

a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NASDAQ–2023–038 and should be submitted on or before October 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Sherry R. Haywood,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98648; File No. SR–MEMX–2023–26]

### Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule and Adopt Membership Fees for MEMX Options

September 29, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on September 28, 2023, MEMX LLC (“MEMX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members<sup>3</sup> (the “Fee Schedule”) pursuant to Exchange Rules 15.1(a) and (c) to establish membership fees for Members of the Exchange's options platform and make a number of

clarifying, organizational changes to its Fee Schedule. The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The text of the proposed rule change is provided in Exhibit 5.

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

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

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

###### 1. Purpose

In connection with the Exchange's launch of MEMX Options,<sup>4</sup> its options trading platform, the Exchange proposes to modify its fee schedule applicable to use of the Exchange, effective immediately, in order to: (i) establish membership fees (“Membership Fees”) for MEMX Options Members, and (ii) make a number of clarifying, organizational changes to its single existing fee schedule, in order to create three separate fee schedules for: (A) executions that occur on the Exchange's pre-existing equities market (“MEMX Equities”), (B) executions that occur on MEMX Options, and (C) the Exchange's Membership Fees (for both MEMX Equities and MEMX Options), respectively.<sup>5</sup> The Exchange believes that these changes will provide greater transparency to Members about how the Exchange assesses fees and calculates rebates, as well as allowing Members to more easily validate their bills on a monthly basis. The Exchange notes that none of these changes amend any existing fee or rebate for applicable to

<sup>4</sup> On August 8, 2022, the Commission approved SR–MEMX–2022–10, which proposed rules for the trading of options on the Exchange. See Securities Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (SR–MEMX–2022–010). The Exchange launched MEMX Options on September 27, 2023.

<sup>5</sup> The Exchange initially filed the proposed changes on September 1, 2023 (SR–MEMX–2023–22). On September 13, 2023, the Exchange withdrew that filing and submitted SR–MEMX–2023–23. On September 28, 2023, the Exchange withdrew SR–MEMX–2023–23 and submitted this filing.

MEMX Equities (including non-transaction fees such as membership, connectivity, and market data). Specifically, the Exchange is proposing the following:

- To more clearly separate pricing applicable to MEMX Options from the Exchange's current fee schedule, which will remain applicable to MEMX Equities. Although the Exchange has always maintained a single fee schedule applicable to trades on the Exchange, as the Exchange has launched the MEMX Options platform, the Exchange believes that separating the fee schedules for MEMX Options and MEMX Equities will reduce potential confusion. The Exchange currently intends to begin charging for connectivity and market data for MEMX Options in 2024 and will file separately to adopt such fees. The Exchange has also intentionally left blank certain additional portions of the MEMX Options fee schedule, including “Transaction Fees” and “Options Regulatory Fee”, and it has filed separately to adopt those specific fees.

- To more clearly separate Membership Fees from the Exchange's current fee schedule. Membership Fees are applicable to Members of both MEMX Equities and MEMX Options platforms. Because the Membership Fees section is applicable to members of both platforms, the Exchange believes that separating the fee schedule for Membership Fees (such separate fee schedule for Membership Fees, the “Membership Fee Schedule”) will reduce potential confusion (e.g., as to which fees a Member that participates on both MEMX Equities and MEMX Options must pay on a monthly basis to maintain membership with the Exchange).

- To implement additional fees set forth on the Membership Fee Schedule that would be applicable to Options Order Entry Firms (as defined in Exchange Rule 16.1) and Options Market Makers (i.e., those Options Members that have registered as Market Makers on the Exchange under Exchange Rule 22.2.). Options Order Entry Firms and Options Market Makers would collectively be referred to on the Membership Fee Schedule as “Options Trading Members.” As proposed, the Membership Fee Schedule will easily identify the fees for membership that are applicable to all Members of MEMX (including Members of MEMX Equities and MEMX Options) and the additional fees for membership which are applicable to all Options Trading Members.

