

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99446; File No. SR-GEMX-2024-03)

January 30, 2024

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend 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 January 16, 2024, 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 its Rules at Options 7, Section 6, C, Ports and Other Services.³

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially filed the proposed pricing changes on November 28, 2023 (SR-GEMX-2023-16) to be effective on December 1, 2023. On December 5, 2023, the Exchange withdrew SR-GEMX-2023-16 and replaced it with SR-GEMX-2023-19. On January 16, 2023, the Exchange withdrew SR-GEMX-2023-19 and submitted this filing.

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 Options 7, Section 6, C, Ports and Other Services.

Specifically, the Exchange proposes to amend the monthly caps for SQF Ports⁴ and SQF Purge Ports.⁵

Today, GEMX assesses \$1,250 per port, per month for an SQF Port as well as an SQF Purge Port.⁶ Also, today, SQF Ports and SQF Purge Ports are subject to a monthly cap of \$17,500, which cap is applicable to Market Makers.

At this time, the Exchange proposes to increase the SQF Port and SQF Purge Port

⁴ “Specialized Quote Feed” or “SQF” is an interface that allows Market Makers to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying instruments); (2) System event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Market Maker. Market Makers may only enter interest into SQF in their assigned options series. Immediate-or-Cancel Orders entered into SQF are not subject to the Order Price Protection, Market Order Spread Protection, and Size Limitation Protection in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B) respectively. See Supplementary Material .03(c) to Options 3, Section 7.

⁵ SQF Purge is a specific port for the SQF interface that only receives and notifies of purge requests from the Market Maker. Dedicated SQF Purge Ports enable Market Makers to seamlessly manage their ability to remove their quotes in a swift manner. The SQF Purge Port is designed to assist Market Makers in the management of, and risk control over, their quotes. Market Makers may utilize a purge port to reduce uncertainty and to manage risk by purging all quotes in their assigned options series. Of note, Market Makers may only enter interest into SQF in their assigned options series. Additionally, the SQF Purge Port may be utilized by a Market Maker in the event that the Member has a system issue and determines to purge its quotes from the order book.

⁶ The Exchange proposes to add a comma between “per port” and “per month” in the Options 7, Section 6, C, SQF Port and SQF Purge Port Fee rule text. The Exchange also proposes to remove an extraneous period in Options 7, Section 6, C, in the second paragraph.

monthly cap fee of \$17,500 per month to \$27,500 per month.⁷ The Exchange is not amending the \$1,250 per port, per month SQF Port and SQF Purge Port. As is the case today, the Exchange would not assess a Member an SQF Port or SQF Purge Port fee beyond the monthly cap once the Member has exceeded the monthly cap for the respective month. Despite increasing the monthly cap for SQF Ports and SQF Purge Ports from \$17,500 per month to \$27,500 per month, the Exchange will continue to offer Members the opportunity to cap their SQF Port and SQF Purge Port fees so that they would not be assessed these fees beyond the cap. Further, a GEMX Market Maker requires only one SQF Port to submit quotes in its assigned options series into GEMX. A GEMX Market Maker may submit all quotes through one SQF Port and utilize one SQF Purge Port to view its purge requests. While a Market Maker may elect to obtain multiple SQF Ports and SQF Purge Ports to organize its business,⁸ only one SQF Port and SQF Purge Port is necessary for a Market Maker to fulfill its regulatory quoting obligations.⁹

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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

⁷ Today, 62% of GEMX Market Makers have capped their SQF Ports and SQF Purge Ports on GEMX. The Exchange notes that of the Market Makers currently registered on GEMX, there is a mix of size of Market Makers that cap.

⁸ For example, a Market Maker may desire to utilize multiple SQF Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Member.

⁹ GEMX Market Makers have various regulatory requirements as provided for in Options 2, Section 4. Additionally, GEMX Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. SQF Ports are the only quoting protocol available on GEMX and only Market Makers may utilize SQF Ports. The same is true for SQF Purge Ports.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

discrimination between customers, issuers, brokers, or dealers.

The proposed pricing change to increase the monthly cap applicable to SQF Ports and SQF Purge Ports is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[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’”¹²

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.”¹³

Numerous indicia demonstrate the competitive nature of this market. Within this environment, market participants can freely and often do shift their order flow among the

¹² NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹³ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Exchange and competing venues in response to changes in their respective pricing schedules.

The proposed pricing change to increase the SQF Port and SQF Purge Port monthly cap from \$17,500 per month to \$27,500 per month is reasonable because despite the increase in the monthly cap, the Exchange will continue to offer Members the opportunity to cap their SQF Port and SQF Purge Port fees so that they would not be assessed these fees beyond the cap.

