

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91259; File No. SR-CBOE-2021-014]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

March 4, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 25, 2021, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “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

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its fees schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The Exchange proposes to amend its COVID-19 Test Fee which it recently adopted in connection with the COVID-19 pandemic. By way of background, on March 16, 2020, the Exchange suspended open outcry trading to help prevent the spread of COVID-19<sup>3</sup> and was operating in an all-electronic configuration until June 15, 2020. On June 15, 2020, the Exchange reopened its trading floor, but with a modified configuration of trading crowds in order to implement social distancing and other measures consistent with local and state health and safety guidelines to help protect the safety and welfare of individuals accessing the trading floor. In order to further protect the safety and welfare of individuals accessing the trading floor during the COVID-19 pandemic, the Exchange determined to implement on-site COVID-19 testing for all trading floor personnel, beginning November 16, 2020. The Exchange has contracted with an independent health care provider who conducts the tests, which the Exchange currently conducts twice each week. The Exchange currently assesses a fee of \$150 per test, per Trading Permit Holder (“TPH”) or associated person of a TPH<sup>4</sup> that is tested, which is the same amount the Exchange is charged by the independent health care provider conducting the tests (*i.e.*, the Exchange passes through its costs). The COVID-19 Test Fee allows the Exchange to offset the costs incurred with on-site testing.

The Exchange wishes to amend the language in the Fees Schedule to provide generally that the Exchange will pass through the cost the Exchange is charged for each test, instead of specifying the exact amount (currently \$150) in the Fees Schedule. In adopting the COVID-19 Test Fee, the Exchange represented that the proposed fee is a

pass-through of the costs to the Exchange and that the Exchange will not generate any revenue in excess of those costs.<sup>5</sup> Although the Exchange is currently still subject to the \$150 rate (which it will continue to pass through), the proposed change provides flexibility should the rate change in the future. For example, if the independent health care provider lowers the rate they charge the Exchange for each test (*e.g.*, lowers from \$150 to \$100), the Exchange can charge \$100 per test, per TPH and associated person of a TPH, without having to submit an additional rule filing. The Exchange represents that it will continue to ensure it does not generate any revenue in excess of its costs associated with the tests. The Exchange also does not anticipate the cost exceeding the current rate of \$150.

The Exchange next proposes to provide that in certain limited circumstances, the Exchange will waive the costs of the test in its entirety, regardless of the cost to the Exchange. Particularly, the Exchange proposes to provide that it will not assess any fees, regardless of the cost to the Exchange, when test results are not received from the independent health care provider that conducts the tests in a timely manner. The Exchange notes the testing process is rolling and intended to capture any potential positive COVID cases. Accordingly, the Exchange does not believe it’s appropriate or equitable to assess the fee if results are delivered past the time such results can no longer be utilized by the Exchange for its intended purpose.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>6</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>7</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and

<sup>3</sup> On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic and to slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses.

<sup>4</sup> For example, a TPH may have personnel other than Nominees on the floor that need to access the trading floor. Such persons will also be subject to testing requirements and will be assessed the proposed fee.

<sup>5</sup> See Securities Exchange Release No. 90504 (November 24, 2020) 85 FR 77295 (December 1, 2020) (SR-CBOE-2020-111).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

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

<sup>2</sup> 17 CFR 240.19b-4.

open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>8</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes the proposed change to the COVID-19 Test Fee is reasonable as the Exchange will continue to pass through the costs that the Exchange incurs per test. Indeed, the proposed change to replace the reference to the specific amount currently being passed through with general language providing the COVID-19 Test Fee is a pass-through of the Exchange's costs, merely provides the Exchange more flexibility to adapt to changing rates and avoids the administrative burden of submitting an additional rule filing each time the rate changes. As noted above, the Exchange does not currently anticipate that the COVID-19 Test Fee would increase above the current rate of \$150 per test, per TPH/associated person of a TPH. The fee the Exchange ultimately assesses to TPHs and associated persons of a TPH will always be the same amount that is assessed to the Exchange by the independent health care provider administering the tests. Also as noted above, the revenue generated from the proposed fee will continue to not be more than the cost to the Exchange for administering the tests. The Exchange further notes that to date, it has absorbed all other costs incurred in connection with the safety and health protocols it has taken to ensure the safety and welfare of individuals access the trading floor, including daily deep-cleaning of its facilities. The Exchange believes the proposed change is equitable and not unfairly discriminatory because it applies uniformly to any TPH or associated person of a TPH that is tested and accesses the trading floor.

The Exchange believes the proposal to waive the fee in instances where the results of a test are not received in a timely manner by the Exchange from the independent health care provider is reasonable because TPHs and associated persons of TPHs will not be subject to a fee in such cases. The Exchange recognizes there may be unforeseen circumstances which may cause a delay of test results to be received (*e.g.*, inclement weather). In such cases, the Exchange does not believe it's equitable

or appropriate to continue to assess the COVID-19 Test Fee for impacted tests as the Exchange would not be able to utilize the results as intended. Lastly, the Exchange believes the proposed change to waive the fee when test results are delayed is equitable and not unfairly discriminatory because the waiver will be applied to any TPH or associated person of a TPH that is impacted by such delay.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes the proposed change is not intended to address any competitive issue. Rather, the proposed changes relate to a pass-through fee that allows the Exchange to continue to recoup costs associated with COVID-19 testing in order to help protect the safety and welfare of individuals access the trading floor. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply equally to all similarly situated market participants. The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes only affect trading on the Exchange in limited circumstances.

