

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90849; File No. SR-MEMX-2020-17)

January 5, 2021

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Exchange Rule 11.8(b) Relating to the Handling of Limit Orders When the National Best Bid or Offer is Not Available

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 December 29, 2020, MEMX LLC (“MEMX” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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 Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4.

Rule 11.8(b) as it relates to the System's⁵ handling of Limit Orders⁶ when the national best bid or offer ("NBBO") is not available. The text of the proposed rule change is provided in Exhibit 5.

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

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

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

1. Purpose

On May 4, 2020, the Commission approved the Exchange's Form 1 application for registration as a national securities exchange, including the initial Rules of the Exchange.⁷ In preparation for the Exchange's launch on September 21, 2020, the Exchange adopted in August 2020 certain additional Rules relating to the System's handling of Market Orders⁸ and Limit

⁵ As defined in Rule 1.5(gg), the Exchange's "System" is the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing. As defined in Rule 1.5(jj), a "User" is a member of the Exchange ("Member") or sponsored participant of a Member who is authorized to obtain access to the System pursuant to Rule 11.3.

⁶ Limit Orders are described in Exchange Rule 11.8(b) and generally defined as an order to buy or sell a stated amount of a security at a specified price or better.

⁷ See Securities Exchange Act Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (the "Approval Order").

⁸ Market Orders are described in Exchange Rule 11.8(a) and generally defined as an order to buy or sell a stated amount of a security that is to be executed at the NBBO or better when the order reaches the Exchange.

Orders when the NBBO is not available.⁹ Specifically, the Exchange adopted Exchange Rule 11.8(a)(7), which provides that a Market Order received by the System when the NBBO is not available will be rejected or cancelled back to the entering User, and Exchange Rule 11.8(b)(9), which similarly provides that a Limit Order received by the System when the NBBO is not available will be rejected or cancelled back to the entering User. These Rules were based on language applicable to Pegged Orders¹⁰ set forth in Exchange Rule 11.8(c)(7) and were intended to match the handling of Market Orders and Limit Orders with the handling of Pegged Orders when the NBBO is not available under that Rule (i.e., that such orders will be rejected or cancelled back to the entering User).¹¹ The Exchange noted in the proposal to adopt Exchange Rules 11.8(a)(7) and 11.8(b)(9) that it believed that, at least in connection with the launch of the Exchange, it should not accept orders (of any type) when there is no available NBBO in the applicable security, as the Exchange believed that the absence of an NBBO may be indicative of a potential market problem and that many of the protections in place for the protection of investors may be absent when there is no NBBO.¹²

The Exchange now proposes to delete Exchange Rule 11.8(b)(9) to allow the System to accept Limit Orders when the NBBO is not available and handle such orders in accordance with the User's instructions and the Rules of the Exchange. Since its launch, the Exchange has had

⁹ See Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR-MEMX-2020-04).

¹⁰ In addition to Market Orders and Limit Orders, Pegged Orders are the third of three primary order types offered by the Exchange. Pegged Orders are described in Exchange Rules 11.6(h) and 11.8(c) and generally defined as an order that is pegged to a reference price and automatically re-prices in response to changes in the NBBO. The two types of peg instructions for Pegged Orders are: (1) Primary Peg, which pegs to the NBB (NBO) for buy (sell) orders; and (2) Midpoint Peg, which pegs to the midpoint of the NBBO.

¹¹ See Exchange Rule 11.8(c)(7).

¹² See supra note 9 at 51805.

direct experience with handling orders when the NBBO is not available, and the Exchange believes that potential problems applicable to Market Orders and Pegged Orders when the NBBO is not available are not applicable to Limit Orders. For instance, with respect to Market Orders, the Exchange believes that the absence of an NBBO may be problematic because such orders must, by definition, be executed at the NBBO or better when the order reaches the Exchange, and thus when no NBBO is available the System is not able to execute at the NBBO and does not have a price to reference for determining what constitutes an appropriate price.¹³ Moreover, because Market Orders are not subject to any further price limitations entered by the User, the System could execute an accepted Market Order when no NBBO is available against a marketable contra-side order resting on the Exchange that is priced far away from the last sale price or last disseminated NBBO, which the Exchange believes would rarely be intended. Therefore, to protect against executions of Market Orders at unintended price levels, the Exchange believes that rejecting or cancelling such orders is still appropriate. With respect to Pegged Orders, the Exchange believes that the absence of an NBBO may be problematic because such orders, by definition, must be pegged to (i) the NBB (NBO) for buy (sell) orders for a Primary Peg instruction, or (ii) the midpoint of the NBBO for a Midpoint Peg instruction, and thus when no NBBO is available there is no reference price to which such orders can be pegged. Therefore, the Exchange believes that rejecting or cancelling such orders is still appropriate. Accordingly, the Exchange believes the protection afforded by Exchange Rules 11.8(a)(7) and 11.8(c)(7) for Market Orders and Pegged Orders when the NBBO is not available (i.e., that such orders will be rejected or cancelled back to the entering User) is still appropriate and the Exchange does not propose to delete or amend these Rules.

