

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88806; File No. 10-237]

In the Matter of the Application of MEMX LLC for Registration as a National Securities Exchange Findings, Opinion, and Order of the Commission

May 4, 2020.

I. Introduction and Procedural History

On September 9, 2019, MEMX LLC (“MEMX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a Form 1 application under the Securities Exchange Act of 1934 (“Act”), seeking registration as a national securities exchange under Section 6 of the Act.¹ On October 23, 2019, MEMX submitted Amendment No. 1 to the application.² Notice of the application, as amended, was published for comment in the *Federal Register* on November 6, 2019.³ In a letter dated January 31, 2020, MEMX consented to an extension of time for up to an additional 30 days from the date of publication of notice of its Form 1 application.⁴ On February 26, 2020, MEMX submitted Amendment No. 2 to the application.⁵ On March 3, 2020, MEMX consented to another 30-day

extension of time.⁶ The Commission received three comments on the application, along with two response letters from MEMX.⁷ On March 26, 2020, MEMX consented to another 30-day extension of time.⁸ On April 27, 2020, MEMX submitted Amendment No. 3 to the application.⁹

The Commission has reviewed the Exchange’s registration application, as amended, together with the comment letters received, in order to make a determination whether to grant such registration. For the reasons set forth below, and based on the representations set forth in MEMX’s Form 1, as amended, this order approves MEMX’s Form 1 application, as amended, for registration as a national securities exchange.

II. Statutory Standards

Pursuant to Sections 6(b) and 19(a) of the Act,¹⁰ the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.¹¹

As discussed in greater detail below, the Commission finds that MEMX’s application, as amended, for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MEMX are consistent with Section 6 of the Act in that, among other things, they are designed to: (1) Assure fair

representation of the exchange’s members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer;¹² (2) prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system;¹³ (3) not permit unfair discrimination between customers, issuers, or dealers;¹⁴ and (4) protect investors and the public interest.¹⁵ The Commission also finds that the proposed rules of MEMX are consistent with Section 11A of the Act.¹⁶ Finally, the Commission finds that MEMX’s proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁷

III. Discussion

A. Governance of MEMX

MEMX will be owned directly or indirectly by MEMX Holdings LLC (“MEMX Holdings”), a Delaware limited liability company. Specifically, MEMX Holdings will directly own 99.5% of the equity of MEMX and indirectly hold the remaining .5% of the equity of MEMX through its 100% ownership of MEMX SubCo LLC (“SubCo”). In turn, MEMX Holdings is owned by a group of investors that include broker-dealers and banks.

1. MEMX Board of Directors

The board of directors of MEMX (“Exchange Board”) ¹⁸ will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of MEMX as a self-regulatory organization (“SRO”).¹⁹ Specifically:

¹² See U.S.C. 78f(b)(3).

¹³ See U.S.C. 78f(b)(5).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ 15 U.S.C. 78k-1.

¹⁷ 15 U.S.C. 78f(b)(8).

¹⁸ A Director may not be subject to statutory disqualification. See Second Amended and Restated Limited Liability Company Agreement of MEMX (“MEMX LLC Agreement”), Article VII, Section 7.6(d).

¹⁹ See MEMX LLC Agreement, Article VII, Section 7.2. See also Form 1, Exhibit J.

¹ 15 U.S.C. 78f. See also 15 U.S.C. 78s(a)(1) (stating that the Commission shall, “[w]ithin ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents),” grant the registration or institute proceedings to determine whether the registration should be denied).

² See Letter to Vanessa Countryman, Secretary, Commission, from Anders Franzon, General Counsel, MEMX, dated October 23, 2019. In Amendment No. 1, MEMX submitted updated portions of its Form 1, including revised Exhibits A-5 (Second Amended and Restated LLC Agreement of MEMX LLC), B (Rules of MEMX), C-2 (Third Amended and Restated LLC Agreement of MEMX Holdings, LLC), and C-4 (Amended and Restated LLC Agreement of MEMX SubCo LLC).

³ See Securities Exchange Act Release No. 87436 (October 31, 2019), 84 FR 59854 (“Notice”).

⁴ See Letter to Brett Redfearn, Director, Division of Trading and Markets, Commission, from Anders Franzon, General Counsel, MEMX, dated January 31, 2020, available at <https://www.sec.gov/comments/10-237/10237-6741997-207764.pdf>. See also *supra* note 1 (discussing the time for Commission action following publication of notice of an application for exchange registration).

⁵ See Letter to Vanessa Countryman, Secretary, Commission, from Anders Franzon, General Counsel, MEMX, dated February 26, 2020, available at <https://www.sec.gov/rules/other/2019/memx/memx-form-1.htm>. In Amendment No. 2, MEMX updated portions of its Form 1, including revised Exhibits A-5 (Second Amended and Restated Limited Liability Company Agreement of MEMX), B (Rules of MEMX), C, C-2 (Fourth Amended and Restated Limited Liability Company Agreement of MEMX Holdings), C-6 (First Amended and Restated Limited Liability Company Agreement of MEMX Technologies LLC), J, and K.

⁶ See Letter to Brett Redfearn, Director, Division of Trading and Markets, Commission, from Anders Franzon, General Counsel, MEMX, dated March 3, 2020, available at <https://www.sec.gov/comments/10-237/10237-6915230-211271.pdf>.

⁷ Comments received in response to the Notice, and MEMX’s responses thereto, are available at <https://www.sec.gov/comments/10-237/10-237.htm>.

⁸ See Letter to Brett Redfearn, Director, Division of Trading and Markets, Commission, from Anders Franzon, General Counsel, MEMX, dated March 26, 2020, available at <https://www.sec.gov/comments/10-237/10237-7000570-214790.pdf>.

⁹ See Letter to Vanessa Countryman, Secretary, Commission, from Anders Franzon, General Counsel, MEMX, dated April 27, 2020, available at <https://www.sec.gov/rules/other/2019/memx/memx-form-1.htm>. In Amendment No. 3, MEMX updated Exhibit A-5 (Second Amended and Restated Limited Liability Company Agreement of MEMX).

¹⁰ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

¹¹ See also *supra* note 1 (discussing the time for Commission action following publication of notice of an application for exchange registration).

- The Exchange Board initially will be composed of 10 directors;²⁰
- one director will be the Chief Executive Officer of MEMX;²¹
- the number of Non-Industry Directors²² will equal or exceed the sum of the Industry Directors²³ and Member Representative Directors;²⁴
- at least two of the Non-Industry Directors shall also qualify as Independent Directors;²⁵
- at least one of the Non-Industry Directors shall be representative of issuers and investors and not associated with an Exchange Member, a broker, or a dealer; and
- at least 20% of the directors on the Exchange Board will be Member Representative Directors.²⁶

The initial directors of the Exchange Board will be appointed by MEMX Holdings and will serve until the first annual meeting of Company Members.²⁷ The first annual meeting of Company Members will be held within 90 days after the Commission grants MEMX's exchange registration.²⁸

²⁰ See MEMX LLC Agreement, Article VII, Section 7.3(a).

²¹ See MEMX LLC Agreement, Article VII, Section 7.3(b)(i).

²² "Non-Industry Director" means a Director who is an Independent Director or any other individual who would not be an Industry Director. See MEMX LLC Agreement, Article I, Section 1.1.

²³ "Industry Director" means, among other criteria, a Director who is or has been within the prior three years an officer, director or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer. See MEMX LLC Agreement, Article I, Section 1.1., for a description of all of the circumstances regarding when a Director would be considered an Industry Director.

²⁴ See MEMX LLC Agreement, Article VII, Section 7.3(b)(ii)(A). "Member Representative Director" means a Director who has been appointed as such to the initial Exchange Board pursuant to Section 7.4 of the MEMX LLC Agreement or elected by MEMX Holdings after having been nominated by the Member Nominating Committee or by an Exchange member pursuant to the MEMX LLC Agreement and confirmed as the nominee of Exchange members after majority vote of Exchange members, if applicable. A Member Representative Director must be an officer, director, employee, or agent of an Exchange member that is not a Unitholder Exchange Member. See MEMX LLC Agreement, Article I, Section 1.1.

²⁵ "Independent Director" means a Director who has no material relationship with the Exchange or any affiliate of the Exchange or any Exchange Member or any affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of MEMX or MEMX Holdings. See MEMX LLC Agreement, Article I, Section 1.1.

²⁶ See MEMX LLC Agreement, Article VII, Section 7.3(b)(ii)(B). See also Amendment No. 3, *supra* note 9 (in which MEMX amended Section 7.3(b)(ii)).

²⁷ See MEMX LLC Agreement, Article VII, Section 7.3(f). "Company Members" means MEMX Holdings and SubCo. See MEMX LLC Agreement, Article I, Section 1.1.

²⁸ See MEMX LLC Agreement, Article VII, Section 7.3(f).

In addition, MEMX Holdings will appoint the initial Nominating Committee and Member Nominating Committee, consistent with each committee's compositional requirements, to nominate candidates for election to the Exchange Board.²⁹ The Nominating Committee and Member Nominating Committee, after completion of their respective duties for nominating directors for election to the Board for that year, will recommend candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable.³⁰ MEMX members will have rights to nominate and elect additional candidates for the Member Nominating Committee pursuant to a petition process.³¹

The Nominating Committee will nominate candidates for election to the Board.³² For Member Representative Director positions, the Member Nominating Committee, composed solely of Member Representative Committee or Panel Members,³³ will solicit input from MEMX members and members may submit petition candidates.³⁴ If no candidates are nominated pursuant to a petition process, then the initial nominees approved and submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee.³⁵ If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MEMX members for election to determine the final designees for any open Member Representative Director positions.³⁶ In the event of a contested election, the candidates who receive the most votes will be selected as the Member Representative Director designees by the Member Nominating Committee.³⁷

²⁹ See MEMX LLC Agreement, Article VIII, Section 8.7(b).

³⁰ See *id.*

³¹ See MEMX LLC Agreement, Article VII, Section 7.4

³² See MEMX LLC Agreement, Article VII, Section 7.4(a).

³³ "Member Representative Committee or Panel Members" means a member of any Committee or hearing panel who is an officer, director, employee or agent of an Exchange Member that is not a Unitholder Exchange Member. See MEMX LLC Agreement, Article I, Section 1.1.

³⁴ See MEMX LLC Agreement, Article VII, Section 7.4(a). See also MEMX LLC Agreement, Article VII, Section 8.7(c).

³⁵ See MEMX LLC Agreement, Article VII, Section 7.4(e).

³⁶ See *id.*

³⁷ See MEMX LLC Agreement, Article VII, Section 7.4(f).

