

August 16, 2022

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. SR-MEMX-2022-20¹

Dear Ms. Countryman:

The Healthy Markets Association² writes to object to the above-referenced filing submitted by MEMX LLC to change its market data feed usage.

In reliance on this Filing, MEMX has switched to using market data from the Consolidated Quotation System (“CQS”)/UTP Quotation Data Feed (“UQDF”) for market data from Cboe BYX, Cboe EDGA, Nasdaq BX, Nasdaq PSX, NYSE American, NYSE Chicago, and NYSE National. Put simply, MEMX has swapped faster data feeds for slower ones (with potentially stale prices). Further, the Exchange submitted the Filing pursuant to procedures intended for non-controversial filings.

The Filing fails for both procedural and substantive reasons. It should be suspended and proceedings for disapproval should be initiated.

Legal Standards for Filings

Rule 19b-4(f) of the Exchange Act specifies the types of proposed rule changes that may become immediately effective upon filing with the Commission. This includes “non-controversial” rule changes. However, for filings that do not meet these criteria, the rule changes may not be implemented until after Commission approval.³

Further, the Commission must determine that all exchange rules are designed to:

- “prevent fraudulent and manipulative acts and practices,”⁴

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Update Exchange Rule 13.4(a) Regarding the Exchange’s Usage of Data Feeds*, SEC, Exch. Act Rel. No. 34-95395, July 29, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95395.pdf> (“MEMX Data Feed Usage Filing”).

² Healthy Markets Association (“HMA”) engages asset owners, asset managers, brokers, exchanges, data providers, policymakers, regulators, and other stakeholders to increase capital markets transparency and reduce conflicts of interest, risks, and costs for investors. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

³ The Commission may delegate that authority.

⁴ 15 U.S.C. § 78f(b)(5).



- “promote just and equitable principles of trade,”⁵
- “protect investors and the public interest,”⁶ and
- not “permit unfair discrimination between customers, issuers, brokers, or dealers.”⁷

Review and Analysis

The Filing Does Not Qualify for Immediately Effective Status

The Filing was submitted as though it was a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Exchange Act and Rule 19b-4(f)(6) thereunder.⁸ We struggle to see how taking the unprecedented step of introducing latency to data streams used by a registered securities exchange is non-controversial.

As detailed below, this Filing is controversial at face value, and may have profound long-term consequences on the efficacy of the Exchange’s application of the order protection rule and its customers’ execution quality.

The Exchange, however, seems to simply ignore the complex issues raised by its Filing. For example, the Filing does not address how moving to stale prices for some exchanges impact its operations, much less investors. Notably, the Filing also raises significant broader concerns with how it may interact with competing SIPs. None of these issues are discussed. The Filing should be suspended as it was inappropriately deemed “effective upon filing,” and should instead be subject to careful deliberation by the Commission, Commission staff, and market participants.

The Filing Does Not Include Sufficient Information to Establish that the Exchange Has Met Its Burdens Under the Exchange Act or Commission Rules

The MEMX Market Data Usage Filing does not include sufficient information for the Commission to conclude that the new rule complies with the Exchange Act and Commission Rules.

As an initial matter, we do not know why MEMX is making the change. The Filing does not explain why MEMX has chosen to switch from using the exchanges’ proprietary data feeds to the SIP. We speculate that the reason for the switch from more timely data

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Filing, at 1.



feeds to slower feeds (with stale prices) is based upon cost. By making the switch, the exchange is saving (by our estimates) hundreds of thousands of dollars per year. But we don't know for sure, because MEMX has declined to share with the Commission or the public how much money the switch is saving the exchange. The Filing does not use the word "cost" once.

The Filing does not explain why the Exchange has chosen to not have a backup data feed for the identified exchanges. MEMX has further declined to explain how this lack of backup is consistent with its regulatory obligations.

The Filing does not explain why the Exchange is relying upon the SIP for some exchanges and not others. What is the basis for the disparity? If the Exchange is revising its rules to save money, then why not switch for all exchanges (so it could presumably save more money)?