- To add a hyperlink within the “Additional Fees” sections of the MEMX Equities Fee Schedule and the

<sup>15</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b–4.

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

MEMX Options Fee Schedule, which will electronically hyperlink the reader to the Membership Fee Schedule on the Exchange’s website.

(i) MEMX Options Membership Fees

As the existing fee applicable to Membership is not specific to participation on a specific trading platform, the Exchange will continue to charge its current Membership Fee of \$200 per month to each Exchange Member, other than those to whom a

waiver applies as set forth below (*i.e.*, the Exchange will charge a single fee of \$200 to Members of MEMX Equities, Members of MEMX Options, and Members of both MEMX Equities and MEMX Options). In addition, the Exchange is proposing to charge an additional \$1,000 per month to Options Order Entry Firms (as defined in Exchange Rule 16.1), and an additional \$7,000 per month to Options Market Makers, (*i.e.*, those Options Members that have registered as Market Makers

on the Exchange under Exchange Rule 22.2.). The Exchange notes that the proposed fees for Options Trading Firms are competitive with and in several cases significantly lower than the fees for membership imposed by several other options exchanges that charge such fees. The Exchange provides the below table for comparison purposes to show how the Exchange’s proposed fees for membership compare to fees for membership currently charged by other options exchanges.

Exchange	Monthly membership trading permit fee
MEMX Options (as proposed) .....	All Members: \$200. Options Order Entry Firm: \$1,000. Options Market Maker: \$7,000.
Nasdaq PHLX LLC (“PHLX”) <sup>6</sup> .....	Streaming Quote Trader (“SQT”) permit fees: Tier 1 (up to 200 option classes): \$0.00. Tier 2 (up to 400 option classes): \$2,200. Tier 3 (up to 600 option classes): \$3,200. Tier 4 (up to 800 option classes): \$4,200. Tier 5 (up to 1,000 option classes): \$5,200. Tier 6 (up to 1,200 option classes): \$6,200. Tier 7 (all option classes): \$7,200. Remote Market Maker Organization (“RMO”) permit fees: Tier 1 (less than 100 classes): \$5,000. Tier 2 (more than 100 and less than 999 classes): \$8,000. Tier 3 (1000 or more classes): \$11,000.
BOX Options Exchange LLC (“BOX”) <sup>7</sup> .....	Participant Fee: \$1,500 per month (Electronic Market Makers are not charged the Participant Fee). Market Maker Trading Permit fees: Up to and including 10 classes: \$4,000. Up to and including 40 classes: \$6,000. Up to and including 100 classes: \$8,000. Over 100 classes: \$10,000.
NYSE American, LLC (“NYSE American”) <sup>8</sup> .....	Permit (“ATP”) Fees: Floor Broker: \$500. Order Flow Provider: \$1,000. Clearing Member: \$1,000. Options Market Maker 1st ATP: \$8,000. Options Market Maker 2nd ATP: \$6,000. Options Market Maker 3rd ATP: \$5,000. Options Market Maker 4th ATP: \$4,000. Options Market Maker 5th ATP: \$3,000. Options Market Maker 6th to 9th ATP: \$2,000. Options Market Maker 10th or more ATPs: \$500.
NYSE Arca, Inc. (“NYSE Arca”) <sup>9</sup> .....	Permit (“OTP”) Fees: Office or Clearing Firms: \$1,000. Floor Broker: \$500. Options Market Maker 1st ATP: \$8,000. Options Market Maker 2nd ATP: \$6,000. Options Market Maker 3rd ATP: \$5,000. Options Market Maker 4th ATP: \$4,000. Options Market Maker 5th ATP: \$3,000. Options Market Maker 6th to 9th ATP: \$2,000. Options Market Maker 10th or more ATPs: \$500. Reserve Market Maker OTP: \$175.
MIAX Options Exchange (“MIAX Options”) <sup>10</sup> ....	Electronic Exchange Members Trading Permit: \$1,500. Market Maker Trading Permit (up to 10 classes): \$7,000. Market Maker Trading Permit (up to 40 classes): \$12,000. Market Maker Trading Permit (up to 100 classes): \$17,000. Market Maker Trading Permit (over 100 classes): \$22,000.