The Commission believes that the MEMX governance provisions are consistent with the Act. In particular, the Commission believes that the requirement that the number of Member Representative Directors must be at least 20% of the Board and the means by which they will be chosen by MEMX members provides for the fair representation of members in the selection of directors and the administration of MEMX and therefore are consistent with Section 6(b)(3) of the Act.³⁸ As the Commission has previously noted, this requirement helps to ensure that members have a voice in an exchange's self-regulatory program, and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.³⁹

In addition, with respect to the requirements that the number of Non-Industry Directors equal or exceed the sum of the number of Industry Directors and Member Representative Directors, that at least two Non-Industry Directors shall also qualify as Independent Directors, and that at least one of the Non-Industry Directors shall be representative of issuers and investors and not associated with an Exchange Member, a broker, or a dealer, the Commission believes that the proposed composition of the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,⁴⁰ which require in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission previously has stated that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.⁴¹

³⁸ 15 U.S.C. 78f(b)(3).

³⁹ See, e.g., Securities Exchange Act Release Nos. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10-234) (order granting registration of Long Term Stock Exchange, Inc.) ("LTSE Order"); 79543 (December 13, 2016), 81 FR 92901, 92903 (December 20, 2016) (File No. 10-227) (order granting registration of MIAX PEARL, LLC) ("MIAX PEARL Order"); 68341 (December 3, 2012), 77 FR 73065, 73067 (December 7, 2012) (File No. 10-207) (order granting the registration of Miami International Securities Exchange, LLC ("MIAX Exchange")) ("MIAX Order"); 58375 (August 18, 2008), 73 FR 49498, 49501 (August 21, 2008) (File No. 10-182) (order granting the registration of BATS Exchange, Inc.) ("BATS Order"); and 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (File No. 10-131) (granting the exchange registration of Nasdaq Stock Market, Inc.) ("Nasdaq Order").

⁴⁰ 15 U.S.C. 78f(b)(3).

⁴¹ See, e.g., LTSE Order, *supra* note 39, at 21843; MIAX PEARL Order, *supra* note 39, at 92903; MIAX Order, *supra* note 39, at 73067; BATS Order, *supra* note 39, at 49501; and Nasdaq Order, *supra* note 39, at 3553.

Further, the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unbiased perspectives, which may enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.

2. Interim Board

MEMX Holdings will hold a special meeting to appoint Interim Directors of the Board (“Interim Board”), which will include Interim Member Representative Directors.⁴² Upon appointment of the Interim Directors, the Interim Board will meet the Board composition requirements set forth in the MEMX LLC Agreement.⁴³ The Interim Board members will serve only until the first annual meeting of Company Members, which will be held within 90 days after the Commission grants the Exchange’s registration as a national securities exchange.⁴⁴ The Exchange represents that it will complete the full nomination, petition, and voting process set forth in the MEMX LLC Agreement, which will provide persons that are approved as MEMX members after the date that the Commission grants the Exchange’s registration as a national securities exchange with the opportunity to participate in the selection of Member Representative Directors as promptly as possible after the effective date of the MEMX LLC Agreement.⁴⁵

3. Exchange Committees

MEMX has proposed to establish several named committees of the Exchange Board, including: An Appeals Committee⁴⁶ and a Regulatory Oversight Committee,⁴⁷ as well as the Nominating Committee and Member

Nominating Committee, discussed above.⁴⁸

The Appeals Committee will consist of two Independent Directors, and one Member Representative Director.⁴⁹ Each member of the Regulatory Oversight Committee must be an Independent Director.⁵⁰

The Commission believes that the MEMX proposed named committees, which are similar to the named committees maintained by other exchanges,⁵¹ are designed to help enable the Exchange to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁵²

B. MEMX Holdings and Regulation of the Exchange

When MEMX commences operations as a national securities exchange, it will have all of the attendant regulatory obligations under the Act. In particular, MEMX will be responsible for the operation and regulation of its trading system and the regulation of its members. The Commission believes that certain provisions in both the MEMX and MEMX Holdings governing documents are designed to facilitate the ability of MEMX to fulfill its regulatory obligations and to help facilitate Commission oversight of MEMX. The discussion below summarizes some of these key provisions.

1. Ownership Structure; Ownership and Voting Limitations

As stated above, MEMX will be owned directly or indirectly by MEMX Holdings. The proposed Fourth Amended and Restated Limited Liability Company Agreement of MEMX Holdings (“MEMX Holdings LLC Agreement”) includes restrictions on the ability to own and vote units representing a fractional part of the interest in MEMX Holdings (“Units”).⁵³

⁴⁸ The Exchange Board could also establish additional committees. See MEMX LLC Agreement, Article VIII, Section 8.1. All committees of the Board will be subject to the control and supervision of the Board. See *id.*

⁴⁹ See MEMX LLC Agreement, Article VIII, Section 8.6.

⁵⁰ See MEMX LLC Agreement, Article VIII, Section 8.8(e).

⁵¹ See, e.g., Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10–222) (order granting the registration of Investors’ Exchange, LLC) (“IEX Order”); Article IV, Section 4.1 of the Eleventh Amended and Restated Bylaws of Cboe Exchange, Inc.

⁵² 15 U.S.C. 78f(b)(1).

⁵³ “Unit” is defined in Article I, Section 1.1 of the MEMX Holdings LLC Agreement. These provisions are consistent with ownership and voting limits

These limitations are designed to prevent any party to the MEMX Holdings LLC Agreement from exercising undue control over the operation of the Exchange and to ensure that the Exchange and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as MEMX Holdings shall control, directly or indirectly, MEMX, no person,⁵⁴ either alone or together with its related persons,⁵⁵ will be permitted to beneficially own, directly or indirectly, of record or beneficially, shares constituting more than 40% of any class of Units.⁵⁶ A more restrictive condition will apply to the broker-dealer members of the Exchange, who will be prohibited from beneficially owning, directly or indirectly, either alone or together with their related persons, more than 20% of any class of Units.⁵⁷ If any party to the MEMX Holdings LLC Agreement purports to transfer⁵⁸ any Units or Unit Equivalents⁵⁹ in violation of these ownership limits, MEMX Holdings will be required (to the extent funds are legally available) to redeem the Units in excess of the applicable ownership limit.⁶⁰

approved by the Commission for other SROs. See, e.g., IEX Order, *supra* note 51, and LTSE Order, MIAX PEARL Order, MIAX Order, and BATS Order, *supra* note 39; see also Securities Exchange Release Nos. 6068 (February 4, 2016) (File No. 10–221) (order granting exchange registration of ISE Mercury, LLC) (“ISE Mercury Order”); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10–209) (order granting the exchange registration of ISE Gemini, LLC) (“ISE Gemini Order”); 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE–2008–88) (Cboe demutualization order); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR–NSX–2006–03) (NSX demutualization order); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26) (CHX demutualization order); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73) (Phlx demutualization order).

⁵⁴ See MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “Person”).

⁵⁵ See *id.* (defining “Related Persons”).

⁵⁶ See MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(i). There are limited exceptions to these prohibitions. See *infra* notes 64–66 and accompanying text.

⁵⁷ See MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(ii). This restriction, unlike others discussed below (see *infra* note 64 and accompanying text), cannot be waived. See MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii).

⁵⁸ See MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “transfer” in this context).

⁵⁹ See *id.* (defining “Unit Equivalents”).

⁶⁰ See MEMX Holdings LLC Agreement, Article III, Section 3.7(c). The price of the redeemed Units or Unit Equivalents is also prescribed in the MEMX Holdings LLC Agreement. See *id.* The number of Units or Unit Equivalents to be redeemed is to be calculated after taking into account that the redeemed Units or Unit Equivalents will become treasury shares and will no longer be deemed to be outstanding. See *id.* It is further provided in the

Continued

⁴² See Form 1, Exhibit J.

⁴³ See *id.* See also MEMX LLC Agreement, Article VII, Section 7.3.

⁴⁴ See MEMX LLC Agreement, Article VII, Section 7.3(f).

⁴⁵ See Form 1, Exhibit J.

⁴⁶ See MEMX LLC Agreement, Article VIII, Section 8.1. The Appeals Committee will preside over all appeals related to disciplinary and adverse action determinations in accordance with MEMX rules. See MEMX LLC Agreement, Article VIII, Section 8.6.

⁴⁷ See MEMX LLC Agreement, Article VIII, Section 8.1. The Regulatory Oversight Committee will be responsible for establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer and for recommending personnel actions involving the Chief Regulatory Officer and senior regulatory personnel. See MEMX LLC Agreement, Article VIII, Section 8.8(c).

In addition, no person, alone or together with its related persons, may, directly, indirectly, or pursuant to any agreement, vote or cause the voting of Units or give any consent or proxy with respect to Units representing more than 20% of the voting power of the then issued and outstanding Units (“Voting Limitation”).⁶¹ Further, no person, either alone or together with its related persons, under circumstances that would result in the Units that are subject to such agreement, plan, or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan, or other arrangement would be to enable any person, either alone or together with its related persons, to vote, possess the right to vote, or cause the voting of Units that would represent more than 20% of the voting power of the then issued and outstanding Units.⁶²

The MEMX Holdings Board will be permitted to waive the 40% ownership limitation and the 20% Voting Limitation pursuant to a resolution duly adopted by the MEMX Holdings Board by Supermajority Board Vote,⁶³ if it makes certain determinations.⁶⁴ Any

MEMX Holdings LLC Agreement that any Units or Unit Equivalents that have been called for redemption may not be deemed outstanding Units or Unit Equivalents if a sum sufficient to redeem the Units or Unit Equivalents has been irrevocably deposited or set aside to pay the redemption price. From and after the redemption date (unless MEMX Holdings defaults in providing funds for the payment of the redemption price), the redeemed Units or Unit Equivalents that have been redeemed will become treasury shares, and all rights of the holder of the redeemed Units or Unit Equivalents in MEMX Holdings (except the right to receive from MEMX Holdings the redemption price against delivery to MEMX Holdings of evidence of ownership of the shares) will cease. *See id.* In addition, in the event that any redemption has resulted in any person owning such number of Units or Unit Equivalents that is in violation of the ownership limits, MEMX Holdings will be required to redeem those Units or Unit Equivalents pursuant to the limitation provisions. *See id.*

⁶¹ *See* MEMX Holdings LLC Agreement, Article III, Section 3.5(a)(iii).

⁶² *See id.* In addition, the quorum requirements of the MEMX Holdings board of directors (“MEMX Holdings Board”) will require the presence of (1) a Market Maker Director, (2) a Bank Director, and (3) a Retail Broker Director. *See* MEMX Holdings LLC Agreement, Article VIII, Section 8.6(a)(i). *See also* MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining Market Maker Director, Bank Director, and Retail Broker Director). The Commission believes that this quorum provision will guard against undue influence over the affairs of MEMX Holdings by any particular category of MEMX Holdings investor.

⁶³ *See* MEMX Holdings LLC Agreement, Article I, Section 1.1 (defining “Supermajority Board Vote”).

