

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² 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 Members³ and non-Members of the Exchange pursuant to Exchange Rules 15.1(a) and (c) related to the Options Regulatory Fee (“ORF”).

A notice of the proposed rule change for publication in the Federal Register is provided as Exhibit 1, and 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:

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A Member is defined as “any registered broker or dealer that has been admitted to membership in the Exchange.” See Exchange Rule 1.5(p).

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

a. Purpose

The Exchange proposes to amend its Options Fee Schedule related to the ORF to remove the current sunset date of May 31, 2024, and thus continue charging the previously established ORF in the amount of \$0.0015 per contract side. As discussed herein, the ORF sunset was initially included to provide time for the Exchange to discuss alternative ORF models with its Members. However, those discussions have made clear that there is no consensus among market participants on a path forward that would address industry concerns in a manner that would effect change broadly across all U.S. options exchanges. Thus, while the Exchange continues to support additional dialogue on ORF reform, it believes that such reform efforts must be lead, in the first instance, by the Commission itself, with any requirements applied not only to the Exchange, but to each of the sixteen (16) other options exchanges as well. In the interim, it is necessary for the Exchange to continue to fund its regulatory program via ORF so that it can compete on equal footing with incumbent exchanges, each of which charge similar regulatory fees in amounts that far exceed the relatively modest amounts collected by the Exchange.

As background, MEMX previously filed a proposal to establish an ORF in the amount of \$0.0015 per contract side that would automatically sunset on September 30, 2024 (the "Initial ORF Filing").⁴ The Initial ORF Filing was published for comment in

⁴ See Securities Exchange Act Release No. 98585 (September 28, 2023), 88 FR 68692 (October 4, 2023) (SR-MEMX-2023-25).

the Federal Register on October 4, 2023.⁵ The Commission received no comments on the Initial ORF Filing before November 24, 2023. On that date, the Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule to Establish an Options Regulatory Fee (“the OIP”) and requested public comment and additional information on various aspects of the Initial ORF Filing.⁶ To date, the Commission has received no comment letters in response to the OIP. The Exchange withdrew the Initial ORF Filing on December 1, 2023 and submitted a new proposal for immediate effectiveness (“Second ORF Filing”).⁷

The Second Filing and Subsequent Filings proposed the same fee as in the Initial ORF Filing, but with a modified sunset date of May 31, 2024, which was four months prior to the proposed sunset date in the Initial ORF Filing. At this time, the Exchange proposes to remove the automatic sunset date of May 31, 2024, as described more fully below, in order to compete on a level playing field with the sixteen (16) other registered options exchanges that are allowed to recoup a portion of their regulatory costs via the ORF.

⁵ See supra note 4.

⁶ See Securities Exchange Act Release No. 99017 (November 24, 2023), 88 FR 83590 (November 30, 2023) (SR-MEMX-2023-25). Additionally, on November 24, 2023, solely for the purposes of consistent billing for the entire month of November 2023, the Exchange filed SR-MEMX-2023-31 with the Commission, which proposed to keep the Initial ORF rate of \$0.0015 per contract side that had been charged since September 27th in place for November 24 through November 30, 2023. See Securities Exchange Act Release No. 99112 (December 7, 2023) (SR-MEMX-2023-31).

⁷ In order to make certain clarifying changes, the Exchange withdrew the Second ORF Filing on December 13, 2023, and submitted a third proposal for immediate effectiveness (“Third ORF Filing”). Again, in order to make certain clarifying changes, the Exchange withdrew the Third ORF Filing on December 19, 2023, and submitted a fourth proposal for immediate effectiveness (“Fourth ORF Filing”). On December 20, 2023, in order to correct an inadvertent administrative error, the Exchange withdrew the Fourth ORF Filing and submitted a fifth proposal for immediate effectiveness (“Fifth ORF Filing” and together with the Third ORF Filing and Fourth ORF Filing, the “Subsequent Filings”).

