

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”),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 (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 3, 2024.

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:

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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 purpose of the proposed rule change is to amend the Fee Schedule to: (1) increase the rebate for executions of Retail Orders⁴ in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange (such orders, “Added Displayed Retail Volume”); (2) modify Retail Tier 1 by increasing the rebate provided and modifying the required criteria under such tier; and (3) modify NBBO Setter Tier 1 by modifying the required criteria under such tier, each as further described below.

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 14.5% of the total market share of executed volume of equities trading.⁵ 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

⁴ A “Retail Order” means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization (“RMO”), provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 11.21(a).

⁵ Market share percentage calculated as of May 28, 2024. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

represents approximately 2.4% of the overall market share.⁶ 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.

Increase Base Rebate for Added Displayed Retail Volume

Currently, the Exchange provides a base rebate of \$0.0032 per share for executions of Added Displayed Retail Volume. The Exchange now proposes to increase the base rebate for executions of Added Displayed Retail Volume to \$0.0034 per share.⁷ The purpose of increasing the base rebate for executions of Added Displayed Retail Volume is for business and competitive reasons, as the Exchange believes that increasing such rebate as proposed would incentivize Members to submit additional Added Displayed Retail Volume to the Exchange, which the Exchange believes would promote price discovery and price formation, provide more trading opportunities and tighter spreads, and deepen liquidity that is subject to the Exchange’s transparency, regulation

⁶ Id.

⁷ The proposed base rebate for executions of Added Displayed Retail Volume is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume, Retail Order” with a Fee Code of “Br”, “Dr” or “Jr”, as applicable, on execution reports.

and oversight, thereby enhancing market quality to the benefit of all Members and investors.

Retail Tier

As described above, the Exchange is proposing to provide a base rebate of \$0.0034 per share for executions of Added Displayed Retail Volume. The Exchange also currently offers Retail Tier 1 under which qualifying Members may receive an enhanced rebate of \$0.0034 per share for executions of Added Displayed Retail Volume by achieving a Retail Order ADAV⁸ that is equal to or greater than 0.07% of the TCV.⁹ Now, the Exchange proposes to modify Retail Tier 1 by increasing the enhanced rebate provided for executions of Added Displayed Retail Volume to \$0.0037 per share, and by modifying the required criteria such that a Member would qualify for such tier by achieving: (1) a Retail Order ADAV that is equal to or greater than 0.20% of the TCV; or (2) a Retail Order ADAV that is equal to or greater than 1,000,000 shares in the Pre-Market Session¹⁰ and/or the Post-Market Session.¹¹ Thus, such proposed change would increase the Retail Order ADAV threshold in the first required criteria and add an alternative criteria (2) that provides an incentive for Members to meet a certain Retail

⁸ 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.

⁹ 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. The pricing for Retail Tier 1 is referred to by the Exchange on the Fee Schedule under the description “Retail Tier 1” with a Fee Code of “Br1, Dr1, or Jr1, as applicable,” on executions reports.

¹⁰ Exchange Rule 1.5(x) defines the Pre-Market Session as the time between 7:00 a.m. and 9:30 a.m. Eastern Time.

¹¹ Exchange Rule 1.5(w) defines the Post-Market Session as the time between 4:00 p.m. and 8:00 p.m. Eastern Time.

Order ADAV threshold outside of regular trading hours, i.e. during the Pre-Market Session, the Post-Market Session, or a combination of both.

The proposed changes to the Retail Tier 1 are designed to encourage Members to increase their Retail Order flow, not only during regular trading hours but also during the Pre and Post-Market Sessions, to the Exchange in order to qualify for the enhanced rebate for executions of Added Displayed Retail Volume, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that Retail Tier 1 as modified by the proposed changes described above, reflects 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, not only during regular trading hours but during the Pre and Post-Market Sessions.

