also believes that the proposed fees are reasonable because they are generally less than the fees charged by competing equities exchanges for comparable market data products, notwithstanding that the competing exchanges may have different system architectures that may result in different cost structures for the provision of market data.

The Exchange believes the proposed fees for the Exchange Data Feeds are reasonable when compared to fees for comparable products, such as the BZX Depth feed, BZX Top feed, and BZX Last Sale feed, compared to which the Exchange's proposed fees are generally lower, as well as other comparable data feeds priced significantly higher than the Exchange's proposed fees for the Exchange Data Feeds.³⁸ Specifically with respect to the MEMOIR Depth feed, the Exchange believes that the proposed fees for such feed are reasonable because they represent not only the value of the data available from the MEMOIR Top and MEMOIR Last Sale data feeds, which have lower proposed fees, but also the value of receiving the depth-of-book data on an order-by-order basis. The Exchange believes it is reasonable to have pricing based, in part, upon the amount of information contained in each data feed and the value of that information to market participants. The MEMOIR Top and Last Sale data feeds, as described above, can be utilized to trade on the Exchange but contain less information than that is available on the MEMOIR Depth feed (i.e., even for a subscriber who takes both feeds, such feeds do not contain

³⁸ See [supra](#) notes 20-21; see [supra](#) note 23 and accompanying text.

depth-of-book information). Thus, the Exchange believes it reasonable for the products to be priced as proposed, with MEMOIR Last Sale having the lowest price, MEMOIR Top the next lowest price, and MEMOIR Depth the highest price (and more than MEMOIR Last Sale and MEMOIR Top combined).

Internal Distribution Fees. The Exchange believes that it is reasonable to charge Fees to access the Exchange Data Feeds for Internal Distribution because of the value of such data to subscribers in their profit-generating activities. The Exchange also believes that the proposed monthly Internal Distribution fees for MEMOIR Depth, MEMOIR Top, and MEMOIR Last Sale are reasonable as they are the same amounts charged by at least one other exchange of comparable size for comparable data products,³⁹ and are lower than the fees charged by several other exchanges for comparable data products.⁴⁰

External Distribution Fees. The Exchange believes that it is reasonable to charge External Distribution fees for the Exchange Data Feeds because vendors receive value from redistributing the data in their business products provided to their customers. The Exchange believes that charging External Distribution fees is reasonable because the vendors that would be charged such fees profit by re-transmitting the Exchange's market data to their customers. These fees would be charged only once per month to each vendor account that redistributes any Exchange Data Feed, regardless of the number of customers to which that vendor redistributes the data. The Exchange also believes the proposed monthly External Distribution fee for the

³⁹ See BZX Fee Schedule, *supra* note 17.

⁴⁰ See, e.g., NYSE Proprietary Market Data Pricing list, available at: https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Pricing.pdf ("NYSE Fee Schedule"); Nasdaq Global Data Products pricing list, available at: <http://www.nasdaqtrader.com/TraderB.aspx?id=MDDPricingALLN> ("Nasdaq Fee Schedule").

MEMOIR Depth Feed is reasonable because it is half the amount of the fee charged by at least one other exchange of comparable size for a comparable data product,⁴¹ and significantly less than the amount charged by several other exchanges for comparable data products.⁴² Similarly, the Exchange believes the proposed monthly External Distribution fees for the MEMOIR TOP and MEMOIR Last Sale feeds are reasonable because they are discounted compared to same amounts charged by at least one other exchange of comparable size for comparable data products,⁴³ and significantly less than the amount charged by several other exchanges for comparable data products.⁴⁴

User Fees. The Exchange believes that having separate Professional and Non-Professional User fees for the MEMOIR Depth feed is reasonable because it will make the product more affordable and result in greater availability to Professional and Non-Professional Users. Setting a modest Non-Professional User fee is reasonable because it provides an additional method for Non-Professional Users to access the Exchange Data Feeds by providing the same data that is available to Professional Users. The proposed monthly Professional User fee and monthly Non-Professional User fee are reasonable because they are lower than the fees charged by at least one other exchange of comparable size for comparable data products,⁴⁵ and significantly less than the amounts charged by several other exchanges for comparable data products.⁴⁶

⁴¹ See BZX Fee Schedule, supra note 17.