<sup>6</sup> See PHLX Fee Schedule Section 8A, 8B, and 8C, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/phlx-options-7> (last visited September 27, 2023).

<sup>7</sup> See BOX Options Fee Schedule Section I, available at <https://boxoptions.com/fee-schedule/> (last visited September 27, 2023).

<sup>8</sup> See NYSE American Options Fees Schedule Section III(A), available at [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf) (last visited September 27, 2023).

<sup>9</sup> See NYSE Arca Options Fees and Charges, available at <https://www.nyse.com/publicdocs/>

[nyse/markets/arca-options/NYSE\\_Arca\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf) (last visited September 27, 2023).

<sup>10</sup> See MIAX Options Fee Schedule, Section 3, available at <https://www.miaxglobal.com/markets/us-options/miax-options/fees> (last visited September 27, 2023).

The Exchange proposes to maintain its existing billing practices for all Membership Fees, including the newly proposed Options Membership Fees. As is current practice, Members will be assessed their monthly Membership Fees at the close of business on the first day of each month. The Exchange will also maintain the current practice such that if a Member is pending a voluntary termination of rights as a Member pursuant to Exchange Rule 2.8 prior to its monthly Membership Fee being assessed and the Member does not utilize the facilities of the Exchange while such voluntary termination of rights is pending, then the Member will not be obligated to pay the monthly Membership Fee. Additionally, the Membership Fees will not be prorated if a membership is not active for an entire month, which the Exchange believes is reasonable based on the frequency that the fee is assessed (*i.e.*, monthly instead of applying to a longer period).

Lastly, to encourage new participants to join MEMX Options, effective June 30, 2023, the Exchange implemented a Membership Fee Waiver until January 1, 2024.<sup>11</sup> The Exchange is proposing to maintain this language on the new Membership Fee Schedule, and as such, will apply this waiver to the additional proposed Membership Fees for new Members of MEMX Options as well.

## 2. Statutory Basis

The Exchange believes that the proposed rule change to reorganize the fee schedule as described above is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general, and furthers the objective of Section 6(b)(1) of the Act,<sup>13</sup> in particular, in that the proposed rule change enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed reorganization of the Exchange's fee schedule is designed to make the fee schedule easier to read and for Members to validate the bills they receive from the Exchange. The Exchange believes the proposed fee schedules, and the division thereof, will be clearer and less confusing for Members of the Exchange and will eliminate potential Member confusion.

The Exchange believes that the proposed Membership Fee changes are

consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>15</sup> in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as further discussed below.

MEMX believes that its \$200 Membership Fee which is assessed to all Members (Members of MEMX Options and Members of MEMX Equities alike) is consistent with the Act, as the Exchange assesses the same fee to all Members of the Exchange on all platforms. The Exchange believes that it is reasonable and consistent with the Act to assess this Membership Fee to all Members because there are technical, regulatory, and administrative services associated with a market participant being a Member of the Exchange. As a self-regulatory organization, MEMX's membership team reviews applicants to ensure that each applicant for membership meets the Exchange's qualification criteria prior to approval. The membership team, in conjunction with the Regulatory Department, reviews the registration and qualification of an applicant's associated persons, the applicant's financial health, the validity of its clearing relationship, and its disciplinary history. The membership team also provides ongoing support to Members with respect to membership changes, registration, and other questions that commonly arise from Members regarding such matters. The Exchange believes that it is consistent with the Act to charge the \$200 Membership Fee as it is reasonable to cover costs of administering its membership program.

