





1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> MEMX LLC (“MEMX” or the “Exchange”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend the Exchange’s fee schedule applicable to Members<sup>3</sup> (the “Fee Schedule”) pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately.

A notice of the proposed rule change for publication in the Federal Register is provided as Exhibit 1. The text of the proposed rule change is provided in Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by Exchange staff pursuant to authority delegated to it by the Board of Directors of the Exchange (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the proposed rule change.

The persons on the Exchange staff prepared to respond to questions and comments on the proposed rule change are:

Anders Franzon  
General Counsel

Molly Hartley  
Counsel

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

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

<sup>3</sup> See Exchange Rule 1.5(p).

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

a. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to modify the method by which the Exchange provides the rebate under Liquidity Provision Tiers 4, 5, and 6 such that if a Member achieves any of the criteria under Liquidity Provision Tiers 4, 5, or 6 in a given month, it would receive that rebate for that month and in the following month. As described further below, this differs from the current practice, whereby a Member receives the applicable rebate at the end of the month if it achieved the applicable criteria during that month, and the process resets the following month.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.<sup>4</sup> Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently

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<sup>4</sup> Market share percentage calculated as of June 1, 2023. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

represents approximately 3% of the overall market share.<sup>5</sup> The Exchange in particular operates a “Maker-Taker” model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

#### **Liquidity Provision Tiers**

The Exchange currently provides a base rebate of \$0.0018 per share for executions of Added Displayed Volume.<sup>6</sup> The Exchange also currently offers Liquidity Provision Tiers 1-6 under which a Member may receive an enhanced rebate for executions of Added Displayed Volume by achieving the corresponding required volume criteria for each such tier. The Exchange now proposes to modify the method by which it provides the rebate under Liquidity Provision Tiers 4, 5, and 6, as further described below.

With respect to Liquidity Provision Tier 4, the Exchange currently provides an enhanced rebate of \$0.0029 per share for executions of Added Displayed Volume for

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<sup>5</sup> Id.

<sup>6</sup> The base rebate for executions of Added Displayed Volume is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume” with a Fee Code of “B”, “D” or “J”, as applicable, on execution reports.

Members that qualify for such tier by achieving: (1) an ADAV<sup>7</sup> that is equal to or greater than 0.15% of the TCV<sup>8</sup>; or (2) a Displayed ADAV<sup>9</sup> that is equal to or greater than 0.02% of the TCV and a Step-Up Displayed ADAV<sup>10</sup> of the TCV from April 2023 that is equal to or greater than 50% of the Member's April 2023 Displayed ADAV of the TCV.<sup>11</sup>

With respect to Liquidity Provision Tier 5, the Exchange currently provides an enhanced rebate of \$0.0027 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving an ADAV that is equal to or greater than 0.075% of the TCV.<sup>12</sup> With respect to Liquidity Provision Tier 6, the Exchange currently provides an enhanced rebate of \$0.0024 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving a Displayed ADAV that is

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<sup>7</sup> As set forth on the Fee Schedule, "ADAV" means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and "Displayed ADAV" means ADAV with respect to displayed orders.

<sup>8</sup> As set forth on the Fee Schedule, "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

<sup>9</sup> As set forth on the Fee Schedule, "Non-Displayed ADAV" means ADAV with respect to non-displayed orders (including orders subject to Display-Price Sliding that receive price improvement when executed and Midpoint Peg orders).

<sup>10</sup> As set forth on the Fee Schedule, "Step-Up Displayed ADAV" means Displayed ADAV in the relevant baseline month subtracted from current Displayed ADAV.

