

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93999; File No. SR-GEMX-2022-01)

January 19, 2022

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX's Pricing Schedule at Options 7, Section 3

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 4, 2022, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II 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 proposes to amend GEMX's Pricing Schedule at Options 7, Section 3, titled "Regular Order Fees and Rebates."

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/gemx/rules>, at the principal office of the Exchange, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

GEMX proposes to amend its Regular Order Fees and Rebates within Options 7, Section 3. Specifically, the Exchange proposes to: (1) decrease the Priority Customer³ Tier 1 Taker Fee in Penny Symbols⁴; and (2) eliminate the Tier 5 Maker Rebates and Taker Fees in Penny Symbols and Non-Penny Symbols.⁵ Each amendment is described below.

Priority Customer Taker Fee

Currently, Priority Customers are assessed Penny Symbol Taker Fees as follows: a Tier 1 Taker Fee of \$0.49 per contract; a Tier 2 Taker Fee of \$0.48 per contract; a Tier 3 Taker Fee of \$0.48 per contract; a Tier 4 Taker Fee of \$0.43 per contract; and a Tier 5 Taker Fee of \$0.42 per contract. Other GEMX market participants are assessed higher Penny Symbol Taker Fees as compared to Priority Customers. Market Makers⁶ and Non-Nasdaq GEMX Market Makers

³ A “Priority Customer” is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq GEMX Options 1, Section 1(a)(36). Unless otherwise noted, when used in this Pricing Schedule the term “Priority Customer” includes “Retail” as defined below. See Options 7, Section 1.

⁴ “Penny Symbols” are options overlying all symbols listed on Nasdaq GEMX that are in the Penny Interval Program. See Options 7, Section 1.

⁵ “Non-Penny Symbols” are options overlying all symbols excluding Penny Symbols. See Options 7, Section 1.

⁶ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

(FarMM)⁷ are assessed Tier 1 through Tier 3 Penny Symbol Taker Fee of \$0.50 per contract and a Tier 4 and Tier 5 Penny Symbol Taker Fee of \$0.48 per contract.⁸ Firm Proprietary⁹/Broker Dealers¹⁰ and Professional Customers¹¹ are assessed Tier 1 through Tier 3 Penny Symbol Taker Fee of \$0.50 per contract and a Tier 4 and Tier 5 Penny Symbol Taker Fee of \$0.49 per contract.¹²

At this time, the Exchange proposes to decrease the current Tier 1 Priority Customer Penny Symbol Taker Fee from \$0.49 to \$0.48 per contract. The Exchange believes that lowering the Tier 1 Priority Customer Penny Symbol Taker Fee will attract additional order flow to the Exchange. With this proposal, Priority Customers continue to be assessed the lowest Penny Symbol Taker Fees.

⁷ A “Non-Nasdaq GEMX Market Maker” is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange. See GEMX Options 7, Section 1.

⁸ Non-Priority Customer orders are charged the Taker Fee for trades executed during the Opening Process. Priority Customer orders executed during the Opening Process receive the applicable Maker Rebate based on the tier achieved. Non-Priority Customers who execute less than 4.0% of Customer Total Consolidated Volume are charged a Taker Fee of \$0.50 per contract for trades executed against a Priority Customer. Non-Priority Customers who execute 4.0% or greater of Customer Total Consolidated Volume are charged a Taker Fee of \$0.47 per contract for trades executed against a Priority Customer. All Priority Customer orders are charged a Taker Fee of \$0.49 per contract for trades executed against a Priority Customer. For purposes of note 13 within Options 7, Section 3, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month. See notes 4 and 16 of Options 7, Section 3.

⁹ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account. See GEMX Options 7, Section 1.

¹⁰ A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. See GEMX Options 7, Section 1.

¹¹ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer. See GEMX Options 7, Section 1.

¹² See note 8 above.

Tier 5 Maker Rebates and Taker Fees

Today, GEMX pays the following Tier 5 Penny Symbol Maker Rebates: \$0.45 per contract to Market Makers and \$0.53 per contract to Priority Customers. Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers are not eligible for Tier 5 Penny Symbol Maker Rebates. Today, GEMX pays the following Tier 5 Non-Penny Symbol Maker Rebates: \$0.75 per contract to Market Makers and \$1.05 per contract to Priority Customers. Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers are not eligible for Tier 5 Non-Penny Symbol Maker Rebates. Market Maker and Priority Customer orders are eligible for higher Penny and Non-Penny Symbol Maker Rebates based on achieving volume thresholds in Table 1 within Options 7, Section 3.¹³