NBBO Setter Tier

The Exchange currently offers NBBO Setter Tier 1 under which a Member may receive an additive rebate of \$0.0002 per share for a qualifying Member's executions of Added Displayed Volume (other than Retail Orders) in securities priced at or above \$1.00 per share that establish the NBBO and have a Fee Code B¹² (such orders, "Setter Volume"), and an additive rebate of \$0.0001 per share for executions of Added Displayed Volume (other than Retail Orders) that do not establish the NBBO (i.e., Fee Codes D and J)¹³ by achieving: (1) an ADAV with respect to orders with Fee Code B that

¹² The Exchange notes that orders with Fee Code B include orders, other than Retail Orders, that establish the NBBO.

¹³ The Exchange notes that orders with Fee Code J include orders, other than Retail Orders, that establish a new BBO on the Exchange that matches the NBBO first established on an away market. Orders with Fee Code D include orders that add displayed liquidity to the Exchange but that are not Fee Code B or J, and thus, orders with Fee Code B, D or J include all orders, other than Retail Orders, that add displayed liquidity to the Exchange.

is equal to or greater than 5,000,000 shares; or (2) an ADAV (excluding Retail Orders) that is equal to or greater than 0.30% of the TCV.¹⁴ Now, the Exchange proposes to modify the required criteria under NBBO Setter Tier 1 such that a Member would now qualify for such tier by achieving: (1) an ADAV with respect to orders with Fee Code B that is equal to or greater than 5,000,000 shares; or (2) an ADAV in securities priced at or above \$1.00 per share (excluding Retail Orders) that is equal to or greater than 0.30% of the TCV in securities priced at or above over \$1.00 per share. Thus, such proposed change keeps the first alternative criteria intact with no changes but modifies the second alternative criteria by excluding securities priced below \$1.00 per share from the ADAV threshold and corresponding TCV calculation.¹⁵ The Exchange is not proposing to change the amount of the additive rebates provided under the NBBO Setter Tier 1.

The Exchange believes that the proposed modified criteria provides an incremental incentive for Members to strive for higher ADAV on the Exchange, not only in orders with a Fee Code B (i.e. criteria 1) but also in any security that is priced at or above \$1.00 (i.e. criteria 2) to receive the additive rebate for qualifying executions of Added Displayed Volume under such tier, and thus, it is designed to encourage Members that do not currently qualify for such tier to increase their overall orders that add liquidity to the Exchange. The Exchange also believes that the criteria changes reflect a reasonable and competitive pricing structure that is right-sized and consistent with the

¹⁴ The pricing is referred to by the Exchange on the Fee Schedule under the existing description “NBBO Setter Tier” with a Fee Code of “S1” to be appended to the otherwise applicable Fee Code for qualifying executions.

¹⁵ The Exchange will determine whether a security meets the “priced at or above \$1.00 per share” threshold for purposes of calculating the ADAV and TCV by using the prior day’s closing price.

Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity.

The Exchange believes that the proposed modified criteria would further incentivize increased order flow to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members.

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁶ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,¹⁷ 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.

As discussed above, the Exchange operates in a highly fragmented and 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, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. 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."¹⁸

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

¹⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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 trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects 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 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 increasing the base rebate for executions of Added Displayed Retail Volume is reasonable, equitable, and not unfairly discriminatory because, as described above, such change is designed to incentivize Members to maintain or increase their Retail Order flow to the Exchange, thus increasing liquidity and contributing to a deeper and more liquid market ecosystem on the Exchange. The Exchange believes that the Retail Tier 1

and NBBO Setter Tier 1, each as modified by the proposed changes to the rebate and/or required criteria under each such tier as described above, are reasonable, equitable and not unfairly discriminatory for these same reasons. Such tiers would provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, are available to all Members on an equal basis, and, as described above, are designed to encourage Members to maintain or increase their order flow, including in the form of displayed, liquidity-adding, Retail and/or NBBO-setting orders to the Exchange in order to qualify for an enhanced or additive rebate, as applicable, thereby contributing to a deeper, more liquid and well balanced market ecosystem on the Exchange to the benefit of all Members and market participants.