⁶⁴ *See* MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii). *See also supra* note 57 (concerning the inability to waive restrictions for broker-dealer members of the Exchange.) The required determinations are that such waiver will not impair the ability of the Exchange to carry out

such waiver will not be effective unless and until approved by the Commission.⁶⁵

Any person that proposes to own Units in excess of the 40% ownership limitation, or to vote or grant any proxies or consents with respect to Units constituting more than 20% of the voting power of the then outstanding Units, will be required to deliver written notice to the MEMX Holdings Board of its intention.⁶⁶ The notice must be delivered to the MEMX Holdings Board not less than 45 days (or any shorter period to which the Board expressly consents) before the proposed ownership of such Units or the proposed vote.⁶⁷

The MEMX Holdings LLC Agreement also contains provisions that are designed to further safeguard the ownership and voting limitations described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons beneficially owns, directly or indirectly (whether by acquisition or a change in the number of Units outstanding), of record or beneficially 5% or more of the then outstanding Units will be required to notify the MEMX Holdings Board in writing of such ownership.⁶⁸ Thereafter, such persons will be required to update MEMX Holdings of any increase or

its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder; that such waiver is otherwise in the best interests of MEMX Holdings, its stockholders, and the Exchange; that such waiver will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and that such Person and its Related Persons are not subject to any applicable “statutory disqualification” within the meaning of Section 3(a)(39) of the Act. *See id.* *See also* MEMX Holdings LLC Agreement, Article III, Section 3.5(c). These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* IEX Order, *supra* note 51, ISE Mercury Order and ISE Gemini Order, *supra* note 53; LTSE Order, MIAx PEARL Order, MIAx Order, and BATS Order, *supra* note 39; and Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10–194 and 10–196) (order approving DirectEdge exchanges) (“DirectEdge Exchanges Order”).

⁶⁵ *See* MEMX Holdings LLC Agreement, Article III, Section 3.5(b)(ii).

⁶⁶ *See* MEMX Holdings LLC Agreement, Article III, Section 3.5(d).

⁶⁷ *See id.*

⁶⁸ *See* MEMX Holdings LLC Agreement, Article III, Section 3.6(a). The notice will require the Person’s full legal name; the Person’s title or status and the date on which such title or status was acquired; the Person’s and its Related Person’s approximate ownership interest in MEMX Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of MEMX Holdings, whether through ownership of securities, by contract or otherwise. *See id.*

decrease of 1% or more in their previously reported ownership percentage.⁶⁹ Further, in the event of a merger or affiliation between MEMX Holdings members, the surviving member or surviving affiliated group will (1) if both such members had nominated a director that is serving on the MEMX Holdings Board at the time of their merger or affiliation, remove or cause the removal of one of such directors effective upon the consummation of such merger or affiliation, and (2) thereafter have the right to nominate only one director and the number of directors shall be reduced accordingly.⁷⁰

The Exchange’s LLC Agreement does not include the same change of control provisions that are present in the MEMX Holdings LLC Agreement because the MEMX LLC Agreement instead explicitly identifies its owners (MEMX Holdings and SubCo) by name as the Company Members of MEMX.⁷¹ Thus, any changes in the ownership of MEMX would require the MEMX LLC Agreement to be amended. Any amendment to the MEMX LLC Agreement, including to ownership of the Exchange, would constitute a proposed rule change under Section 19(b) of the Act⁷² and Rule 19b–4⁷³ thereunder that will be required to be filed with, or filed with and approved by, the Commission.⁷⁴ Moreover, pursuant to the MEMX LLC Agreement itself, any transfer of limited liability company interests of MEMX will be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act.⁷⁵

Although MEMX Holdings is not directly responsible for regulation, its activities with respect to the operation of MEMX must be consistent with, and must not interfere with, the self-regulatory obligations of MEMX.⁷⁶ As described above, the provisions applicable to direct and indirect

⁶⁹ *See* MEMX Holdings LLC Agreement, Article III, Section 3.6(b). Changes of less than 1% must also be reported to MEMX Holdings if they result in such Person crossing a 20% or 40% ownership threshold. *See id.* In addition, the Exchange’s rules also impose limits on affiliation between the Exchange and a member of the Exchange. *See* MEMX Rule 2.10 (No Affiliation between Exchange and any Member).

⁷⁰ *See* MEMX Holdings LLC Agreement, Article VIII, Section 8.17(a). *See also* MEMX LLC Agreement, Article VII, Section 7.3(c)(v); and *supra* note 5 (concerning Amendment No. 2).

⁷¹ *See* MEMX LLC Agreement, Schedule 1.

⁷² 15 U.S.C. 78s(b).

⁷³ 17 CFR 240.19b–4.

⁷⁴ *See* MEMX LLC Agreement, Article XIX, Section 19.2.

⁷⁵ *See* MEMX LLC Agreement, Article XV, Section 15.1(a).

⁷⁶ *See, e.g.,* IEX Order, *supra* note 51.

changes in control of MEMX Holdings and MEMX, as well as the voting limitation imposed on owners of MEMX Holdings who also are MEMX members, are designed to help prevent any owner of MEMX Holdings from exercising undue influence or control over the operation of the Exchange and to help ensure that the Exchange retains a sufficient degree of independence to effectively carry out its regulatory obligations under the Act.

In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. As the Commission has noted in the past, a member's ownership interest in an entity that controls an exchange could become so large as to cast doubt on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.⁷⁷ A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, the Commission believes that these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

As noted above, the Commission received two comment letters on MEMX's Form 1 application, one of which addressed the regulatory independence of MEMX. The commenter "welcomes the prospect of MEMX's entry" but expressed that it "hopes and expects that MEMX will [serve the interests of its member-owners] without compromising the broader interest of market participants and, ultimately, of investors."⁷⁸ The commenter said that it expects the Commission "will hold the 'Members' Exchange' to the same regulatory

⁷⁷ See, e.g., ISE Mercury Order, *supra* note 53, and IEX Order, *supra* note 51; LTSE Order, MIAAX PEARL Order, MIAAX Order, and BATS Order, *supra* note 39; and DirectEdge Exchanges Order, *supra* note 64.

⁷⁸ Letter to Vanessa Countryman, Secretary, Commission, from John A. Zecca, Executive Vice President, Chief Legal Officer, and Chief Regulatory Officer, Nasdaq, Inc., dated December 19, 2019, available at <https://www.sec.gov/comments/10-237/10237-6571115-201079.pdf> ("Nasdaq Letter"), at 1–2.

standard to which is holds other SROs—which is to act for the benefit of all market participants and investors—rather than for the primary or exclusive benefit of its members."⁷⁹ In response, MEMX explained that it "is committing significant resources to its regulatory program by investing in experienced personnel and proven surveillance technology" and that it "fully expects that the Commission will regulate MEMX consistent with other SROs and in accordance with the federal securities laws."⁸⁰

Potential conflicts of interest arise across different types of exchange ownership structures. Broker-dealer ownership and control of an exchange, which is not novel, presents inherent conflicts of interest when exchanges both regulate their members and serve the commercial interests of their member-owners.⁸¹

The Commission has recognized that "to be effective, an SRO must be structured in such a way that regulatory staff is unencumbered by inappropriate business pressure" that could "inhibit effective regulation and discourage vigorous enforcement against members."⁸² To help ensure independent and empowered SRO regulatory operations, MEMX has, among other things, adopted a governance structure designed to mitigate the inherent conflict. Specifically, MEMX has an independent Chief Regulatory Officer that oversees

⁷⁹ *Id.* at 2.

⁸⁰ Letter to Vanessa Countryman, Secretary, Commission, from Anders Franzon, General Counsel, MEMX, dated January 16, 2020 ("MEMX Letter 1"), at 1–2, available at <https://www.sec.gov/comments/10-237/10237-6668083-203948.pdf>. MEMX noted that while "it does intend to provide cost savings to the industry," the benefit of those savings "will not be limited to its member-owners or come at the expense of investment into regulatory oversight." *Id.* at 1.

⁸¹ See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) (Concept Release Concerning Self-Regulation). Despite these inherent conflicts of interest, the federal securities laws reflect Congress' determination to rely on "self-regulation" as a fundamental component of U.S. market and broker-dealer regulation in which all broker-dealers are required to be members of an SRO that sets standards, conducts examinations, and enforces rules regarding its members. See *id.* at 71256. Among other benefits, self-regulation reduces costs while leveraging the expertise of those most familiar with the nuances of securities industry operations and also allows SROs to set prescriptive standards, including standards that exceed those imposed by the Commission, like business conduct standards. See *id.*

⁸² *Id.* Nevertheless, the federal securities laws require member involvement in the overall governance and administration of an exchange. See, e.g., 15 U.S.C. 78f(b)(3) (requiring an exchange, among other things, to provide to its broker-dealer members "a fair representation of its members in the selection of its directors and administration of its affairs").

the exchange's regulatory operations and that reports to an independent Regulatory Oversight Committee of the exchange board of directors. In addition, MEMX has a majority independent board of directors with other key independent board committees, such as the Regulatory Oversight Committee.⁸³

Ownership and voting limits in the governing documents of the exchange and/or its holding company further protects the status of SRO independence. The provisions that MEMX has proposed, which are consistent with those in place across all exchanges today, are designed to prevent any direct or indirect owner from exercising control over the operation of the exchange as well as to ensure that the exchange and the Commission are able to carry out their regulatory obligations under the Act. These provisions impose limits on voting and ownership of exchange holding companies, with more stringent ownership limits imposed on member owners.⁸⁴

As a registered exchange, MEMX will be subject to the same regulatory standards applicable to any other exchange regardless of the identity of the ultimate owners of that exchange. As discussed above and further below, MEMX has proposed to adopt industry-standard protections in a governance structure for itself and its holding company that is designed to preserve MEMX's self-regulatory independence by protecting MEMX from inappropriate business pressures, and the Commission believes these protections address the concerns raised by the commenter.

Finally, one commenter urged the Commission to consider whether it is "incongruous" for the Commission "to freely permit" large banks and broker-dealers, which, the commenter says, "control much of the order flow . . . and which in many cases own or operate their own alternative trading systems," to own and operate an exchange without also permitting exchanges to own or operate broker-dealer venues on the same terms as banks and broker-dealers.⁸⁵ In response, MEMX noted that it has not proposed to own or operate an alternative trading system.⁸⁶ And whether exchanges should be permitted to own or operate broker-dealer venues on the same terms as banks and broker-dealers is beyond

⁸³ Each member of the Regulatory Oversight Committee will be an Independent Director. See Article VIII, Section 8.8(e) of the MEMX LLC Agreement.

⁸⁴ See *supra* notes 54–75 and accompanying text.

⁸⁵ See Nasdaq Letter, *supra* note 78, at 2.

⁸⁶ See MEMX Letter 1, *supra* note 80, at 1.

the scope of this order, which concerns MEMX's Form 1 application.

