

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98253; File No. SR-MEMX-2023-17)

August 30, 2023

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 19.3 (Criteria for Underlying Securities) to Accelerate the Listing of Options on Certain IPOs

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 August 22, 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 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 proposes to amend MEMX Rule 19.3 (Criteria for Underlying Securities) to permit an underlying security having a market capitalization of at least \$3 billion based upon the offering price of its initial public offering, to be listed and traded starting on or after the second business day following the initial public offering day. 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In August 2022, the Commission approved the Exchange’s adoption of rules to govern the trading of options on the Exchange by MEMX Options³, which will be a facility of the Exchange. The Exchange plans to launch MEMX Options in September 2023, and in advance of that launch, the Exchange is proposing a listings rule change applicable to options that is substantially similar in all material respects to the proposal approved from NYSE American LLC (“NYSE American”).⁴ Specifically, the Exchange proposes to amend Rule 19.3 (Criteria for Underlying Securities) to permit an underlying security having a market capitalization of at least \$3 billion based upon the offering price of its initial public offering, to be listed and traded starting on or after the second business day following the initial public offering day. This is a competitive filing that is based on a proposal recently submitted by NYSE American and approved by the Commission.⁵

The purpose of the proposed rule change is to amend Rule 19.3 (Criteria for Underlying Securities) (the “Rule”) as set forth below. Following discussions with other exchanges and a cross-section of industry participants and in coordination with the Listed Options Market Structure Working Group (“LOMSWG”) (collectively, the “Industry

³ See Securities Exchange Act Release No. 95445 (August 9, 2022), 87 FR 49884 (August 12, 2022) (SR-MEMX-2022-010).

⁴ See Securities Exchange Act Release No. 98013 (July 27, 2013) (Order Approving SR-NYSEAMER-2023-27).

⁵ Id.

Working Group”), the Exchange proposes to modify the standard set forth in the Rule for the listing and trading of options on “covered securities” to reduce the time to market.

Rule 19.3(b)(5)(A) sets forth the guidelines to be considered in evaluating for option transactions underlying securities that are “covered securities,” as defined in Section 18(b)(1)(A) of the Securities Act of 1933 (hereinafter “covered security” or “covered securities”).⁶ Currently, the Exchange permits the listing of an option on an underlying covered security that, amongst other things, has a market price of at least \$3.00 per share for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to The Options Clearing Corporation (“OCC”) to list and trade options on the underlying security (the “three-day lookback period”).⁷ Under the current rule, if an initial public offering (“IPO”) occurs on a Monday, the earliest date the Exchange could submit its listing certificate to OCC would be on Thursday, with the market price determined by the closing price over the three-day lookback period from Monday through Wednesday. The option on the IPO’d security would then be eligible for trading on the Exchange on Friday (i.e., within four business days of the IPO inclusive of the day the listing certificate is submitted to OCC).

The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities -- well above the \$3.00 per share threshold -- that

⁶ Rule 19.3(a) requires that, for underlying securities to be eligible for option transactions, such securities must be duly registered and be an “NMS stock” as defined in Rule 600 of Regulation NMS under the Act and will be characterized by a substantial number of outstanding shares which are widely held and actively traded. See MEMX Rule 19.3(a)(1) and (2).

⁷ See MEMX Rule 19.3(b)(5)(A). The Exchange is not proposing to make any changes to the guidelines for listing securities that are not a “covered security”. See MEMX Rule 19.3(b)(5)(B).

would obviate the need for the three-day lookback period. In this regard, the Industry Working Group has recently identified proposed changes to Rule 19.3(b)(5)(A) that would help options on covered securities that have a market capitalization of at least \$3 billion based upon the offering price of its IPO come to market earlier.⁸ The proposed change, which is intended to be harmonized across options exchanges, is designed to provide investors the opportunity to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted.⁹ The Exchange believes that options serve a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility in the trading of IPO'd securities.

Accordingly, the Exchange proposes to modify Rule 19.3 to waive the three-day lookback period for covered securities that have a market capitalization of at least \$3 billion based upon the offering price of the IPO of such securities and to allow options on such securities to be listed and traded starting on or after the second business day following the initial public offering day (i.e., not inclusive of the day of the IPO).¹⁰ NYSE American has reviewed trading data for IPO'd securities dating back to 2017 and

⁸ See proposed Rule 19.3(b)(5)(A)(2). The Exchange proposes a non-substantive change to number the existing and proposed criteria for covered securities as (1) and (2) of paragraph (5)(A). See proposed Rule 19.3(b)(5)(A).