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Members' customer options business, including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. Currently, all other registered options exchanges impose ORF on their members, and those exchanges also charge ORF for executions occurring on MEMX Options cleared by their customers.⁸

⁸ See Securities Exchange Act Release Nos. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008) (SR-CBOE-2008-05) (notice of filing and immediate effectiveness of Cboe Exchange, Inc. ("CBOE") adopting an ORF applicable to transactions across all options exchanges); 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100) (notice of filing and immediate effectiveness of Nasdaq PHLX LLC ("Phlx") adopting an ORF applicable to transactions across all options exchanges); 61154 (December 11, 2009), 74 FR 67278 (December 18, 2009) (SR-ISE-2009-105) (notice of filing and immediate effectiveness of Nasdaq ISE, LLC ("ISE") adopting an ORF applicable to transactions across all options exchanges); 61388 (January 20, 2010), 75 FR 4431 (January 27, 2010) (SR-BX-2010-001) (notice of filing and immediate effectiveness of Nasdaq OMX BX, Inc. ("BX") adopting an ORF applicable to transactions across all options exchanges); 70200 (August 14, 2013) 78 FR 51242 (August 20, 2013) (SR- Topaz-2013-01) (notice of filing and immediate effectiveness of Nasdaq GEMX, LLC ("GEMX"), formerly known as ISE Gemini and Topaz Exchange, adopting an ORF applicable to transactions across all options exchanges); 64400 (May 4, 2011), 76 FR 27118 (May 10, 2011) (SR-NYSEAmex-2011-27) (notice of filing and immediate effectiveness of NYSE Amex LLC ("NYSE AMEX") adopting an ORF applicable to transactions across all options exchanges); 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (SR-NYSEArca-2011-20) (notice of filing and immediate effectiveness of NYSE Arca, Inc. ("NYSE Arca") adopting an ORF applicable to transactions across all options exchanges); 65913 (December 8, 2011), 76 FR 77883 (December 14, 2011) (SR-NASDAQ-2011-163) (notice of filing and immediate effectiveness of Nasdaq Options Market ("NOM") adopting an ORF applicable to transactions across all options exchanges); 66979 (May 14, 2012), 77 FR 29740 (May 18, 2012) (SR-BOX-2012-002) (notice of filing and immediate effectiveness of BOX Options Exchange LLC ("BOX") adopting an ORF applicable to transactions across all options exchanges); 67596 (August 6, 2012), 77 FR 47902 (August 10, 2012) (SR-C2-2012-023) (notice of filing and immediate effectiveness of C2 Options Exchange, Inc. ("C2") adopting an ORF applicable to transactions across all options exchanges); 68711 (January 23, 2013) 78 FR 6155 (January 29, 2013) (SR-MIAX-2013-01) (notice of filing and immediate effectiveness of Miami International Securities Exchange LLC ("MIAX") adopting an ORF applicable to transactions across all options exchanges); 74214 (February 5, 2015), 80 FR 7665 (February 11, 2015) (SR-BATS-2015-08) (notice of filing and immediate effectiveness of Cboe BZX Exchange, Inc. ("BZX") formerly known as BATS, adopting an ORF applicable to transactions across all options exchanges); 80025 (February 13, 2017) 82 FR 11081 (February 17,

The Exchange notes that in 2019, the Commission issued suspensions of and orders instituting proceedings to determine whether to approve or disapprove a proposed rule change to modify the Options Regulatory Fee of NYSE American, NYSE Arca, MIAX, MIAX Pearl, MIAX Emerald, Cboe, Cboe EDGX Options, and C2.⁹ Each of those exchanges had filed to increase their ORF, and the Commission indicated that each of those filings lacked detail and specificity, signaling that more information was needed to speak to whether the proposed increased ORFs were reasonable, equitably allocated and not unfairly discriminatory, particularly given that the ORF is assessed on transactions that clear in the “customer” range and regardless of the exchange on which the transaction occurs. The Commission also noted that the filings provided only broad general statements regarding options transaction volume and did not provide any information on those exchanges’ historic or projected options regulatory costs (including the costs of regulating activity that cleared in the “customer” range and the costs of

2017) (SR-BatsEDGX-2017-04) (notice of filing and immediate effectiveness of Cboe EDGX Exchange, Inc. (“EDGX”) formerly known as Bats EDGX Exchange, Inc., adopting an ORF applicable to transactions across all options exchanges); 80875 (June 7, 2017) 82 FR 27096 (June 13, 2017) (SR-PEARL-2017-26) (notice of filing and immediate effectiveness of MIAX Pearl, LLC (“MIAX Pearl”) adopting an ORF applicable to transactions across all options exchanges); 85127 (February 13, 2019) 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03) (notice of filing and immediate effectiveness of Nasdaq MRX, LLC (“MRX”) adopting an ORF applicable to transactions across all options exchanges); 85251 (March 6, 2019) 84 FR 8931 (March 12, 2019) (SR-EMERALD-2019-01) (notice of filing and immediate effectiveness of MIAX Emerald LLC (“MIAX Emerald”) adopting an ORF applicable to transactions across all options exchanges).