⁴² See, e.g., NYSE Fee Schedule, supra note 40; Nasdaq Fee Schedule, supra note 40.

⁴³ See BZX Fee Schedule, supra note 17.

⁴⁴ See, e.g., NYSE Fee Schedule, supra note 40; Nasdaq Fee Schedule, supra note 40.

⁴⁵ See BZX Fee Schedule, supra note 17.

⁴⁶ See, e.g., NYSE Fee Schedule, supra note 40; Nasdaq Fee Schedule, supra note 40.

The Exchange also believes it is reasonable to charge the same low per User fee of \$0.01 for both Professional Users and Non-Professional Users receiving the MEMOIR Top and MEMOIR Last Sale feeds, as this is not only pricing such data at a much lower cost than other exchanges charge for comparable data feeds⁴⁷ but doing so will also simplify reporting for subscribers who externally distribute these data feeds to Users, as the Exchange believes that categorization of Users as Professional and Non-Professional is not meaningful for these products and that requiring such categorization would expose Firms to unnecessary audit risk of paying more for mis-categorization. The Exchange also believes that the proposal to require reporting of individual Users, but not devices, is reasonable as this too will eliminate unnecessary audit risk that can arise when recipients are required to apply complex counting rules such as whether or not to count devices or whether an individual accessing the same data through multiple devices should be counted once or multiple times. In addition, the Exchange believes it is reasonable to charge User fees only for External Distribution of the MEMOIR Top and MEMOIR Last Sale feeds, and not charge User fees for Internal Distribution of such market data feeds, because vendors receive additional value from being able to redistribute such data to their customers and can recoup associated expenses by passing on such fees either directly to those customers or indirectly by using the data to facilitate other revenue-generating activity.

The Exchange further believes that its proposal to adopt a Digital Media Enterprise Fee for each of the Exchange Data Feeds is reasonable because it would allow a market participant that wishes to disseminate information from the Exchange Data Feeds through a digital media platform such as a public website without determining the number of Users, which would be practically impossible. The Exchange further believes it is reasonable for the Digital Media

⁴⁷ [See id.](#)

Enterprise Fee to be higher for MEMOIR Depth than MEMOIR Top or MEMOIR Last Sale because of the additional information that is contained in MEMOIR Depth, and in turn, the potential additional value to data recipients.

The Exchange also believes it is reasonable to adopt an Enterprise Fee for MEMOIR Top and MEMOIR Last Sale because this would allow a market participant to disseminate such data feeds to an unlimited number of Users without the necessity of counting such Users. As this is an optional subscription, a data recipient is able to determine whether it prefers to count Users and report such Users to the Exchange or not, and also whether it is more economically advantageous to count and pay for specific Users or to subscribe to the Enterprise Fee. The Exchange also notes that given the low cost proposed per User, only a market participant with a substantial number of Users would likely choose to subscribe for and pay the Enterprise Fee. The Exchange also believes it is reasonable not to adopt an Enterprise Fee for MEMOIR Depth at this time as the Exchange does not believe there is sufficient demand for an Enterprise Fee given relatively low User counts for subscribers of MEMOIR Depth. While MEMOIR Top and MEMOIR Last Sale also currently have relatively low User counts, the Exchange does believe that there is potential demand for a market data recipient that wishes to disseminate top of book and last sale information to a large subscriber base, and thus again believes it is reasonable to offer an Enterprise Fee option for such a market data recipient.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Usage fees for the MEMOIR Depth feed are reasonable, because they reflect the value of the data to the data recipients in their profit-generating activities and do not impose the burden of counting non-display devices.

The Exchange believes that the proposed Non-Display Usage fees for the MEMOIR Depth feed reflect the significant value of the non-display data use to data recipients, most of whom purchase such data on a voluntary basis. Non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate Trading Platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. Although some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce a recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting recipients. The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that can be performed more quickly and accurately and less expensively than if they were performed manually.

