

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96062; File No. SR-GEMX-2022-09)

October 13, 2022

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX Options 7

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 October 3, 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 Pricing Schedule at Options 7.

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 Exchange proposes to amend Options 7, Sections 1, 3 and 4 in connection with adopting an Affiliated Entity program. The Exchange also proposes to amend Options 7, Section 3 to amend its Regular Order Fees and Rebates for Penny Symbols and Non-Penny Symbols and Qualifying Tier Thresholds and remove note 13 from the Pricing Schedule. Each change is described below.

Affiliated Entity Program

The Exchange proposes to permit Affiliated Entities to aggregate certain volume for purposes of paying lower fees or receiving higher rebates. Today, Nasdaq MRX, LLC (“MRX”) and Nasdaq ISE, LLC (“ISE”)³ also permit Affiliated Entities to aggregate volume for purposes of qualifying for certain pricing.

Specifically, the Exchange proposes to adopt the term “Affiliated Entity” within Options 7, Section 1(c).⁴ An “Affiliated Entity” would be a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. An “Appointed Market Maker” is proposed to be defined within Options 7, Section 1(c) as a Market Maker who has been appointed by an OFP for purposes of qualifying as an Affiliated Entity. An “Order Flow Provider” or “OFP” is proposed to be defined within

³ See MRX and ISE Options 7, Section 1.

⁴ The Exchange proposes to add a “c” before the term references within Options 7, Section 1 to further describe this section of the Pricing Schedule.

Options 7, Section 1(c) as any Member, other than a Market Maker, that submits orders, as agent or principal, to the Exchange.⁵ Finally, an “Appointed OFP” would be defined within Options 7, Section 1(c) as an OFP who has been appointed by a Market Maker for purposes of qualifying as an Affiliated Entity.

In order to become an Affiliated Entity, Market Makers and OFPs would be required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month.⁶ For example, with this proposal, market participants should have submitted emails to the Exchange to become Affiliated Entities to qualify for discounted pricing by September 28, 2022, which is 3 business days prior to the first business day of October 3, 2022. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule within Options 7, Section 1(c).

Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members⁷ may not qualify as a counterparty comprising an Affiliated Entity.

⁵ Market Makers shall not be considered Appointed OFPs for the purpose of becoming an Affiliated Entity.

⁶ The Exchange issued an Options Trader Alert which provided the email address and details required to apply to become an Affiliated Entity.

⁷ An “Affiliated Member” is Member that shares at least 75% common ownership with a particular Member as reflected on the Member’s Form BD, Schedule A. This term is currently described within Options 7, Sections 3 and 4. The Exchange proposes to remove the description of an Affiliated Member from Options 7, Sections 3 and 4 and instead describe an Affiliated Member within Options 7, Section 1(c). The Exchange

Each Member may qualify for only one (1) Affiliated Entity relationship at any given time. As proposed, an Affiliated Entity shall be eligible to aggregate their volume for purposes of qualifying for certain pricing specified in the Pricing Schedule, as described below.

The Exchange proposes to amend Options 7, Section 3, Regular Order Fees and Rebates, to indicate that with respect to the Qualifying Tier Thresholds, for purposes of measuring Total Affiliated Member *or Affiliated Entity* % 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. Further, the Exchange proposes to provide that all eligible volume from Affiliated Members *or an Affiliated Entity* will be aggregated in determining applicable tiers for each of the Qualifying Tier Thresholds in Table 1. Finally, the Exchange proposes to note that the Total Affiliated Member *or Affiliated Entity* % 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.

With these proposed amendments, an Affiliated Entity would be permitted to aggregate its volume to qualify for the Qualifying Tier Thresholds. By aggregating volume, the Appointed Market Maker and Appointed OFP will both have an opportunity to receive lower Taker Fees and higher Maker Rebates as a result of the aggregation. The Exchange believes that the Affiliated Entity program will encourage Appointed Market Makers and Appointed OFPs to submit additional liquidity on GEMX.

As noted above, with this proposed change, a GEMX Member may aggregate either as an

also proposes to capitalize the word “affiliated” within Options 7, Section 4 to refer to the defined term.

Affiliated Member or an Affiliated Entity during the same time period, but may not aggregate under both programs during the same time period. The Exchange proposes to incentivize certain Members, who are not Affiliated Members, to enter into an Affiliated Entity relationship for the purpose of aggregating volume executed on the Exchange to qualify to for certain Maker or Taker tiers.