⁹ While the Exchange acknowledges that market participants may utilize options for speculative purposes (in addition to as a hedging tool), the Exchange believes (as set forth below) that its surveillance technologies and procedures adequately address potential violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

¹⁰ The Exchange acknowledges that the Options Listing Procedures Plan (or "OLPP") requires that the listing certificate be provided to OCC no earlier than 12:01 a.m. and no later than 11:00 a.m. (Chicago time) on the trading day prior to the day on which trading is to begin. See the OLPP, at p. 3., available here: https://www.theocc.com/getmedia/198bfc93-5d51-443c-9e5bfd575a0a7d0f/options_listing_procedures_plan.pdf. The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series.

stated that it is unaware of any such security that achieved a market capitalization of \$3 billion based upon the offering price of its IPO that would not have also qualified for listing options based on the three-day lookback requirement. Specifically, NYSE American determined that 202 of the 1,179 IPOs that took place between January 1, 2017, and October 21, 2022, met the \$3 billion market capitalization/IPO offering price threshold. Options on all 202 of those IPO shares subsequently satisfied the three-day lookback requirement for listing and trading, i.e., none of these large IPOs closed below the \$3.00/share threshold during its first three days of its trading. As such, the Exchange believes the proposed capitalization threshold of \$3 billion based upon the offering price of its IPO is appropriate.

Under the proposed rule, if an IPO for a company with a market capitalization of \$3 billion based upon the offering price of its IPO occurs on a Monday, the Exchange could submit its listing certificate to OCC (to list and trade options on the IPO'd security) as soon as all the other requirements for listing are satisfied. If, on Tuesday, all requirements are deemed satisfied, the IPO'd security could then be eligible for trading on the Exchange on Wednesday (i.e., starting on or after the second business day following the IPO day). Thus, the proposal could potentially accelerate the listing of options on IPO'd securities by two days. The Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner without sacrificing investor protection. The Exchange represents that trading in IPO'd securities -- like all other securities traded on the Exchange -- is subject to surveillances administered by the Exchange and to cross-market surveillances administered by FINRA on behalf of the Exchange. Those surveillances are designed to detect violations of Exchange rules and

applicable federal securities laws.¹¹ The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of IPO'd securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.¹² As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, adequately address potential concerns regarding possible manipulation or price stability.

Implementation Date

The Exchange will announce the effective date of the proposed change by Notice distributed to all Members.¹³ The Exchange will coordinate the effective date to coincide with the implementation of the proposed change on the other options exchanges.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular, in that it is designed to prevent fraudulent and manipulative 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

¹¹ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a Regulatory Services Agreement. The Exchange is responsible for FINRA's performance under this Regulatory Services Agreement.

¹² See *supra* note 10.

¹³ The term "Member" shall mean any registered broker or dealer that has been admitted to membership in the Exchange. See Rule 1.5(p).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

and open market and a national market system, and, in general to protect investors and the public interest. In particular, the Exchange believes the proposed change would facilitate options transactions and would remove impediments to and perfect the mechanism of a free and open market and a national market system, which would, in turn, protect investors and the public interest by providing an avenue for options on IPO'd securities to come to market earlier. The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities -- well above the \$3.00 per share threshold -- that would obviate the need for the three-day lookback period. As noted above, NYSE American has reviewed trading data for IPO'd securities dating back to 2017 and it is unaware of an IPO'd security with a market capitalization of \$3 billion or more (based upon the offering price of its IPO) that subsequently would have failed to qualify for listing and trading as options under the three-day lookback requirement. The Exchange believes that the proposed amendment, which would be harmonized across options exchanges, would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing an avenue for investors to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted. The Exchange believes that options serve a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility to IPO'd securities.¹⁶

¹⁶ See supra note 10.

Further, as noted herein, the Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner (i.e., at least two business days post-IPO not inclusive of the day of the IPO) without sacrificing investor protection. The Exchange represents that trading in IPO'd securities -- like all other securities traded on the Exchange -- is subject to surveillances administered by the Exchange and to cross-market surveillances administered by FINRA on behalf of the Exchange. Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws.¹⁷ The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of IPO'd securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange, including wrongful efforts to manipulate the prices of those securities in order to bring them in compliance with the \$3.00/share threshold for the listing of options. As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, would adequately address potential concerns regarding possible manipulation or price stability.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by NYSE American that

¹⁷ See supra note 11.

was recently approved by the Commission.¹⁸ The Exchange anticipates that the other options exchanges will adopt substantively similar proposals¹⁹, such that there would be no burden on intermarket competition from the Exchange’s proposal. Accordingly, the proposed change is not meant to affect competition among the options exchanges. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and does not impose any undue burden on intermarket 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) of the Act²⁰ and Rule 19b-4(f)(6) thereunder.²¹

¹⁸ See *supra* note 4.

¹⁹ BOX Exchange LLC (“BOX”) recently filed a similar proposal. See Securities Exchange Act Release No. 98073 (August 7, 2023) (SR-BOX-2023-21).

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6)(iii). 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 shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)²² normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange requested the waiver, stating that it would ensure fair competition among the exchanges by allowing the Exchange to allow options on IPO'd securities to come to market sooner (i.e., at least two business days post-IPO not inclusive of the day of the IPO) without sacrificing investor protection. For these reasons, and because the proposed rule change does not raise any novel legal or regulatory issues, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal 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 to determine whether the proposed rule change should be approved or disapproved.

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii).

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MEMX-2023-17 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-2023-17. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3

p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MEMX-2023-17 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,

Assistant Secretary.

²⁵ 17 CFR 200.30-3(a)(12).