Previously, the non-display use data pricing policies of many exchanges required customers to count, and the exchanges to audit the count of, the number of non-display devices used by a customer. As non-display use grew more prevalent and varied, however, exchanges received an increasing number of complaints about the impracticality and administrative burden associated with that approach. In response, several exchanges developed a non-display use pricing structure that does not require non-display devices to be counted or those counts to be audited, and instead categorizes different types of use. The Exchange proposes to distinguish between non-display use for the operation of a Trading Platform and other non-display use,

which is similar to exchanges such as BZX and EDGX,⁴⁸ while other exchanges maintain additional categories and in many cases charge multiple times for different types of non-display use or the operation of multiple Trading Platforms.⁴⁹

The Exchange believes that it is reasonable to segment the fee for non-display use into these two categories. As noted above, the uses to which customers can put the MEMOIR Depth feed are numerous and varied, and the Exchange believes that charging separate fees for these separate categories of use is reasonable because it reflects the actual value the customer derives from the data, based upon how the customer makes use of the data.

The Exchange believes that the proposed fees for non-display use other than operation of a Trading Platform is reasonable. These fees are comparable to, and lower than, the fees charged by at least one other exchange of comparable size for a comparable data product,⁵⁰ and significantly less than the amounts charged by several other exchanges for comparable data products.⁵¹ The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using data on a non-display basis in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments. Further, the Exchange benefits from other non-display use by market participants (including the fact that the Exchange receives orders resulting from algorithms and routers) and both the Exchange and other participants benefit from other non-display use by market participants when such use is to

⁴⁸ See BZX Fee Schedule, *supra* note 17; EDGX Fee Schedule, available at: https://www.cboe.com/us/equities/membership/fee_schedule/edgx/.

⁴⁹ See *supra* notes 20-21.

⁵⁰ See BZX Fee Schedule, *supra* note 17.

⁵¹ See, e.g., NYSE Fee Schedule, *supra* note 40; Nasdaq Fee Schedule, *supra* note 40.

support more broadly beneficial functions such as risk management and compliance. Based on the Exchange's desire to encourage other non-display use by market participants, the Exchange believes it is reasonable to provide data for non-display use other than operation of a Trading Platform at a price that is discounted when compared to that for non-display use for operation of a Trading Platform.

The Exchange also believes, regarding non-display use for operation of a Trading Platform, it is reasonable to charge a higher monthly fee than for other non-display use because such use is optional for Trading Platforms and because a similar fee structure is in place on other exchanges. With respect to alternative trading systems, or ATSS, such platforms can utilize the Exchange Data Feeds to form prices for trading on such platforms but are not required to do so and can instead utilize SIP data. Approximately two-thirds of the ATSS approved to trade NMS stocks do not currently subscribe to the Exchange Data Feeds.⁵² With respect to other exchanges, which may choose to use the Exchange Data Feeds for Regulation NMS compliance and order routing, the Exchange notes that several exchange competitors of the Exchange have not subscribed to any Exchange Data Feeds and instead utilize SIP data for such purposes.⁵³ Accordingly, both ATSS and other exchanges clearly have a choice whether to subscribe to the Exchange Data Feeds. The Exchange also believes that it is reasonable to charge the proposed fees for non-display use for operation of a Trading Platform because the proposed fees are comparable to, and lower than, the fees charged at least one other exchange of comparable size

⁵² MEMX internal data regarding non-display use by Trading Platforms; as of December 31, 2022, there were 33 ATSS that had filed an effective Form ATS-N with the Commission to trade NMS stocks.

⁵³ See, e.g., NYSE Arca Rule 7.37-E.(d), Order Execution and Routing, and BZX Rule 11.21, each of which discloses the data feeds used by each respective exchange and state that SIP products are used with respect to MEMX.

for a comparable data product,⁵⁴ and significantly less than the amounts charged by several other exchanges for comparable data products, which also charge per Trading Platform operated by a data subscriber subject to a cap in most cases, rather than charging per Firm, as proposed by the Exchange.⁵⁵

The proposed Non-Display Usage fees for the MEMOIR Depth feed are also reasonable because they take into account the extra value of receiving the data for Non-Display Usage that includes a rich set of information including top of book quotations, depth-of-book quotations, executions and other information. The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using the MEMOIR Depth feed on a non-display basis in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.⁵⁶ For the same reasons, the Exchange believes it is reasonable to provide other data feeds, namely MEMOIR Top and MEMOIR Last Sale, free of charge for Non-Display Usage. The Exchange does not believe that either MEMOIR Top or MEMOIR Last Sale has the same value to market participants with respect to non-display usage as MEMOIR Depth, as neither of MEMOIR Top or MEMOIR Last Sale contains the amount of

⁵⁴ See [BZX Fee Schedule](#), [supra](#) note 17.

