

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93381; File No. SR-MEMX-2021-12)

October 19, 2021

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt a Billing Errors Policy and Enable the Exchange to Agree to Alternative Payment Instructions for the Exchange's Direct Debit Collection Process

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 12, 2021, MEMX LLC ("MEMX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 Exchange Rule 15.3 to: (a) adopt a policy relating to billing errors that is substantially similar to the policy adopted by another group of exchanges; (b) enable the Exchange, upon request, to permit a member of the Exchange ("Member") or applicant for registration as such to provide alternative payment instructions (i.e., other than a National Securities Clearing Corporation ("NSCC") clearing account number, as currently required by Exchange Rule 15.3(a)) for purposes of the Exchange's direct debit process for the collection of fees and other monies due and owing to the Exchange; and (c) add paragraph headings and relocate certain existing text within the Rule. The text of the proposed rule change is provided in Exhibit 5.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Billing Errors Policy

The Exchange is proposing to adopt a policy relating to billing errors. Specifically, the Exchange proposes to adopt a new paragraph (c) in Rule 15.3 entitled, “Billing Errors,” which would provide that all fees and rebates assessed by the Exchange prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange would resolve such an error by crediting or debiting affected Members and non-Member customers of the Exchange (“Non-Members”) based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.³ The Exchange would apply the three month look back

³ The Exchange notes that the current policy in Rule 15.3(b), which states that all pricing disputes must be submitted no later than sixty (60) days after receipt of a billing invoice, will remain in place.

regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a pricing dispute.⁴

The purpose of the proposed change is to provide both the Exchange and its Members and Non-Members finality with respect to fees and rebates previously assessed by the Exchange and the ability to close their books after a specified time period. The Exchange notes that Rule 15.3(b) already requires that pricing disputes must be submitted to the Exchange in writing and accompanied by supporting documentation no later than 60 days after receipt of a billing invoice, which is designed to encourage prompt review of Exchange invoices so that any pricing disputes can be addressed in a timely manner. The Exchange believes the proposed change would further the goal of addressing billing discrepancies in a timely manner while the information and data underlying those charges (e.g., applicable fees and order information) is still easily and readily available, without further limiting the timeframe in which a pricing dispute may be submitted. This practice would avoid issues that may arise when billing errors are discovered long after they occurred and the parties have already prepared, and in some cases published, their books, and would conserve Exchange resources that would have to be expended to resolve untimely billing disputes. As such, the proposed rule change would alleviate administrative burdens related to prior billing errors, which could divert Exchange staff resources away from the Exchange's regulatory and business purposes.

⁴ For example, if the Exchange becomes aware of a transaction fee billing error on June 4, 2021, the Exchange will resolve the error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied to any impacted transactions during March, April and May 2021. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the June 2021 invoice, and therefore, transactions impacted after the end of the last full calendar month through the date of discovery (in this example, after May 31, 2021 through June 4, 2021), and thereafter, would be billed correctly.

The Exchange notes that the language of proposed Rule 15.3(c) is substantially similar to language included in the fee schedules of the four Cboe U.S. equities exchanges – Cboe BZX Exchange, Inc. (“Cboe BZX”),⁵ Cboe BYX Exchange, Inc. (“Cboe BYX”),⁶ Cboe EDGA Exchange, Inc. (“Cboe EDGA”),⁷ and Cboe EDGX Exchange, Inc. (“Cboe EDGX”).⁸ The Exchange also notes that a number of other exchanges have explicitly stated that they consider all fees to be final after a similar period of time.⁹ The proposed billing errors policy would apply to all fees and rebates assessed by the Exchange. Finally, the Exchange notes that the proposed billing errors policy is not intended to circumvent or supersede any audit process with respect to the Exchange’s market data offering, which is intended to ensure that market data recipients are in compliance with the terms of the applicable market data subscriber agreement. Thus, the

⁵ See Cboe BZX equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/). See also Securities Exchange Act Release No. 90897 (January 11, 2021), 86 FR 4161 (January 15, 2021) (SR-CboeBZX-2020-094).

⁶ See Cboe BYX equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/byx/). See also Securities Exchange Act Release No. 90899 (January 11, 2021), 86 FR 4156 (January 15, 2021) (SR-CboeBYX-2020-034).

⁷ See Cboe EDGA equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/edga/). See also Securities Exchange Act Release No. 90897 (January 11, 2021), 86 FR 4161 (January 15, 2021) (SR-CboeBZX-2020-094).