The Commission believes that MEMX's and MEMX Holdings' proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁸⁷ In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

2. Regulatory Independence and Oversight

Although MEMX Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MEMX must be consistent with, and must not interfere with, MEMX's self-regulatory obligations. In this regard, MEMX and MEMX Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MEMX. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.⁸⁸ Specifically:

- The directors, officers, employees, and agents of MEMX Holdings must give due regard to the preservation of the independence of the self-regulatory function of MEMX and to its obligations to investors and the general public and must not take actions which would interfere with the effectuation of decisions by the Exchange Board relating to its regulatory functions (including disciplinary matters) or which would interfere with MEMX's ability to carry out its responsibilities under the Act.⁸⁹

⁸⁷ 15 U.S.C. 78f(b)(1).

⁸⁸ See, e.g., IEX Order, *supra* note 51; LTSE Order and MIAAX Order, *supra* note 39; and DirectEdge Exchanges Order, *supra* note 64.

⁸⁹ See MEMX Holdings LLC Agreement, Article VIII, Section 8.18(b). Similarly, Article VII, Section 7.2(b) of the MEMX LLC Agreement requires the Exchange Board and each Director, when managing the business and affairs of MEMX, to consider the requirements of Section 6(b) of the Act and requires each Director, officer, or employee of MEMX to comply with the federal securities laws and regulations thereunder and cooperate with the Commission, and MEMX pursuant to its regulatory authority. Article VII, Section 7.2(c) of the MEMX LLC Agreement also requires the Exchange Board, when evaluating any proposal to take into account all factors that the Exchange Board deems relevant, to the extent deemed relevant: the potential impact on the integrity, continuity and stability of the

- MEMX Holdings must comply with the federal securities laws and the rules and regulations promulgated thereunder, and must cooperate with the Commission, MEMX, Financial Industry Regulatory Authority, Inc. ("FINRA"), and any other SROs of which MEMX Execution Services LLC ("MEMX ES") is a member, pursuant to and to the extent of their respective regulatory authority.⁹⁰ In addition, MEMX Holdings' officers, directors, employees, and agents must comply with the federal securities laws and the rules and regulations promulgated thereunder and are deemed to agree to cooperate with: (1) The Commission and MEMX in respect of the Commission's oversight responsibilities regarding MEMX and the self-regulatory functions and responsibilities of MEMX; and (2) FINRA, any other SROs of which MEMX ES is a member, and MEMX ES in respect of FINRA's and any such other SRO's oversight responsibilities regarding MEMX ES.⁹¹ MEMX Holdings must take reasonable steps necessary to cause its officers, directors, employees and agents to so cooperate.⁹²

- MEMX Holdings, and its officers, directors, employees, and agents must submit to the jurisdiction of the U.S. federal courts, the Commission, and MEMX, for purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, MEMX activities.⁹³

- All books and records of MEMX reflecting confidential information pertaining to the self-regulatory function of MEMX (including but not limited to disciplinary matters, trading data, trading practices, and audit information) must be retained in confidence by MEMX and its personnel, directors, officers, employees, and agents, and will not be used by MEMX for any non-regulatory purposes and shall not be made available to any person

national securities exchange operated by MEMX and the other operations of MEMX, on the ability to prevent fraudulent and manipulative acts and practices, and on investors and the public, and whether such proposal would promote just and equitable principles of trade, foster cooperation and coordination with Persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

⁹⁰ See MEMX Holdings LLC Agreement, Article XI, Section 11.3(h). MEMX ES is a subsidiary of MEMX Holdings that intends to register with the Commission as a broker-dealer and become a member of FINRA. See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See MEMX Holdings LLC Agreement, Article XV, Section 15.12(b).

(including, without limitation, any MEMX member) other than to personnel of the Commission, personnel of another self-regulatory organization performing regulatory services on behalf of MEMX, the processor operating pursuant to an effective national market system plan (*i.e.*, the Consolidated Audit Trail processor), and those personnel of MEMX, members of committees of the Exchange Board, members of the Exchange Board, or hearing officers and other agents of MEMX, to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of MEMX.⁹⁴ Similar provisions apply to MEMX Holdings and its directors, officers, employees, and agents.⁹⁵

- The books and records of MEMX and MEMX Holdings must be maintained in the United States⁹⁶ and, to the extent they are related to the operation or administration of MEMX, MEMX Holdings' books and records will be subject at all times to inspection and copying by the Commission and MEMX.⁹⁷

- Furthermore, to the extent they are related to the operation or administration of MEMX, the books, records, premises, officers, directors, employees, and agents of MEMX Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MEMX, for purposes of, and subject to oversight pursuant to, the Act.⁹⁸

- MEMX Holdings will take reasonable steps necessary to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) with MEMX Holdings to consent in writing to the applicability of

⁹⁴ See MEMX LLC Agreement, Article XIII, Section 13.1.

⁹⁵ The MEMX Holdings LLC Agreement provides that all books and records of MEMX reflecting confidential information pertaining to the self-regulatory function of MEMX that come into the possession of MEMX Holdings, and the information contained in those books and records, will be subject to confidentiality restrictions and will not be used for any non-regulatory purposes. See MEMX Holdings LLC Agreement, Article XII, Section 12.2(c). The MEMX and MEMX Holdings governing documents acknowledge that requirements to keep such information confidential shall not limit or impede the rights of the Commission to access and examine such information or limit the ability of officers, directors, employees, or agents of MEMX or MEMX Holdings to disclose such information to the Commission or MEMX. See MEMX LLC Agreement, Article XIII, Section 13.1 and MEMX Holdings LLC Agreement, Article XII, Section 12.2(c).

⁹⁶ See MEMX LLC Agreement, Article XIII, Section 13.1(a); and MEMX Holdings LLC Agreement, Article XII, Section 12.2(a).

⁹⁷ See MEMX Holdings LLC Agreement, Article XII, Section 12.2(b).

⁹⁸ See *id.*

provisions regarding non-interference, confidentiality, books and records, compliance and cooperation, jurisdiction, and regulatory obligations, with respect to their activities related to MEMX.⁹⁹

- The MEMX Holdings LLC Agreement requires that, so long as MEMX Holdings controls MEMX, any changes to that document must be submitted to the Exchange Board for approval, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations thereunder, such change shall not be effective until filed with and effective by operation of law, or filed with, and approved by, the Commission.¹⁰⁰

The Commission believes that the provisions discussed in this section, which are designed to help ensure the independence of MEMX's regulatory function and facilitate the ability of MEMX to carry out its regulatory responsibilities under, and operate in a manner consistent with, the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.¹⁰¹

One commenter questioned whether the indirect owners of MEMX would be able to access the trading and regulatory records of MEMX.¹⁰² The commenter asserted that access by such member-owners to such records could pose "significant conflicts of interest" because they "directly compete with other exchange members."¹⁰³ In response, MEMX stated that Section 13.1 of the MEMX LLC Agreement expressly provides that confidential information pertaining to the self-regulatory function of MEMX "shall not be made available to any person (including, without limitation, any

Exchange Member)" ¹⁰⁴ MEMX stated that this language means that "no member of the Exchange, including members that indirectly own the Exchange, will have access to regulatory and trading records of the Exchange."¹⁰⁵ Further, MEMX noted that other exchanges have identical confidentiality language in their governing documents.¹⁰⁶ The Commission believes that MEMX has appropriately addressed the commenter's concern, as the proposed governing documents will prohibit MEMX's ultimate owners from accessing the trading and regulatory records of MEMX.

Further, Section 19(h)(1) of the Act ¹⁰⁷ provides the Commission with the authority "to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance . . ." with any such provision by its members (including associated persons thereof). If the Commission were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1),¹⁰⁸ these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

Even in the absence of the governance provisions described above, under Section 20(a) of the Act,¹⁰⁹ any person with a controlling interest in MEMX would be jointly and severally liable with and to the same extent that MEMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act ¹¹⁰ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any

provision of the Act or rule thereunder. Further, Section 21C of the Act ¹¹¹ authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to MEMX Holdings.

3. Regulatory Oversight Committee

The regulatory operations of MEMX will be monitored by the Regulatory Oversight Committee of the Exchange Board. As mentioned above, the Regulatory Oversight Committee will consist only of Independent Directors.¹¹² The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MEMX's regulatory and SRO responsibilities, assessing MEMX's regulatory performance, and assisting the Exchange Board (and committees of the Exchange Board) in reviewing MEMX's regulatory plan and the overall effectiveness of MEMX's regulatory functions.¹¹³

Further, the Chief Regulatory Officer ("CRO") of MEMX will have general supervision over MEMX's regulatory operations, including responsibility for overseeing MEMX's surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another SRO to which MEMX is a party.¹¹⁴ The Regulatory Oversight Committee, in consultation with the Chief Executive Officer of MEMX, will be responsible for establishing the goals, assessing the performance, and fixing the compensation of the CRO and for recommending personnel actions involving the CRO and senior regulatory personnel.¹¹⁵

4. Regulatory Funding and Services

As a prerequisite for the Commission's granting of an exchange's

⁹⁹ See MEMX Holdings LLC Agreement, Article VIII, Section 8.18(b).

¹⁰⁰ See MEMX Holdings LLC Agreement, Article XV, Section 15.9(a).

¹⁰¹ 15 U.S.C. 78f(b)(1).

¹⁰² See Letter to Vanessa Countryman, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE Group, Inc., dated January 15, 2020, available at <https://www.sec.gov/comments/10-237/10237-6668143-203793.pdf> ("NYSE Letter"), at 1–2. The commenter cited to Section 13.3(a) of the Second Amended and Restated Limited Liability Agreement of MEMX LLC, which would permit MEMX Company Members to access, inspect, and copy books and records and to inspect facilities, subject to the confidentiality provisions of Section 13.1. The commenter stated that MEMX Company Members included MEMX Holdings and SubCo, both of which were owned by MEMX's member-owners.

¹⁰³ *Id.* at 1–2.

¹⁰⁴ Letter to Vanessa Countryman, Secretary, Commission, from Anders Franzon, General Counsel, MEMX, dated February 11, 2020 ("MEMX Letter 2"), available at <https://www.sec.gov/comments/10-237/10237-6795399-208386.pdf>, at 2.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 3.

¹⁰⁷ See 15 U.S.C. 78s(h)(1).

¹⁰⁸ 15 U.S.C. 78f(b)(1); 15 U.S.C. 78s(g)(1).

¹⁰⁹ 15 U.S.C. 78t(a).

¹¹⁰ 15 U.S.C. 78t(e).

¹¹¹ 15 U.S.C. 78u–3.

¹¹² See *supra* note 50 and accompanying text.

¹¹³ See MEMX LLC Agreement, Article VIII, Section 8.8(a).

¹¹⁴ See MEMX LLC Agreement, Article IX, Section 9.3.

