

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88293; File No. SR-GEMX-2020-04)

February 26, 2020

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 3, Titled Regular Order Fees and Rebates

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 February 12, 2020, 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. Specifically, the Exchange proposes to amend 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 <http://nasdaqgemx.cchwallstreet.com/>, 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 Pricing Schedule at Options 7, Section 3, titled “Regular Order Fees and Rebates.” Specifically, GEMX proposes to amend the Qualifying Tier Thresholds in Table 1.

The Exchange originally filed the proposed pricing changes on February 3, 2020 (SR-GEMX-2020-01). On February 12, 2020, the Exchange withdrew that filing and submitted this filing.

Today, GEMX has 4 tiers as part of its Qualifying Tier Thresholds in Table 1 of Options 7, Section 3 as follows:

Qualifying Tier Thresholds

Table 1		
Tier	Total Affiliated Member ADV	Priority Customer Maker ADV
Tier 1	0-99,999	0-19,999
Tier 2	100,000-224,999, or executes 1% to less than 2% of Customer Total Consolidated Volume	20,000-99,999
Tier 3	225,000-349,999, or executes 2% to less than 3% of Customer Total Consolidated Volume	100,000-149,999
Tier 4	350,000 or more, or executes 3% or greater of Customer Total Consolidated Volume	150,000 or more

All market participants can qualify for Tiers 1 through 4, provided they meet the requisite

volume thresholds specified in Table 1 above. The maker and taker fees for all market participants represented in Table 1, displayed above, are dependent on qualifying for a particular tier. With respect to these tiers, the highest tier threshold attained applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants. All eligible volume from affiliated Members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

The Exchange proposes to amend the current Qualifying Tier Thresholds for Non-Priority Customers by replacing the ADV thresholds with total industry percentage thresholds for the Total Affiliated Member.³ Specifically, the Exchange proposes that a Member would be eligible for Tier 1 if it executes less than 0.65%⁴ of Customer Total Consolidated Volume.⁵ A Member would be eligible for Tier 2 if it executes 0.65% to less than 1.5% of Customer Total Consolidated Volume. A Member would be eligible for Tier 3 if it executes 1.5% to less than 2.50% of Customer Total Consolidated Volume. Finally, a Member would be eligible for Tier 4 if it executes 2.5% or greater of Customer Total Consolidated Volume. The Exchange notes by way of comparison that the proposed new percentage tiers for Non-Priority Customer are equivalent in terms of requisite volume to the current tiers.

³ As proposed, the Total Affiliated Member % of Customer Total Consolidated Volume category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms. See proposed Pricing Schedule at Options 7, Section 3.

⁴ For example, 0.65% of Customer Total Consolidated Volume is approximately 100,000 contracts per day.

⁵ As proposed, 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. See proposed Pricing Schedule at Options 7, Section 3.

The Exchange also proposes to amend the current Qualifying Tier Thresholds by replacing the ADV thresholds with total industry percentage thresholds with respect to tier volumes for Members that submit Priority Customer maker orders.⁶ Specifically, the Exchange proposes that a Member would be eligible for Tier 1 if it executes Priority Customer maker volume of less than 0.10% of Customer Total Consolidated Volume. A Member would be eligible for Tier 2 if it executes Priority Customer maker volume of 0.10% to less than 0.65% of Customer Total Consolidated Volume. A Member would be eligible for Tier 3 if it executes Priority Customer maker Volume of 0.65% to less than 1.20% of Customer Total Consolidated Volume. Finally, a Member would be eligible for Tier 4 if it executes Priority Customer maker volume of 1.20% or greater of Customer Total Consolidated Volume. The Exchange notes that the proposed new percentage for Priority Customer maker 1-3 tiers are equivalent in terms of requisite volume to the existing tiers. Priority maker Tier 4 requires additional volume to meet the proposed criteria of 1.20% of Customer Total Consolidated Volume, which is approximately 180,000 contracts per day, as compared to a current ADV of 150,000 contracts.