Additionally, a GEMX Market Maker requires only one SQF Port to submit quotes in its assigned options series into GEMX. A GEMX Market Maker may submit all quotes through one SQF Port and utilize one SQF Purge Port to view its purge requests. While a Market Maker may elect to obtain multiple SQF Ports and SQF Purge Ports to organize its business,¹⁴ only one SQF Port and SQF Purge Port is necessary for a Market Maker to fulfill its regulatory quoting obligations.¹⁵ Additionally, the Exchange believes that the caps are reasonable for two reasons.

First, SQF Ports are a secure method for Market Makers to submit quotes into the Exchange's match engine and for the Exchange to send messages related to those quotes to Market Makers. GEMX must manage the security and message traffic, among other things, for each port. Utilizing the cap to manage a Market Maker's costs while also managing the quantity of SQF Ports issued on GEMX has led the Exchange to select \$27,500 as the amended monthly cap for SQF Ports and SQF Purge Ports. By capping the ports at a different level, the Exchange is considering the message traffic and message rates associated with the current number of outstanding ports and its ability to process messages. The ability to have a cap and amend that cap permits the Exchange to scale its needs with respect to processing messages in an efficient

¹⁴ For example, a Market Maker may desire to utilize multiple SQF Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Member.

¹⁵ GEMX Market Makers have various regulatory requirements as provided for in Options 2, Section 4. Additionally, GEMX Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. SQF Ports are the only quoting protocol available on GEMX and only Market Makers may utilize SQF Ports.

manner.

Second, the Exchange notes that multiple ports are not necessary, however, to the extent that some Market Makers elect to obtain multiple ports, the Exchange is offering to cap their total port cost at \$27,500 per month. GEMX believes the existence of a cap allows for efficiencies and permits Market Makers to increase their number of ports beyond the cap. The cap levels the playing field by allowing those Market Makers that want to obtain a larger number of ports to do so with the certainty of a fee cap. Without the cap, GEMX Market Makers may pay more to obtain multiple ports on GEMX.

The Exchange's proposed pricing change to increase the SQF Port and SQF Purge Port monthly cap from \$17,500 per month to \$27,500 per month is equitable and not unfairly discriminatory because the Exchange would uniformly not assess any Market Makers that exceeded the proposed monthly cap any SQF Port and SQF Purge Port fees for that month beyond the cap. Market Makers are the only market participants that are assessed SQF Port and SQF Purge Port fees because they are the only market participants that are permitted to quote on the Exchange. Unlike other market participants, Market Makers are subject to market making and quoting obligations.¹⁶ These liquidity providers are critical market participants in that they are the only market participants that provide liquidity to GEMX on a continuous basis. In addition, the Exchange notes that Lead Market Makers are required to submit quotes in the Opening Process to open an options series.¹⁷ Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay separate Membership Fees,¹⁸ and CMM

¹⁶ See Options 2, Sections 4 and 5.

¹⁷ See Options 3, Section 8.

¹⁸ See Options 7, Section 6, A.

Trading Right Fees,¹⁹ in addition to other fees paid by other market participants. Providing Market Makers a means to cap their cost related to quoting and enabling all Market Makers to acquire SQF Ports and SQF Purge Ports at no cost beyond a certain dollar amount enables these market participants to provide the necessary liquidity to GEMX at lower costs.

In 2022, NYSE Arca, Inc. (“NYSE Arca”) proposed to restructure fees relating to OTPs for Market Makers.²⁰ In that rule change,²¹ NYSE Arca argued that,

Market Makers serve a unique and important function on the Exchange (and other options exchanges) given the quote-driven nature of options markets. Because options exchanges rely on actively quoting Market Makers to facilitate a robust marketplace that attracts order flow, options exchanges must attract and retain Market Makers, including by setting competitive Market Maker permit fees. Stated otherwise, changes to Market Maker permit fees can have a direct effect on the ability of an exchange to compete for order flow. The Exchange also believes that the number of options exchanges on which Market Makers can effect option transactions also ensures competition in the marketplace and constrains the ability of exchanges to charge supracompetitive fees for access to its market by Market Makers.

Further, NYSE ARCA noted that,²²

The Exchange further believes that its ability to set Market Maker permit fees is constrained by competitive forces based on the fact that Market Makers can, and have, chosen to terminate their status as a Market Maker if they deem Market Maker permit fees to be unreasonable or excessive. Specifically, the Exchange notes that a BOX participant modified its access to BOX in connection with the implementation of a proposed change to BOX's Market Maker permit fees. The Exchange has also observed that another options exchange group experienced decreases in market share following its proposed modifications of its access fees (including Market Maker trading permit fees), suggesting that market participants (including Market Makers) are sensitive to changes in exchanges’ access fees and may respond by shifting their order flow elsewhere if they deem the fees to be unreasonable or excessive.