⁹ See Securities Exchange Act Release No. 87168 (September 30, 2019), 84 FR 53210 (October 4, 2019) (SR-Emerald-2019-29); Securities Exchange Act Release No. 87167 (September 30, 2019), 84 FR 53189 (October 4, 2019) (SR-PEARL-2019-23); Securities Exchange Act Release No. 87169 (September 30, 2019), 84 FR 53195 (October 4, 2019) (SR-MIAX-2019-35); Securities Exchange Act Release No. 87170 (September 30, 2019), 84 FR 53213 (October 4, 2019) (SR-CBOE-2019-040); Securities Exchange Act Release No. 87172 (September 30, 2019) 84 FR 53192 (October 4, 2019) (SR-CboeEDGX-2019-051); Securities Exchange Act Release No. 87171 (September 30, 2019), 84 FR 53200 (October 4, 2019) (SR-C2-2019-018); Securities Exchange Act Release No. 86832 (August 30, 2019), 84 FR 46980 (September 6, 2019) (SR-NYSEArca-2019-49); Securities Exchange Act Release No. 86833 (August 30, 2019) 84 FR 47029 (September 6, 2019) (SR-NYSEAMER-2019-27).

regulating activity that occurred off exchange), the amount of regulatory revenue they had generated and expected to generate from the ORF as well as other sources, or the “material portion” of options regulatory expenses that they sought to recover from the ORF. Each of those exchanges withdrew their filings, but continue charging ORF today as discussed above. Since that time, MEMX Options is the first new options exchange to launch and as noted previously, its Initial ORF Filing was also suspended.¹⁰ Unlike its competitors noted above, however, the Exchange is the only exchange that did not have a previously implemented ORF to continue charging notwithstanding said suspensions. As such, the Exchange proposed to establish an ORF but implemented a sunset date of May 31, 2024, in order to allow it time to inform its approach to the ORF moving forward.

MEMX is a new exchange operator founded by a diverse group of market participants to bring competition to the U.S. securities markets. Over the past months, the Exchange has engaged with retail brokers, market makers, and other options market participants on potential paths to address industry concerns about existing ORF practices. The result of those efforts have made clear that there is no consensus among market participants on a path forward that would address their stated concerns in a manner that would effect change broadly across all U.S. options exchanges. As such, the Exchange proposes to continue to collect ORF as other options exchanges currently do. While the Exchange is open to ORF reform, it is critical that the Commission treat all exchanges equally as it relates to the ability to fund their regulatory programs.

As a new exchange, not having the opportunity to fund its regulatory program through the same regulatory fee charged by every other options exchange would place an

¹⁰ See supra note 6.

undue competitive disadvantage upon the Exchange's regulatory program and options business as a whole. Further, the Exchange emphasizes that other exchanges will be charging ORF for transactions occurring on MEMX Options, and as such, it follows that the Exchange that is primarily responsible for monitoring those transactions should also be able to charge the ORF for activity occurring on its own market, as well as transactions it surveils on away markets.

b. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Act¹² in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act¹³ in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive, and enforcement activities. Removing the current ORF sunset is reasonable because continued collection of ORF will serve to balance the Exchange's regulatory revenue

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78f(b)(5).

against the anticipated regulatory costs, thereby ensuring proper regulatory funding. Moreover, the Exchange's ORF rate is significantly lower than the amount of ORF assessed by other exchange groups.¹⁴

The Exchange notes that while certain individual options exchanges do charge a lower ORF than that currently charged by the Exchange, each of these options exchanges is part of an exchange "group" (i.e., affiliated with other options exchanges). In turn, each of these exchange groups charges more than two (2) to five (5) times the amount of ORF as a group when compared to the Exchange's ORF rate.¹⁵ While each additional options exchange is its own legal entity with regulatory obligations under the Act to regulate its members, there is significant scale that can be achieved for an exchange group that operates multiple exchanges, including with respect to regulation, and this scale allows such options exchanges to operate with a lower assessment of ORF. In other words, the initial fixed costs associated with implementing an exchange group's options regulatory program are scalable as additional options exchanges are launched by that

¹⁴ See, e.g., NYSE Arca Options Fees and Charges, Options Regulatory Fee ("ORF") and NYSE American Options Fees Schedule, Section VII(A), which provide that ORF is assessed at a rate of \$0.0055 per contract for each respective exchange. See also Nasdaq PHLX, Options 7 Pricing Schedule, Section 6(D), which provides for an ORF rate of \$0.0034 per contract, Cboe Options Fee Schedule, which provides an ORF rate of \$0.0017 per contract, Nasdaq Options Market, Options 7 Pricing Schedule, Section 5, which provides an ORF rate of \$0.0016 per contract, BOX Options Fee Schedule Section II(C), which provides an ORF rate of \$0.00295 per contract, MIAX Options Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0019 per contract, MIAX Pearl Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0018 per contract.

