

September 20, 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-2022-26<sup>1</sup>

Dear Ms. Countryman:

On behalf of the Healthy Markets Association,<sup>2</sup> I write to object to the Seventh MEMX Connectivity Filing<sup>3</sup> for the same reasons as HMA objected to its predecessor filings.<sup>4</sup>

As with its predecessors, the Seventh MEMX Connectivity Filing does not provide the Commission or staff with sufficient information to conclude that MEMX has met its obligations under the Exchange Act and Commission Rules, and the filing should therefore be immediately suspended and proceedings initiated for its disapproval.

The Initial MEMX Connectivity filing was made in December 2021.<sup>5</sup> It was suspended by the Commission staff and proceedings were initiated to approve or disapprove it in February 2022.<sup>6</sup> Since then, the filing has been withdrawn, modestly modified in

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<sup>1</sup> *Proposed rule change to amend the Fee Schedule to adopt fees the Exchange will charge to Members and non-Members for connectivity services*, MEMX, Sept. 15, 2022, available at <https://info.memxtrading.com/sr-memx-2022-26-proposed-changes-to-fee-schedule/> (“Seventh MEMX Connectivity Filing”).

<sup>2</sup> 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>.

<sup>3</sup> Upon further review, it appears as though there have been a total of seven filings, although two were withdrawn and replaced shortly thereafter for “technical errors.” Further, for reasons unknown, these filings were never published by the Commission.

<sup>4</sup> See, Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Jan. 26, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/01/IEX-Fee-Filing-Letter-Jan-2022.pdf>; Letter from Chris Nagy, HMA, to Vanessa Countryman, SEC, June 28, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/06/6-28-22-MEMX-Connectivity-and-Data-FINAL1.pdf>; Letter from Chris Nagy, HMA, to Vanessa Countryman, SEC, Aug. 19, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/08/HMA-SR-MEMX-2022-17-AND-2022-19.pdf>.

<sup>5</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-93937, Jan. 10, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf>.

<sup>6</sup> *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Connectivity Fees*, SEC, Exch.



non-substantive ways, and refiled six more times. Attached as **Exhibit 1** is a timeline for the MEMX Connectivity Filings.

Most recently, following HMA's objection to the Fifth MEMX Connectivity Filing,<sup>7</sup> MEMX withdrew it,<sup>8</sup> re-filed a substantively similar Sixth MEMX Connectivity Filing the same day. That filing was then withdrawn "due to a technical error" and replaced by the Seventh MEMX Connectivity Filing.<sup>9</sup>

The Exchange is highly incentivized to continue playing this ludicrous game of "Whack-a-Mole." The Seventh MEMX Connectivity Filing acknowledges that this filing process is being undertaken so that the firm can continue to collect fees<sup>10</sup> prior to the Commission determining that the fees comply with the law:

The Exchange is re-filing this proposal promptly following the withdrawal of the Fourth Proposal with the intention of maintaining the existing fees for connectivity services while at the same time revising the proposal to focus on its Cost Analysis, as described below. The Exchange believes that this approach is appropriate and fair for competitive reasons as several other exchanges currently charge for similar services, as described below, and because others have followed a similar approach when adopting fees.

As set forth in the Initial Proposal, the Second Proposal, the Third Proposal, the Fourth Proposal, and this filing, the Exchange does incur significant costs related to the provision of connectivity services and believes it should be permitted to continue charging for such services while also providing additional time for public comment on the level of detail contained in this proposal and other questions posed in the OIP. Finally, the Exchange does not believe that the ability to charge fees for connectivity services or the level of the Exchange's proposed fees are at issue, but rather, that the level of detail required to be included by the Exchange when adopting such fees is at issue. For these reasons, the

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Act Rel. No. 34-94332, Feb. 28, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf>.

<sup>7</sup> Letter from Christopher Nagy, HMA, to Secretary, SEC, August 19, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/08/HMA-SR-MEMX-2022-17-AND-2022-19.pdf>.

<sup>8</sup> *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. 34-95739, Sept. 12, 2022, available at, <https://www.sec.gov/rules/sro/memx/2022/34-95739.pdf>.

<sup>9</sup> Seventh MEMX Connectivity Filing, at 3.

<sup>10</sup> We also note that there appear to have been some brief lapses in the periods covered by the offending filings.



Exchange believes it is appropriate to re-file this proposal and to continue charging for connectivity services.<sup>11</sup>

Contrary to the Exchange's assertion, the dispute is not a technical or clerical error, but rather whether the now Seventh MEMX Connectivity Filing has met its burden to establish that it is consistent with the law and Commission Rules. Obviously, if filings don't meet that burden, then they should not be implemented, and the fees should not be assessed. The "level of detail required" is essential for the Commission to be able to make the determination of whether the fee levels (and impacts) are consistent with the law and Commission Rules. Without the "detail," for example, the Commission could not determine whether the fees are "reasonable," "equitably allocated," not undue burdens on competition, or non-discriminatory – as required by law.

Given that the Exchange has now withdrawn six of these filings, it appears to have acknowledged that its six predecessor filings did not meet their burdens. This filing is no different.

Despite never providing the Commission with sufficient information with which to ensure the connectivity offering and fees comply with the Exchange Act, and despite the Commission staff's suspension of the Initial MEMX Connectivity Filing in February, the Exchange has continued to collect an estimated hundreds of thousands of dollars in connectivity fees from its connectivity customers each month.