The Exchange believes that charging a \$1,000 Membership Fee for Order Entry Firms is consistent with the Act, because this fee is in line with what other options exchanges charge members of their options platform who are not Market Makers.<sup>16</sup> For example, MEMX would charge \$1,200 after January 1, 2024, to an Order Entry Firm. If the same market participant (*i.e.*, not a market maker) wanted to join to trade on the BOX Options Exchange, they would be charged \$1,500 monthly.<sup>17</sup> The Exchange anticipates that Order Entry Firms will require more resources than Members of the Exchange's

equities platform due to various complexities inherent to the options markets, such as the process for Clearing Member Give Ups described in Exchange Rule 21.12 and the process for listing classes and strikes made available for trading on MEMX Options described in Rules 19.3 through 19.5. The Exchange also anticipates that Order Entry Firms that are proprietary trading firms will generate a high volume of message traffic, which will result in additional costs to the Exchange.

The Exchange believes that charging a higher \$7,000 Membership Fee for Market Makers on MEMX Options is consistent with the Act, because it is also in line with what other options exchanges charge members of their options platform who are Market Makers.<sup>18</sup> As an example, MEMX would charge \$7,200 monthly after January 1, 2024, to a new Options Member who is a Market Maker. If the same market participant wanted to join NYSE Arca Options Exchange, they would be charged \$8,000 monthly.<sup>19</sup> Based upon the Exchange's projections, the Exchange anticipates that Market Makers will consume the most bandwidth and Exchange resources and produce the highest volume of message traffic on the Exchange. The Exchange anticipates the volume of message traffic which is generated by Options Market Makers to be higher than the volume of message traffic generated by Options Order Entry Firms and additional functionality is offered: (i) to Market Makers only (*e.g.*, bulk messages described in Exchange Rule 21.1(l)), or (ii) with Market Makers as the most likely market participants to employ such functionality (*e.g.*, the Risk Monitor Mechanism described in Exchange Rule 21.16). The MEMX Options functionality for bulk messages allows Market Makers to submit up to 20 two-sided quotes in a single bulk quote message and is only available to Market Makers registered with the Exchange.<sup>20</sup> The Risk Monitor Mechanism is available to all Options Members but the Exchange anticipates that this functionality will be primarily used by Market Makers to manage their risk. Market Makers also require high touch network support services as provided by the Exchange and its staff. The Exchange anticipates that Order

<sup>18</sup> See *id.*

<sup>19</sup> See *supra* note 9.

<sup>20</sup> See MEMX U.S. Options FAQ, available at <https://info.memxtrading.com/us-options-trading-resources/us-options-faq/> (last visited September 27, 2023).

<sup>11</sup> See Securities Exchange Act Release No. 97893 (July 13, 2023), 88 FR 46285 (July 19, 2023) (SR-MEMX-2023-13).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(1).

<sup>14</sup> See *supra* note 12.

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

<sup>16</sup> See *supra* notes 6 through 10.

<sup>17</sup> See *supra* note 7.

Entry Firms<sup>21</sup> will consume less Exchange resources and generate fewer costs to the Exchange.

The Exchange notes that, while it anticipates that Market Makers will account for a vast majority of the costs and resources placed on the Exchange and its systems (as discussed herein), Market Makers continue to be valuable market participants on the exchanges as the options market is a quote-driven industry. The Exchange recognizes the value that Market Makers bring to the Exchange and particularly to the MEMX Options platform. The Exchange believes that incentivizing Market Makers to direct order flow to the Exchange will benefit all market participants by increasing liquidity on the Exchange. The Membership Fees proposed herein are meant to strike a balance between offsetting the costs which Market Makers will place on the Exchange and continuing to incentivize Market Makers to access and make markets on the Exchange. As such, the Exchange proposes to establish higher, separate Membership Fees for Market Makers that are more aligned with the costs and resources that Market Makers will place on the Exchange and its systems and will align the Membership Fees with those of the majority of other options exchanges.<sup>22</sup>

The Exchange proposes to charge a flat fee for Market Makers because it expects most Market Makers who trade on the Exchange to quote in many of the options classes available, and the Exchange wishes to structure the Membership Fee in order to incentivize these Market Makers to quote more. While some other exchanges have ranges of membership fees depending on the number of classes in which a Market Maker quotes, the Exchange believes that assessing a single Membership Fee for all Market Makers on MEMX Options will incentivize those Market Makers who already quote in a large number of classes to route more order flow to the Exchange. The Exchange believes that the proposed Membership Fees are consistent with the Act and will improve market quality and improve competitiveness for all market participants.