Today, GEMX assesses the following Tier 5 Penny Symbol Taker Fees: \$0.48 per contract to Market Makers and Non-Nasdaq GEMX Market Makers (FarMM), \$0.49 per contract to Firm Proprietary/Broker Dealers and Professional Customers, and \$0.42 per contract to Priority Customers.¹⁴ Today, GEMX assesses the following Tier 5 Non-Penny Symbol Taker Fees: \$0.94 per contract to Market Makers, Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers, and Professional Customers, and \$0.82 per contract to Priority Customers.¹⁵

At this time, the Exchange proposes to eliminate Penny and Non-Penny Symbol Tier 5 Maker Rebates and Taker Fees. The Exchange also proposes to amend the criteria for Tier 4 of

¹³ See note 5 of Options 7, Section 3.

¹⁴ See note 8 above.

¹⁵ See note 8 above.

the Qualifying Tier Thresholds, within Table 1 of Options 7, Section 3, so that volume that is 2.5% or greater of Customer Total Consolidated Volume and Priority Customer Maker Percentage of Customer Total Consolidated Volume of 1.20% or greater would qualify a GEMX Member for the Tier 4 Penny and Non-Penny Symbol Maker Rebates and Taker Fees.

The elimination of the Tier 5 Penny Symbol Maker Rebates would result in no change as the same Tier 5 Penny Symbol Maker Rebates exist for Tier 4 Penny Symbol Maker Rebates, with the exception of the Penny Symbol Market Maker Rebate. The Tier 5 Penny Symbol Market Maker Rebate is \$0.45 per contract, while the Tier 4 Penny Symbol Market Maker Rebate is \$0.41 per contract. With this proposal, the highest Penny Symbol Market Maker Rebate that can be achieved would now be \$0.41 per contract.

The elimination of the Tier 5 Penny Symbol Taker Fees would result in no change as the same Tier 5 Penny Symbol Taker Fees exist for Tier 4 Penny Symbol Taker Fees, with the exception of the Priority Customer Penny Symbol Taker Fee. The Tier 5 Penny Symbol Priority Customer Taker Fee is \$0.42 per contract, while the Tier 4 Penny Symbol Priority Customer Taker Fee is \$0.43 per contract. With this proposal, the lowest Penny Symbol Priority Customer Taker Fee that would be assessed would now be \$0.43 per contract.

The elimination of the Tier 5 Non-Penny Symbol Maker Rebates and Taker Fees would result in no change as the same Tier 5 Non-Penny Symbol Maker Rebates and Taker Fees exist for Tier 4 Non-Penny Symbol Maker Rebates and Taker Fees. As noted, with the amended Tier 4 criteria, a GEMX Member would continue to be able to achieve the same Non-Penny Symbol Maker Rebates and Taker Fees that are currently offered for Tier 4 Non-Penny Symbol Maker Rebates and Taker Fees.

With these proposed changes, Priority Customers would continue to be paid the highest Market Rebates and be assessed the lowest Taker Fees in both Penny and Non-Penny Symbols.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁷ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁸

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁹ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

¹⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.²⁰ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”²¹

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”²² Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

Priority Customer Taker Fee

The Exchange’s proposal to decrease the current Tier 1 Priority Customer Penny Symbol Taker Fee from \$0.49 to \$0.48 per contract is reasonable as this decrease would result in a lower Tier 1 Priority Customer Penny Symbol Taker Fee. The Exchange believes that lowering the Tier 1 Priority Customer Penny Symbol Taker Fee will attract additional order flow to the Exchange. With this proposal, Priority Customers continue to be assessed the lowest Penny Symbol Taker Fees.

The Exchange’s proposal to decrease the current Tier 1 Priority Customer Penny Symbol Taker Fee from \$0.49 to \$0.48 per contract is equitable and not unfairly discriminatory. Priority

²⁰ See NetCoalition, at 534 - 535.

²¹ Id. at 537.

²² Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

Customers continue to be assessed the lowest Penny Symbol Taker Fees. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Tier 5 Maker Rebates and Taker Fees

