

April 20, 2023

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

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

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-03);<sup>[1]</sup>  
Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-14);<sup>[2]</sup>  
Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-19);<sup>[3]</sup>  
Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-28);<sup>[4]</sup>  
Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2022-32);<sup>[5]</sup>  
Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2023-02);<sup>[6]</sup>  
and Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees (File No. SR-MEMX-2023-04)<sup>[7]</sup>

Dear Ms. Countryman:

The Healthy Markets Association<sup>[8]</sup> writes to object to the Seventh MEMX Market Data Filing for similar reasons as we did to its predecessors.

We also write to acknowledge the Exchange broke its streak of allowing its filings to sit for 59-60 days before replacing them with new immediately effective filings by making the change at 39 days. Also, the Seventh Market Data filing makes a substantive change to the assessed fees.

Sadly, the Exchange's Seventh MEMX Market Data Filing continues MEMX's streak intact of failing to provide factual information sufficient to conclude that MEMX's market data fees are reasonable, equitably allocated, non-discriminatory, and not undue burdens on competition.<sup>[9]</sup> Put simply, the Seventh MEMX Market Data Filing – like all six of its predecessor filings – 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. Accordingly, the Commission should immediately suspend the defective filing and initiate proceedings for its disapproval.

I. The Exchange Has Not Supported Its New, Altered Market Data Fee

MEMX has asserted that it has arguably satisfied its burden in its last few filings because it has arguably provided a “cost analysis that focuses solely on costs related to the provision of the Exchange Data Feeds,” rather than facially inflating those data costs with “costs related to operating its trading system, or transaction services, with costs of producing market data.”<sup>[10]</sup>

For approximately the past year, as covered by the first six filings, the Exchange charged different non-display usage fees for trading platforms (\$4,000) and other users, i.e., not trading platforms (\$1,500). The Seventh MEMX Market Data Filing now sets non-display usage fees for both trading platforms and other users at \$2,500. For firms using the MEMOIR Depth feed for both types of Non-Display Usage, the changes now result in a \$500 monthly reduction in fees.

Notably, the Exchange admits as much by stating that the fee changes are “revenue neutral to the Exchange, and thus, do not materially alter any of the cost analysis or revenue projections” in its proposal.<sup>[11]</sup> That may be fine for the Exchange, but what about the impacts on the different market participants? The change materially impacts how much different types of firms pay. Just because the change may be revenue neutral to the Exchange does not mean that it is revenue neutral to its customers. It is decidedly not for several of them.

The Exchange has offered no material analysis of the impacts of the change on them, other than to suggest that firms can arguably drop subscriptions. That analysis fails to account for the consequences to a firm of making the determination to drop its direct subscription or alternatively seek the data from another subscriber. The Exchange should perform that analysis.

Aside from the fee change, the Proposal largely repeats prior filings verbatim.

## II. MEMX’s Pattern of Yo-Yo Filings Continues to Harm Markets

MEMX has escalated from a steady yo-yo pattern of filings and withdrawals to performing yo-yo tricks which injure investors and other market participants. Here, given the limited information revealed, it appears difficult to determine the market impact of the minor fee changes. MEMX may have pulled this trick simply to secure review of its filing without our prior comment letters in the file and extend its ability to collect unjustified fees. This continued pattern of filing, withdrawing, and re-filing the Market Data Filings denies market participants the opportunity to dispute or challenge the fees the Exchange collects. The Seventh MEMX Market Data Filing is simply a minor variation on the same fee structure now in effect for almost a year. This pattern will continue unless the Commission intervenes.

For over 300 days, the Commission has allowed the Exchange to charge market data fees, collecting thousands of dollars monthly without following the law or allowing challenges from market participants. The Exchange avoids accountability by filing for fees, withdrawing the objectionable filing, and re-submitting a nearly identical one just before the 60-day period ends. The Commission can suspend these filings considering public interest or protection of investors.<sup>[12]</sup>

MEMX’s pattern of filing “new” rule proposals, withdrawing them before the timing has run, and then refiling to impose the same fees (or now minimally amended fees) is unmistakable.

<b>Filing</b>	<b>Effective Dates</b>	<b>Length of Effectiveness</b>
Initial MEMX Market Data Fee Filing	3/24/22 – 5/23/22	60 days
Second MEMX Market Data Fee Filing	5/23/22 – 7/21/22	59 days
Third MEMX Market Data Fee Filing	7/22/22 – 9/20/22	60 days
Fourth MEMX Market Data Fee Filing	9/20/22 – 11/18/22	60 days
Fifth MEMX Market Data Fee Filing	11/18/22 – 1/17/23	60 days
Sixth MEMX Market Data Fee Filing	1/17/23 – 2/25/23	39 days
Seventh MEMX Market Data Fee Filing	3/1/23 – current	

Given the roughly 20-day acceleration in MEMX’s yo-yo filing pace, we struggle to precisely predict which upcoming holiday will mark the likely demise of the Seventh MEMX Market Data Fee Filing.