¹¹⁵ See MEMX LLC Agreement, Article VIII, Section 8.8(c). To the extent that the Chief Executive Officer of MEMX has any indirect supervisory responsibility for the role or function of the CRO, including but not limited to, implementation of the budget for the regulatory function or regulatory personnel matters, the Regulatory Oversight Committee will take all steps reasonably necessary to ensure that the Chief Executive Officer does not compromise the regulatory autonomy and independence of the CRO or the regulatory function. See MEMX LLC Agreement, Article VIII, Section 8.8(d).

application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act.¹¹⁶ Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and rules thereunder and the rules of the exchange.¹¹⁷ The discussion below summarizes how MEMX proposes to conduct and structure its regulatory operations.

a. Regulatory Funding

To help ensure that MEMX has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MEMX represents that, if the Commission approves MEMX's application for registration as a national securities exchange, MEMX Holdings will allocate sufficient assets to MEMX to enable the Exchange's operation.¹¹⁸ Specifically, MEMX represents that MEMX Holdings will make a cash contribution to MEMX of \$5,000,000, "in addition to any previously-provided in-kind contributions, such as legal, regulatory, and infrastructure-related services."¹¹⁹

MEMX also represents that such cash and in-kind contributions from MEMX Holdings will be adequate to operate MEMX, including the regulation of the Exchange, and that MEMX Holdings and MEMX will enter into an agreement that requires MEMX Holdings to provide adequate funding for the Exchange's operations, including the regulation of the Exchange.¹²⁰

Further, any "Regulatory Funds" received by MEMX will not be used for non-regulatory purposes or distributed to MEMX Holdings, but rather will be applied to fund the regulatory operations of MEMX, or, as applicable, used to pay restitution and disgorgement to customers.¹²¹ Any

¹¹⁶ See 15 U.S.C. 78f(b)(1).

¹¹⁷ See *id.* See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

¹¹⁸ See Form 1, Exhibit I.

¹¹⁹ See *id.*

¹²⁰ See *id.* MEMX represents that this agreement will provide that MEMX will receive all fees, including regulatory fees and trading fees, payable by MEMX's members, as well as any funds received from any applicable market data fees and tape revenue, and will further provide that MEMX Holdings will reimburse MEMX for its costs and expenses to the extent that the Exchange's assets are insufficient to meet its costs and expenses. See *id.*

¹²¹ See MEMX LLC Agreement, Article XVII, Section 17.4(b). Article I, Section 1.1 of the MEMX LLC Agreement defines "Regulatory Funds" as "fees, fines, or penalties derived from the regulatory operations of [MEMX]," but such term does not include "revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of [MEMX], even if a portion of such revenues are used to pay costs associated with the regulatory operations of

excess non-regulatory funds, as solely determined by MEMX, will be remitted to MEMX Holdings in accordance with the MEMX LLC Agreement.¹²²

b. Regulatory Contract with FINRA

Although MEMX will be an SRO with all of the attendant regulatory obligations under the Act, it has represented to the Commission that it intends to enter into a regulatory services agreement ("RSA") with FINRA, under which FINRA as a regulatory services provider will perform certain regulatory functions on MEMX's behalf.¹²³ Specifically, MEMX expects that such services will include performance of investigation, disciplinary, and hearing services.¹²⁴ Notwithstanding the RSA, MEMX will retain legal responsibility for the regulation of its members and its market and the performance of FINRA as its regulatory services provider. Because MEMX anticipates entering into an RSA with FINRA, it has not made provisions to fulfill the regulatory services that will be undertaken by FINRA. Accordingly, the Commission is conditioning the operation of MEMX on a final RSA that specifies the services that will be provided to MEMX.

The Commission believes that it is consistent with the Act for MEMX to contract with FINRA to perform certain examination, enforcement, and disciplinary functions.¹²⁵ These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that FINRA has the expertise and experience to perform these functions for MEMX.¹²⁶ However, MEMX, unless relieved by the Commission of its responsibility, bears the self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MEMX's behalf.¹²⁷ In performing these

[MEMX]." This definition is consistent with the rules of other SROs. See, e.g., LTSE Bylaws, Article I(bb); Amended and Restated By-Laws of MIA Exchange, Article 1(II); By-Laws of NASDAQ PHLX LLC, Article I(ii); and By-Laws of NASDAQ BX, Inc., Article I(ii).

¹²² See Form 1, Exhibit I.

¹²³ See Form 1, Exhibit L. See also MEMX Rule 9.8.

¹²⁴ See Form 1, Exhibit L.

¹²⁵ For example, LTSE, IEX, MIA Exchange, MIAX PEARL, LLC, Nasdaq MRX, LLC, Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. ("Cboe EDGX"), and Cboe BZX Exchange, Inc. ("Cboe BZX") have entered into RSAs with FINRA.

¹²⁶ See, e.g., LTSE Order, *supra* note 39; IEX Order, *supra* note 51; DirectEdge Exchanges Order, *supra* note 64; and Nasdaq Order, *supra* note 39. The Commission is not approving the RSA or any of its specific terms.

¹²⁷ See 15 U.S.C. 78s(g)(1).

regulatory functions, however, FINRA may nonetheless bear liability for causing or aiding and abetting the failure of MEMX to perform its regulatory functions.¹²⁸ Accordingly, although FINRA will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for MEMX, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws or rules thereunder by MEMX.¹²⁹

c. Rule 17d-2 Agreements

Section 19(g)(1) of the Act,¹³⁰ among other things, requires every SRO registered as either a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members.¹³¹ Rule 17d-2 of the Act permits SROs to propose joint plans to allocate regulatory responsibilities amongst themselves for their common rules with respect to their common members.¹³² These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. For example, the Commission recently declared effective a plan to allocate regulatory responsibilities between FINRA and the Long-Term Stock Exchange, Inc. ("LTSE") pursuant to which FINRA assumes examination and enforcement

¹²⁸ For example, if failings by FINRA have the effect of leaving MEMX in violation of any aspect of MEMX's self-regulatory obligations, MEMX would bear direct liability for the violation, while FINRA may bear liability for causing or aiding and abetting the violation. See, e.g., LTSE Order, *supra* note 39; IEX Order, *supra* note 51; Nasdaq Order and BATS Order, *supra* note 39; and DirectEdge Exchanges Order, *supra* note 64.

¹²⁹ See, e.g., LTSE Order, *supra* note 39; IEX Order, *supra* note 51; and Nasdaq Order, *supra* note 39.

¹³⁰ 15 U.S.C. 78s(g)(1).

¹³¹ 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

¹³² See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

responsibility for broker-dealers that are members of both FINRA and LTSE with respect to the rules of LTSE that are substantially similar to the applicable rules of FINRA, as well as certain specified provisions of the federal securities laws.¹³³

A Rule 17d-2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.¹³⁴ MEMX has represented to the Commission that it will join all applicable plans, including Rule 17d-2 plans for the allocation of regulatory responsibilities.¹³⁵ Similar to other exchanges, the Commission understands from MEMX that it will enter into a bilateral Rule 17d-2 agreement covering common members of MEMX and FINRA. This agreement will allocate to FINRA regulatory responsibility, with respect to common members, for specified regulatory and enforcement matters arising out of specified common rules and specified provisions of the Act and the rules and regulations thereunder. In addition, the Commission is conditioning operation of MEMX as an exchange on MEMX first joining the applicable multilateral Rule 17d-2 plans, including the multi-party Rule 17d-2 plan for the allocation of regulatory responsibilities with respect to certain Regulation NMS and Consolidated Audit Trail Rules and the multi-party Rule 17d-2 plan for the surveillance, investigation, and enforcement of common insider trading rules.¹³⁶

¹³³ See Securities Exchange Act Release No. 86587 (August 7, 2019), 84 FR 39883 (August 12, 2019) (File No. 4-747). See also, e.g., Securities Exchange Act Release Nos. 83696 (July 24, 2018), 83 FR 35682 (July 27, 2018) (FINRA/MIAX Exchange/MIAX PEARL); 77321 (March 8, 2016), 81 FR 13434 (March 14, 2016) (File No. 4-697) (FINRA/ISE Mercury, LLC); 73641 (November 19, 2014), 79 FR 70230 (November 25, 2014) (File No. 4-678) (FINRA/MIAX Exchange); 70053 (July 26, 2013), 78 FR 46656 (August 1, 2013) (File No. 4-663) (FINRA/Topaz Exchange n/k/a ISE Gemini, LLC); 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4-575) (FINRA/Boston Stock Exchange, Inc. ("BSE")); 58818 (October 20, 2008), 73 FR 63752 (October 27, 2008) (File No. 4-569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4-536) (National Association of Securities Dealers, Inc. ("NASD") n/k/a FINRA) and Chicago Board of Options Exchange, Inc. concerning the CBOE Stock Exchange, LLC); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4-529) (NASD/International Securities Exchange, LLC); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4-517) (NASD/Nasdaq).

¹³⁴ See Rule 17d-2 Adopting Release, *supra* note Error! Bookmark not defined.

¹³⁵ See Form 1, Exhibit E, at 15.

¹³⁶ See Securities Exchange Act Release Nos. 88366 (March 12, 2020), 85 FR 15238 (March 17, 2020) (File No. 4-618); and 86542 (August 1, 2019), 84 FR 38679 (August 7, 2019) (File No. 4-566).

Because MEMX anticipates entering into these Rule 17d-2 agreements, it has not made provision to fulfill the regulatory obligations that will be undertaken by FINRA and other SROs under these agreements with respect to common members.¹³⁷ Accordingly, the Commission is conditioning the operation of MEMX on approval by the Commission of a Rule 17d-2 agreement that allocates the above specified matters to FINRA, and the approval of an amendment to the existing multi-party Rule 17d-2 plans specified above to add MEMX as a party.

C. MEMX Trading System

MEMX will operate a fully automated electronic order book, and will not maintain or operate a physical trading floor. Only broker-dealer members of MEMX and entities that enter into market access arrangements with members (collectively, "Users") will have access to the MEMX system.¹³⁸ Users will be able to electronically submit orders to buy or sell securities traded on the Exchange through a variety of systems.¹³⁹ MEMX will allow firms to register as market makers with affirmative and negative market making obligations.¹⁴⁰

Users may submit orders to the Exchange as Limit Orders, Market Orders, or Pegged Orders.¹⁴¹ Orders may be submitted with the following time-in-force instructions, as applicable: Immediate-or-Cancel; Day; Fill-or-Kill; Good 'til Time, and Regular Hours Only.¹⁴² Users may submit orders with the display instructions of Displayed or Non-Displayed, but all orders eligible for display will be automatically defaulted to Displayed unless a User elects otherwise.¹⁴³ A Limit Order with a Displayed instruction also may include a Reserve Quantity.¹⁴⁴

¹³⁷ For common members, the regulatory obligations will be covered by the Rule 17d-2 agreements, and for MEMX members that are not also members of FINRA, the regulatory obligations will be covered by the RSA.