<sup>11</sup> The pricing for Liquidity Provision Tier 4 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, Liquidity Provision Tier 4" with a Fee Code of "B4", "D4" or "J4", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

<sup>12</sup> The pricing for Liquidity Provision Tier 5 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, Liquidity Provision Tier 5" with a Fee Code of "B5", "D5" or "J5", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

equal to or greater than 0.007% of the TCV and has a Step-Up Displayed ADAV of the TCV from May 2023 that is equal to or greater than 50% of the Member's May 2023 Displayed ADAV of the TCV.<sup>13</sup>

The Exchange is not proposing to modify the rebates provided or qualification criteria of Liquidity Provision Tiers 4, 5, and 6 as described above. However, the Exchange now proposes to modify the method by which it will provide the rebates under Liquidity Provision Tiers 4, 5, and 6 and it will indicate this in a note under the Liquidity Provision Tiers pricing table on the Fee Schedule. Specifically, the Exchange will note: *“Members that qualify for Tier 4, 5, or 6 based on activity in a given month will also receive the associated Tier 4, 5, or 6 rebate during the following month.”* Effectively, this means that if a Member achieves the applicable criteria under any of the Liquidity Provision Tiers 4, 5, or 6 during a given month, that Member will receive that rebate for the total amount of Added Displayed Volume executed during that month and in the following month, even if they do not achieve the applicable criteria under that same Liquidity Provision Tier during that following month. This is different from the current practice, whereby the Exchange calculates Members' overall ADAV on a monthly basis, and Members that qualify for a Liquidity Provision Tier by achieving the applicable criteria receive the applicable enhanced rebate per share for all executions of Added Displayed Volume in that previous month. Accordingly, Members do not know whether

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<sup>13</sup> The pricing for Liquidity Provision Tier 6 is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume, Liquidity Provision Tier 6” with a Fee Code of “B6”, “D6” or “J6”, as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

they will receive the enhanced rebate at the time of execution, but rather, receive it at the end of the month based on their activity during that month.

To illustrate, the Exchange offers the following example: Under the current method, at the end of June 2023, the Exchange would calculate a Member's total ADAV for June 2023 and if that Member met either of the criteria under Liquidity Provision Tier 4, the Member would receive the enhanced rebate of \$0.0029 per share for the Added Displayed Volume it executed in June 2023. Under the new model, the Exchange will continue to calculate a Member's total ADAV at the end of June 2023, and will continue to provide \$0.0029 per share for the Member's Added Displayed execution volume in June 2023, but it will also provide \$0.0029 per share for the Added Displayed Volume the Member executes in July 2023 (regardless of the Member's activity in July 2023). Accordingly, in this example, the Member will be aware of the rebate it will receive under Liquidity Provision Tier 4 during the month of July 2023, regardless of what their July 2023 ADAV is, because it is awarded based on its June 2023 ADAV. The Exchange notes that although the enhanced rebate of \$0.0029 per share would be provided to the Member in July of 2023, if the Member in the example above did not qualify for Liquidity Provision Tier 4 based on their July 2023 ADAV, the Member would no longer qualify for the enhanced rebate of \$0.0029 per share for the Added Displayed Volume the Member executes in August 2023.

The tiered pricing structure for executions of Added Displayed Volume under the Liquidity Provision Tiers provides an incremental incentive for Members to strive for higher volume thresholds to receive higher enhanced rebates for such executions and, as such, is intended to encourage Members to maintain or increase their order flow,

primarily in the form of liquidity-adding volume, to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that the Liquidity Provision Tiers reflect a reasonable and competitive pricing structure that is right-sized and consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity. The proposed change does not modify any criteria or rebate provided under any of the Liquidity Provision Tiers, rather, it modifies the process by which rebates paid under Liquidity Provision Tier 4, 5, and 6 are awarded to Members, allowing Members to anticipate whether such rebate will apply at the time of execution based on whether the criteria was achieved in the prior month. The Exchange believes this method will provide Members with additional certainty when trading on the Exchange, which in turn, will incentivize Members to achieve certain volume thresholds on the Exchange on an ongoing basis.

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>15</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or

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<sup>14</sup> 15 U.S.C. 78f.