Options 7, Section 3

The Exchange proposes to amend Options 7, Section 3, Regular Order Fees and Rebates, to: (1) renumber current Penny and Non-Penny Symbol Maker Rebate Tier 4 and Taker Fee Tier 4 as Maker Rebate Tier 5 and Taker Fee Tier 5, respectively, (2) add a new Maker Rebate Tier 4 and Taker Fee Tier 4; (3) amend new Priority Customer⁸ Maker Rebate Tier 5; and (4) eliminate current note 13. Each change will be described below.

Maker Rebates

Today, GEMX pays the following Tier 4 Penny Symbol Maker Rebates: \$0.41 per contract to Market Makers⁹ and \$0.52 per contract to Priority Customers. Non-Nasdaq GEMX

⁸ 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(c), as proposed.

⁹ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

Market Makers (FarMM),¹⁰ Firm Proprietary¹¹/Broker Dealers¹² and Professional Customers¹³ are not eligible for Tier 4 Penny Symbol Maker Rebates. Today, GEMX pays the following Tier 4 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 4 Non-Penny Symbol Maker Rebates.

At this time, the Exchange proposes to renumber Penny and Non-Penny Symbol Maker Rebate Tiers 4 as Tier 5.

The Exchange also proposes to increase the Priority Customer Penny Symbol newly renumbered Maker Rebate Tier 5 from \$0.52 to \$0.53 per contract.

The Exchange also proposes to adopt a new Penny Symbol Maker Rebate Tier 4 as follows: \$0.32 per contract to Market Makers and \$0.51 per contract to Priority Customers. Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers will not be eligible for proposed Tier 4 Penny Symbol Maker Rebates.

The Exchange also proposes to adopt a new Non-Penny Symbol Maker Rebate Tier 4 as follows: \$0.50 per contract to Market Makers and \$0.90 per contract to Priority Customers. Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and

¹⁰ 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.

¹¹ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account. See GEMX Options 7, Section 1.

¹² 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.

¹³ 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.

Professional Customers will not be eligible for proposed Tier 4 Non-Penny Symbol Maker Rebates.

Taker Fees

Today, GEMX pays the following Tier 4 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 \$0.43 per contract to Priority Customers. Today, GEMX pays the following Tier 4 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

At this time, the Exchange proposes to renumber Penny and Non-Penny Symbol Taker Fee Tiers 4 as Tier 5.

The Exchange also proposes to adopt a new Penny Symbol Taker Fee Tier 4 as follows: \$0.50 per contract to Market Makers, Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers, and \$0.48 per contract to Priority Customers. Similar to current Penny Symbol Taker Fees, non-Priority Customer¹⁴ orders will be charged the Penny Symbol Taker Fee for trades executed during the Opening Process for Penny Symbol Tier 4 Taker Fees. Priority Customer orders executed during the Opening Process will receive the applicable Penny Symbol Maker Rebate based on the tier achieved.¹⁵

The Exchange also proposes to adopt a new Non-Penny Symbol Taker Fee Tier 4 as

¹⁴ Non-Priority Customer Orders includes order for the accounts of Market Makers, Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers.

¹⁵ See note 4 in Options 7, Section 3 of the Pricing Schedule.

follows: \$0.99 per contract to Market Makers, Non-Nasdaq GEMX Market Makers (FarMM), Firm Proprietary/Broker Dealers and Professional Customers, and \$0.85 per contract to Priority Customers. Similar to current Non-Penny Symbol Taker Fees, non-Priority Customer orders will be charged the Non-Penny Taker Fee for trades executed during the Opening Process for Non-Penny Symbol Tier 4 Taker Fees. Priority Customer orders executed during the Opening Process will receive the applicable Non-Penny Symbol Maker Rebate based on the tier achieved.¹⁶ Additionally, Non-Priority Customer orders will be charged a Non-Penny Symbol Taker Fee of \$1.10 per contract for trades executed against a Priority Customer. Priority Customer orders will be charged a Non-Penny Symbol Taker Fee of \$0.85 per contract for trades executed against a Priority Customer.¹⁷

Today, for Penny Symbol Taker Fees 1,¹⁸ 2,¹⁹ 3²⁰ and 4, non-Priority Customers who execute less than 4.0% of Customer Total Consolidated Volume²¹ will be charged a Penny Symbol Taker Fee of \$0.48 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 Symbol Taker Fee of \$0.47 per contract for trades executed against a Priority Customer. All Priority Customer orders will be charged a Penny Symbol Taker Fee of

¹⁶ See note 4 in Options 7, Section 3 of the Pricing Schedule.