¹⁵ Each of MIAX Emerald, Cboe BZX Options, Cboe C2 Options, Cboe EDGX Options, Nasdaq ISE Gemini, Nasdaq ISE and Nasdaq BX Options charges a lower rate than \$0.0015 per contract, which is the rate proposed by the Exchange. However, the Cboe exchanges, comprised of four options exchanges, charges an aggregate ORF rate of \$0.0021 per contract (more than the Exchange's proposed rate), the MIAX exchanges, comprised of three options exchanges, charges an aggregate ORF rate of \$0.0043 per contract (nearly 3 times the Exchange's proposed rate); and the Nasdaq exchanges, comprised of six options exchanges, charges an aggregate ORF rate of \$0.0084 per contract (nearly 6 times the Exchange's proposed rate). The Exchange notes that the NYSE exchanges, comprised of two options exchanges, charges an aggregate ORF rate of \$0.011 per contract (over 7 times the Exchange's proposed rate).

exchange group.

Removing the sunset date is also reasonable because doing so would allow the Exchange to recoup its regulatory expenses in exactly the same manner as other options exchanges. If the Exchange were not allowed to charge an ORF, then after the sunset date of May 31, 2024, it would be forced to pay for its regulatory program solely out of business revenues, unlike every other competing exchange, each of which would continue to assess an ORF, including on transactions executed on MEMX Options. This would impact MEMX's ability to effectively compete with other exchanges. Eliminating the sunset is therefore consistent with Section 11A of the Exchange Act which provides that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure,"¹⁶ among other things, "fair competition... among exchange markets."¹⁷ Indeed, as Congress and the Commission have long recognized, competition is at the heart of the national market system.

Removing the ORF sunset is also equitable and not unfairly discriminatory because the ORF would continue to be objectively allocated to Members in a manner that is consistent with the ORF imposed by the other sixteen (16) options exchanges. The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than 75% of the Exchange's regulatory costs, which is consistent with the

¹⁶ 15 U.S.C. 78k1(a)(1)(c).

¹⁷ 15 U.S.C. 78k1(a)(1)(C)(ii).

Exchange's by-laws that state in Section 17.4(b): "[a]ny Regulatory Funds shall not be used for non-regulatory purposes or distributed, advanced or allocated to any Company Member, but rather, shall be applied to fund regulatory operations of the Company (including surveillance and enforcement activities)..."¹⁸

4. 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. This proposal will not create an unnecessary or inappropriate intra-market burden on competition because the Exchange's ORF would continue to apply to all customer activity, and is designed to enable the Exchange to recover a material portion of the Exchange's cost related to its regulatory activities.

The Exchange's ORF, as described herein, is lower than or comparable to fees charged by other options exchanges (though as noted above, some exchange groups do have options exchanges operating with a lower ORF on a standalone basis).

The Exchange notes that while it does not believe that its ORF will impose any burden on inter-market competition, the Exchange being precluded from charging an ORF after the sunset date would, in-fact, represent a significant burden on competition. As noted above, the Exchange is a new entrant in the highly competitive environment for equity options trading. As also noted above, all sixteen (16) other registered options exchanges currently impose the ORF on their members, and such ORF fees imposed by other options exchanges currently do and will continue to extend to executions occurring on the Exchange. The Exchange believes that in order to compete with these exchanges,

¹⁸ See MEMX LLC – LLC Agreement at <https://info.memxtrading.com/regulation/governance/>.

it must, in fact, impose an ORF on its Members, and that the inability to do so would result in an unfair competitive disadvantage to the Exchange. Requiring a single options exchange to sunset its ORF collection while not imposing the same restriction on other U.S. options exchanges would represent a significant burden on competition.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

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) or Section 19(b)(7)(D)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,¹⁹ and Rule 19b-4(f)(2)

thereunder²⁰, the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed 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.