We note that the exchanges identified appear to all have limited market share. Did the Exchange determine that moving to stale prices for these exchanges would not materially negatively impact its operations or customers because the Exchange's matching and routing under the Order Protection Rule would be so rarely impacted? If so, where is that analysis? Unfortunately, the Filing offers no analysis at all as to what happens when it swaps faster data feeds for slower ones, including the impact on its operations or its customers. It must.

There may be very significant customer impacts (and harm) when stale prices are used to process and match orders. In fact, one of MEMX's owners settled an enforcement action with the Commission for lying to its customer for saying that it was providing the best prices available, when it was transacting for itself at better prices using the exchanges' proprietary data feeds.⁹ Similarly, years ago, a chief executive of another trading venue was accused of enabling latency arbitrage by using the SIPs to match customer orders, and he famously (and falsely) declared on television that his firm used the faster proprietary data feeds to match customer orders.¹⁰ There is a reason why exchanges – and even many ATSS – rely upon the faster proprietary data feeds for their operations.

There is no precedent for an equity exchange to switch from relying upon a more timely data stream to a slower one. While some exchanges have been allowed to rely upon the SIPs when onboarding data from new exchanges (as they have come online), such as when IEX was first approved, we are not aware of any exchange being permitted to essentially go backwards. We have been unable to identify any filing prior to this one in

⁹ *In the Matter of Citadel Securities LLC*, SEC, Admin. Proc. 3-17772, Jan. 13, 2017, available at <https://www.sec.gov/litigation/admin/2017/33-10280.pdf>.

¹⁰ *This Week on CNBC: Katsuyama vs. O'Brien*, CNBC, Apr. 14, 2014, available at <https://www.youtube.com/watch?v=K9F-pZu0hiA> (last viewed, Aug. 5, 2022).



which an exchange filed to discontinue usage of direct feeds in favor of the facially inferior SIPs.¹¹

Further, we do not understand how or why the Commission has permitted any registered national securities exchanges to rely upon a non-backed up SIP data stream for any other registered securities exchange. All exchanges make more timely information available to market participants, and in all cases, the introduction of the time delayed feeds creates risks for investors.

The Commission should require all registered securities exchanges to use the most timely and accurate pricing available, because they are the regulatorily privileged entities upon which the entire National Market System is constructed. The Order Protection Rule, for example, does not effectively protect investors if the decisions are based upon stale information. The fact that the Commission hasn't long ago clarified that registered securities exchanges must rely upon timely data to comply with their obligations is troubling. But that inaction should not be used to justify further, and new, investor harms.

While MEMX has provided no analysis of the impact of its data feed conversion (and it bears the burden of doing so), we note that the Commission has the necessary data and tools to engage in a preliminary assessment of the impacts of the change. We encourage the Commission's analytics team to use MIDAS or the Consolidated Audit Trail to study this issue.

Notably, if MEMX were to provide details of why it is making the change (including details of its expected cost savings), as well as provide a detailed analysis showing no or a "de minimis" negative impact on its operations and investors, we could imagine the Commission being able to conclude that the change would be consistent with the Exchange Act.

However, beyond these missing facts and analyses, there are also a number of very technical unaddressed concerns regarding the Exchange's new reliance on SIP data.

¹¹ We note that, following a series of serious SIP failures, beginning over nine years ago, the Commission has embarked on numerous initiatives to improve the quality and resiliency of the SIPs. Press Release, *Nasdaq OMX Provides Updates on Events of August 22, 2013*, Nasdaq, Aug. 29, 2013, available at <https://ir.nasdaq.com/news-releases/news-release-details/nasdaq-omx-provides-updates-events-august-22-2013>; Press Release, *SEC Chair White Statement on Meeting With Leaders of Exchanges*, SEC, Sept. 12, 2013, available at <https://www.sec.gov/news/press-release/2013-178>; *Regulation Systems Compliance and Integrity*, SEC, 79 Fed. Reg. 72252, (Dec. 5, 2014), available at <https://www.govinfo.gov/content/pkg/FR-2014-12-05/pdf/2014-27767.pdf>. However, these products are nevertheless still slower than the proprietary data streams sold by the exchanges directly.