<sup>15</sup> 15 U.S.C. 78f(b)(4) and (5).

discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. The Exchange believes the proposal continues to reflect a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants.

The Exchange notes that volume-based incentives and discounts (such as tiers) have been widely adopted by exchanges (including the Exchange), and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that the proposed modification of the way it provides the rebate under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable and not unfairly discriminatory for these same reasons, as the tiers continue to provide Members with incremental incentives to achieve certain volume thresholds on the Exchange, are available to all Members on an equal basis, and, as described above, are reasonably designed to encourage Members to maintain or increase their order flow to the Exchange with an added layer of certainty in the rebate they will receive, if applicable.

The Exchange also believes that the proposed modification is appropriate to apply only to Liquidity Provision Tiers 4, 5, and 6 at this time given that the enhanced rebates provided under those specific Liquidity Provision Tiers (as opposed to Liquidity

Provision Tiers 1, 2, and 3<sup>16</sup>) are each less than \$0.0030 per share, which is the standard fee charged by the Exchange for orders that remove liquidity and also the highest transaction fee allowed by the Commission under Rule 610(c)(1) of Regulation NMS.<sup>17</sup> The Exchange considers this distinction relevant in light of the fact that this is the first time the Exchange will be providing rebates in this manner, and as such, would like to initiate this change under Liquidity Provision Tiers that provide rebates below the aforementioned standard fee for removing liquidity. Again, the Exchange believes that the application of its methodology of awarding rebates under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable, and not unfairly discriminatory, as there is a legitimate distinction between the rebates provided under these Liquidity Provision Tiers as opposed to Liquidity Provision Tiers 1, 2, and 3, and the opportunity to qualify for the Liquidity Provision Tiers is available equally to all Members of the Exchange.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act<sup>18</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

#### 4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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<sup>16</sup> Currently, the rebates provided under Liquidity Provision Tiers 1, 2, and 3 are \$0.00335, \$0.00325, and \$0.0031 per share, respectively.

<sup>17</sup> 17 CFR 242.610

<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>19</sup>

#### *Intramarket Competition*

As discussed above, the Exchange believes that the proposal would maintain a tiered pricing structure that is still consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and would incentivize market participants to direct additional order flow to the Exchange through volume-based tiers, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

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<sup>19</sup> Securities Exchange Act Release No 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

The Exchange does not believe that the proposed change would impose any burden on intramarket competition because such change will incentivize members to submit additional order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for each of the Liquidity Provision Tiers is still available to all Members that meet the associated volume requirements in any month. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *Intermarket Competition*

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no

single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels and processes at those other venues to be more favorable. As described above, the proposed change represents a competitive proposal through which the Exchange is seeking to incentivize market participants to direct additional order flow to the Exchange through volume-based tier rebates that are awarded based on a prior month's activity, thus allowing Members to have greater certainty of the rebate that they will receive when trading on the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing structures and incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors

and listed companies.”<sup>20</sup> The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. SEC, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”<sup>21</sup> Accordingly, the Exchange does not believe its proposed rule change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>22</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-

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<sup>20</sup> Id.

<sup>21</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

<sup>22</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing. 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) of the Act to determine whether the proposed rule change should be approved or disapproved.<sup>23</sup>

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1. Form of Notice of the Proposed Rule Change for Publication in the Federal Register.

Exhibit 5. Text of Proposed Fee Schedule.

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<sup>23</sup> 15 U.S.C. 78s(b)(2)(B).

EXHIBIT 1

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR-MEMX-2023-10]

[Insert date]

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on [insert date], MEMX LLC ("MEMX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members<sup>3</sup> (the "Fee Schedule") pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on June 1, 2023. 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

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

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

<sup>3</sup> See Exchange Rule 1.5(p).