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

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁰ 17 CFR 240.19b-4.

and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 - Notice of Proposed Rule Change for publication in the Federal

Register.

Exhibit 5 - Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR-MEMX-2024-17]

[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 related to the Options Regulatory Fee (“ORF”)

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 [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 Members³ and non-Members of the Exchange (the “Fee Schedule”) pursuant to Exchange Rules 15.1(a) and (c) to remove the current sunset date of May 31, 2024 applicable to the Options Regulatory Fee (“ORF”). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The text of the proposed rule change is provided in Exhibit 5.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

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

The Exchange to amend its Options Fee Schedule related to the ORF to remove the current sunset date of May 31, 2024, and thus continue charging the previously established ORF in the amount of \$0.0015 per contract side. As discussed herein, the ORF sunset was initially included to provide time for the Exchange to discuss alternative ORF models with its Members. However, those discussions have made clear that there is no consensus among market participants on a path forward that would address industry concerns in a manner that would effect change broadly across all U.S. options exchanges. Thus, while the Exchange continues to support additional dialogue on ORF reform, it believes that such reform efforts must be lead, in the first instance, by the Commission itself, with any requirements applied not only to the Exchange, but to each of the sixteen (16) other options exchanges as well. In the interim, it is necessary for the Exchange to continue to fund its regulatory program via ORF so that it can compete on equal footing with incumbent exchanges, each of which charge similar regulatory fees in amounts that far exceed the relatively modest amounts collected by the Exchange.

As background, MEMX previously filed a proposal to establish an ORF in the amount of \$0.0015 per contract side that would automatically sunset on September 30,

2024 (the “Initial ORF Filing”).⁴ The Initial ORF Filing was published for comment in the Federal Register on October 4, 2023.⁵ The Commission received no comments on the Initial ORF Filing before November 24, 2023. On that date, the Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule to Establish an Options Regulatory Fee (“the OIP”) and requested public comment and additional information on various aspects of the Initial ORF Filing.⁶ To date, the Commission has received no comment letters in response to the OIP. The Exchange withdrew the Initial ORF Filing on December 1, 2023 and submitted a new proposal for immediate effectiveness (“Second ORF Filing”).⁷

The Second Filing and Subsequent Filings proposed the same fee as in the Initial ORF Filing, but with a modified sunset date of May 31, 2024, which was four months prior to the proposed sunset date in the Initial ORF Filing. At this time, the Exchange proposes to remove the automatic sunset date of May 31, 2024, as described more fully below, in order to compete on a level playing field with the sixteen (16) other registered

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options exchanges that are allowed to recoup a portion of their regulatory costs via the ORF.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Members' customer options business, including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. Currently, all other registered options exchanges impose ORF on their members, and those exchanges also charge ORF for executions occurring on MEMX Options cleared by their customers.⁸

⁸ See Securities Exchange Act Release Nos. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008) (SR-CBOE-2008-05) (notice of filing and immediate effectiveness of Cboe Exchange, Inc. ("CBOE") adopting an ORF applicable to transactions across all options exchanges); 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100) (notice of filing and immediate effectiveness of Nasdaq PHLX LLC ("Phlx") adopting an ORF applicable to transactions across all options exchanges); 61154 (December 11, 2009), 74 FR 67278 (December 18, 2009) (SR-ISE-2009-105) (notice of filing and immediate effectiveness of Nasdaq ISE, LLC ("ISE") adopting an ORF applicable to transactions across all options exchanges); 61388 (January 20, 2010), 75 FR 4431 (January 27, 2010) (SR-BX-2010-001) (notice of filing and immediate effectiveness of Nasdaq OMX BX, Inc. ("BX") adopting an ORF applicable to transactions across all options exchanges); 70200 (August 14, 2013) 78 FR 51242 (August 20, 2013) (SR- Topaz-2013-01) (notice of filing and immediate effectiveness of Nasdaq GEMX, LLC ("GEMX"), formerly known as ISE Gemini and Topaz Exchange, adopting an ORF applicable to transactions across all options exchanges); 64400 (May 4, 2011), 76 FR 27118 (May 10, 2011) (SR-NYSEAmex-2011-27) (notice of filing and immediate effectiveness of NYSE Amex LLC ("NYSE AMEX") adopting an ORF applicable to transactions across all options exchanges); 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (SR-NYSEArca-2011-20) (notice of filing and immediate effectiveness of NYSE Arca, Inc. ("NYSE Arca") adopting an ORF applicable to transactions across all options exchanges); 65913 (December 8, 2011), 76 FR 77883 (December 14, 2011) (SR-NASDAQ-2011-163) (notice of filing and immediate effectiveness of Nasdaq Options Market ("NOM") adopting an ORF applicable to transactions across all options exchanges); 66979 (May 14, 2012), 77 FR 29740 (May 18, 2012) (SR-BOX-2012-002) (notice of filing and immediate effectiveness of BOX Options Exchange LLC ("BOX") adopting an ORF applicable to transactions across all options exchanges); 67596 (August 6, 2012), 77 FR 47902 (August 10, 2012) (SR-C2-2012-023) (notice of filing and immediate effectiveness of C2 Options Exchange, Inc. ("C2") adopting an ORF applicable to transactions across all options exchanges); 68711 (January 23, 2013) 78 FR 6155 (January 29, 2013) (SR-MIAX-2013-01) (notice of filing and immediate effectiveness of Miami International Securities Exchange LLC ("MIAX") adopting