⁵⁵ See [supra](#) notes 20-21.

⁵⁶ See also Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01) (“[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm’s employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.”)

information that the Exchange expects market participants need for typical trading and non-trading non-display applications.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the Exchange Data Feeds are reasonable.

Equitable Allocation

Overall. The Exchange believes that its proposed fees are reasonable, fair, and equitable, and not unfairly discriminatory because they are designed to align fees with services provided. The Exchange believes the proposed fees for the Exchange Data Feeds are allocated fairly and equitably among the various categories of users of the feeds, and any differences among categories of users are justified and appropriate.

The Exchange believes that the proposed fees are equitably allocated because they will apply uniformly to all data recipients that choose to subscribe to the Exchange Data Feeds. Any subscriber or vendor that chooses to subscribe to one or more Exchange Data Feeds is subject to the same Fee Schedule, regardless of what type of business they operate, and the decision to subscribe to one or more Exchange Data Feeds is based on objective differences in usage of Exchange Data Feeds among different Firms, which are still ultimately in the control of any particular Firm. The Exchange believes the proposed pricing between Exchange Data Feeds is equitably allocated because it is based, in part, upon the amount of information contained in each data feed and the value of that information to market participants. The MEMOIR Top and Last Sale data feeds, as described above, can be utilized to trade on the Exchange but contain less information than that is available on the MEMOIR Depth feed (i.e., even for a subscriber who takes both feeds, such feeds do not contain depth-of-book information). Thus, the Exchange believes it is an equitable allocation of fees for the products to be priced as proposed, with

MEMOIR Last Sale having the lowest price, MEMOIR Top the next lowest price, and MEMOIR Depth the highest price (and more than MEMOIR Last Sale and MEMOIR Top combined).

Internal Distribution Fee. The Exchange believes the proposed monthly fees for Internal Distribution of the Exchange Data Feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the Exchange Data Feeds for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for External Distribution of the Exchange Data Feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the Exchange Data Feeds that choose to redistribute the feeds externally. The Exchange also believes that the proposed monthly fees for External Distribution are equitably allocated when compared to lower proposed fees for Internal Distribution because data recipients that are externally distributing Exchange Data Feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

User Fees. The Exchange believes that the fee structure differentiating Professional User fees from Non-Professional User fees for display use of the MEMOIR Depth feed is equitable. This structure has long been used by other exchanges and the SIPs to reduce the price of data to Non-Professional Users and make it more broadly available.⁵⁷ Offering the MEMOIR Depth feed to Non-Professional Users at a lower cost than Professional Users results in greater equity

⁵⁷ See, e.g., Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (establishing the \$15 Non-Professional User Fee (Per User) for NYSE OpenBook); Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983) (establishing Non-Professional fees for CTA data); NASDAQ BX Equity 7 Pricing Schedule, Section 123.

among data recipients, as Professional Users are categorized as such based on their employment and participation in financial markets, and thus, are compensated to participate in the markets.

While Non-Professional Users too can receive significant financial benefits through their participation in the markets, the Exchange believes it is reasonable to charge more to those Users who are more directly engaged in the markets. The Exchange also believes it may be unreasonable to charge a Non-Professional User the same fee that it has proposed for Professional Users, as this fee would be higher than any other U.S. equities exchange charges to Non-Professional Users for receipt of a comparable data product. These User fees would be charged uniformly to all individuals that have access to the MEMOIR Depth feed based on the category of User.

The Exchange also believes the proposed User fees for MEMOIR Top and MEMOIR Last Sale are equitable because the Exchange has proposed to charge Professional Users and Non-Professional Users the same low rate of \$0.01 per month. In addition, the Exchange believes it is equitable to charge User fees only for External Distribution of the MEMOIR Top and MEMOIR Last Sale feeds, and not charge User fees for Internal Distribution of such market data feeds, because vendors receive additional value from being able to redistribute such data to their customers and can recoup associated expenses by passing on such fees either directly to those customers or indirectly by using the data to facilitate other revenue-generating activity.

