

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94922; File No. SR-GEMX-2022-06)

May 16, 2022

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the GEMX 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 May 2, 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 GEMX’s Pricing Schedule at Options 7, Section 3 (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 Pricing Schedule at Options 7, Section 3 to: (1) decrease the Priority Customer³ Tier 4 Maker Rebate in Penny Symbols,⁴ and (2) decrease the Non-Priority Customer⁵ and Priority Customer Penny Symbol Taker Fees in note 13. Each amendment is described below.

Priority Customer Maker Rebate

Today, the Exchange provides Priority Customers Penny Symbol Maker Rebates as follows: \$0.25 per contract (Tier 1), \$0.40 per contract (Tier 2), \$0.48 per contract (Tier 3), and \$0.53 per contract (Tier 4). Priority Customers are eligible for the higher tiers of Maker Rebates based on achieving the tiered volume thresholds in Table 1 in Options 7, Section 3. The Exchange now proposes to lower the Tier 4 Priority Customer Maker Rebate from \$0.53 to \$0.52 per contract.

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).

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-Priority Customer” includes Market Makers (including Market Maker orders sent to the Exchange by EAMs), Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary / Broker-Dealers, and Professional Customers.

Note 13 Taker Fees

Today, the Exchange assesses all market participants Penny Symbol Taker Fees in Tiers 1 – 4 as follows:

Market Participant	Taker Fee: Tier 1	Taker Fee: Tier 2	Taker Fee: Tier 3	Taker Fee: Tier 4
Market Maker	\$0.50	\$0.50	\$0.50	\$0.48
Non-Nasdaq GEMX Market				
Maker (FarMM)	\$0.50	\$0.50	\$0.50	\$0.48
Firm Proprietary / Broker-Dealer	\$0.50	\$0.50	\$0.50	\$0.49
Professional Customer	\$0.50	\$0.50	\$0.50	\$0.49
Priority Customer	\$0.48	\$0.48	\$0.48	\$0.43

Market participants are eligible for the higher tiers of Penny Taker Fees based on achieving the tiered volume thresholds in Table 1 in Options 7, Section 3. The tiered Penny Taker Fees set forth above apply when the market participant trades against a Non-Priority Customer. When the market participant trades against a Priority Customer, the Exchange assesses the Penny Taker Fees set forth in note 13 of Options 7, Section 3, regardless of tier. Specifically, note 13 currently provides that Non-Priority Customers who execute less than 4.0% of Customer Total Consolidated Volume will be charged a Penny 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 will be charged a Penny Taker Fee of \$0.47 per contract for trades executed against a Priority Customer. All Priority Customer orders will be charged a Penny Taker Fee of \$0.49 per contract for trades executed against a Priority Customer. For purposes of note 13, 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 now proposes to lower the: (i) \$0.50 Taker Fee for Non-Priority Customers that execute less than 4.0% of Customer Total Consolidated Volume to \$0.48 per contract when trading against a Priority Customer, and (ii) the \$0.49 Taker Fee for Priority Customers that trade against another Priority Customer to \$0.48 per contract. In other words, all market participants would be charged a base Penny Taker Fee of \$0.48 per contract if they trade against a Priority Customer. Non-Priority Customers will continue to have an opportunity to lower that fee to \$0.47 per contract if they execute 4.0% or greater of Customer Total Consolidated Volume.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁷ 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.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

The Exchange's 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 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’”⁸

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.”⁹

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The

⁸ 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)).

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

Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. 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 schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

Priority Customer Maker Rebate

The Exchange believes that its proposal to lower the Tier 4 Penny Maker Rebate for Priority Customers from \$0.53 to \$0.52 per contract is reasonable, equitable and not unfairly discriminatory. While the Exchange is lowering this rebate, Priority Customers will continue to receive the highest Penny Maker Rebates with the proposed changes. No market participants other than Market Makers and Priority Customers are offered enhanced Penny Maker Rebates in Tier 4, and the proposed \$0.52 Tier 4 Maker Rebate for Priority Customers continues to be significantly higher than the \$0.41 Tier 4 Maker Rebate currently provided to Market Makers.¹⁰ The Exchange therefore believes that the proposed pricing will continue to be attractive for Priority Customer order flow.