The Exchange notes that in 2019, the Commission issued suspensions of and orders instituting proceedings to determine whether to approve or disapprove a proposed rule change to modify the Options Regulatory Fee of NYSE American, NYSE Arca, MIAX, MIAX Pearl, MIAX Emerald, Cboe, Cboe EDGX Options, and C2.⁹ Each of those exchanges had filed to increase their ORF, and the Commission indicated that each of those filings lacked detail and specificity, signaling that more information was needed to speak to whether the proposed increased ORFs were reasonable, equitably allocated and not unfairly discriminatory, particularly given that the ORF is assessed on transactions that clear in the “customer” range and regardless of the exchange on which the transaction occurs. The Commission also noted that the filings provided only broad general statements regarding options transaction volume and did not provide any information on those exchanges’ historic or projected options regulatory costs (including

an ORF applicable to transactions across all options exchanges); 74214 (February 5, 2015), 80 FR 7665 (February 11, 2015) (SR-BATS-2015-08) (notice of filing and immediate effectiveness of Cboe BZX Exchange, Inc. (“BZX”) formerly known as BATS, adopting an ORF applicable to transactions across all options exchanges); 80025 (February 13, 2017) 82 FR 11081 (February 17, 2017) (SR-BatsEDGX-2017-04) (notice of filing and immediate effectiveness of Cboe EDGX Exchange, Inc. (“EDGX”) formerly known as Bats EDGX Exchange, Inc., adopting an ORF applicable to transactions across all options exchanges); 80875 (June 7, 2017) 82 FR 27096 (June 13, 2017) (SR-PEARL-2017-26) (notice of filing and immediate effectiveness of MIAX Pearl, LLC (“MIAX Pearl”) adopting an ORF applicable to transactions across all options exchanges); 85127 (February 13, 2019) 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03) (notice of filing and immediate effectiveness of Nasdaq MRX, LLC (“MRX”) adopting an ORF applicable to transactions across all options exchanges); 85251 (March 6, 2019) 84 FR 8931 (March 12, 2019) (SR-EMERALD-2019-01) (notice of filing and immediate effectiveness of MIAX Emerald LLC (“MIAX Emerald”) adopting an ORF applicable to transactions across all options exchanges).

⁹ See Securities Exchange Act Release No. 87168 (September 30, 2019), 84 FR 53210 (October 4, 2019) (SR-Emerald-2019-29); Securities Exchange Act Release No. 87167 (September 30, 2019), 84 FR 53189 (October 4, 2019) (SR-PEARL-2019-23); Securities Exchange Act Release No. 87169 (September 30, 2019), 84 FR 53195 (October 4, 2019) (SR-MIAX-2019-35); Securities Exchange Act Release No. 87170 (September 30, 2019), 84 FR 53213 (October 4, 2019) (SR-CBOE-2019-040); Securities Exchange Act Release No. 87172 (September 30, 2019) 84 FR 53192 (October 4, 2019) (SR-CboeEDGX-2019-051); Securities Exchange Act Release No 87171 (September 30, 2019), 84 FR 53200 (October 4, 2019) (SR-C2-2019-018); Securities Exchange Act Release No. 86832 (August 30, 2019), 84 FR 46980 (September 6, 2019) (SR-NYSEArca-2019-49); Securities Exchange Act Release No. 86833 (August 30, 2019) 84 FR 47029 (September 6, 2019) (SR-NYSEAMER-2019-27).