Finally, the Exchange believes it is equitable to adopt User fees for the Memoir Depth feed that are significantly higher than the User fees for the MEMOIR Top and MEMOIR Last Sale feeds because, as described above, MEMOIR Depth contains significantly more data than such data feeds. The Exchange believes it is equitable to have pricing based, in part, upon the

amount of information contained in each data feed and the value of that information to market participants.

The Exchange further believes that its proposal to adopt a Digital Media Enterprise Fee for each of the Exchange Data Feeds is equitable because it would allow a market participant that wishes to disseminate information from the Exchange Data Feeds through a digital media platform such as a public website without determining the number of Users, which would be practically impossible. The Exchange further believes it is equitable for the Digital Media Enterprise Fee to be higher for MEMOIR Depth than MEMOIR Top or MEMOIR Last Sale because of the additional information that is contained in MEMOIR Depth, and in turn, the potential additional value to data recipients.

The Exchange also believes it is equitable to adopt an Enterprise Fee for MEMOIR Top and MEMOIR Last Sale because this would allow a market participant to disseminate such data feeds to an unlimited number of Users without the necessity of counting such Users. As this is an optional subscription, a data recipient is able to determine whether it prefers to count Users and report such Users to the Exchange or not, and also whether it is more economically advantageous to count and pay for specific Users or to subscribe to the Enterprise Fee. The Exchange also believes it is equitable not to adopt an Enterprise Fee for MEMOIR Depth at this time as the Exchange does not believe there is sufficient demand for an Enterprise Fee given relatively low User counts for subscribers of MEMOIR Depth, as described above.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Usage fees are equitably allocated because they would require subscribers to pay fees only for the uses they actually make of the data. As noted above, non-display data can be used by data recipients for a wide variety of profit-generating purposes (including trading and order routing) as well as

purposes that do not directly generate revenues (such as risk management and compliance) but nonetheless substantially reduce the recipient's costs by automating certain functions. The Exchange believes that it is equitable to charge non-display data subscribers that use MEMOIR Depth data for purposes other than operation of a Trading Platform as proposed because all such subscribers would have the ability to use such data for as many non-display uses as they wish for one low fee. As noted above, this structure is comparable to that in place for the BZX Depth feed but several other exchanges charge multiple non-display fees to the same client to the extent they use a data feed in several different trading platforms or for several types of non-display use.⁵⁸

In contrast to non-display use for operation of a Trading Platform, the Exchange benefits from other non-display use by market participants (including the fact that the Exchange receives orders resulting from algorithms and routers) and both the Exchange and other participants benefit from other non-display use by market participants when such use is to support more broadly beneficial functions such as risk management and compliance. Based on the Exchange's desire to encourage other non-display use by market participants, the Exchange believes it is equitable to charge a lower rate for non-display not by Trading Platforms than it does for non-display by Trading Platforms. With respect to ATs and other exchanges, the Exchange reiterates that approximately two-thirds of ATs and several exchange competitors of the Exchange have not subscribed to any Exchange Data Feeds.⁵⁹ Accordingly, ATs and other exchanges clearly have a choice whether to subscribe to the Exchange Data Feeds. The Exchange also notes that, as described above, other exchanges have similar fee structures in

⁵⁸ See [supra](#) notes 20-21.

⁵⁹ See [supra](#) note 52 and accompanying text; see also, [supra](#) note 53.

place that charge a higher rate for non-display use by a Trading Platform than for a non-Trading Platform.⁶⁰ As such, with respect to other exchanges, the Exchange also believes it is equitable to adopt a similar fee structure because it is the same fee structure that the Exchange is subject to when subscribing to data feeds from such other exchanges (i.e., paying a higher rate than that paid by non-Trading Platforms).

The Exchange believes that it is equitable to charge a single fee per Firm rather than multiple fees for a Firm that operates more than one Trading Platform because operators of Trading Platforms are many times viewed as a single competing venue or group, even if there are multiple liquidity pools operated by the same competitor.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the Exchange Data Feeds are equitably allocated.

The Proposed Fees Are Not Unfairly Discriminatory

The Exchange believes the proposed fees for the Exchange Data Feeds are not unfairly discriminatory because any differences in the application of the fees are based on meaningful distinctions between customers, and those meaningful distinctions are not unfairly discriminatory between customers.