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

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

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to modify the method by which the Exchange provides the rebate under Liquidity Provision Tiers 4, 5, and 6 such that if a Member achieves any of the criteria under Liquidity Provision Tiers 4, 5, or 6 in a given month, it would receive that rebate for that month and in the following month. As described further below, this differs from the current practice, whereby a Member receives the applicable rebate at the end of the month if it achieved the applicable criteria during that month, and the process resets the following month.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.<sup>4</sup> Thus, in such a low-

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<sup>4</sup> Market share percentage calculated as of June 1, 2023. The Exchange receives

concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 3% of the overall market share.<sup>5</sup> The Exchange in particular operates a “Maker-Taker” model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

### **Liquidity Provision Tiers**

The Exchange currently provides a base rebate of \$0.0018 per share for executions of Added Displayed Volume.<sup>6</sup> The Exchange also currently offers Liquidity Provision Tiers 1-6 under which a Member may receive an enhanced rebate for executions of Added Displayed Volume by achieving the corresponding required volume criteria for each such tier. The Exchange now proposes to modify the method by which it provides the rebate under Liquidity Provision Tiers 4, 5, and 6, as further described

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and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

<sup>5</sup> Id.

<sup>6</sup> The base rebate for executions of Added Displayed Volume is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume” with a Fee Code of “B”, “D” or “J”, as applicable, on execution reports.

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With respect to Liquidity Provision Tier 4, the Exchange currently provides an enhanced rebate of \$0.0029 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving: (1) an ADAV<sup>7</sup> that is equal to or greater than 0.15% of the TCV<sup>8</sup>; or (2) a Displayed ADAV<sup>9</sup> that is equal to or greater than 0.02% of the TCV and a Step-Up Displayed ADAV<sup>10</sup> of the TCV from April 2023 that is equal to or greater than 50% of the Member's April 2023 Displayed ADAV of the TCV.<sup>11</sup>

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<sup>8</sup> As set forth on the Fee Schedule, "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

<sup>9</sup> As set forth on the Fee Schedule, "Non-Displayed ADAV" means ADAV with respect to non-displayed orders (including orders subject to Display-Price Sliding that receive price improvement when executed and Midpoint Peg orders).

<sup>10</sup> As set forth on the Fee Schedule, "Step-Up Displayed ADAV" means Displayed ADAV in the relevant baseline month subtracted from current Displayed ADAV.

<sup>11</sup> The pricing for Liquidity Provision Tier 4 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, Liquidity Provision Tier 4" with a Fee Code of "B4", "D4" or "J4", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

<sup>12</sup> The pricing for Liquidity Provision Tier 5 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, Liquidity

provides an enhanced rebate of \$0.0024 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving a Displayed ADAV that is equal to or greater than 0.007% of the TCV and has a Step-Up Displayed ADAV of the TCV from May 2023 that is equal to or greater than 50% of the Member's May 2023 Displayed ADAV of the TCV.<sup>13</sup>

The Exchange is not proposing to modify the rebates provided or qualification criteria of Liquidity Provision Tiers 4, 5, and 6 as described above. However, the Exchange now proposes to modify the method by which it will provide the rebates under Liquidity Provision Tiers 4, 5, and 6 and it will indicate this in a note under the Liquidity Provision Tiers pricing table on the Fee Schedule. Specifically, the Exchange will note: *“Members that qualify for Tier 4, 5, or 6 based on activity in a given month will also receive the associated Tier 4, 5, or 6 rebate during the following month.”* Effectively, this means that if a Member achieves the applicable criteria under any of the Liquidity Provision Tiers 4, 5, or 6 during a given month, that Member will receive that rebate for the total amount of Added Displayed Volume executed during that month and in the following month, even if they do not achieve the applicable criteria under that same Liquidity Provision Tier during that following month. This is different from the current practice, whereby the Exchange calculates Members' overall ADAV on a monthly basis, and Members that qualify for a Liquidity Provision Tier by achieving the applicable

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Provision Tier 5” with a Fee Code of “B5”, “D5” or “J5”, as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

<sup>13</sup> The pricing for Liquidity Provision Tier 6 is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume, Liquidity Provision Tier 6” with a Fee Code of “B6”, “D6” or “J6”, as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

criteria receive the applicable enhanced rebate per share for all executions of Added Displayed Volume in that previous month. Accordingly, Members do not know whether they will receive the enhanced rebate at the time of execution, but rather, receive it at the end of the month based on their activity during that month.