The Exchange is proposing to amend these volume requirements to align with increasing Member activity on GEMX over time. The Exchange believes that Members will not be impacted by this proposal with the exception of the Tier 4 Priority Customer maker tier, which is more stringent as a result of this proposal.⁷ While the Tier 4 Priority Customer tier is more stringent, the proposed pricing is intended to continue to reward Members that submit Priority

⁶ As proposed, the Priority Customer maker % of Customer Total Consolidated Volume category includes all Priority Customer volume that adds liquidity in all symbols. See proposed Pricing Schedule at Options 7, Section 3.

⁷ Based on 2019 participant tier qualifications, the Exchange anticipates that market participants will continue to qualify for the Tier 4 Priority Customer maker tier, notwithstanding the additional volume requirements.

Customer order flow to the Exchange and thereby increase liquidity and trading opportunities for all Members. The Total Affiliated Member % of Customer Total Consolidated Volume category, as proposed and described below, includes all volume executed on the Exchange in all symbols and order types, as is the case today. The maker/taker fees will remain the same for all Member orders⁸ regardless of the tier achieved.

Finally, the Exchange proposes to amend the notes within Options 7, Section 3, which follow the Qualifying Tier Thresholds, to replace the term “ADV” with “% of Customer Total Consolidated Volume” to conform the text to the amendments proposed herein.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options 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

⁸ The Exchange is not proposing to amend any GEMX maker or taker fees within Options 7, Section 3 for Penny and Non-Penny Symbols.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

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’”¹¹

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.”¹²

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is only one of options venues to which market participants may direct their order flow. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon Members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange's proposal to amend the current Qualifying Tier Thresholds for Non-Priority Customers by replacing the ADV thresholds with total industry percentage thresholds for the Total Affiliated Member is consistent with the Act.¹³ The Exchange is proposing to base Tiers 1 through 4 on a percentage of industry volume in recognition of the fact that the volume executed by a Member may rise or fall with industry volume. A percentage of industry volume calculation allows the Exchange's tiers to be calibrated to current market volumes rather than requiring the same amount of volume regardless of market conditions. While the amount of volume required by the proposed tiers may change in any given month due to increases or decreases in industry volume, the Exchange believes that the proposed tier requirements are set at appropriate levels. These proposed percentage of industry volume tier requirements are no more stringent than the current ADV requirements. The Exchange is proposing to effectively equalize the volume thresholds with the current Qualifying Tier Thresholds so that the Exchange may continue to align the tier requirements with GEMX's anticipated growth as a venue (and corresponding increased Member activity) over time. These proposed percentage of industry volume tier requirements are no more stringent than the current ADV requirements and therefore

¹³ The Exchange proposes that a Member would be eligible for Tier 1 if it executes less than 0.65% of Customer Total Consolidated Volume. A Member would be eligible for Tier 2 if it executes 0.65% to less than 1.5% of Customer Total Consolidated Volume. A Member would be eligible for Tier 3 if it executes 1.5% to less than 2.50% of Customer Total Consolidated Volume. Finally, a Member would be eligible for Tier 4 if it executes 2.5% or greater of Customer Total Consolidated Volume. As proposed, for purposes of measuring Total Affiliated and/or Appointed 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.

the Exchange does not anticipate any impact to Non-Priority Customers as a result of replacing the ADV thresholds with total industry percentage thresholds for the Total Affiliated Member.

The Exchange's proposal to amend the current Qualifying Tier Thresholds for Priority Customers makers by replacing the ADV thresholds with total industry percentage thresholds for the Total Affiliated Member is consistent with the Act.¹⁴ The Exchange is proposing to base Tiers 1 through 4 on a percentage of industry volume in recognition of the fact that the volume executed by a Member may rise or fall with industry volume. A percentage of industry volume calculation allows the Exchange's tiers to be calibrated to current market volumes rather than requiring the same amount of volume regardless of market conditions. While the amount of volume required by the proposed tiers may change in any given month due to increases or decreases in industry volume, the Exchange believes that the proposed tier requirements are set at appropriate levels. These proposed percentage of industry volume tier requirements are no more stringent than the current ADV requirements for Tier 1 through 3 and therefore the Exchange does not anticipate any impact to Members that submit Priority Customer maker orders as a result of replacing the ADV thresholds with total industry percentage thresholds. However, with this proposal, Priority Customer Tier 4 is more stringent than the current tier level. Despite the increased volume amount to qualify for proposed Priority Customer Tier 4 of 1.20% of Customer Total Consolidated Volume, which is approximately 180,000 contracts per