¹³⁸ To obtain authorized access to the MEMX system, each User must enter into a User Agreement with MEMX. See MEMX Rule 11.3(a).

¹³⁹ For a discussion of the means of access to MEMX, see MEMX Form 1, Exhibit E, Section 1.

¹⁴⁰ See MEMX Rules 11.17 through 11.20. MEMX's rules relating to market makers are similar to the rules of other national securities exchanges. See, e.g., Cboe EDGX Rules 11.17 through 11.20.

¹⁴¹ See MEMX Rule 11.8(a)-(c). Limit Orders may be designated as Intermarket Sweep Orders. See MEMX Rule 11.8(b)(5). Pegged Orders may be designated as either a Primary Peg or a Midpoint Peg. See MEMX Rules 11.6(h) and 11.8(c).

¹⁴² See MEMX Rules 11.6(o) and 11.8.

¹⁴³ See MEMX Rules 11.6(c) and 11.8(a)-(c). Market Orders and Pegged Orders are not eligible for display. See MEMX Rules 11.8(a)(3) and 11.8(c)(3).

¹⁴⁴ See MEMX Rules 11.6(k), and 11.8(b)(4).

Displayed orders will be displayed on an anonymous basis at a specified price.¹⁴⁵ Orders may be entered as a Round Lot, Odd Lot, or Mixed Lot.¹⁴⁶ In addition, a User may attach a Minimum Execution Quantity instruction to the order.¹⁴⁷ Users also may choose to designate orders as Book Only or Post Only.¹⁴⁸ MEMX's proposed order types and instructions are similar to order types and instructions approved by the Commission and currently available on other national securities exchanges.¹⁴⁹

One of MEMX's proposed order instructions is novel and not based on the existing rules of other exchanges. Specifically, in connection with a Limit Order submitted with a Reserve Quantity instruction, a member may attach a Random Replenishment instruction.¹⁵⁰ In addition to randomizing the size of the refreshed displayed portion, this instruction will allow the User to elect to have the MEMX system randomly replenish the displayed replenishment quantity at different time intervals ranging up to one millisecond following each execution that triggers replenishment.¹⁵¹

The MEMX system will continuously and automatically match orders pursuant to price/time priority. For equally-priced trading interest in time priority, MEMX will give first priority to the portion of a Limit Order with a displayed instruction over Limit Orders with a non-displayed instruction, Pegged Orders, and Reserve Quantity of Limit Orders.¹⁵² With respect to the price of executions that would occur on MEMX, the MEMX system is designed to comply with the order protection requirements of Rule 611 of Regulation NMS¹⁵³ by requiring that, for any

¹⁴⁵ See MEMX Rule 11.10(b).

¹⁴⁶ See MEMX Form 1, Exhibit E, Section 2, and MEMX Rules 11.6(q) and 11.8(a)-(c).

¹⁴⁷ See MEMX Rules 11.6(f) and 11.8(a)-(c).

¹⁴⁸ See *id.*

¹⁴⁹ See, e.g., Cboe EDGX Rules 11.6 and 11.8. While MEMX Rule 11.10, Interp .02(b), which offers batch cancel functionality, is similar to Cboe EDGX Rule 11.10, Interp .02(b), MEMX uses the term "batch cancel functionality," while Cboe EDGX uses the term "purge port" and Cboe EDGX specifies that a user can "simultaneously cancel all or a subset of its orders in one or more symbols across multiple logical ports," while MEMX's provision specifies that a user can "simultaneously cancel all or a subset of its orders in one or more symbols."

¹⁵⁰ See MEMX Form 1, Exhibit E, Section 2(a), and MEMX Rule 11.6(k)(1)(A).

¹⁵¹ See *id.*

¹⁵² See MEMX Rule 11.9(a)(2). The highest-priced order to buy (lowest-priced order to sell) will have priority over all other orders to buy (sell) in all cases. Rule 11.9 describes how orders will be ranked based on time when orders to buy (sell) are entered into the MEMX system at the same price.

¹⁵³ 17 CFR 242.611.

execution to occur on MEMX during regular trading hours, the price must be equal to, or better than, the Protected NBBO unless an exception to Rule 611 applies.¹⁵⁴ Orders may be executed on the Exchange during the Market Session or during Pre- and Post-Market Sessions;¹⁵⁵ however, some order types and functionality are available only during the Market Session.¹⁵⁶ Orders also may be entered during the Early Order Entry Session, but are not eligible for execution until the start of the Pre-Market Session or Market Session, depending on the time-in-force instructions.¹⁵⁷ MEMX will conduct an opening process at the start of its Market Session, and Users who wish to participate in the opening process may enter designated orders for queuing in the system.¹⁵⁸

In addition, MEMX's rules are designed to address locked and crossed markets, as required by Rule 610(d) of Regulation NMS,¹⁵⁹ in that they are designed not to disseminate interest that would lock or cross a protected quote, require Users to reasonably avoid displaying interest that locks or crosses any protected quotation, and are reasonably designed to assure the reconciliation of locked or crossed interest.¹⁶⁰ One commenter questioned whether MEMX's proposed rules adequately specify how resting orders would be processed when locked or crossed by an away market quote and whether resting depth-of-book orders that have been locked or crossed by an away market and then become the best-ranked orders on MEMX would be transmitted to the securities information processor ("SIP") at their original price.¹⁶¹ In response, MEMX disagreed

¹⁵⁴ See MEMX Rules 1.5(y) (defining "Protected NBBO") and 11.10(a)(2).

¹⁵⁵ MEMX's Market Session will run from 9:30 a.m. ET to 4:00 p.m. ET, its Pre-Market Session will run from 7:00 a.m. ET to 9:30 a.m. ET, and its Post-Market Session will run from 4:00 p.m. ET to 8:00 p.m. ET. See MEMX Rules 1.5(o), (w), and (x), respectively.

¹⁵⁶ See MEMX Rules 11.8(a)–(c). MEMX's Early Order Entry Session will run from 6:00 a.m. ET to 7:00 a.m. ET. See MEMX Rule 1.5(i).

¹⁵⁷ See MEMX Rule 11.1(a).

¹⁵⁸ See MEMX Rule 11.7.

¹⁵⁹ 17 CFR 242.610(d).

¹⁶⁰ See MEMX Rule 11.10(f). See also MEMX Rule 11.6(a) (allowing Users to attach a Cancel Back instruction to immediately cancel an order when, if displayed, it would create a violation of Rule 610(d) of Regulation NMS, 17 CFR 242.610(d)), and MEMX Rules 11.6(j) and 11.8(b)(8) (relating to price sliding functionality to avoid violations of Rule 610(d) of Regulation NMS, 17 CFR 242.610(d)).

¹⁶¹ See NYSE Letter, *supra* note 102, at 2–3 and Letter to Vanessa Countryman, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE Group, Inc., dated April 7, 2020 (repeating its question about how MEMX handles depth-of-book orders

that its proposed rules are unclear in these regards and noted that its applicable rules are based on the rules of other exchanges.¹⁶² The Commission believes that MEMX addressed the commenter's first question by stating that, under MEMX Rule 11.6(j)(1)(A)(ii), it "is clear that an order displayed by MEMX would not be re-priced if another market locked or crossed an order displayed by MEMX, as a locking or crossing quote would not allow MEMX to re-rank and display such an order at a more aggressive price."¹⁶³ In respect of the commenter's second point, the Commission believes that MEMX addressed the commenter's concern, as MEMX stated that its proposed rules "are clear regarding its dissemination of quotations to the SIP" and noted that it "searched the rules of NYSE and other exchanges for additional language describing such an example or details regarding special handling in such a scenario, but such search has been fruitless."¹⁶⁴

In addition, MEMX will offer outbound routing functionality through its affiliated routing broker-dealer, MEMX ES.¹⁶⁵ A member's use of the order routing functionality provided by the Exchange's affiliated routing broker-dealer is entirely optional and members may use other broker-dealers to route out to other market centers.¹⁶⁶

The Commission finds that MEMX's trading rules are consistent with the Act and, in particular, the Section 6(b)(5) requirement that an exchange's rules be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and protect investors and the public interest.¹⁶⁷

With regard to MEMX's proposed Random Replenishment feature, the rule is largely based on similar functionality offered by other exchanges with the addition of one unique feature.¹⁶⁸ Specifically, in addition to randomizing the displayed replenishment size, a User also may elect to have the MEMX system replenish the displayed replenishment quantity at different time

that become the best-ranked orders on MEMX in a specific scenario described by NYSE).

¹⁶² See MEMX Letter 2, *supra* note 104, at 3.

¹⁶³ *Id.* at 4.

¹⁶⁴ *Id.*

¹⁶⁵ See MEMX Rule 2.11.

¹⁶⁶ See *id.*

¹⁶⁷ See 15 U.S.C. 78f(b)(5). MEMX's trading rules, including its rules relating to market makers, order types and instructions, priority, execution, and opening processes, are similar to existing exchanges' trading rules. See, e.g., Chapter XI of the Cboe EDGX rule book.

¹⁶⁸ See, e.g., Cboe EDGX Rule 11.6(m)(1)(A).

intervals ranging up to one millisecond following the execution that triggered replenishment. The Commission believes that this feature is consistent with the Act because it is designed to protect investors consistent with the general purpose of Reserve Quantity orders and Random Replenishment functionality, which the Commission has previously approved for use on other exchanges.¹⁶⁹ Specifically, replenishing the display quantity at random time intervals may make reserve interest harder to detect, which could incentivize investors to rest larger-size reserve interest on the Exchange. Importantly, the non-displayed portion of an order subject to the time interval Random Replenishment will remain fully executable prior to the replenishment of a User's displayed quantity.¹⁷⁰ Accordingly, to the extent this feature encourages investors to provide more liquidity, other market participants could correspondingly benefit from having access to that additional liquidity.

As noted above, MEMX proposes to offer routing services to its Users through its affiliated broker-dealer, MEMX ES.¹⁷¹ The Commission previously has stated that an exchange-affiliated outbound router, as a "facility" of the exchange, will be subject to the exchange's and the Commission's regulatory oversight, and that the exchange will be responsible for ensuring that the affiliated outbound routing function is operated consistent with Section 6 of the Act and the exchange's rules.¹⁷² For example, in approving an exchange with an affiliated outbound routing broker, the Commission previously noted that "[a] conflict of interest would arise if the national securities exchange (or an affiliate) provided advantages to its broker-dealer that are not available to other members."¹⁷³ The Commission further explained that "advantages, such as greater access to information, improved speed of execution, or enhanced operational capabilities in dealing with the exchange, might constitute unfair discrimination under the Act."¹⁷⁴

¹⁶⁹ See *id.*

¹⁷⁰ See MEMX Form 1, Exhibit E, Section 2(a), and MEMX Rule 11.6(k)(1)(A).

¹⁷¹ See MEMX Rule 2.11.

¹⁷² See, e.g., Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (August 19, 2010) (granting BATS Y Exchange's request to register as a national securities exchange).