The Exchange notes that there are material costs associated with providing

<sup>21</sup> An Order Entry Firm means those Options Members representing as agent Customer Orders on MEMX Options, and non-Market Maker Members conducting proprietary trading. Customer Orders are any orders for the account of a Priority Customer. "Priority Customer" means any person or entity that is neither a broker or dealer in securities nor a Professional. See Rule 16.1 of the MEMX Rulebook.

<sup>22</sup> See *supra* notes 6 to 10.

the infrastructure, System functionality, and headcount to fully support access to the Exchange. The Exchange incurs technology expenses related to establishing and maintaining Information Security services, System upkeep, and regulatory services. While some of the expenses are fixed, much of the expenses are not fixed and increase as the expenses associated with access for Market Makers increase. For example, new Market Makers to the Exchange may require additional resources of the Exchange due to the volume of their activities (*i.e.*, quote volumes, which are significantly higher on average than Order Entry Firms, thus leading to increased storage and capacity costs of the Exchange) and automatically will have access to additional features offered by the Exchange only to Market Makers free of charge (*i.e.*, bulk message functionality as described above). As the total number of Market Makers increases, the Exchange may need to increase its data center footprint and consume additional power, resulting in increased costs charged by its third-party data center provider. As the cost to the Exchange to provide access to Market Makers will increase with the number of Market Makers, the Exchange believes the proposed Membership Fees are reasonable and consistent with the Act, in order to offset a portion of the costs to the Exchange associated with providing Market Makers access to the Exchange's quote and order infrastructure.

The Exchange proposes higher, separate fees for Market Makers that are more aligned with the costs and resource requirements which the Exchange anticipates Market Makers will place on the Exchange and its systems. As previously stated, while the Exchange anticipates that Market Makers will account for the majority of the System usage on the Exchange, because the options market is a quote-driven industry, the Exchange recognizes the value that Market Makers bring to the Exchange and wishes to attract Market Makers to join the Exchange as Members. As the options market is quote-driven, attracting Market Makers to the Exchange will create additional liquidity on the Exchange by encouraging Market Makers to quote in option classes. A market making firm does not need to be a member of the Exchange in order to route orders to the Exchange.<sup>23</sup> The

<sup>23</sup> For example, a market making firm could use a third-party connectivity service (where such third-party service is a Member of the Exchange) to route orders to the Exchange.

Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem the fees on any particular venue to be excessive. The Exchange's Membership Fees are restrained by competition. Many firms that actively trade on options markets are not currently Members of MEMX Options.<sup>24</sup> No market makers are required by rule, regulation, or competitive forces to be a Market Maker on the Exchange and can choose not to access the Exchange if it is determined that the Exchange's Membership Fees do not make business or economic sense for such market maker. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. The Exchange believes that the proposed Membership Fees reflect this competitive environment. If the Exchange is incorrect in this assessment, that error will be reflected in the Exchange's ability to compete with other options exchanges.

There is ample evidence that the Exchange is subject to competitive constraints on the amount it can charge for Membership Fees. Of the 16 other operating options exchanges, none currently has more than a 19.2% market share.<sup>25</sup> High levels of market share enhance the value of trading and membership. Market participants will distribute their transactions across exchanges according to their business needs. Market participants can and will choose where to become Members, as market participants do not need to become members of all exchanges and may utilize a third party to route their orders to the Exchange. Rather than becoming a Member of the exchange, a market participant could elect to have their orders routed to MEMX Options as nothing in the Options Order Protection and Locked/Crossed Market Plan<sup>26</sup> requires any market participant to become a member of any exchange. These competitive forces ensure that the Exchange cannot charge supra-competitive fees for membership. The Exchange expects that market participants will evaluate the Exchange's ability to meet market

<sup>24</sup> See *infra* note 27.