the costs of regulating activity that cleared in the “customer” range and the costs of regulating activity that occurred off exchange), the amount of regulatory revenue they had generated and expected to generate from the ORF as well as other sources, or the “material portion” of options regulatory expenses that they sought to recover from the ORF. Each of those exchanges withdrew their filings, but continue charging ORF today as discussed above. Since that time, MEMX Options is the first new options exchange to launch and as noted previously, its Initial ORF Filing was also suspended.¹⁰ Unlike its competitors noted above, however, the Exchange is the only exchange that did not have a previously implemented ORF to continue charging notwithstanding said suspensions. As such, the Exchange proposed to establish an ORF but implemented a sunset date of May 31, 2024, in order to allow it time to inform its approach to the ORF moving forward.

MEMX is a new exchange operator founded by a diverse group of market participants to bring competition to the U.S. securities markets. Over the past months, the Exchange has engaged with retail brokers, market makers, and other options market participants on potential paths to address industry concerns about existing ORF practices. The result of those efforts have made clear that there is no consensus among market participants on a path forward that would address their stated concerns in a manner that would effect change broadly across all U.S. options exchanges. As such, the Exchange proposes to continue to collect ORF as other options exchanges currently do. While the Exchange is open to ORF reform, it is critical that the Commission treat all exchanges equally as it relates to the ability to fund their regulatory programs.

As a new exchange, not having the opportunity to fund its regulatory program

¹⁰ See supra note 6.

through the same regulatory fee charged by every other options exchange would place an undue competitive disadvantage upon the Exchange's regulatory program and options business as a whole. Further, the Exchange emphasizes that other exchanges will be charging ORF for transactions occurring on MEMX Options, and as such, it follows that the Exchange that is primarily responsible for monitoring those transactions should also be able to charge the ORF for activity occurring on its own market, as well as transactions it surveils on away markets.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Act¹² in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act¹³ in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive, and enforcement activities. Removing the current ORF sunset is reasonable because

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78f(b)(5).

continued collection of ORF will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs, thereby ensuring proper regulatory funding. Moreover, the Exchange's ORF rate is significantly lower than the amount of ORF assessed by other exchange groups.¹⁴

The Exchange notes that while certain individual options exchanges do charge a lower ORF than that currently charged by the Exchange, each of these options exchanges is part of an exchange "group" (i.e., affiliated with other options exchanges). In turn, each of these exchange groups charges more than two (2) to five (5) times the amount of ORF as a group when compared to the Exchange's ORF rate.¹⁵ While each additional options exchange is its own legal entity with regulatory obligations under the Act to regulate its members, there is significant scale that can be achieved for an exchange group that operates multiple exchanges, including with respect to regulation, and this scale allows such options exchanges to operate with a lower assessment of ORF. In other words, the initial fixed costs associated with implementing an exchange group's options

¹⁴ See, e.g., NYSE Arca Options Fees and Charges, Options Regulatory Fee ("ORF") and NYSE American Options Fees Schedule, Section VII(A), which provide that ORF is assessed at a rate of \$0.0055 per contract for each respective exchange. See also Nasdaq PHLX, Options 7 Pricing Schedule, Section 6(D), which provides for an ORF rate of \$0.0034 per contract, Cboe Options Fee Schedule, which provides an ORF rate of \$0.0017 per contract, Nasdaq Options Market, Options 7 Pricing Schedule, Section 5, which provides an ORF rate of \$0.0016 per contract, BOX Options Fee Schedule Section II(C), which provides an ORF rate of \$0.00295 per contract, MIAX Options Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0019 per contract, MIAX Pearl Fee Schedule, Section 2(b), which provides an ORF rate of \$0.0018 per contract.

¹⁵ Each of MIAX Emerald, Cboe BZX Options, Cboe C2 Options, Cboe EDGX Options, Nasdaq ISE Gemini, Nasdaq ISE and Nasdaq BX Options charges a lower rate than \$0.0015 per contract, which is the rate proposed by the Exchange. However, the Cboe exchanges, comprised of four options exchanges, charges an aggregate ORF rate of \$0.0021 per contract (more than the Exchange's proposed rate), the MIAX exchanges, comprised of three options exchanges, charges an aggregate ORF rate of \$0.0043 per contract (nearly 3 times the Exchange's proposed rate); and the Nasdaq exchanges, comprised of six options exchanges, charges an aggregate ORF rate of \$0.0084 per contract (nearly 6 times the Exchange's proposed rate). The Exchange notes that the NYSE exchanges, comprised of two options exchanges, charges an aggregate ORF rate of \$0.011 per contract (over 7 times the Exchange's proposed rate).

regulatory program are scalable as additional options exchanges are launched by that exchange group.