The Commission Staff should set up a betting pool internally on when MEMX will again move to frustrate the Commission’s authority to review and oversee its rules by withdrawing and refiling this latest submission. Will the Exchange mock the SEC process and withdraw this rule on April Fool’s Day (April 1)? Will the rule survive all the way through Passover (April 5-13)? Perhaps the temptation to withdraw and resurrect the rule at Easter (April 9) will be too big to pass up? Or will the Exchange finally break its fast and celebrate a completed Ramadan on Eid (April 21)?

This continued yo-yo process deprives market participants of their legal rights and a final action to challenge in court. This is inconsistent with protecting investors and fair markets. The Commission must stop this abusive process.

### III. MEMX’s Yo-Yo Pattern of Filings and Withdrawals Raises Questions About Undisclosed Communications

Most importantly, we remain concerned that undisclosed communications now occur between Commission staff and the Exchange. To the extent that this latest filing making a minor change in the Exchange’s fees resulted from undisclosed communication between Commission staff and the Exchange, the Commission should issue public guidance setting forth its views so that all market participants will know the Commission’s policy. As an agency often fixated on

disclosure, the Commission should welcome the opportunity to do its business in the daylight instead of the dark.

The Commission should suspend the Seventh MEMX Market Data Filing, initiate proceedings to disapprove it, and immediately suspend any similar filings from the Exchange until a determination has been made.

IV. Fees Should Apply Equally to Firms, Regardless of Size of Firm or Firm Type

While not forming the basis of an objection to the instant filing, we noticed that MEMX explained that “[t]he proposed fee will not apply differently based upon the size or type of Firm.”<sup>[13]</sup>

We wonder why the Exchange made this representation. In our view, this affirmative commitment against overt discrimination is important, in part, because it appears to be essential to showing “fair access.”

However, we are somewhat baffled that while the Exchange has taken this position for the imposition of these data fees, it has nevertheless adopted pricing tiers for trading fees and rebates that facially “apply differently based upon the size or type of Firm.” Those fees also directly impact access to the venue, and they are equally required to be consistent with the Exchange Act.

We urge the Commission to consider ensuring that all MEMX fees – including transaction fees and rebates – apply to firms the same way, regardless of the size or type of firm.

Thank you for your consideration.

Sincerely,



Tyler Gellasch  
President and CEO

Cc: Hon. Gary Gensler, Chair

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<sup>[1]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange’s Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-94614, Apr. 5, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-94614.pdf> (“Initial MEMX Market Data Filing”). The Initial MEMX Market Data Filing was withdrawn May 23, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95027, June 2, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95027.pdf>.

<sup>[2]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95036, June 3, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95036.pdf> ("Second MEMX Market Data Filing") (containing typo suggesting it was filed on March 24th, when subsequent documents suggest it was filed on May 23rd). The Second MEMX Market Data Filing was withdrawn July 21, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95400, Aug. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95400.pdf>.

<sup>[3]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95420, Aug. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95420.pdf> ("Third MEMX Market Data Filing"). The Third MEMX Market Data Filing was withdrawn on September 20, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95917, Sept. 27, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95917.pdf>.

<sup>[4]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-95981, Oct. 4, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-95981.pdf> ("Fourth MEMX Market Data Filing"). The Fourth MEMX Market Data Filing was withdrawn on November 18, 2022. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96453, Dec. 6, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96453.pdf>.

<sup>[5]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96430, Dec. 1, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-96430.pdf> ("Fifth MEMX Market Data Filing"). The Fifth MEMX Market Data Filing was withdrawn on January 20, 2023. *Notice of Withdrawal of a Proposed Rule Change to Amend its Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96720, Jan. 20, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-96720.pdf>.

<sup>[6]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-96775, Jan. 30, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-96775.pdf> ("Sixth MEMX Market Data Filing"). The Sixth MEMX Market Data Filing was withdrawn on March 13, 2023. *Notice of Withdrawal of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-97131, Mar. 13, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-97131.pdf>.

<sup>[7]</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Market Data Fees*, SEC, Exch. Act Rel. No. 34-97130, Mar 13, 2023, available at <https://www.sec.gov/rules/sro/memx/2023/34-97130.pdf> ("Seventh MEMX Market Data Filing").

<sup>[8]</sup> The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

<sup>[9]</sup> *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> ("2019 Staff Guidance").

<sup>[10]</sup> Seventh MEMX Market Data Filing, at 2-3.

<sup>[11]</sup> Seventh MEMX Market Data Filing, at 7.

<sup>[12]</sup> See Exchange Act Section 19(b)(3)(C) (stating that the Commission may "temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this chapter...").

<sup>[13]</sup> Seventh MEMX Market Data Filing, at 3.