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 Act¹⁹ 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. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

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. Instead, as discussed above, the proposal is intended to incentivize market participants to

¹⁹ 15 U.S.C. 78f(b)(4) and (5).

direct additional order flow to the Exchange, thereby enhancing 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."²⁰

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional order flow, including displayed, liquidity-adding, Retail, and/or NBBO setting orders to the Exchange during both regular trading hours, the Pre-Market Session, and the Post-Market Session, 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. The opportunity to qualify for the proposed higher base rebate for Added Displayed Retail Volume and each of the proposed modified Retail Tier 1 and NBBO Setter Tier 1, would be available to all Members that meet the associated volume requirements in any

²⁰ See supra note 24.

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 14.5% 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 at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to generate additional revenue with respect to its transaction pricing and to encourage the submission of additional order flow to the Exchange through

volume-based tiers, which have been widely adopted by exchanges, including 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 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.”²¹ 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’”²² Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

²¹ Id.

²² 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)).

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,²³ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-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.²⁴

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

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 15 U.S.C. 78s(b)(2)(B).

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.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR-MEMX-2024-24]

[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"),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 (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 3, 2024. The text of the proposed rule change is provided in Exhibit 5.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

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: (1) increase the rebate for executions of Retail Orders⁴ in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange (such orders, “Added Displayed Retail Volume”); (2) modify Retail Tier 1 by increasing the rebate provided and modifying the required criteria under such tier; and (3) modify NBBO Setter Tier 1 by modifying the required criteria under such tier, each as further described below.

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 14.5% of the total market share of executed volume of equities trading.⁵ Thus, in such a low-

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⁵ Market share percentage calculated as of May 28, 2024. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

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 2.4% of the overall market share.⁶ 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.

Increase Base Rebate for Added Displayed Retail Volume

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⁶ Id.

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price discovery and price formation, provide more trading opportunities and tighter spreads, and deepen liquidity that is subject to the Exchange's transparency, regulation and oversight, thereby enhancing market quality to the benefit of all Members and investors.

Retail Tier

As described above, the Exchange is proposing to provide a base rebate of \$0.0034 per share for executions of Added Displayed Retail Volume. The Exchange also currently offers Retail Tier 1 under which qualifying Members may receive an enhanced rebate of \$0.0034 per share for executions of Added Displayed Retail Volume by achieving a Retail Order ADAV⁸ that is equal to or greater than 0.07% of the TCV.⁹ Now, the Exchange proposes to modify Retail Tier 1 by increasing the enhanced rebate provided for executions of Added Displayed Retail Volume to \$0.0037 per share, and by modifying the required criteria such that a Member would qualify for such tier by achieving: (1) a Retail Order ADAV that is equal to or greater than 0.20% of the TCV; or (2) a Retail Order ADAV that is equal to or greater than 1,000,000 shares in the Pre-Market Session¹⁰ and/or the Post-Market Session.¹¹ Thus, such proposed change would increase the Retail Order ADAV threshold in the first required criteria and add an

⁸ 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.

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¹¹ Exchange Rule 1.5(w) defines the Post-Market Session as the time between 4:00 p.m. and 8:00 p.m. Eastern Time.

alternative criteria (2) that provides an incentive for Members to meet a certain Retail Order ADAV threshold outside of regular trading hours, i.e. during the Pre-Market Session, the Post-Market Session, or a combination of both.

The proposed changes to the Retail Tier 1 are designed to encourage Members to increase their Retail Order flow, not only during regular trading hours but also during the Pre and Post-Market Sessions, to the Exchange in order to qualify for the enhanced rebate for executions of Added Displayed Retail Volume, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that Retail Tier 1 as modified by the proposed changes described above, reflects 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, not only during regular trading hours but during the Pre and Post-Market Sessions.