Removing the sunset date is also reasonable because doing so would allow the Exchange to recoup its regulatory expenses in exactly the same manner as other options exchanges. If the Exchange were not allowed to charge an ORF, then after the sunset date of May 31, 2024, it would be forced to pay for its regulatory program solely out of business revenues, unlike every other competing exchange, each of which would continue to assess an ORF, including on transactions executed on MEMX Options. This would impact MEMX's ability to effectively compete with other exchanges. Eliminating the sunset is therefore consistent with Section 11A of the Exchange Act which provides that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure,"¹⁶ among other things, "fair competition... among exchange markets."¹⁷ Indeed, as Congress and the Commission have long recognized, competition is at the heart of the national market system.

Removing the ORF sunset is also equitable and not unfairly discriminatory because the ORF would continue to be objectively allocated to Members in a manner that is consistent with the ORF imposed by the other sixteen (16) options exchanges. The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be

¹⁶ 15 U.S.C. 78k1(a)(1)(c).

¹⁷ 15 U.S.C. 78k1(a)(1)(C)(ii).

less than 75% of the Exchange's regulatory costs, which is consistent with the Exchange's by-laws that state in Section 17.4(b): "[a]ny Regulatory Funds shall not be used for non-regulatory purposes or distributed, advanced or allocated to any Company Member, but rather, shall be applied to fund regulatory operations of the Company (including surveillance and enforcement activities)..."¹⁸

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 not necessary or appropriate in furtherance of the purposes of the Act. This proposal will not create an unnecessary or inappropriate intra-market burden on competition because the Exchange's ORF would continue to apply to all customer activity, and is designed to enable the Exchange to recover a material portion of the Exchange's cost related to its regulatory activities.

The Exchange's ORF, as described herein, is lower than or comparable to fees charged by other options exchanges (though as noted above, some exchange groups do have options exchanges operating with a lower ORF on a standalone basis).

The Exchange notes that while it does not believe that its ORF will impose any burden on inter-market competition, the Exchange being precluded from charging an ORF after the sunset date would, in-fact, represent a significant burden on competition. As noted above, the Exchange is a new entrant in the highly competitive environment for equity options trading. As also noted above, all sixteen (16) other registered options exchanges currently impose the ORF on their members, and such ORF fees imposed by other options exchanges currently do and will continue to extend to executions occurring

¹⁸ See MEMX LLC – LLC Agreement at <https://info.memxtrading.com/regulation/governance/>.

on the Exchange. The Exchange believes that in order to compete with these exchanges, it must, in fact, impose an ORF on its Members, and that the inability to do so would result in an unfair competitive disadvantage to the Exchange. Requiring a single options exchange to sunset its ORF collection while not imposing the same restriction on other U.S. options exchanges would represent a significant burden on 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁹ and Rule 19b-4(f)(2)²⁰ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁰ 17 CFR 240.19b-4(f)(2).

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-2024-17 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-2024-17. 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-2024-17 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.²¹

Sherry R. Haywood,

Assistant Secretary.

²¹ 17 CFR 200.30-3(a)(12).

Exhibit 5

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

MEMX Options Fee Schedule
(EFFECTIVE [APRIL 15]MAY 1, 2024)

* * * * *

Options Regulatory Fee (ORF)

The per-contract Options Regulatory Fee (“ORF”) set forth below is assessed by MEMX Options to each Member for options transactions cleared by The Options Clearing Corporation (OCC) in the “customer” range where:

- (1) the execution occurs on MEMX Options, or
- (2) the execution occurs on another options exchange and is cleared or ultimately cleared by a MEMX Options Member.

Options Regulatory Fee (ORF)	Fee Per Executed Contract Side
All Classes	\$0.0015

Additional Notes:

- The Exchange uses reports from OCC when assessing and collecting the ORF.
- The ORF is collected by OCC on behalf of MEMX Options from either: (1) a Member that was the ultimate clearing firm for the transaction, or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm for the transaction.
- The Exchange may only increase or decrease the ORF semi-annually.
- The Exchange will notify participants of any change in the amount of the fee at least 30 calendar days prior to the effective date of the change.
- [• The ORF will automatically sunset on May 31, 2024.]

* * * * *