¹⁹ See Options 7, Section 6, B.

²⁰ See Securities Exchange Act Release No. 95412 (June 23, 2022), 87 FR 38786 (June 29, 2022) (SR-NYSEArca-2022-36). NYSE Arca proposed to increase both the monthly fee per Market Maker OTP and the number of issues covered by each additional OTP because, among other reasons, the number of issues traded on the Exchange has increased significantly in recent years.

²¹ Id. at 38788.

²² Id. at 38790.

There is no requirement, regulatory or otherwise, that any Market Maker connect to and access any (or all of) the available options exchanges. The Exchange also is not aware of any reason why a Market Maker could not cease being a permit holder in response to unreasonable price increases. The Exchange does not assess any termination fee for a Market Maker to drop its OTP, nor is the Exchange aware of any other costs that would be incurred by a Market Maker to do so.

The Exchange likewise believes that its ability to cap SQF Port and SQF Purge fees is constrained by competitive forces and that its proposed modifications to the SQF Port and SQF Purge Fee cap is reasonably designed in consideration of the competitive environment in which the Exchange operates, by balancing the value of the enhanced benefits available to Market Makers due to the current level of activity on the Exchange with a fee structure that will continue to incent Market Makers to support increased liquidity, quote competition, and trading opportunities on the Exchange, for the benefit of all market participants.

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.

Intermarket Competition

The proposal does not impose an undue burden on intermarket competition. The Exchange believes its proposal remains competitive with other options markets who also offer order entry protocols. 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. In such an environment, the Exchange must continually adjust its fees to remain competitive with other 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. Other exchanges have been permitted to amend certain costs attributed to Market Makers.²³ Further, in 2022, MRX proposed a monthly cap for SQF Ports and SQF Purge Ports of 17,500.²⁴ MRX noted in its rule change that, “Only one SQF quote protocol is required for an MRX Market Maker to submit quotes into MRX and to meet its regulatory requirements.”²⁵

If the Commission were to apply a different standard of review this proposal than it applied to other exchange fee filings, where Market Maker fees were increased and port fee caps were established, it would create a burden on competition such that it would impair GEMX’s ability to compete among other options markets.

Intramarket Competition

The Exchange’s proposed pricing change to increase the SQF Port and SQF Purge Port monthly cap from \$17,500 per month to \$27,500 per month does not impose an undue burden on competition because the Exchange would uniformly not assess any Market Makers that exceeded the proposed monthly cap any SQF Port and SQF Purge Port fees for that month beyond the cap. Market Makers are the only market participants that are assessed SQF Port and SQF Purge Port fees because they are the only market participants that are permitted to quote on the Exchange. Unlike other market participants, Market Makers are subject to market making and quoting obligations.²⁶ These liquidity providers are critical market participants in that they are the only market participants that provide liquidity to GEMX on a continuous basis. In addition, the

²³ See Securities Exchange Act Release No. 95412 (June 23, 2022), 87 FR 38786 (June 29, 2022) (SR-NYSEArca-2022-36).

²⁴ See Securities Exchange Act No. 96824 (February 7, 2023), 88 FR 8975 (February 10, 2023) (SR-MRX-2023-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Options 7, Section 6).

²⁵ Id. at 8976.

²⁶ See Options 2, Sections 4 and 5.

Exchange notes that Lead Market Makers are required to submit quotes in the Opening Process to open an options series.²⁷ Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay separate permit fees,²⁸ and Streaming Quote Trader Fees,²⁹ in addition to other fees paid by other market participants. Providing Market Makers a means to cap their cost related to quoting and enabling all Market Makers to acquire SQF Ports and SQF Purge Ports at no cost beyond a certain dollar amount enables these market participants to provide the necessary liquidity to GEMX at lower costs. Therefore, because Market Makers fulfill a unique role on the Exchange, are the only market participant required to submit quotes as part of their obligations to operate on the Exchange, and, in light of that role, they are eligible for certain incentives. The proposed SQF Port and SQF Purge Fee cap is designed to continue to incent Market Makers to quote on GEMX, thereby promoting liquidity, quote competition, and trading opportunities.

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.³⁰ 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,

²⁷ See Options 3, Section 8.

²⁸ See Options 7, Section 8, A.

²⁹ See Options 7, Section 8, B.

³⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-GEMX-2024-03 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-2024-03. 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-GEMX-2024-03 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

³¹ 17 CFR 200.30-3(a)(12).