The Exchange's proposal to eliminate Penny and Non-Penny Symbol Tier 5 Maker Rebates and Taker Fees is reasonable. The elimination of the Tier 5 Penny Symbol Maker Rebates would result in no change as the same Tier 5 Penny Symbol Maker Rebates exist for Tier 4 Penny Symbol Maker Rebates, with the exception of the Penny Symbol Market Maker Rebate. The Tier 5 Penny Symbol Market Maker Rebate is \$0.45 per contract, while the Tier 4 Penny Symbol Market Maker Rebate is \$0.41 per contract. With this proposal, the highest Penny Symbol Market Maker Rebate that can be achieved would now be \$0.41 per contract. The elimination of the Tier 5 Penny Symbol Taker Fees would result in no change as the same Tier 5 Penny Symbol Taker Fees exist for Tier 4 Penny Symbol Taker Fees, with the exception of the Priority Customer Penny Symbol Taker Fee. The Tier 5 Penny Symbol Priority Customer Taker Fee is \$0.42 per contract, while the Tier 4 Penny Symbol Priority Customer Taker Fee is \$0.43 per contract. With this proposal, the lowest Priority Customer Penny Symbol Taker Fee that would be assessed would now be \$0.43 per contract. Notwithstanding, the decreased Penny Symbol Market Maker Rebate of \$0.45 per contract and the increased Priority Customer Penny Symbol Taker Fee of \$0.43 per contract, the Exchange believes that the Market and Taker Tier 4 pricing in Penny Symbols will continue to attract order flow to GEMX. The elimination of the Tier 5 Non-Penny Symbol Maker Rebates and Taker Fees would result in no change as the same

Tier 5 Non-Penny Symbol Maker Rebates and Taker Fees exist for Tier 4 Non-Penny Symbol Maker Rebates and Taker Fees. As noted, with the amended Tier 4 criteria a GEMX Member would continue to be able to achieve the same Non-Penny Symbol Maker Rebates and Taker Fees that are currently offered for Tier 4 Non-Penny Symbol Maker Rebates and Taker Fees. With these proposed changes, Priority Customers would continue to be paid the highest Market Rebates and be assessed the lowest Taker Fees in Penny and Non-Penny Symbols.

The Exchange's proposal to eliminate the Penny and Non-Penny Symbol Tier 5 Maker Rebates and Taker Fees is equitable and not unfairly discriminatory. All Members that meet the qualifications of the Tier 1 through Tier 4 Qualifying Tier Thresholds would continue to be eligible, uniformly, to receive the corresponding rebates and fees.

Qualifying Tier Thresholds

The Exchange's proposal to amend the description of Tier 4 of the Qualifying Tier Thresholds, within Table 1 of Options 7, Section 3, with respect to the Total Affiliated Member % of Customer Total Consolidated Volume,²³ to require that a member execute 2.5% or greater of Customer Total Consolidated Volume is reasonable, equitable and not unfairly discriminatory. Also, the Exchange's proposal to amend the description of the Tier 4 of Qualifying Tier Threshold with respect to the Priority Customer Maker % of Customer Total Consolidated Volume,²⁴ to require that a member executes Priority Customer Maker volume of 1.20% or greater of Customer Total Consolidated Volume is reasonable, equitable and not unfairly

²³ For purposes of measuring Total Affiliated Member % of Customer Total Consolidated Volume, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

²⁴ The Priority Customer Maker % of Customer Total Consolidated Volume category includes all Priority Customer volume that adds liquidity in all symbols.

discriminatory. With the elimination of Tier 5 Penny and Non-Penny Symbol Maker Rebates and Taker Fees, the Tier 4 Penny and Non-Penny Symbol Maker Rebates and Taker Fees would be the highest Maker Rebate and lowest Taker Fee. All Members that meet the qualifications of the Tier 4 Qualifying Tier Threshold would be eligible, uniformly, to receive the corresponding rebates and fees.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition.

Priority Customer Taker Fee

The Exchange's proposal to decrease the current Tier 1 Priority Customer Penny Symbol Taker Fee from \$0.49 to \$0.48 per contract does not impose an undue burden on competition. Priority Customers continue to be assessed the lowest Penny Symbol Taker Fees. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Tier 5 Maker Rebates and Taker Fees

The Exchange's proposal to eliminate Penny and Non-Penny Symbol Tier 5 Maker Rebates and Taker Fees does not impose an undue burden on competition. Exchange's proposal to eliminate the Penny and Non-Penny Symbol Tier 5 Maker Rebates and Taker Fees is equitable and not unfairly discriminatory. All Members that meet the qualifications of the Tier 1 through Tier 4 Qualifying Tier Thresholds would continue to be eligible, uniformly, to receive the corresponding rebates and fees.

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

No written comments were either solicited or received.

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,²⁵ and Rule 19b-4(f)(2)²⁶ 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

²⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁶ 17 CFR 240.19b-4(f)(2).

it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 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 e-mail to rule-comments@sec.gov. Please include File Number SR-GEMX-2022-01 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-GEMX-2022-01. This file number should be included on the subject line if e-mail 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-GEMX-2022-01 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

J. Matthew DeLesDernier
Assistant Secretary

²⁷ 17 CFR 200.30-3(a)(12).