<sup>25</sup> See U.S. Options Market Volume Summary, available at [https://www.cboe.com/us/options/market\\_statistics/market/2023-09-27/](https://www.cboe.com/us/options/market_statistics/market/2023-09-27/) (last visited September 27, 2023). Market share is the percentage of volume on a particular exchange relative to the total volume across all exchanges and indicates the amount of order flow directed to that exchange.

<sup>26</sup> See Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at [https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options\\_order\\_protection\\_plan.pdf](https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf) (last visited September 28, 2023).

participants' needs through technology, functionality, and liquidity to determine whether such market participant will route flow to the Exchange. In fact, as a new entrant to the options industry, the Exchange is particularly subject to competitive forces and has carefully crafted its proposed Membership Fees with the goal of attracting order flow to the Exchange. In this environment, the Exchange has no ability to set Membership Fees at levels that would be deemed supra-competitive, as doing so would limit the Exchange's ability to compete with larger, established competitors in the options market.

At launch, the Exchange expects to have only around 30 Members of MEMX Options, which is lower than several other options exchanges.<sup>27</sup> Competitive forces constrain what the Exchange can charge, because if the Exchange charges Membership Fees which market participants deem to be excessive, market participants would simply not become Members.

As noted above, the proposed fees are also competitive with and in several cases significantly lower than the fees for membership imposed by several other options exchanges.<sup>28</sup> The Exchange also does not charge and does not have any plan to charge several types of fees that are charged by other exchanges with respect to membership or participation on the exchange—for example, the Exchange does not charge an application fee for Membership or any testing or certification fees—further highlighting the reasonableness of the proposed Options Membership Fees.<sup>29</sup>

<sup>27</sup> For example, in an August 2023 filing, MIAX Pearl noted that MIAX Pearl and its affiliated options markets, MIAX and MIAX Emerald, have a total of 47 members. See Securities Exchange Act Release No. 98180 (August 21, 2023), 88 FR 58404 (August 25, 2023) (SR-PEARL-2023-35). In a July 2023 filing, BZX Exchange noted that it has 61 members who trade options, Cboe EDGX Exchange has 51 members who trade options, and Cboe C2 has 52 Trading Permit Holders. See Securities Exchange Act Release No. 97928 (July 17, 2023), 88 FR 47209 (August 21, 2023) (SR-CboeBZX-2023-047). Based on publicly available information, NYSE American Options has 71 members. See NYSE American Options Membership Directory, available at <https://www.nyse.com/markets/american-options/membership#directory> (last visited September 27, 2023). Lastly, based on publicly available information, NYSE Arca Options has 68 members. See NYSE Arca Options Membership Directory, available at <https://www.nyse.com/markets/arca-options/membership#directory> (last visited September 27, 2023).

<sup>28</sup> See *supra* notes 6 to 10.

<sup>29</sup> In contrast, for example, MIAX Options charges a \$2,500.00 one-time application fee for Electronic Exchange Members and a \$3,000 one-time application fee for Market Makers. In addition, MIAX Options charges a \$1,000 testing and certification fee for Electronic Exchange Members and a \$2,500 testing and certification fee for Market Makers. See MIAX Options Fee Schedule, Section

The Exchange believes that the proposed Options Membership Fees are equitably allocated and not unfairly discriminatory because they would be assessed uniformly across all firms that seek to become Members. Additionally, the Exchange believes that the proposed fees are not unfairly discriminatory because no broker-dealer is required to become a Member of the Exchange or to register as a Market Maker with the Exchange. Even if a broker dealer does become a Member of the Exchange, the proposed fees are not unfairly discriminatory because the proposed Membership Fees are designed to account for the costs to MEMX of providing support for the Member trading on MEMX Options and, in the case of Market Makers, to provide additional support which the Exchange anticipates Market Makers would require on MEMX Options. As between Order Entry Firms and Market Makers, the Exchange believes that the higher fee for Market Makers is reasonable, equitably allocated and not unfairly discriminatory because the Exchange notes that other options exchanges currently charge Market Makers higher monthly fees for membership than are charged to other members of their options platform.<sup>30</sup>

The vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether membership to the Exchange is appropriate and worthwhile. At the time of launch, MEMX Options was the 17th national registered options exchange, and as noted above, no broker-dealer is required to become a Member of the Exchange. Notwithstanding the foregoing, the Exchange still believes that the proposed Membership Fee for Options Order Entry Firms of \$1,000 per month and the proposed Membership Fee for Options Market Makers of \$7,000 per month are reasonable, equitably allocated and not unfairly discriminatory, even for a broker-dealer that determines it should join the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange commenced operation of MEMX Options in September 2023. The Exchange notes that on June 30, 2023, it filed to waive Membership Fees for all new Members of the Exchange until January 1, 2024, and it intends to keep this language in its fee schedule,

3, available at <https://www.miaxglobal.com/markets/us-options/miax-options/fees> (last visited September 27, 2023).

<sup>30</sup> See *id.*

thus any new Members of the Exchange will not be charged Membership Fees until January 1, 2024.<sup>31</sup> The Exchange believes it is reasonable to similarly waive the proposed Options Membership Fees for new Members of the Exchange to provide an incentive for Options Trading Firms to apply for Exchange membership in connection with the launch of MEMX Options. The Exchange believes waiving the additional Options Membership Fees in addition to waiving the existing Membership Fees that apply to both Equities and Options is reasonable, equitable and not unfairly discriminatory in that it will apply uniformly to all new Members of the Exchange, and because the majority of the Exchange's current Members joined at a time when the Exchange did not impose Membership Fees (also to incentivize such participants to join) and thus already received this benefit.

Although the Exchange will not charge Membership Fees for new Members until January 2024, the Exchange proposes the Membership Fee structure to communicate its intent to charge Membership Fees beginning January 2024. As a new exchange entrant, the Exchange chooses not to charge for new Members to join the Exchange until January 2024 to encourage market participants to trade on the Exchange and experience the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later, once there is sufficient depth and breadth of liquidity, amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives, before increasing non-transaction fees, encourages market entry and promotes competition. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without membership fees serving as a potential barrier to attracting memberships and order flow.<sup>32</sup>

<sup>31</sup> See *supra* note 11.

<sup>32</sup> See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (stating, "[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . ."). See also, e.g., Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR-

The waiver is also a protection to new Members. If new Members join the Exchange in order to participate on MEMX Options and subsequently decide that they do not want to continue trading on MEMX Options prior to January 2024, they can cancel their membership with the Exchange prior to such date.

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

The Exchange believes its proposed amendments would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *Intramarket Competition*

As it relates to the reorganization of the fee schedule and the Membership Fee waiver, as discussed above, the Exchange does not believe that the proposed changes would impose any burden on intramarket competition because such changes would encourage new participants to apply for Exchange membership, thereby enhancing liquidity and market quality on the Exchange, as well as enhancing the attractiveness of the Exchange as a trading venue. The proposed Membership Fees do not place certain market participants at a relative disadvantage to other market participants to impose a burden on competition. As noted above, all Members trading on any of the Exchange's platforms will be assessed a \$200 fee applicable to all Members, all Order Entry Firms trading on the Exchange's options platform will be assessed the same \$1,000 Membership Fee, and all Market Makers trading on the Exchange's options platform will be assessed the same \$7,000 Membership Fee. Also as previously noted, the Exchange anticipates that Market Makers will consume the most bandwidth and resources of the Exchange's Systems, will transact the vast majority of the volume on the Exchange, and will require the most support services provided by Exchange staff. As opposed to Options Order Entry Firms, the Exchange anticipates that Market Makers will take up more Exchange resources than Order Entry Firms. As such, the Exchange does not believe charging Market Makers higher Membership Fees will impose a burden on intramarket competition.