#### *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) of the Act<sup>9</sup> and paragraph (f) of Rule 19b-4<sup>10</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 will 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 (<http://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-CBOE-2021-014 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.

All submissions should refer to File Number SR-CBOE-2021-014. 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 (<http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2021-014 and

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f).

should be submitted on or before March 31, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91256; File No. SR-MEMX-2021-03]

### Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 11.6(h)(1) To Enable Users To Include a Limit Price on a Pegged Order With a Primary Peg Instruction

March 4, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 24, 2021, 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. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act <sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 Exchange Rule 11.6(h)(1) to enable Users <sup>5</sup> to include a limit price on a Pegged Order <sup>6</sup> with a Primary Peg

instruction.<sup>7</sup> 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

Currently, Exchange Rule 11.6(h)(1) provides that a User submitting a Pegged Order with a Primary Peg instruction may not include a limit price on such order.<sup>8</sup> In contrast, Exchange Rule 11.6(h)(2) provides that a User submitting a Pegged Order with a Midpoint Peg instruction may, but is not required to, include a limit price on such order. The Exchange therefore currently has different functionality with respect to a User’s ability to include a limit price on a Pegged Order with a Primary Peg instruction and a Pegged Order with a Midpoint Peg

automatically re-prices in response to changes in the NBBO. The two types of peg instructions for Pegged Orders are: (1) Primary Peg, which pegs to the NBB (NBO) for buy (sell) orders; and (2) Midpoint Peg, which pegs to the midpoint of the NBBO.

<sup>7</sup> A Primary Peg instruction is an instruction that may be placed on a Pegged Order that instructs the Exchange to peg the order to the NBB, for a buy order, or the NBO, for a sell order. A User may, but is not required to, select an offset equal to or greater than \$0.01 above or below the NBB or NBO that the order is pegged to. See Exchange Rule 11.6(h)(1).

<sup>8</sup> As initially adopted, Exchange Rule 11.6(h)(1) was silent as to whether a User submitting a Pegged Order with a Primary Peg instruction may include a limit price on such order. The Exchange interpreted the Rule’s silence in this regard to mean that a limit price may not be included on such orders, which was the intended functionality for such orders at the time of the Exchange’s initial launch. However, after receiving inquiries from Users as to whether a limit price may be included on such orders, prior to commencing operations the Exchange adopted a change to Exchange Rule 11.6(h)(1) to expressly state that a User submitting a Pegged Order with a Primary Peg instruction may not include a limit price on such order. The purpose of this change was therefore to make Exchange Rule 11.6(h)(1) more clearly reflect the intended and actual functionality. See Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR-MEMX-2020-04).

instruction in that Users may only include a limit price on the latter.

The Exchange now proposes to enable a User submitting a Pegged Order with a Primary Peg instruction to include a limit price on such order. The purpose of the proposed change is to align the functionality with respect to a User’s ability to include a limit price for the two types of peg instructions for Pegged Orders (*i.e.*, Primary Peg and Midpoint Peg), as the Exchange believes there should be no distinction with respect to this functionality for such orders. Thus, the language of the proposed change is based on and mirrors the relevant language applicable to Pegged Orders with a Midpoint Peg instruction set forth in Exchange Rule 11.6(h)(2) and, accordingly, provides that a User submitting a Pegged Order with a Primary Peg instruction may, but is not required to, include a limit price on such order.

The Exchange notes that by enabling a User to include a limit price on a Pegged Order with a Primary Peg instruction, the User is able to establish an additional risk protection in the form of a specified price limitation, which the Exchange believes would help to minimize the risk of executions of such orders at unintended price levels, thereby promoting the operation of a fair and orderly market. Accordingly, as Users would have greater flexibility in establishing a price limitation with respect to such orders, the Exchange believes that the proposed change would result in Users sending additional Pegged Orders with a Primary Peg instruction to the Exchange, which would deepen the liquidity on the Exchange to the benefit of all Users. The Exchange also notes that the proposed change to enable Users to include a limit price on a Pegged Order with a Primary Peg instruction is consistent with the existing functionality of other exchanges.<sup>9</sup>

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the Exchange’s rules must be designed to

<sup>9</sup> See, *e.g.*, Cboe EDGX Exchange, Inc. (“EDGX”) Rule 11.8(b)(9), which provides that pegged functionality (including a primary peg instruction similar to the Exchange’s Primary Peg instruction) is available for limit orders that are posted to the EDGX book; The Nasdaq Stock Market LLC (“Nasdaq”) Rule 4703(d), which generally permits an order with pegging (including primary pegging similar to the Exchange’s Primary Peg instruction) to specify a limit price beyond which the order may not be executed.

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</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> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> As defined in Exchange Rule 1.5(jj), a “User” is a member of the Exchange (“Member”) or sponsored participant of a Member who is authorized to obtain access to the System pursuant to Exchange Rule 11.3. As defined in Exchange Rule 1.5(gg), the Exchange’s “System” is the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing.

<sup>6</sup> Pegged Orders are described in Exchange Rules 11.6(h) and 11.8(c) and generally defined as an order that is pegged to a reference price and