NBBO Setter Tier

The Exchange currently offers NBBO Setter Tier 1 under which a Member may receive an additive rebate of \$0.0002 per share for a qualifying Member's executions of Added Displayed Volume (other than Retail Orders) in securities priced at or above \$1.00 per share that establish the NBBO and have a Fee Code B¹² (such orders, "Setter Volume"), and an additive rebate of \$0.0001 per share for executions of Added Displayed Volume (other than Retail Orders) that do not establish the NBBO (i.e., Fee Codes D and J)¹³ by achieving: (1) an ADAV with respect to orders with Fee Code B that

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is equal to or greater than 5,000,000 shares; or (2) an ADAV (excluding Retail Orders) that is equal to or greater than 0.30% of the TCV.¹⁴ Now, the Exchange proposes to modify the required criteria under NBBO Setter Tier 1 such that a Member would now qualify for such tier by achieving: (1) an ADAV with respect to orders with Fee Code B that is equal to order greater than 5,000,000 shares; or (2) an ADAV in securities priced at or above \$1.00 per share (excluding Retail Orders) that is equal to or greater than 0.30% of the TCV in securities priced at or above over \$1.00 per share. Thus, such proposed change keeps the first alternative criteria intact with no changes but modifies the second alternative criteria by excluding securities priced below \$1.00 per share from the ADAV threshold and corresponding TCV calculation.¹⁵ The Exchange is not proposing to change the amount of the additive rebates provided under the NBBO Setter Tier 1.

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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 Exchange believes that the proposed modified criteria would further incentivize increased order flow to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁶ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,¹⁷ 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.

As discussed above, the Exchange operates in a highly fragmented and 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, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. 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

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

and listed companies.”¹⁸

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 trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects 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 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 increasing the base rebate for executions of Added Displayed Retail Volume is reasonable, equitable, and not unfairly discriminatory because, as described above, such change is designed to incentivize Members to maintain or increase their Retail Order

¹⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

flow to the Exchange, thus increasing liquidity and contributing to a deeper and more liquid market ecosystem on the Exchange. The Exchange believes that the Retail Tier 1 and NBBO Setter Tier 1, each as modified by the proposed changes to the rebate and/or required criteria under each such tier as described above, are reasonable, equitable and not unfairly discriminatory for these same reasons. Such tiers would provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, are available to all Members on an equal basis, and, as described above, are designed to encourage Members to maintain or increase their order flow, including in the form of displayed, liquidity-adding, Retail and/or NBBO-setting orders to the Exchange in order to qualify for an enhanced or additive rebate, as applicable, thereby contributing to a deeper, more liquid and well balanced market ecosystem on the Exchange to the benefit of all Members and market participants.

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 Act¹⁹ 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. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

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

The Exchange does not believe that the proposal will result in any burden on

¹⁹ 15 U.S.C. 78f(b)(4) and (5).

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, thereby enhancing 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."²⁰

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional order flow, including displayed, liquidity-adding, Retail, and/or NBBO setting orders to the Exchange during both regular trading hours, the Pre-Market Session, and the Post-Market Session, 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. The opportunity to qualify for the proposed higher base rebate for Added Displayed

²⁰ See supra note 24.

Retail Volume and each of the proposed modified Retail Tier 1 and NBBO Setter Tier 1, would be 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 14.5% 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 at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the

Exchange is seeking to generate additional revenue with respect to its transaction pricing and to encourage the submission of additional order flow to the Exchange through volume-based tiers, which have been widely adopted by exchanges, including 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 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.”²¹ 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’”²² Accordingly, the

²¹ Id.

²² 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)).

Exchange does not believe its proposed pricing changes impose 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 Act²³ and Rule 19b-4(f)(2)²⁴ 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:

Electronic Comments:

- Use the Commission's internet comment form

(<https://www.sec.gov/rules/sro.shtml>); or

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

- Send an email to rule-comments@sec.gov. Please include file number SR-MEMX-2024-24 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-2024-24. 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-2024-24 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Sherry R. Haywood,

Assistant Secretary.

²⁵ 17 CFR 200.30-3(a)(12).

Exhibit 5

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

**MEMX Equities Fee Schedule
(EFFECTIVE [MAY 1]~~JUNE 3~~, 2024)**

Transaction Fees

MEMX Members are charged per share fees or provided per share rebates based on shares executed within each of the fee code categories below.