For example, how does the Exchange address data issues, such as conflation of SIP data?¹²

Lastly, neither the Filing nor the Commission's release seem to recognize how allowing registered securities exchanges to rely upon the SIP or mix and match proprietary and SIP data streams could create new conflicts of interest or investor risks.

Worse, neither the Filing nor the Commission's release examine how those conflicts of interest and risks could be impacted by a competitive SIP model, such as what has already been approved by the Commission.¹³ In a world where the latency of the SIP could give rise to arbitrage opportunities and risks for market participants of being filled (or not routed away as provided by the Order Protection Rule), simply relying upon any SIP as "good enough" without any minimum timeliness obligations for the SIP is troubling.

As we told the Commission in May 2020,

We are also concerned about minimum timeliness expectations. Some market data users may wish to subscribe to a very low cost, or very low quality SIP product. The Commission should recognize that it must establish a minimum timeliness standard that should be readily adjustable over time, as technology improves.¹⁴

If exchanges are permitted to execute and make routing decisions based upon some stale SIP prices, we could see significant opportunities for some market participants to exploit those opportunities at the expense of investors. In fact, we could easily see significant demand for a very low-cost, slow SIP, that could be used to create arbitrage opportunities for sophisticated market participants at the expense of investors.

Rather than address any of these issues, the Filing summarily concludes that switching to the slower data stream

is consistent with the Act because it will ensure that the Rule correctly identifies and publicly states on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for

¹² See, Letter from Tyler Gellasch, HMA, to Vanessa Countryman, July 27, 2020, *available at* <https://www.sec.gov/comments/s7-03-20/s70320-7489141-221756.pdf>.

¹³ *Market Data Infrastructure*, SEC, 86 Fed. Reg. 18596 (Apr. 9, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-04-09/pdf/2020-28370.pdf>.

¹⁴ Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, at 3, May 26, 2020, *available at* <https://www.sec.gov/comments/s7-03-20/s70320-7235195-217095.pdf>.



performing the regulatory compliance checks related to each of those functions.¹⁵

The Exchange Act does not merely require correct disclosure of operational facts, but instead demands that the Commission ensure that the operations substantively “prevent fraudulent and manipulative acts and practices,” “promote just and equitable principles of trade,” “protect investors and the public interest,” and meet the other obligations.¹⁶ Unfortunately, the Filing doesn’t address those demands. Worse, the facts suggest that the Filing may instead directly contradict them.

As we have stated before, decades of ad hoc, de novo reviews of filings without clear standards from the Commission have proven to materially erode investor protections and compliance with the law. It has also created an unlevel playing field amongst exchanges wherein some legacy exchanges are able to operate with unjustified, unreasonable, discriminatory fees, whereas other exchanges may have their efforts to simply match their competitors’ fees blocked.

The Commission should suspend and disapprove this Filing. It should also revise its process for evaluating exchange filings and stop exchanges from abusing its filing processes.¹⁷ Improving the process would improve the consistency of compliance with the law, while also reducing the need for market participants to engage in repetitive, costly filings and challenges. Further, market participants should not be compelled to pay unreasonable and discriminatory fees, or suffer inferior executions, simply because an exchange is able to make a rule change effective immediately – prior to any substantive review by the Commission, its staff, or market participants.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at (402) 312-7918.

Sincerely,

Christopher Nagy
Research Director

Cc: Honorable Gary Gensler, Chair

¹⁵ Filing, at 3.

¹⁶ 15 U.S.C. § 78f(b)(5).

¹⁷ See, e.g., Letter from Chris Nagy, HMA, to Secretary, SEC, June 28, 2022, *available at* <https://healthymarkets.org/wp-content/uploads/2022/06/6-28-22-MEMX-Connectivity-and-Data-FINAL1.pdf>; see also, Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Oct. 29, 2021, *available at* <https://www.sec.gov/comments/sr-cboeedga-2021-017/srcboeedga2021017-9360012-261666.pdf>.