¹⁷ See note 16 in Options 7, Section 3 of the Pricing Schedule.

¹⁸ Today, the Exchange assesses \$0.50 per contract for Penny Symbol Taker Fee 1 for all non-Priority Customers and \$0.48 per contract for Priority Customers.

¹⁹ Today, the Exchange assesses \$0.50 per contract for Penny Symbol Taker Fee 2 for all non-Priority Customers and \$0.48 per contract for Priority Customers.

²⁰ Today, the Exchange assesses \$0.50 per contract for Penny Symbol Taker Fee 3 for all non-Priority Customers and \$0.48 per contract for Priority Customers.

²¹ 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.

\$0.48 per contract for trades executed against a Priority Customer.²²

At this time, the Exchange proposes to remove note 13 from the Pricing Schedule within Options 7, Section 3. While the Exchange is eliminating certain incentives to lower the Penny Symbol Taker Fee when trading against a Priority Customer, the Exchange believes that the amendments proposed herein to the Taker Fees offer market participants the ability to obtain lower Taker Fees, if they are currently in Penny Symbol Taker Fee Tiers 1-3, by submitting additional order flow to GEMX.

Finally, the Exchange proposes to amend the criteria to qualify for the tier thresholds within Options 7, Section 3. The Exchange proposes to add tier qualifications for new Tier 4 which would require a Member to execute 2.25% to less than 2.50% of Customer Total Consolidated Volume for the qualifying percentage of Customer Total Consolidated Volume. Also, for Tier 4, a Member would be required to execute Priority Customer Maker volume of 1.05% to less than 1.20% of Customer Total Consolidated Volume for the qualifying Priority Customer Maker % of Customer Total Consolidated Volume.

With the addition of new Tier 4 in the Qualifying Tier Thresholds, the Exchange proposes to also amend Tier 3 to accommodate the new tier. The Exchange proposes to amend the range in Tier 3 for the qualifying percentage of Customer Total Consolidated Volume to require a Member to execute 1.5% to less than 2.25% of Customer Total Consolidated Volume (from 1.5% to less than 2.50% of Customer Total Consolidated Volume). Also, the Exchange proposes to amend the range in Tier 3 for the qualifying Priority Customer Maker % of Customer Total Consolidated Volume to require a Member to execute Priority Customer Maker volume of 0.65% to less than 1.05% of Customer Total Consolidated Volume (from 0.65% to

²² See note 13 in Options 7, Section 3 of the Pricing Schedule.

less than 1.20% of Customer Total Consolidated Volume). Finally, the Exchange proposes to renumber Tier 4 as Tier 5 within the Qualifying Tier Thresholds.

The Exchange believes that the addition of Tier 4 will incentive GEMX Members in Penny and Non-Penny Symbol Tiers 1 through 3 to submit additional order flow to GEMX to obtain lower Taker Fees and higher Maker Rebates.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁴ 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 Proposal is Reasonable

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 Commission²⁵ (“NetCoalition”), the D.C. Circuit stated, “[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

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(4) and (5).

²⁵ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

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'"²⁶

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 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. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

Affiliated Entity Program

The Exchange's proposal to permit an Affiliated Entity to aggregate certain volume for purposes of paying lower fees or receiving higher rebates is reasonable because the Exchange believes this program will incentivize certain GEMX Members, who are not Affiliated Members, to enter into an Affiliated Entity relationship for the purpose of aggregating volume executed on the Exchange to qualify for certain lower Market Maker fees. By aggregating volume, the Appointed Market Maker and Appointed OFP will both have an opportunity to receive lower Taker Fees and higher Maker Rebates as a result of the aggregation. Additionally, this proposal will harmonize GEMX's program with MRX's and ISE's programs.²⁷ While a GEMX Member may not utilize both the Affiliated Member and the Affiliated Entity program to aggregate

²⁶ 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)).

²⁷ See MRX and ISE Options 7, Section 1.

volume for purposes of achieving lower fees or higher rebates, the Exchange believes that permitting aggregation individually under each program, Affiliated Member and the Affiliated Entity program, will encourage Appointed Market Makers and Appointed OFPs to submit additional liquidity on GEMX if they chose to enter into this relationship.