¹⁷³ Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55233 (November 1, 2001) (PCX-00-25) (order approving Archipelago Exchange ("ArcaEx") as the equities trading facility of PCX Equities, Inc.) ("ArcaEx Order").

¹⁷⁴ *Id.*

MEMX's proposed outbound routing rule is similar to rules the Commission has approved for other exchanges that utilize affiliated routing brokers.¹⁷⁵ In particular, MEMX's affiliated broker-dealer does not have any structural or informational advantages in its provision of routing services as compared to a third-party broker-dealer member of MEMX performing a similar function for itself or others.¹⁷⁶ Accordingly, the Commission believes that the outbound routing functionality of MEMX is consistent with the Act and, in particular, the Section 6(b)(5) requirement that an exchange's rules be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not permit unfair discrimination between customer, issuers, brokers or dealers.¹⁷⁷

As a national securities exchange, MEMX will be a trading center whose quotations can be "automated quotations" under Rule 600(b)(3).¹⁷⁸ MEMX has designed itself to qualify by being an "automated trading center" under Rule 600(b)(4) whose best-priced, displayed quotation will be a "protected quotation" under Rules 600(b)(57) and 600(b)(58), and for purposes of Rule 611.¹⁷⁹ One commenter requested that MEMX clarify the calculation of its consolidated quote, which would be disseminated by the SIP.¹⁸⁰ Specifically, the commenter asked whether displayed odd-lot orders at more than one price point on MEMX would be aggregated in the MEMX quote provided to the SIP for dissemination.¹⁸¹ In response, MEMX noted that its proposed rule is based on rules of other exchanges, but agreed that additional clarity in the rules could be beneficial and so submitted clarifying rule text in Amendment No. 2.¹⁸² MEMX will aggregate displayed odd-lot orders on the MEMX order book across price levels for transmission to the SIPs as the MEMX best ranked bid or offer,

when applicable.¹⁸³ Specifically, MEMX added paragraph (b)(2) to Rule 11.9 which provides that, pursuant to Rule 602 of Regulation NMS, the Exchange will transmit to the appropriate SIP the highest (lowest) price to buy (sell) wherein the aggregate size of all displayed buy (sell) interest in the MEMX system greater (less) than or equal to that price is one round lot or greater, and that the aggregate size of all displayed buy (sell) interest in the MEMX system greater (less) than or equal to that price will be transmitted rounded down to the nearest round lot.¹⁸⁴ The Commission believes that MEMX's proposed rule, as revised in Amendment No. 2, is clear and substantially similar to the rules of other exchanges governing aggregation and display of odd-lot orders.¹⁸⁵

To meet their regulatory responsibilities under Rule 611(a) of Regulation NMS, other trading centers will be required to have sufficient notice of new protected quotations, as well as all necessary information and technical specifications.¹⁸⁶ The Commission believes that it would be a reasonable policy and procedure under Rule 611(a) to require that industry participants begin treating MEMX's best bid and best offer as a protected quotation as soon as possible but no later than 90 days after the date of this order, or such later date as MEMX begins operation as a national securities exchange. The Commission has taken the same position with other new equities exchanges.¹⁸⁷

D. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.¹⁸⁸ Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the federal securities laws and rules thereunder and the rules of the exchange.¹⁸⁹ As also noted above, pursuant to an RSA with FINRA, FINRA

will perform many of the initial disciplinary processes on behalf of MEMX.¹⁹⁰ For example, FINRA will investigate potential securities laws violations, issue complaints, and conduct hearings pursuant to MEMX rules. Appeals from disciplinary decisions will be heard by the MEMX Appeals Committee,¹⁹¹ and the MEMX Appeals Committee's decision shall be final.¹⁹² In addition, the Exchange Board on its own initiative may order review of a disciplinary decision.¹⁹³

The MEMX LLC Agreement and MEMX rules provide that the Exchange has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws and rules.¹⁹⁴ The Exchange's rules also permit MEMX to sanction members for violations of its rules and violations of the federal securities laws and rules by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member, or any other fitting sanction.¹⁹⁵ MEMX's rules also provide for the imposition of fines for certain minor rule violations in lieu of commencing disciplinary proceedings.¹⁹⁶ Accordingly, as a condition to the operation of MEMX, a Minor Rule Violation Plan ("MRVP") filed by MEMX under Act Rule 19d-1(c)(2) must be declared effective by the Commission.¹⁹⁷

The Commission finds that the MEMX LLC Agreement and rules concerning its disciplinary and oversight programs are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act¹⁹⁸ in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the rules of MEMX provide it with the ability to comply, and with the ability to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and

¹⁷⁵ See, e.g., Cboe EDGX Rule 2.11.

¹⁷⁶ See MEMX Rule 2.11. For example, MEMX's rule provides that the Exchange shall have procedures and controls to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities, including MEMX ES. See MEMX Rule 2.11(a)(5).

¹⁷⁷ See 15 U.S.C. 78f(b)(5).

¹⁷⁸ See MEMX Rule 11.10(b).

¹⁷⁹ See 17 CFR 242.600(b)(57)–(58) and 17 CFR 242.611.

¹⁸⁰ See NYSE Letter, *supra* note 102, at 2.

¹⁸¹ See *id.*

¹⁸² See MEMX Letter 2, *supra* note 104, at 2, n.8 and accompanying text.

¹⁸³ See *id.* at 3. MEMX further stated that it "believes this is the same process now used by most exchanges and the proposed MEMX rule will be based on rules of other exchanges." *Id.*

¹⁸⁴ See MEMX Rule 11.9(b)(2).

¹⁸⁵ See, e.g., Nasdaq Rule 4756(c)(2) and NYSE Arca Rule 7.36–E(b)(3).

¹⁸⁶ See Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038, 30041 (May 24, 2006) (File No. S7–10–04) (extending the compliance dates for Rule 610 and Rule 611 of Regulation NMS under the Act).

¹⁸⁷ See, e.g., BATS Order at 49505, *supra* note 39, and DirectEdge Exchanges Order at 13163, *supra* note 64.

¹⁸⁸ See 15 U.S.C. 78f(b)(1).

¹⁸⁹ See *id.*

¹⁹⁰ See *supra* notes 123–124 and accompanying text. See also MEMX Rule 9.8 (noting that MEMX and FINRA are parties to a regulatory contract, pursuant to which FINRA will perform certain functions described in Chapter 9 on behalf of MEMX).

¹⁹¹ See MEMX Rule 8.10(b).

¹⁹² See *id.*

¹⁹³ See MEMX Rule 8.10(c).

¹⁹⁴ See generally MEMX LLC Agreement, Article XVII and MEMX Rules Chapters 7 and 8.

¹⁹⁵ See MEMX Rule 8.1(a).

¹⁹⁶ See MEMX Rule 8.15.

¹⁹⁷ 17 CFR 240.19d–1(c)(2).

¹⁹⁸ 15 U.S.C. 78f(b)(6) and (b)(7).

regulations thereunder, and the rules of MEMX.¹⁹⁹

E. Trading on MEMX Pursuant to Unlisted Trading Privileges

MEMX does not intend to be a primary listing market for securities. Accordingly, MEMX has not proposed rules that would allow it to primarily list any securities at this time. Instead, MEMX has proposed to trade securities pursuant to unlisted trading privileges (“UTP”). MEMX Rule 14.1 establishes the Exchange’s authority to trade securities on a UTP basis. MEMX Rule 14.1(a) provides that MEMX may extend UTP to any security that is an NMS stock that is listed on another national securities exchange or with respect to which UTP may otherwise be extended in accordance with Section 12(f) of the Act.²⁰⁰ MEMX Rule 14.1(a) further provides that any such security would be subject to all MEMX rules applicable to trading on MEMX, unless otherwise noted.

MEMX Rule 14.1(b) establishes additional rules for trading of UTP Exchange Traded Products, which are defined in MEMX Rule 1.1. MEMX Rule 14.1(b) provides that MEMX will distribute an information circular prior to the commencement of trading in a UTP Exchange Traded Product that generally would include the same information as the information circular provided by the listing exchange, including (a) the special risks of trading the Exchange Traded Product, (b) the Exchange’s rules that would apply to the Exchange Traded Product and (c) information about the dissemination of value of the underlying assets or indices. MEMX Rule 14.1(b)(2) establishes certain requirements for members that have customers that trade UTP Exchange Traded Products.²⁰¹ MEMX Rule 14.1(b)(4) also establishes certain requirements for any member registered as a market maker in an UTP Exchange Traded Product that derives its value from one or more currencies, commodities, or derivatives based on

one or more currencies or commodities, or is based on a basket or index composed of currencies or commodities. MEMX Rule 14.1(b)(5) provides that the Exchange’s surveillance procedures for Exchange Traded Products traded on the Exchange pursuant to UTP would be similar to the procedures used for equity securities traded on the Exchange and would incorporate and rely upon existing Exchange surveillance systems.

The Commission finds that the Exchange’s proposed approach to the trading of securities on a UTP basis, as set forth in MEMX Rule 14.1, is consistent with Section 12(f) of the Act and Rule 12f–5 thereunder.²⁰² Rule 12f–5 under the Act requires an exchange that extends unlisted trading privileges to securities to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.²⁰³ MEMX Rule 14.1 includes a provision that any security traded UTP on the Exchange “shall be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted.” The provisions in MEMX Rule 14.1 are substantively the same as the existing rules of NYSE National, Inc.²⁰⁴ Accordingly, pursuant to Section 12(f) of the Act and Rule 12f–5 thereunder, MEMX will be permitted to extend unlisted trading privileges to securities of the same class, subject to the trading rules of the Exchange.

F. Section 11(a) of the Act

Section 11(a)(1) of the Act²⁰⁵ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, “covered accounts”) unless an exception applies. Rule 11a2–2(T) under the Act,²⁰⁶ known as the “effect versus execute” rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2–2(T)’s conditions, a member: (i) Must transmit the order from off the exchange

floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;²⁰⁷ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission, MEMX requested that the Commission concur with MEMX’s conclusion that MEMX members that enter orders into the MEMX trading system satisfy the conditions of Rule 11a2–2(T).²⁰⁸ For the reasons set forth below, the Commission believes that MEMX members entering orders into the MEMX trading system could satisfy the requirements of Rule 11a2–2(T).

The Rule’s first condition is that orders for covered accounts be transmitted from off the exchange floor. In the context of automated trading systems, the Commission has found that the off-floor transmission condition is met if a covered account order is transmitted from a remote location directly to an exchange’s floor by electronic means.²⁰⁹ MEMX has represented that MEMX does not have a physical trading floor, and the MEMX trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces.²¹⁰ The Commission believes that the MEMX trading system satisfies this off-floor transmission condition.

The second condition states that the member and any associated person not participate in the execution of its order after the order has been transmitted. MEMX represented that at no time following the submission of an order is

²⁰⁷ This prohibition also applies to associated persons. The member may, however, participate in clearing and settling the transaction.