To illustrate, the Exchange offers the following example: Under the current method, at the end of June 2023, the Exchange would calculate a Member's total ADAV for June 2023 and if that Member met either of the criteria under Liquidity Provision Tier 4, the Member would receive the enhanced rebate of \$0.0029 per share for the Added Displayed Volume it executed in June 2023. Under the new model, the Exchange will continue to calculate a Member's total ADAV at the end of June 2023, and will continue to provide \$0.0029 per share for the Member's Added Displayed execution volume in June 2023, but it will also provide \$0.0029 per share for the Added Displayed Volume the Member executes in July 2023 (regardless of the Member's activity in July 2023). Accordingly, in this example, the Member will be aware of the rebate it will receive under Liquidity Provision Tier 4 during the month of July 2023, regardless of what their July 2023 ADAV is, because it is awarded based on its June 2023 ADAV. The Exchange notes that although the enhanced rebate of \$0.0029 per share would be provided to the Member in July of 2023, if the Member in the example above did not qualify for Liquidity Provision Tier 4 based on their July 2023 ADAV, the Member would no longer qualify for the enhanced rebate of \$0.0029 per share for the Added Displayed Volume the Member executes in August 2023.

The tiered pricing structure for executions of Added Displayed Volume under the Liquidity Provision Tiers provides an incremental incentive for Members to strive for

higher volume thresholds to receive higher enhanced rebates for such executions and, as such, is intended to encourage Members to maintain or increase their order flow, primarily in the form of liquidity-adding volume, to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that the Liquidity Provision Tiers reflect a reasonable and competitive pricing structure that is right-sized and consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity. The proposed change does not modify any criteria or rebate provided under any of the Liquidity Provision Tiers, rather, it modifies the process by which rebates paid under Liquidity Provision Tier 4, 5, and 6 are awarded to Members, allowing Members to anticipate whether such rebate will apply at the time of execution based on whether the criteria was achieved in the prior month. The Exchange believes this method will provide Members with additional certainty when trading on the Exchange, which in turn, will incentivize Members to achieve certain volume thresholds on the Exchange on an ongoing basis.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>15</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>14</sup> 15 U.S.C. 78f.

<sup>15</sup> 15 U.S.C. 78f(b)(4) and (5).

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. The Exchange believes the proposal continues to reflect a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants.

The Exchange notes that volume-based incentives and discounts (such as tiers) have been widely adopted by exchanges (including the Exchange), and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that the proposed modification of the way it provides the rebate under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable and not unfairly discriminatory for these same reasons, as the tiers continue to provide Members with incremental incentives to achieve certain volume thresholds on the Exchange, are available to all Members on an equal basis, and, as described above, are reasonably designed to encourage Members to maintain or increase their order flow to the Exchange with an added layer of certainty in the rebate they will receive, if applicable.

The Exchange also believes that the proposed modification is appropriate to apply

only to Liquidity Provision Tiers 4, 5, and 6 at this time given that the enhanced rebates provided under those specific Liquidity Provision Tiers (as opposed to Liquidity Provision Tiers 1, 2, and 3<sup>16</sup>) are each less than \$0.0030 per share, which is the standard fee charged by the Exchange for orders that remove liquidity and also the highest transaction fee allowed by the Commission under Rule 610(c)(1) of Regulation NMS.<sup>17</sup> The Exchange considers this distinction relevant in light of the fact that this is the first time the Exchange will be providing rebates in this manner, and as such, would like to initiate this change under Liquidity Provision Tiers that provide rebates below the aforementioned standard fee for removing liquidity. Again, the Exchange believes that the application of its methodology of awarding rebates under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable, and not unfairly discriminatory, as there is a legitimate distinction between the rebates provided under these Liquidity Provision Tiers as opposed to Liquidity Provision Tiers 1, 2, and 3, and the opportunity to qualify for the Liquidity Provision Tiers is available equally to all Members of the Exchange.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act<sup>18</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

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<sup>16</sup> Currently, the rebates provided under Liquidity Provision Tiers 1, 2, and 3 are \$0.00335, \$0.00325, and \$0.0031 per share, respectively.