The Exchange does not believe that the proposed changes would impose any burden on intramarket competition

because such changes will incentivize new participants to join the Exchange and the majority of the Exchange's current members joined at a time when the Exchange did not impose Membership Fees (also to incentivize such participants to join), and thus have already received this benefit. The options markets are quote-driven markets and are dependent on liquidity providers for liquidity and price discovery. The proposal will be of particular importance in encouraging liquidity providers to become members of the Exchange, which may result in more trading opportunities, enhanced competition, and improved overall market quality on the Exchange. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *Intermarket Competition*

As described above, the proposed reorganization of the fee schedule and Membership Fee waiver will incentive market participants to join the Exchange during the fee waiver period. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other options exchanges at the time MEMX Options launches.

The Exchange believes that adopting specific Membership Fees applicable to Options Trading Members does not place an undue burden on competition on other SROs that is not necessary or appropriate. As has been previously noted, other options exchanges have similar fees for their participants and several charge even higher rates.<sup>33</sup> As a new entrant in an already highly competitive environment for equity options trading, MEMX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act. The Exchange operates in a highly competitive market in which market participants can determine whether to join the Exchange based on the value compared to the cost of joining and maintain membership on the Exchange.

As noted above, market making firms have no obligation to become market makers on all options exchanges. As a new options platform, the Exchange seeks to attract market making firms to become Members on the MEMX Options platform. If the Membership Fees charged are deemed too high by a market making firm, such market

making firm can elect not to become a Member of the Exchange. The Exchange operates in a highly competitive market where market participants can favor an alternate venue if they deem the Exchange's Membership Fees to be excessive. In such an environment the Exchange must continually review and adjust its fees and credits to remain competitive with other exchanges and to attract order flow. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

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

The Exchange neither solicited nor received comments on the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>34</sup> and Rule 19b-4(f)(2)<sup>35</sup> thereunder.

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

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-MEMX-2023-26 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

NYSENAT-2020-05) (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

<sup>33</sup> See *supra* notes 6 to 10.

<sup>34</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>35</sup> 17 CFR 240.19b-4(f)(2).

All submissions should refer to file number SR–MEMX–2023–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–MEMX–2023–26 and should be submitted on or before October 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

**Sherry R. Haywood,**  
Assistant Secretary.

[FR Doc. 2023–22011 Filed 10–3–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98610; File No. SR–NASDAQ–2023–016]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares

September 28, 2023.

On June 29, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the iShares Bitcoin Trust (“Trust”) under Nasdaq Rule 5711(d), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on July 19, 2023.<sup>3</sup>

On August 31, 2023, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

#### I. Summary of the Proposal

As described in more detail in the Notice,<sup>7</sup> the Exchange proposes to list and trade the Shares of the Trust under Nasdaq Rule 5711(d), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust is to reflect generally the performance of the price of bitcoin before payment of the Trust’s expenses and liabilities.<sup>8</sup>

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 97905 (July 13, 2023), 88 FR 46342 (“Notice”). Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nasdaq-2023-016/srnasdaq2023016.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 98267, 88 FR 61652 (Sept. 7, 2023). The Commission designated October 17, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Notice, *supra* note 3.

<sup>8</sup> See *id.* at 46342. iShares Delaware Trust Sponsor LLC (“Sponsor”), a Delaware limited

The assets of the Trust will consist primarily of bitcoin held by a custodian on behalf of the Trust.<sup>9</sup> On each Business Day, as soon as practicable after 4:00 p.m. Eastern Time, the administrator of the Trust will evaluate the bitcoin held by the Trust as reflected by the CF Benchmarks Index and determine the net asset value of the Trust.<sup>10</sup> The Trust will issue and redeem baskets of Shares on a continuous basis only in exchange for an amount of bitcoin determined by the trustee of the Trust.<sup>11</sup>

#### II. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2023–016 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>12</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>13</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”<sup>14</sup>

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data

liability company and an indirect subsidiary of BlackRock, Inc., is the sponsor of the Trust.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 46343.

<sup>11</sup> See *id.*

<sup>12</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>13</sup> *Id.*

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>36</sup> 17 CFR 200.30–3(a)(12).