

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95772; File No. SR-GEMX-2022-08)

September 14, 2022

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Port-related Fees at Options 7, Section 6

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 September 1, 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, 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

The Exchange proposes to amend the Exchange’s port-related fees at Options 7, Section 6, as described further below. 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

The purpose of the proposed rule change is to amend Options 7, Section 6 to (i) prorate port fees for the first month of service, (ii) clarify that port fees for cancelled services will continue to be charged for the remainder of month, (iii) clarify that Disaster Recovery Port Fees are not charged for market data ports listed in Options 7, Section 6C(iii), and (iv) clarify that Nasdaq Testing Facility (“NTF”) ports are provided at no cost.

Currently, the Exchange does not prorate port connectivity fees. Thus, participants are assessed a full month’s fee if they direct the Exchange to make the subscribed connectivity live on any day of the month, including the last day thereof. Participants are also assessed a full month’s port fee if they cancel service during the month.

The Exchange proposes to provide prorated port fees for the first month of service for new requests. By prorating the first month’s fees, the Exchange would charge participants port fees only for the days in which the participants are connected to the Exchange during the first month of service. The Exchange proposes to continue the current practice of charging port fees for the remainder of the month upon cancellation. If a participant starts and cancels service in the same month, the participant would not be billed for those days prior to the service start date but would be billed for the remainder of the month, including after the service is cancelled.³

³ For example, if a participant orders a port on September 4, 2022 and cancels the port on September 16, 2022, the participant would be charged the prorated port fee for September 5, 2022 through September 30, 2022.

The Exchange believes it is important for participants to have the option to establish new connections to the Exchange at any time during the month without being hampered by a full month charge irrespective of when during the month service begins. Moreover, other exchanges also charge new ports on a prorated basis for the first month of service.⁴

The Exchange also proposes to make clarifying changes to Options 7, Section 6C(iv). First, the Exchange proposes to clarify that Disaster Recovery Port Fees are not charged for the ports listed in Options 7, Section 6C(iii). The market data ports in Options 7, Section 6C(iii) are provided at no cost and the Exchange does not charge a Disaster Recovery Port Fee for these ports. Second, the Exchange proposes to clarify the Exchange's existing practice that NTF Ports are provided at no cost. The NTF provides subscribers with a virtual System test environment that closely approximates the production environment on which they may test their automated systems that integrate with the Exchange. For example, the NTF provides subscribers a virtual System environment for testing upcoming releases and product enhancements, as well as testing firm software prior to implementation. The Exchange proposes adding express language in the Rules to provide increased clarity to market participants.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

⁴ See, e.g., Cboe BZX U.S. Equities Exchange Fee Schedule, available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/; New York Stock Exchange Price List 2022, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its port fee schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options and equity securities transaction services that constrain its pricing determinations in that market. 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."⁷

The Exchange believes that it is reasonable to prorate port fees for the first month of connectivity. As discussed above, the Exchange believes it is important for participants to have the flexibility to establish new connections to the Exchange at any time during the month without being hampered by a full month charge. For example, the Exchange believes it is reasonable to charge a user who begins a subscription on the last day of the month to be charged only for use of a port for that day. As noted above, other exchanges already charge their customers for new ports on a prorated basis for the first month of service.⁸ The proposed language describing the

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

⁸ Supra note 4.

Exchange's practice to bill for the remainder of the month upon cancellation is intended only to clarify the existing practice and limit any confusion.

The Exchange believes that the proposal is also equitable and not unfairly discriminatory because the proposed change to prorate port fees for the first month of service and continue to charge for the remainder of the month upon cancellation will apply uniformly to all similarly situated participants. Removing the requirement to pay a full month's port fee if a user joins any day other than the first of the month is user-friendly and provides users incentive to subscribe at their convenience. The Exchange believes that prorating the fees for the first month of a user's subscription will ensure that the fees are more equitable to a user's utilization of the products. All users will benefit from the proration of the first month of their subscription.

The Exchange also believes that it is just and equitable, and in the interests of market participants, for the Exchange to (i) clarify the Exchange's existing practice to provide NTF ports at no cost in Options 7, Section 6C(iv), codifying existing practice where it is not expressly stated in the Rule, and (ii) clarify the Exchange's existing practice not to charge a Disaster Recovery Port Fee for ports listed in Options 7, Section 6C(iii). The Exchange believes that market participants will benefit from increased clarity, which will help limit any potential confusion in the future.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participants at a competitive disadvantage. The proposed change to prorate port fees for the first month of service will apply uniformly to all similarly situated participants. All users will receive

the benefit of a proration for the first month of port connectivity, which will enable users to save money that they otherwise would incur under the Exchange's current rules that do not provide for proration. The proposed language describing the Exchange's practice to bill for the remainder of the month upon cancellation, as well as the proposed changes to Options 7, Section 6C(iv) to clarify that the Exchange does not charge a Disaster Recovery Port Fee for ports listed in Options 7, Section 6C(iii) and to clarify that NTF ports are provided at no cost, merely codify and clarify existing practices of the Exchange.

Intermarket Competition

The Exchange believes that the proposed change to its port fee schedule to provide proration for the first month of port connectivity will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock. Moreover, as noted above, other exchanges currently charge new ports on a prorated basis for the first month of service.⁹ The proposed changes will help ensure that the Exchange's billing practices are commensurate with competitors.

The proposed change to the Exchange's port fee schedule is reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17-18% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Accordingly, the Exchange does not

⁹ Supra note 4.

believe that the proposed change will impair the ability of members, participants, or competing order execution venues to maintain their competitive standing in the financial markets.

The proposed changes to clarify that the Exchange does not charge a Disaster Recovery Port Fee for ports listed in Options 7, Section 6C(iii) and to clarify that NTF ports are provided at no cost are designed to expressly state existing practices without changing their operation and, therefore, the Exchange believes that the proposed changes will not impose a burden on competition.

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) of the Act¹⁰ and paragraph (f) of Rule 19b-4¹¹ 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: (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.

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f).

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-2022-08 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-2022-08. 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-2022-08 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.¹²

J. Matthew DeLesDernier

Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).