²⁰⁸ See Letter from Anders Franzon, General Counsel, MEMX, to Vanessa Countryman, Secretary, Commission, dated January 31, 2020 (“MEMX 11(a) Letter”).

²⁰⁹ See, e.g., Nasdaq Order, *supra* note 39; ArcaEx Order, *supra* note 173; Securities Exchange Act Release Nos. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR–BATS–2009–031) (approving BATS options trading); 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (approving equity securities listing and trading on BSE); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (approving Nasdaq Options Market options trading); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR–NYSE–90–52 and SR–NYSE–90–53) (approving NYSE’s Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (“1979 Release”).

²¹⁰ See MEMX 11(a) Letter, *supra* note 208.

¹⁹⁹ See 15 U.S.C. 78f(b)(1).

²⁰⁰ 15 U.S.C. 78(f).

²⁰¹ MEMX Rule 14.1(b)(2)(A) states that MEMX Rule 14.1(b)(2) applies to UTP Exchange Traded Products that are the subject of an order by the Commission exempting the series from certain prospectus delivery requirements under Section 24(d) of the 1940 Act, and are not otherwise subject to prospectus delivery requirements under the Securities Act. MEMX Rule 14.1(b)(2)(B) requires members to provide a written description of the terms and characteristics of UTP Exchange Traded Products to purchasers of such securities, not later than the time of confirmation of the first transaction, and with any sales materials relating to UTP Exchange Traded Products. MEMX Rule 14.1(b)(2)(C) requires members to provide a prospectus to a customer requesting a prospectus.

²⁰² 15 U.S.C. 78(f); 17 CFR 240.12f–5.

²⁰³ See 17 CFR 240.12f–5. See also Securities Exchange Act Release No. 35737 (April 21, 1995), 60 FR 20891 (April 28, 1995) (File No. S7–4–95) (adopting Rule 12f–5 under the Act).

²⁰⁴ See NYSE National Rule 5.1.

²⁰⁵ 15 U.S.C. 78k(a)(1).

²⁰⁶ 17 CFR 240.11a2–2(T).

a member or an associated person of the member able to acquire control or influence over the result or timing of the order's execution.²¹¹ According to MEMX, the execution of a member's order is determined solely by what quotes and orders are present in the system at the time the member submits the order, and the order priority based on the MEMX rules.²¹² Accordingly, the Commission believes that a MEMX member and its associated persons do not participate in the execution of an order submitted to the MEMX trading system.²¹³

The third condition states that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this condition is satisfied when automated exchange facilities, such as the MEMX trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.²¹⁴ MEMX has represented that the design of the MEMX trading system ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to MEMX.²¹⁵ Based on MEMX's representation, the

²¹¹ See *id.* MEMX notes that a member may cancel or modify the order, or modify the instructions for executing the order, after the order has been transmitted, provided that such cancellations or modifications are transmitted from off an exchange floor. The Commission has stated that the non-participation condition is satisfied under such circumstances so long as such modifications or cancellations are also transmitted from off the floor. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) ("1978 Release") (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

²¹² See MEMX 11(a) Letter, *supra* note 208.

²¹³ See, e.g., BATS Order at 49505, *supra* note 39, and DirectEdge Exchanges Order at 13164, *supra* note 64.

²¹⁴ See, e.g., BATS Order at 49505, *supra* note 39, and DirectEdge Exchanges Order at 13164, *supra* note 64. In considering the operation of automated execution systems operated by an exchange, the Commission noted that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution condition of Rule 11a2-2(T). See 1979 Release, *supra* note 209.

²¹⁵ See MEMX 11(a) Letter, *supra* note 208.

Commission believes that the MEMX trading system satisfies this condition.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T) thereunder.²¹⁶ MEMX members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.²¹⁷

G. Exemption From Section 19(b) of the Act With Regard to FINRA Rules Incorporated by Reference

MEMX proposes to incorporate by reference certain FINRA rules as MEMX rules.²¹⁸ Thus, for those MEMX rules,

²¹⁶ See, e.g., BATS Order at 49505, *supra* note 39 and DirectEdge Exchanges Order at 13164, *supra* note 64. In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member or any associated person thereof in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, *supra* note 211 (stating "[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests").

²¹⁷ MEMX represented that it will advise its membership through the issuance of an Information Circular that those members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption. See MEMX 11(a) Letter, *supra* note 208.

²¹⁸ See Letter from Anders Franzon, General Counsel, MEMX, to Vanessa Countryman, Secretary, Commission, dated September 9, 2019 ("Exemption Request Letter"). MEMX proposes to incorporate by reference the following FINRA rules: (1) FINRA Rule 2210 (Communications with the Public) via MEMX Rule 3.5 (Communications with the Public); (2) the definition of a research report in FINRA Rule 2241, via MEMX Rule 3.13(b)(3); (3) the 12000 and 13000 Series of the FINRA Manual (Code of Arbitration Procedures for Customer Disputes and Code of Arbitration Procedures for Industry Disputes) via MEMX Rules 9.1, 9.2, 9.4, 9.5 and 9.8; (4) FINRA Rule 2268 (Requirements When Using Predispute Arbitration Agreements for Customer Accounts) via MEMX Rule 9.3 (Predispute Arbitration Agreements); (5) the 14000 Series of the FINRA Manual (Code of Mediation Procedures) via MEMX Rule 9.7 (Mediation); and (6) FINRA Rule 5270 (Frontrunning of Block Transactions), via MEMX Rule 12.14 (Frontrunning of Block Transactions).

Exchange members will comply with the MEMX rule by complying with the FINRA rule referenced therein. In connection with its proposal to incorporate FINRA rules by reference, MEMX requested, pursuant to Rule 240.0-12,²¹⁹ an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to those MEMX rules that are effected solely by virtue of a change to a cross-referenced FINRA rule.²²⁰ MEMX represents in its letter that, as a condition to the exemption, it will provide written notice to its members whenever a proposed rule change to a FINRA rule that is incorporated by reference is proposed and whenever any such proposed change is approved by the Commission or otherwise becomes effective.²²¹

Using its authority under Section 36 of the Act,²²² the Commission is hereby granting MEMX's request for an exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MEMX proposes to incorporate by reference.²²³ This exemption is conditioned upon MEMX providing written notice to its members whenever FINRA proposes to change a rule that MEMX has incorporated by reference. The Commission believes that this exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on simultaneous changes to identical rules of more than one SRO.

H. Conclusion

It is ordered that the application of MEMX for registration as a national securities exchange be, and it hereby is, granted.

It is furthered ordered that operation of MEMX is conditioned on the satisfaction of the requirements below:

²¹⁹ See 17 CFR 240.0-12.

²²⁰ See Exemption Request Letter, *supra* note 218.

²²¹ See Exemption Request Letter, *supra* note 218. MEMX will provide such notice through a posting on the same website location where MEMX posts its own rule filings pursuant to Rule 19b-4 under the Act, within the required time frame. The website posting will include a link to the location on the FINRA website where FINRA's proposed rule change is posted. See *id.*

²²² 15 U.S.C. 78mm.

²²³ The Commission previously exempted other exchanges from the requirement to file proposed rule changes under Section 19(b) of the Act. See, e.g., IEX Order, *supra* note 51; ISE Mercury Order, *supra* note 53; MIAIX Order, MIAIX Pearl Order, and BATS Order, *supra* note 39; DirectEdge Exchanges Order, *supra* note 64.

A. *Participation in National Market System Plans.* MEMX must join the Consolidated Tape Association Plan, the Consolidated Quotation Plan, and the Nasdaq UTP Plan (or any successors thereto); the National Market System Plan Establishing Procedures Under Rule 605 of Regulation NMS; the Regulation NMS Plan to Address Extraordinary Market Volatility; the Plan for the Selection and Reservation of Securities Symbols; and the National Market System Plan Governing the Consolidated Audit Trail.

B. *Intermarket Surveillance Group.* MEMX must join the Intermarket Surveillance Group.

C. *Minor Rule Violation Plan.* A MRVP filed by MEMX under Rule 19d-1(c)(2) must be declared effective by the Commission.²²⁴

D. *Rule 17d-2 Agreement.* An agreement pursuant to Rule 17d-2²²⁵ that allocates regulatory responsibility for those matters specified above²²⁶ must be declared effective by the Commission, or MEMX must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

E. *Participation in Multi-Party Rule 17d-2 Plans.* MEMX must become a party to the multi-party Rule 17d-2 agreement concerning the surveillance, investigation, and enforcement of common insider trading rules and the agreement concerning certain Regulation NMS and Consolidated Audit Trail Rules.

F. *RSA.* MEMX must finalize the provisions of the RSA with its regulatory services provider, as described above, that will specify the MEMX and Commission rules for which the regulatory services provider will provide certain regulatory functions, or MEMX must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

It is further ordered, pursuant to Section 36 of the Act,²²⁷ that MEMX shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the FINRA rules that MEMX proposes to incorporate by reference into MEMX's rules, subject to the conditions specified in this Order.

By the Commission.

J. Matthew DeLesDernier,
Assistant Secretary.

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²²⁴ 17 CFR 240.19d-1(c)(2).

²²⁵ 17 CFR 240.17d-2.

²²⁶ See *supra* notes 135-136 and accompanying text.

²²⁷ 15 U.S.C. 78mm.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88805; File No. SR-NASDAQ-2020-025]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide Listed Companies With a Temporary Limited Exception From Certain Shareholder Approval Requirements in Nasdaq Rules 5635(c) and (d)

May 4, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 1, 2020, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to adopt a rule, operative through, and including, June 30, 2020, to provide listed companies with a temporary exception from certain shareholder approval requirements, as described below.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

1. Purpose

Given current market conditions, Nasdaq proposes to provide listed companies with a temporary exception, limited in scope and time, from certain shareholder approval requirements, as described below.

In December 2019, COVID-19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.³ By March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.⁴ To slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel and closed non-essential businesses.

These necessary measures also have affected equity markets, which have seen significant declines.⁵ In response, governments around the world have acted swiftly and decisively to provide relief to regulated entities and are undertaking efforts to stabilize the economy and assist affected companies and their employees.⁶ The Commission,

³ See, e.g., Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), available at <https://www.sec.gov/news/public-statement/clayton-md-a-2020-01-30>. ("Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.")

⁴ See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (March 11, 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-march-2020>.

⁵ In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. See also Phil Mackintosh, *Putting the Recent Volatility in Perspective*, available at <https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05>. ("Analysts showed that we saw the fastest 'correction' in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of \$3.6 trillion.")

⁶ See, e.g., the list of actions undertaken by the Board of Governors of the Federal Reserve System at <https://www.federalreserve.gov/covid-19.htm>. See also Families First Coronavirus Response Act, Public Law 116-127 and Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136.