Overall. The Exchange believes that the proposed fees are not unfairly discriminatory because they would apply to all data recipients that choose to subscribe to the same Exchange Data Feed(s). Any vendor or subscriber that chooses to subscribe to the Exchange Data Feeds is subject to the same Fee Schedule, regardless of what type of business they operate. Because the proposed fees for MEMOIR Depth are higher, vendors and subscribers seeking lower cost options may instead choose to receive data from the SIPs or through the MEMOIR Top and/or

⁶⁰ See, e.g., supra note 48.

MEMOIR Last Sale feed for a lower cost. Alternatively, vendors and subscribers can choose to pay for the MEMOIR Depth feed in order to receive data in a single feed with depth-of-book information if such information is valuable to such vendors or subscribers. The Exchange notes that vendors or subscribers can also choose to subscribe to a combination of data feeds for redundancy purposes or to use different feeds for different purposes. In sum, each vendor or subscriber has the ability to choose the best business solution for itself. The Exchange does not believe it is unfairly discriminatory to base pricing upon the amount of information contained in each data feed and the value of that information to market participants. As described above, the MEMOIR Top and Last Sale data feeds, can be utilized to trade on the Exchange but contain less information than that is available on the MEMOIR Depth feed (i.e., even for a subscriber who takes both feeds, such feeds do not contain depth-of-book information). Thus, the Exchange believes it is not unfairly discriminatory for the products to be priced as proposed, with MEMOIR Last Sale having the lowest price, MEMOIR Top the next lowest price, and MEMOIR Depth the highest price (and more than MEMOIR Last Sale and MEMOIR Top combined).

Internal Distribution Fees. The Exchange believes the proposed monthly fees for Internal Distribution of the Exchange Data Feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same Exchange Data Feed(s) for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for redistributing the Exchange Data Feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same Exchange Data Feed(s) that choose to redistribute the feed(s) externally. The Exchange also believes that having higher monthly fees for External Distribution than Internal Distribution is not unfairly discriminatory

because data recipients that are externally distributing Exchange Data Feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

User Fees. The Exchange believes that the fee structure differentiating Professional User fees from Non-Professional User fees for display use of the MEMOIR Depth feed is not unfairly discriminatory. This structure has long been used by other exchanges and the SIPs to reduce the price of data to Non-Professional Users and make it more broadly available.⁶¹ Offering the Exchange Data Feeds to Non-Professional Users with the same data as is available to Professional Users, albeit at a lower cost, results in greater equity among data recipients. These User fees would be charged uniformly to all individuals that have access to the Exchange Data Feeds based on the category of User. The Exchange also believes the proposed User fees for MEMOIR Depth are not unfairly discriminatory, with higher fees for Professional Users than Non-Professional Users, because Non-Professional Users may have less ability to pay for such data than Professional Users as well as less opportunity to profit from their usage of such data. The Exchange also believes the proposed User fees for MEMOIR Depth are not unfairly discriminatory, even though substantially higher than the proposed User fees for MEMOIR Top and MEMOIR Last Sale, because, as described above, MEMOIR Depth has significantly more information than the other Exchange Data Feeds and is thus potentially more valuable to such Users. The Exchange also believes the proposed User fees for MEMOIR Top and MEMOIR Last Sale are not unfairly discriminatory because the Exchange has proposed to charge Professional Users and Non-Professional Users the same low rate of \$0.01 per month.

The Exchange further believes that its proposal to adopt a Digital Media Enterprise Fee

⁶¹ [See supra note 56.](#)

for each of the Exchange Data Feeds and an Enterprise Fee for MEMOIR Top and MEMOIR Last Sale is not unfairly discriminatory because these optional alternatives to counting and paying for specific Users will provide market participants the ability to provide information from the Exchange Data Feeds to large numbers of Users without counting and paying for such Users. The Exchange also believes it is not unfairly discriminatory not to adopt an Enterprise Fee for MEMOIR Depth at this time as the Exchange does not believe there is sufficient demand for an Enterprise Fee given relatively low User counts for subscribers of MEMOIR Depth, as described above.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Usage fees for the MEMOIR Depth feed are not unfairly discriminatory because they would require subscribers for non-display use to pay fees depending on their use of the data, either for operation of a Trading Platform or not, but would not impose multiple fees to the extent a Firm operates multiple Trading Platforms or has multiple different types of non-display use. As noted above, non-display data can be used by data recipients for a wide variety of profit-generating purposes as well as purposes that do not directly generate revenues but nonetheless substantially reduce the recipient's costs by automating certain functions. This segmented fee structure is not unfairly discriminatory because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