The fact that the Commission has inexplicably permitted this to continue despite its decision to suspend the very first filing from MEMX is frustrating. The fact that the Sixth and Seventh MEMX Connectivity Fee Filings have occurred after the Commission was yet again reminded by the DC Circuit that it cannot simply ignore the costs imposed on market participants when evaluating self-regulatory organization filings is even more galling.<sup>12</sup>

We understand why MEMX and other exchanges will engage in these processes, if permitted. For an exchange, it's a fantastic return on expenses to have an employee spend a few hours simply cutting and pasting new dates into old documents and resubmitting new filings to keep collecting a few hundred thousand dollars for another month.

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<sup>11</sup> Seventh MEMX Connectivity Filing, at 5-6. Notably, MEMX appears to be not counting two filings that were withdrawn faster than the other six. This is not the fifth filing, but rather, the seventh.

<sup>12</sup> *Bloomberg, LP, v. SEC*, (D.C. Cir. 2022), available at <https://law.justia.com/cases/federal/appellate-courts/cadc/21-1088/21-1088-2022-08-16.html> (holding that "the Commission's approval of FINRA's proposal was arbitrary and capricious because the Commission neglected to give a reasoned explanation in response to Bloomberg's significant concerns about the costs that FINRA, as well as market participants, will incur in connection to the creation and maintenance of the data service.").



By not halting this abuse of process, the Commission has awarded each exchange the ability to extract fees and expenses that do not comply with the law from market participants with no meaningful limitation or redress. In the case of this filing, market participants have been forced to incur expenses for 261 days and counting.

Market participants should not be compelled to pay unreasonable, inequitable, discriminatory, or anti-competitive fees simply because an exchange is able to refile and reimpose the fees immediately after the same fees are suspended or rejected by the Commission or its staff, or withdrawn by the exchange itself. Further, market participants and trade associations (like HMA) should not be compelled to expend significant resources to engage in this wasteful charade.

The Commission should immediately suspend this filing.

Further, the Commission has the authority to stop this abusive process, and it should do that now. The Commission should immediately develop rules or guidance to provide for a more consistent, transparent, and standards-driven process for reviewing and approving, suspending, or denying filings. This process is deeply flawed and facially inadequate to protecting investors and ensuring compliance with the Exchange Act,<sup>13</sup> and it also appears to still be leading to different exchanges receiving different treatment from the Commission and its staff.

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  
Healthy Markets Association

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<sup>13</sup> At times, it is unclear what level of review, if any, is being applied. Somewhat humorously, last week, the SEC released for public comment another filing by MEMX that contained a typographical error in the very first substantive sentence. See *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend MEMX Rule 11.15, Clearly Erroneous Executions*, SEC, Sept. 13, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95754.pdf> (“Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”), and Rule 19b-4 thereunder, **notice is hereby given that on [insert date], MEMX LLC (“MEMX” or the “Exchange”)** filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange.”)(emphasis added).

# Exhibit 1

## Timeline of MEMX Connectivity Filings

(as of Sept. 19, 2022)

Date of Filing	Filing	Link
12/30/21	<b>Initial MEMX Connectivity Filing</b> (SR-MEMX-2021-22)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf">https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf</a>
2/28/22	<b>Suspension Order and Order Instituting Proceedings to Approve or Disapprove Initial MEMX Connectivity Filing</b> (SR-MEMX-2021-22)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf">https://www.sec.gov/rules/sro/memx/2022/34-94332.pdf</a>
3/1/2022	<b>Second MEMX Connectivity Filing</b> (SR-MEMX-2022-02)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-94419.pdf">https://www.sec.gov/rules/sro/memx/2022/34-94419.pdf</a>
4/29/2022	<b>Withdrawal of Second MEMX Connectivity Filing</b> (SR-MEMX-2022-02)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-94841.pdf">https://www.sec.gov/rules/sro/memx/2022/34-94841.pdf</a>
5/1/2022	<b>Third MEMX Connectivity Filing</b> (SR-MEMX-2022-12)	Not currently available on MEMX or SEC websites.
Unclear, based on currently available public records	<b>Withdrawal of Third MEMX Connectivity Filing</b> (SR-MEMX-2022-12)	Not currently available on MEMX or SEC websites.

# Exhibit 1

5/6/2022	<b><i>Withdrawal of Initial MEMX Connectivity Filing</i></b> (SR-MEMX-2021-22)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-94957.pdf">https://www.sec.gov/rules/sro/memx/2022/34-94957.pdf</a>
5/6/2022	<b><i>Fourth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-13)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-94924.pdf">https://www.sec.gov/rules/sro/memx/2022/34-94924.pdf</a>
7/1/2022	<b><i>Withdrawal of Fourth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-13)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-95202.pdf">https://www.sec.gov/rules/sro/memx/2022/34-95202.pdf</a>
7/5/2022	<b><i>Fifth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-17)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-95299.pdf">https://www.sec.gov/rules/sro/memx/2022/34-95299.pdf</a>
9/1/2022	<b><i>Withdrawal of Fifth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-17)	<a href="https://www.sec.gov/rules/sro/memx/2022/34-95739.pdf">https://www.sec.gov/rules/sro/memx/2022/34-95739.pdf</a>
9/1/2022	<b><i>Sixth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-24)	<i>Not currently available on MEMX or SEC websites.</i>
Unclear, based on currently available public records	<b><i>Withdrawal of Sixth MEMX Connectivity Filing</i></b> (SR-MEMX-2022-24)	<i>Not currently available on MEMX or SEC websites.</i>
9/15/2022	<b><i>Seventh MEMX Connectivity Filing</i></b> (SR-MEMX-2022-26)	<a href="https://info.memxtrading.com/sr-memx-2022-26-proposed-changes-to-fee-schedule/">https://info.memxtrading.com/sr-memx-2022-26-proposed-changes-to-fee-schedule/</a>