¹³ See Exchange Rule 11.8(b)(9).

Unlike Market Orders and Pegged Orders, a Limit Order requires the entering User to specify a dollar price that the System must execute the order at or better than instead of execution of the order being based on the NBBO. Therefore, for Limit Orders, the entering User is able to establish its own protection in the form of a specified price limitation. Thus, even when the NBBO is not available, the possibility of executing at an unintended price is not present for a Limit Order because the User must specify the most aggressive price at which it is willing to execute. Additionally, the Exchange believes that the proposed change would result in Members sending additional liquidity in the form of Limit Orders to the Exchange when there is otherwise no available NBBO, which would deepen the liquidity on the Exchange and potentially establish the NBBO to the benefit of all Members and the market generally.

The Exchange also notes that its initial Rules previously approved by the Commission in the Approval Order did not contain Exchange Rule 11.8(b)(9). Rather, as noted above, this provision was subsequently adopted by the Exchange in connection with the Exchange's initial launch so the Exchange could evaluate the necessity of this functionality while gaining operational experience and data. The Exchange now believes that the rejection of Limit Orders when no NBBO is available pursuant to Exchange Rule 11.8(b)(9) is unnecessary for the reasons stated above. The Exchange also notes that deletion of Exchange Rule 11.8(b)(9) is consistent with the existing rules and functionality of other exchanges.¹⁴

¹⁴ See, e.g., Cboe EDGX Exchange, Inc. Rule 11.8(b) regarding limit orders, which does not have a comparable provision to Exchange Rule 11.8(b)(9); Cboe EDGA Exchange, Inc. Rule 11.8(b) regarding limit orders, which does not have a comparable provision to Exchange Rule 11.8(b)(9).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the Exchange's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and Section 6(b)(8) of the Act,¹⁶ which requires that the Exchange's rules not impose any burden on competition that is not necessary or appropriate.

As noted above, the proposed change is intended to revert the System's handling of Limit Orders when there is no available NBBO to the functionality contemplated by the Exchange's initial Rules previously approved by the Commission in the Approval Order. The Exchange believes that permitting Members to submit Limit Orders to the Exchange when the NBBO is not available is appropriate and consistent with the Act as the Exchange believes that its Members would want to utilize this functionality, thereby resulting in additional liquidity in the form of Limit Orders being sent to the Exchange when there is otherwise no available NBBO, which would deepen the liquidity on the Exchange and potentially establish the NBBO to the benefit of all Members and the market generally. Furthermore, the proposed change would make the System's functionality consistent with the functionality offered by certain other exchanges with respect to accepting Limit Orders when no NBBO is available.¹⁷ Thus, the Exchange believes the proposed changes in this regard would promote just and equitable principles of trade, remove

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ See supra note 14.

impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, would protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange reiterates that the proposed rule change would revert the System's functionality to that contemplated by the Exchange's initial Rules previously approved by the Commission in the Approval Order, which is also consistent with the functionality offered by other exchanges.¹⁸ The Exchange believes that the proposed rule change would not burden intramarket competition because the ability to submit Limit Orders to the Exchange when the NBBO is not available would be open to all Members. The Exchange believes that the proposed rule change would not burden, but rather increase, intermarket competition as the Exchange believes [sic] that permitting Members to submit Limit Orders to the Exchange when the NBBO is not available would ultimately enable the Exchange to better compete with other exchanges that offer this same functionality. Thus, the Exchange believes this proposed rule change will facilitate fair competition among national securities exchanges. In addition, the Exchange believes the proposed rule change will all benefit Members and market participants in that the change would allow for additional orders, particularly when there is not already an active market in a particular security, to be sent to the Exchange, thereby deepening the Exchange's liquidity and possibly establishing the NBBO when it is not otherwise available.

¹⁸ See supra note 14.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act²¹ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.

The proposed change will allow the Exchange to accept Limit Orders when the NBBO is not available, in which case the Exchange will handle such orders in accordance with the User’s instructions and the Rules of the Exchange. The Exchange believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposed functionality will allow market participants to submit limit orders to MEMX when

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6)(iii).

the NBBO is not available, just as they can do to other exchanges, which can provide additional liquidity on MEMX and contribute to the formation of two-sided quotes that are publicly available. In addition, the Exchange states in its filing that its proposal is consistent with the initial applicable rule for the Exchange that was previously approved by the Commission in connection with its initial exchange registration, and also is consistent with existing rules and functionality offered by other exchanges.²³ The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Therefore, the Commission hereby waives the operative delay and designates the proposal as operative upon filing.²⁴

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 under Section 19(b)(2)(B)²⁵ of the Act 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:

²³ See supra note 14. In its filing, the Exchange stated that it proposes to implement the proposed rule change on or about January 15, 2021.

²⁴ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(2)(B).

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-2020-17 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MEMX-2020-17. 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, DC 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 comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-MEMX-2020-17 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.²⁶

J. Matthew DeLesDernier
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).