¹⁴ The Exchange proposes that a Member would be eligible for Tier 1 if it executes Priority Customer maker volume of less than 0.10% of Customer Total Consolidated Volume. A Member would be eligible for Tier 2 if it executes Priority Customer maker volume of 0.10% to less than 0.65% of Customer Total Consolidated Volume. A Member would be eligible for Tier 3 if it executes Priority Customer maker Volume of 0.65% to less than 1.20% of Customer Total Consolidated Volume. Finally, a Member would be eligible for Tier 4 if it executes Priority Customer maker volume of 1.20% or greater of Customer Total Consolidated Volume.

day as compared to a current ADV of 150,000 contracts, the maker/taker tiered fee structure is intended to continue to reward Members to bring more order flow to the Exchange and thereby increase liquidity and trading opportunities for all Members. Overall, the Exchange is proposing to effectively equalize the volume thresholds with the current Qualifying Tier Thresholds so that the Exchange may continue to align the tier requirements with GEMX's anticipated growth as a venue (and corresponding increased Member activity) over time.

The Exchange's proposal to amend the current Non-Priority Customer and Priority Customer maker Qualifying Tier Thresholds is equitable and not unfairly discriminatory. The proposed tiers will be applied uniformly to all market participants, respectively. Furthermore, the Exchange believes that the qualifying tier thresholds are equitable and not unfairly discriminatory as all market participants may qualify for a higher tier by executing the required volume of contracts, either through the Member or its affiliates, as is the case today. The Exchange believes that Members will not be impacted by this proposal, with the exception of the Tier 4 Priority Customer maker. With this proposal, Tier 4 Priority Customers will be required to submit a greater amount of order flow to qualify for proposed Tier 4 as compared to today (1.20% of Customer Total Consolidated Volume is approximately 180,000 contracts per day as compared to a current ADV of 150,000 contracts). Priority Customer orders bring valuable liquidity to the market which liquidity benefits other market participants. Further, the maker/taker fees will remain the same for all Member orders¹⁵ regardless of the tier achieved.

¹⁵ The Exchange is not proposing to amend any GEMX maker or taker fees within Options 7, Section 3 for Penny and Non-Penny Symbols.

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 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.

Intramarket Competition

The proposed amendments do not impose an undue burden on intramarket competition. The Exchange's proposal to amend the current Non-Priority Customer and Priority Customer Qualifying Tier Thresholds do not impose an undue burden on intramarket competition. The tiers will be applied uniformly to all market participants. Furthermore, all market participants may qualify for a higher tier by executing the required volume of contracts, either through the Member or its affiliates, as is the case today. These proposed percentage of industry volume tier requirements are no more stringent than the current ADV requirements, with the exception of the Tier 4 Priority Customer maker. With this proposal, Tier 4 Priority Customers will be required

to submit a greater amount of order flow to qualify for the current Tier 4. Priority Customer orders bring valuable liquidity to the market which liquidity benefits other market participants. As to the remainder of the proposed tiers, the Exchange does not anticipate any impact to market participants as a result of replacing the ADV thresholds with total industry percentage thresholds. Finally, the maker/taker fees will remain the same for all Member orders¹⁶ regardless of the tier achieved. For the foregoing reasons, the Exchange does not believe that its proposal will have an undue burden on intramarket 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)(ii) of the Act,¹⁷ and Rule 19b-4(f)(2)¹⁸ 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.

¹⁶ The Exchange is not proposing to amend any GEMX maker or taker fees within Options 7, Section 3 for Penny and Non-Penny Symbols.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁸ 17 CFR 240.19b-4(f)(2).

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-2020-04 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-2020-04. 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-2020-04 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.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).