The Exchange's proposal to permit Affiliated Entities to aggregate certain volume for purposes of paying lower fees or receiving higher rebates is equitable and not unfairly discriminatory as all market participants may enter into an Affiliated Entity relationship, provided they have not elected to aggregate as an Affiliated Member. As proposed, Affiliated Members, who are eligible to aggregate volume today, are not eligible to also enter into an Affiliated Entity relationship. The Exchange's proposal to exclude Affiliated Members from qualifying as an Affiliated Entity is equitable and not unfairly discriminatory because, today, Affiliated Members may aggregate volume for purposes of lowering fees or increasing rebates on GEMX. Also, as proposed no GEMX Member may utilize both the Affiliated Member and the Affiliated Entity program to aggregate volume for purposes of achieving lower fees or higher rebates. Also, the Exchange will apply all qualifications in a uniform manner for an Affiliated Entity.

Options 7, Section 3

The Exchange's proposal to amend Options 7, Section 3, Regular Order Fees and Rebates, to renumber current Penny and Non-Penny Symbol Maker Rebate Tier 4 and Taker Fee Tier 4 as Maker Rebate Tier 5 and Taker Fee Tier 5, respectively, and add a new Maker Rebate Tier 4 and Taker Fee Tier 4 is reasonable because the addition of new Tier 4 will incentive GEMX Members to submit additional order flow to GEMX to obtain lower fees and higher rebates. Specifically, Members currently in Penny and Non-Penny Symbol Tiers 1

through 3 may be assessed lower Taker Fees or receive higher Maker Rebates if they are able to submit additional order to qualify for new Tier 4.

The Exchange's proposal to amend Options 7, Section 3, Regular Order Fees and Rebates, to renumber current Penny and Non-Penny Symbol Maker Rebate Tier 4 and Taker Fee Tier 4 as Maker Rebate Tier 5 and Taker Fee Tier 5, respectively, and add a new Maker Rebate Tier 4 and Taker Fee Tier 4 is equitable and not unfairly discriminatory because the Exchange's maker/taker model continues to incentivize Priority Customers by assessing them the lowest fees and paying them the highest rebates as compared to all other non-Priority Customer market participants. 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. Continuing to pay Maker Rebates to Priority Customers is equitable and not unfairly discriminatory for these reasons as well. Paying Maker Rebates to Market Makers is equitable and not unfairly discriminatory because Market Makers have different requirements and obligations to the Exchange that other market participants do not (such as quoting requirements).²⁸ Incentivizing Market Makers to provide greater liquidity benefits all market participants through the quality of order interaction.

The Exchange's proposal to amend new Priority Customer Maker Rebate Tier 5 to increase the Priority Customer Penny Symbol Maker Rebate from \$0.52 to \$0.53 per contract is reasonable because the Exchange believes this increased rebate will attract additional Priority Customer order flow to GEMX.

²⁸ See GEMX Options 2, Section 5.

The Exchange's proposal to amend new Priority Customer Maker Rebate Tier 5 to increase the Priority Customer Penny Symbol Maker Rebate from \$0.52 to \$0.53 per contract is equitable and not unfairly discriminatory because 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.

The Exchange's proposal to eliminate note 13 from the Pricing Schedule at Options 7, Section 3 is reasonable because while the Exchange is eliminating certain incentives to lower the Penny Symbol Taker Fee when trading against a Priority Customer, the Exchange believes that the amendments proposed herein to the Penny Symbol Taker Fees offer market participants the ability to obtain lower fees, if they are currently in Penny Symbol Taker Fee Tiers 1-3, by submitting additional order flow to GEMX.

The Exchange's proposal to eliminate note 13 from the Pricing Schedule at Options 7, Section 3 is equitable and not unfairly discriminatory because no market participant will be entitled to a lower Penny Symbol Taker Fee as a result of the removal of note 13.