Fee Code	Description	Fee/(Rebate) - Securities at or above \$1.00 ("A")	Fee/(Rebate) - Securities below \$1.00 ("B")
B, D, J or I	Added displayed volume	\$(0.0015)	(0.075% of total dollar value)
B1, D1, J1 or I1	Added displayed volume, Liquidity Provision Tier 1	\$(0.0033)	(0.075% of total dollar value)
B2, D2, J2 or I2	Added displayed volume, Liquidity Provision Tier 2	\$(0.0032)	(0.075% of total dollar value)
B3, D3, J3 or I3	Added displayed volume, Liquidity Provision Tier 3	\$(0.0030)	(0.075% of total dollar value)
B4, D4, J4 or I4	Added displayed volume, Liquidity Provision Tier 4	\$(0.0029)	(0.075% of total dollar value)
B5, D5, J5 or I5	Added displayed volume, Liquidity Provision Tier 5	\$(0.0025)	(0.075% of total dollar value)
Bq1, Dq1, Jq1 or Iq1	Added displayed volume, DLI Tier 1	\$(0.0031)	(0.075% of total dollar value)
Bq2, Dq2, Jq2 or Iq2	Added displayed volume, DLI Tier 2	\$(0.0026)	(0.075% of total dollar value)
Br, Dr or Jr	Added displayed volume, Retail Order	\$(0.0034 [2])	(0.15% of total dollar value)

Br1, Dr1 or Jr1	Added displayed volume, Retail Tier 1	\$(0.0037[4])	(0.15% of total dollar value)
BO1, DO1, JO1 or IO1	Added displayed volume, Cross Asset Tier 1	\$(0.0033)	(0.075% of total dollar value)
BO2, DO2, JO2 or IO2	Added displayed volume, Cross Asset Tier 2	\$(0.0027)	(0.075% of total dollar value)
BO3, DO3, JO3 or IO3	Added displayed volume, Cross Asset Tier 3	\$(0.0026)	(0.075% of total dollar value)
P	Added volume, order subject to Display-Price Sliding that receives price improvement when executed	\$(0.0008)	(0.075% of total dollar value)
H	Added non-displayed volume	\$(0.0008)	(0.075% of total dollar value)
M	Added non-displayed volume, Midpoint Peg	\$(0.0008)	(0.075% of total dollar value)
H1, M1, P1	Added non-displayed volume, Non-Display Add Tier 1	\$(0.0028)	(0.075% of total dollar value)
H2, M2, P2	Added non-displayed volume, Non-Display Add Tier 2	\$(0.0027)	(0.075% of total dollar value)
H3, M3, P3	Added non-displayed volume, Non-Display Add Tier 3	\$(0.0024)	(0.075% of total dollar value)
H4, M4, P4	Added non-displayed volume, Non-Display Add Tier 4	\$(0.0018)	(0.075% of total dollar value)
R	Removed volume from MEMX Book	\$0.0030	0.28% of total dollar value
R1	Removed volume from MEMX Book, Liquidity Removal Tier 1	\$0.00295	0.28% of total dollar value
Rr0	Removed volume from MEMX Book upon entry, Retail Order (Day/GTT/RHO)	Free	Free

Z	Routed to another market, removed liquidity	\$0.0030	0.30% of total dollar value
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Retail Tier

Tier	Rebate Per Share	Required Criteria
Tier 1	\$(0.0037[4])	(1) Member has a Retail Order ADAV \geq 0.20[07]% of the TCV; or (2) Member has a Retail Order ADAV \geq 1,000,000 shares in the Pre-Market Session and/or Post-Market Session

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NBBO Setter Tier

Tier	Additive Rebate Per Share*	Required Criteria
Tier 1	\$(0.0002) for Fee Code B, and \$(0.0001) for Fee Codes D and J	(1) Member has an ADAV with respect to orders with Fee Code B \geq 5,000,000 shares; or (2) Member has an ADAV <u>in securities priced at or above \$1.00 per share (excluding Retail Orders) \geq 0.30% of the TCV <u>in securities priced at or above \$1.00 per share</u></u>

*Rebate is in addition to otherwise applicable rebate for executions of added displayed volume (other than Retail Orders) in securities priced at or above \$1.00 per share. MEMX will append Fee Code "S1" (for Tier 1) to the otherwise applicable Fee Code for qualifying executions.

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