⁸ See Cboe EDGX equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/). See also Securities Exchange Act Release No. 90901 (January 11, 2021), 86 FR 4137 (January 15, 2021) (SR-CboeEDGX-2020-064).

⁹ See, e.g., Securities Exchange Act Release No. 34-91836 (May 11, 2021), 86 FR 26765 (May 17, 2021) (SR-BOX-2021-08); Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR-NYSECHX-2019-024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SRNYSENAT-2018-23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR-ISEGemini-2016-11).

proposed billing errors policy would not apply to, or otherwise affect the Exchange's or any market data recipient's ability to take a position with respect to, any fees identified through any such audit conducted by the Exchange.¹⁰

Alternative Payment Instructions for Direct Debit

The Exchange is also proposing to amend Rule 15.3(a) to enable the Exchange, upon request, to permit a Member or applicant for registration as such to provide alternative payment instructions (i.e., other than an NSCC clearing account number, as currently required by Rule 15.3(a)) for purposes of the Exchange's direct debit process for the collection of fees and other monies due and owing to the Exchange. Specifically, the proposed rule change would provide that the Exchange will, upon request, waive the current requirement in Rule 15.3(a) for a Member or applicant for registration as such to provide an NSCC clearing account number and instead require such Member or applicant to provide alternative payment instructions as agreed to by the Exchange for purposes of permitting the Exchange to debit any of the fees, fines, charges and/or other monetary sanctions or other monies due and owing to the Exchange listed in Rule 15.3(a). The proposed rule change would further provide that the Exchange reserves the right to require any such Member or applicant to provide an NSCC clearing account number for such purposes if the Exchange encounters repeated failed collection attempts using the alternative payment instructions.

The purpose of the proposed change is to provide the Exchange with the flexibility to agree to an alternative payment arrangement with a Member or applicant for registration as such, if such Member or applicant so requests, as the Exchange understands that certain Members or

¹⁰ The Exchange notes that it does not currently charge any fees for its market data, and therefore does not currently conduct audits of market data recipients, but may do so in the future.

applicants may have an operational burden associated with remitting payment to the Exchange through an NSCC clearing account. Under the proposed rule change, any such alternative payment instructions must: (i) be agreed to by the Exchange; and (ii) permit the Exchange to initiate the debit of any fees and other monies due and owing to the Exchange in a manner similar to the current requirement with respect to an NSCC clearing account (i.e., a direct debit process).¹¹ The requirement that such alternative payment instructions must be agreed to by the Exchange is intended to be an objective standard, and the Exchange's ability to agree to such alternative payment instructions would be exercised uniformly with respect to any Member or applicant that so requests to the extent such alternative payment instructions reasonably appear to permit the Exchange to utilize a direct debit process.

Addition of Paragraph Headings and Relocation of Existing Rule Text

Lastly, the Exchange proposes to add paragraph headings and relocate certain existing text within Rule 15.3 for organization purposes. Specifically, the Exchange is proposing to add paragraph headings to entitle paragraph (a) as "Collection Through Direct Debit"; paragraph (b) as "Pricing Disputes"; and proposed new paragraph (c) as "Billing Errors". Additionally, the Exchange is proposing to relocate existing Rule text related to pricing dispute procedures that is currently located in paragraph (a), which otherwise addresses procedures related to the Exchange's direct debit process for the collection of fees and other monies due and owing to the Exchange, to paragraph (b), which contains procedures related to pricing disputes, as the Exchange believes that including such Rule text in paragraph (b) is more appropriate. The Exchange is not proposing to amend any of the Rule text being relocated. These proposed

¹¹ See Securities Exchange Act Release No. 89784 (September 8, 2020), 85 FR 56672 (September 14, 2020) (SR-MEMX-2020-06) for additional details regarding the Exchange's direct debit process.

changes are non-substantive and are intended to provide greater context and organization within Rule 15.3 and make such Rule easier to navigate and understand.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5) of the Act,¹³ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 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. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(1)¹⁵ requirement that it be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange's Rules.

With respect to the proposed policy relating to billing errors, the Exchange believes that providing that all fees and rebates are final after three months (i.e., resolving billing errors only for the three full calendar months preceding the month in which the Exchange became aware of

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ Id.