The Exchange believes that the proposed Tier 4 Priority Customer Maker Rebate changes are equitable and not unfairly discriminatory. As discussed above, the Exchange believes the proposed pricing will continue to attract Priority Customer order flow to the Exchange. 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

¹⁰ As set forth in Options 7, Section 3, Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary / Broker-Dealers, and Professional Customers are eligible to receive a \$0.20 Penny Maker Rebate in Tier 1 only.

facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Note 13 Taker Fees

The Exchange believes that its proposal in note 13 of Options 7, Section 3 to lower the Penny Taker Fees that apply when trading against a Priority Customer is reasonable. As discussed above, the Exchange is proposing to lower the base Penny Taker Fee for all market participants to \$0.48 per contract if they trade against a Priority Customer. Non-Priority Customers would continue to have an opportunity to lower that fee to \$0.47 per contract if they execute 4.0% or greater of Customer Total Consolidated Volume. The Exchange notes that the proposed Penny Taker Fees for trading against Priority Customers will generally be lower or comparable to the current tiered Penny Taker Fees for trading against Non-Priority Customers. The only exception is the Tier 4 Penny Taker Fee for Priority Customers when trading against a Non-Priority Customer. As described above, this fee is currently \$0.43 per contract. Otherwise, the proposed Taker Fees are lower or comparable for all market participants, regardless of tier.¹¹ The Exchange believes that its proposal will enhance Priority Customer experience on the Exchange by incentivizing market participants with a lower Penny Taker Fee to remove Priority Customer liquidity. At the same time, the Exchange believes the proposed pricing (including the Priority Customer Taker Fee when the counter party is another Priority Customer) appropriately

¹¹ Specifically, all Non-Priority Customers are currently assessed a Penny Taker Fee of \$0.50 per contract in Tiers 1-3 when trading against Non-Priority Customers, while this fee is \$0.48 per contract for Priority Customers in Tiers 1-3. In Tier 4, Market Makers and Non-Nasdaq GEMX Market Makers are currently assessed a \$0.48 per contract Penny Taker Fee when trading against Non-Priority Customers. For Firm Proprietary / Broker-Dealers and Professional Customers, the Tier 4 fee is currently \$0.49 per contract. As previously discussed, the Tier 4 fee is currently \$0.43 per contract for Priority Customers.

balances the Exchange's intent to offset the favorable Penny Symbol pricing currently offered to Priority Customers through higher Maker Rebates and lower Taker Fees. With the proposed changes, the Exchange continues to believe that its pricing structure for Penny Symbols will continue to attract additional volume to GEMX.

The Exchange further believes that the proposed changes to lower the Penny Taker Fees in note 13 are equitable and not unfairly discriminatory. In particular, the Exchange is lowering the Penny Taker Fee to \$0.48 per contract for all market participants when the counter party is a Priority Customer.

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.

The proposed Tier 4 Priority Customer Maker Rebate changes do not impose an undue burden on intra-market competition. As discussed above, Priority Customers will continue to receive the highest Penny Maker Rebates on the Exchange with the proposed changes, so the Exchange believes its proposal will continue to attract Priority Customer order flow to the Exchange. 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. As it relates to proposed note 13 Taker Fee changes, the Exchange will assess the same Taker Fee to all market participants when the counter party is a Priority Customer. Accordingly, the Exchange does not believe that its pricing proposal will place any market participant at a competitive disadvantage.

As it relates to 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 options 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.

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.¹² 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.

¹² 15 U.S.C. 78s(b)(3)(A)(ii).

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-2022-06 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-2022-06. 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-2022-06 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.¹³

J. Matthew DeLesDernier
Assistant Secretary

¹³ 17 CFR 200.30-3(a)(12).