The Exchange's proposal to amend the criteria to qualify for the tier thresholds within Options 7, Section 3 is reasonable because the addition of new Tier 4 would allow Members to qualify for lower fees or higher rebates if they are able to execute 2.25% to less than 2.50% of Customer Total Consolidated Volume for the qualifying percentage of Customer Total Consolidated Volume and execute Priority Customer Maker volume of 1.05% to less than 1.20% of Customer Total Consolidated Volume for the qualifying Priority Customer Maker % of Customer Total Consolidated Volume. The criteria for new Tier 4 requires less order flow than the criteria for re-numbered Tier 5 and pays lower Taker Fees and higher Maker Rebates than

Tier 3.²⁹

The Exchange's proposal to amend the criteria to qualify for the tier thresholds within Options 7, Section 3 is equitable and not unfairly discriminatory because the Qualifying Tier Thresholds are the same for all Members and would be uniformly applied to all Members in determining a Member's applicable tier.

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 Exchange 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. 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 because other options exchanges offer similar affiliation programs and have maker/taker models akin to GEMX's model.

²⁹ The Exchange proposes to amend Tier 3 to accommodate the new tier 4. The Exchange proposes to amend the range in Tier 3 for the qualifying percentage of Customer Total Consolidated Volume to require a Member to execute 1.5% to less than 2.25% of Customer Total Consolidated Volume (from 1.5% to less than 2.50% of Customer Total Consolidated Volume). Also, the Exchange proposes to amend the range in Tier 3 for the qualifying Priority Customer Maker % of Customer Total Consolidated Volume to require a Member to execute Priority Customer Maker volume of 0.65% to less than 1.05% of Customer Total Consolidated Volume (from 0.65% to less than 1.20% of Customer Total Consolidated Volume).

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and rebate changes. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

Intramarket Competition

Affiliated Entity Program

The Exchange's proposal to permit Affiliated Entities to aggregate certain volume for purposes of paying lower Taker Fees or receiving higher Maker Rebates does not impose an undue burden on competition because all market participants may enter into an Affiliated Entity relationship, provided they have not elected to aggregate as an Affiliated Member. As proposed, Affiliated Members, who are eligible to aggregate volume today, are not eligible to also enter into an Affiliated Entity relationship. Today, Affiliated Members may aggregate volume for purposes of lowering fees or increasing rebates on GEMX. Also, as proposed no GEMX Member may utilize both the Affiliated Member and the Affiliated Entity program to aggregate volume for purposes of achieving lower fees or higher rebates. Also, the Exchange will apply all qualifications in a uniform manner for an Affiliated Entity.

Options 7, Section 3

The Exchange's proposal to amend Options 7, Section 3, Regular Order Fees and Rebates, to renumber current Penny and Non-Penny Symbol Maker Rebate Tier 4 and Taker Fee Tier 4 as Maker Rebate Tier 5 and Taker Fee Tier 5, respectively, and add a new Maker Rebate Tier 4 and Taker Fee Tier 4 does not impose an undue burden on competition because the

Exchange's maker/taker model continues to incentivize Priority Customers by assessing them the lowest fees and paying them the highest rebates as compared to all other non-Priority Customer market participants. 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. Continuing to pay Maker Rebates to Priority Customers is equitable and not unfairly discriminatory for these reasons as well. Paying Maker Rebates to Market Makers is equitable and not unfairly discriminatory because Market Makers have different requirements and obligations to the Exchange that other market participants do not (such as quoting requirements).³⁰ Incentivizing Market Makers to provide greater liquidity benefits all market participants through the quality of order interaction.

The Exchange's proposal to amend new Priority Customer Maker Rebate Tier 5 to increase the Priority Customer Penny Symbol Maker Rebate from \$0.52 to \$0.53 per contract does not impose an undue burden on competition because 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.

The Exchange's proposal to eliminate note 13 from the Pricing Schedule at Options 7, Section 3 does not impose an undue burden on competition because no market participant will be entitled to a lower Penny Symbol Taker Fee as a result of the removal of note 13.

The Exchange's proposal to amend the criteria to qualify for the tier thresholds within Options 7, Section 3 does not impose an undue burden on competition because the Qualifying

³⁰ See GEMX Options 2, Section 5.

Tier Thresholds are the same for all Members and would be uniformly applied to all Members in determining a Member's applicable tier.

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 Act³¹ and paragraph (f) of Rule 19b-4³² 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.

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-2022-09 on the subject line.

³¹ 15 U.S.C. 78s(b)(3)(A).

³² 17 CFR 240.19b-4(f).

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-2022-09. 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-2022-09 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.³³

J. Matthew DeLesDernier,
Deputy Secretary.

³³ 17 CFR 200.30-3(a)(12).