¹⁵ 15 U.S.C. 78(b)(1).

the error) is reasonable and consistent with the Act as both the Exchange and its Members and Non-Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on billing errors, the Exchange and its Members and Non-Members would never be able to close their books with any confidence. As noted above, the Exchange believes this proposed change would conserve Exchange resources that would have to be expended to resolve untimely billing disputes, which could divert Exchange staff resources away from the Exchange's regulatory and business purposes. For these reasons, the Exchange believes this proposed change promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest. Furthermore, as noted above, the language of proposed Rule 15.3(c) is substantially similar to language included in the fee schedules of the four Cboe U.S. equities exchanges,¹⁶ and a number of other exchanges similarly consider their fees final after a similar period of time.¹⁷ As such, this proposed change does not raise any new or novel issues that have not been previously considered by the Commission. This proposed change is also equitable and not unfairly discriminatory because it would apply equally to all Members (and Non-Members that pay Exchange fees) and would apply in cases where either the Member (or Non-Member) discovers the error or the Exchange discovers the error.

¹⁶ See supra notes 7-10.

¹⁷ See supra note 11.

The Exchange believes the proposed change to enable the Exchange, upon request, to permit a Member or applicant for registration as such to provide alternative payment instructions (i.e., other than an NSCC clearing account number, as currently required by Rule 15.3) for purposes of the Exchange's direct debit collection process is appropriate and consistent with Section 6(b)(1) of the Act,¹⁸ as such change would provide the Exchange with the flexibility to agree to an alternative payment arrangement with a Member or applicant that has an operational burden associated with remitting payment to the Exchange through an NSCC clearing account, thereby enabling it to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the Exchange's Rules relating to payment of fees and other monies due and owing to the Exchange. The Exchange also believes that reserving the right to revert to the general rule (i.e., to require an NSCC clearing account number for direct debit purposes) with respect to any such Member or applicant if the Exchange encounters repeated failed collection attempts using such alternative payment instructions is appropriately designed to ensure that it is able to collect the fees and other monies due and owing to the Exchange through its standard collection process if warranted, and is thus consistent with the Act for similar reasons.

Additionally, as this proposed change is designed to give the Exchange and its Members flexibility regarding their payment arrangements while providing a safeguard by which the Exchange may revert to its standard collection process, the Exchange believes it would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open

¹⁸ 15 U.S.C. 78(b)(1).

market and a national market system, and, in general, protect investors and the public interest. This proposed change is also equitable and not unfairly discriminatory because it is based on objective standards and would apply equally to all Members and applicants for registration as such, as described above.

Finally, the Exchange believes the proposed changes to add paragraph headings and relocate certain existing Rule text related to pricing disputes to the appropriate paragraph within Rule 15.3 would remove impediments to and perfect the mechanism of a free and open market and a national market system, as such changes would provide greater context and organization within the Rule, which would assist Members in locating the relevant text within the Rule and therefore make the Rule easier to navigate and understand. As noted above, the Rule text being relocated is not being amended by this proposal. For the foregoing reasons, the Exchange believes these proposed changes are non-substantive and consistent with the Act.

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

The Exchange does not believe that the proposal will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the proposed billing errors policy, the proposal would establish a clearly defined timeframe for fees and rebates to be considered final that would apply equally to all Members and Non-Members. Additionally, as noted above, this proposed change is similar to rules of other exchanges and therefore does not raise any new or novel issues that have not been previously considered by the Commission.¹⁹ The proposed change to enable the Exchange to agree to alternative payment instructions for the Exchange's direct debit collection process would also apply equally to all Members and applicants for registration as such, as the opportunity to request that the Exchange

¹⁹ See supra notes 7-11.

agree to alternative payment instructions is available to any such Member or applicant and the Exchange's ability to agree to such alternative payment instructions would be exercised uniformly on an objective basis. Such change, as well as the non-substantive changes to add paragraph headings and relocate existing Rule text within Rule 15.3, do not address competitive issues but are concerned solely with the administration of the Exchange. For these reasons, the Exchange does not believe such proposed changes would impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets, and therefore, the Exchange does not believe the proposal will impose any burden on intermarket competition. Moreover, because the proposed changes would apply equally to all Members and Non-Members, as applicable, the Exchange does not believe the proposal would impose any burden on intramarket competition.

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)(iii) of the Act²⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.²¹

²⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

²¹ 17 CFR 240.19b-4. In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such

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-2021-12 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-2021-12. 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

shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2021-12 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.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).