In contrast to non-display use for operation of a Trading Platform, the Exchange benefits from other non-display use by market participants (including the fact that the Exchange receives orders resulting from algorithms and routers) and both the Exchange and other participants benefit from other non-display use by market participants when such use is to support more broadly beneficial functions such as risk management and compliance. The Exchange believes

that, regarding non-display use other than for operation of a Trading Platform, it is not unreasonably discriminatory to charge a lower rate than that which is charged to a Firm operating a Trading Platform based on the Exchange's desire to encourage other non-display use by market participants. **With respect to other ATSS and other exchanges, the Exchange reiterates that approximately two-thirds of registered ATSS and several exchange competitors of the Exchange have not subscribed to any Exchange Data Feeds.⁶² Accordingly, ATSS and other exchanges clearly have a choice whether to subscribe to the Exchange Data Feeds.**

The Exchange believes that it is not unreasonably discriminatory to charge a single fee for an operator of Trading Platforms that operates more than one Trading Platform because operators of Trading Platforms are many times viewed as a single competing venue or group, even if there a multiple liquidity pools operated by the same competitor. The Exchange again notes that certain competitors to the Exchange charge for non-display usage per Trading Platform,⁶³ in contrast to the Exchange's proposal. In turn, to the extent they subscribe to Exchange Data Feeds, these same competitors will benefit from the Exchange's pricing model to the extent they operate multiple Trading Platforms (as most do) by paying a single fee rather than paying for each Trading Platform that they operate that consumes Exchange Data Feeds.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the Exchange Data Feeds are not unfairly discriminatory.



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

In accordance with Section 6(b)(8) of the Act,⁶⁴ the Exchange does not believe that the

⁶² See [supra](#) note 52 and accompanying text; see also [supra](#) note 53.

⁶³ See [supra](#) notes 20-21.

⁶⁴ 15 U.S.C. 78f(b)(8).

proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange does not believe that the proposed fees for Exchange Data Feeds place certain market participants at a relative disadvantage to other market participants because, as noted above, the proposed fees are associated with usage of Exchange Data Feeds by each market participant based on the type of business they operate, and the decision to subscribe to one or more Exchange Data Feeds is based on objective differences in usage of Exchange Data Feeds among different Firms, which are still ultimately in the control of any particular Firm, and such fees do not impose a barrier to entry to smaller participants. Accordingly, the proposed fees for Exchange Data Feeds do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed fees reflects the types of Exchange Data Feeds consumed by various market participants and their usage thereof.

Inter-Market Competition

The Exchange does not believe the proposed fees place an undue burden on competition on other SROs that is not necessary or appropriate. In particular, market participants are not forced to subscribe to any of the Exchange Data Feeds, as described above. Additionally, other exchanges have similar market data fees in place for their participants, but with comparable and in many cases higher rates for market data feeds.⁶⁵ The proposed fees are based on actual costs^{✖✖✖} and are designed to enable the Exchange to recoup its applicable costs with the possibility of a reasonable profit on its investment as described in the Purpose and Statutory Basis sections. Competing equities exchanges are free to adopt comparable fee structures subject to the SEC rule

⁶⁵ See [supra](#) notes 20-21; see [supra](#) note 23 and accompanying text.

filing process.

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 Act⁶⁶ and Rule 19b-4(f)(2)⁶⁷ 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MEMX-2023-02 on the subject line.

⁶⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

⁶⁷ 17 CFR 240.19b-4(f)(2).

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-2023-02. This file number should be included on the subject line if e-mail 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 (<http://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, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions

should refer to File Number SR-MEMX-2023-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁸

Sherry R. Haywood

Assistant Secretary

⁶⁸ 17 CFR 200.30-3(a)(12).