<sup>17</sup> 17 CFR 242.610

<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

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

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>19</sup>

*Intramarket Competition*

As discussed above, the Exchange believes that the proposal would maintain a tiered pricing structure that is still consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and would incentivize market participants to direct additional order flow to the Exchange through volume-based tiers, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders

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<sup>19</sup> See supra note 18.

to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

The Exchange does not believe that the proposed change would impose any burden on intramarket competition because such change will incentivize members to submit additional order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for each of the Liquidity Provision Tiers is still available to all Members that meet the associated volume requirements in any month. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *Intermarket Competition*

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange

currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels and processes at those other venues to be more favorable. As described above, the proposed change represents a competitive proposal through which the Exchange is seeking to incentivize market participants to direct additional order flow to the Exchange through volume-based tier rebates that are awarded based on a prior month's activity, thus allowing Members to have greater certainty of the rebate that they will receive when trading on the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing structures and incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful

in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>20</sup> The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. SEC, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>21</sup> Accordingly, the Exchange does not believe its proposed rule change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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 Act<sup>22</sup> and Rule 19b-4(f)(2)<sup>23</sup> 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

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<sup>20</sup> Id.

<sup>21</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

<sup>22</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>23</sup> 17 CFR 240.19b-4(f)(2).

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](mailto:rule-comments@sec.gov). Please include File Number SR-MEMX-2023-10 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-2023-10. 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; the Commission does not 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-2023-10 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.<sup>24</sup>

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<sup>24</sup> 17 CFR 200.30-3(a)(12).

**Exhibit 5**

Proposed new language is underlined; Proposed deletions are in [brackets].

**MEMX Fee Schedule  
(EFFECTIVE JUNE 1, 2023)**

**Transaction Fees**

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**Liquidity Provision Tiers**

<b>Tier</b>	<b>Rebate Per Share</b>	<b>Required Criteria</b>
Tier 1	\$(0.00335)	Member has an ADAV (excluding Retail Orders) $\geq$ 0.45% of the TCV
Tier 2	\$(0.00325)	Member has (1) an ADAV (excluding Retail Orders) $\geq$ 0.25% of the TCV; and (2) a Non-Displayed ADAV $\geq$ 4,000,000 shares
Tier 3	\$(0.0031)	Member has an ADAV $\geq$ 0.20% of the TCV
Tier 4*	\$(0.0029)	Member has (1) an ADAV $\geq$ 0.15% of the TCV; or (2) a Displayed ADAV $\geq$ 0.02% of the TCV and a Step-Up Displayed ADAV of the TCV from April 2023 $\geq$ 50% of the Member's April 2023 Displayed ADAV of the TCV**
Tier 5*	\$(0.0027)	Member has an ADAV $\geq$ 0.075% of the TCV
Tier 6*	\$(0.0024)	Member has a Displayed ADAV $\geq$ 0.007% of the TCV and has a Step-Up Displayed ADAV of the TCV from May 2023 $\geq$ 50% of the Member's May 2023 Displayed ADAV of the TCV***

\* Members that qualify for Tier 4, 5, or 6 based on activity in a given month will also receive the associated Tier 4, 5, or 6 rebate during the following month.

\*\* Criteria (2) of Liquidity Provision Tier 4 will expire no later than October 31, 2023.

\*\*\* Liquidity Provision Tier 6 will expire no later than November 30, 2023.

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