

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-97521; File No. SR-GEMX-2023-07)

May 17, 2023

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 9, 2023, 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.”<sup>3</sup>

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The Exchange originally filed SR-GEMX-2023-06 on May 1, 2023. On May 9, 2023, the Exchange withdrew SR-GEMX-2023-06 and replaced that filing with the instant 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

GEMX proposes to amend its Pricing Schedule at Options 7, Section 3, “Regular Order Fees and Rebates” to decrease the Penny Symbol Priority Customer<sup>4</sup> Taker Fees.

Today, GEMX assesses 5 tiers of Penny Symbol Taker Fees. Market Makers,<sup>5</sup> and Non-Nasdaq GEMX Market Makers (FarMM)<sup>6</sup> are assessed the following Penny Symbol Taker Fees: a Tier 1 Taker Fee of \$0.50 per contract; a Tier 2 Taker Fee of \$0.50 per contract; a Tier 3 Taker Fee of \$0.50 per contract; a Tier 4 Taker Fee of \$0.50 per contract; and a Tier 5 Taker Fee of \$0.48 per contract. In comparison, GEMX assesses Firm Proprietary<sup>7</sup> / Broker Dealers<sup>8</sup> and Professional Customers<sup>9</sup> the following Penny Symbol Taker Fees: a Tier 1 Taker Fee of \$0.50

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<sup>4</sup> 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 the Pricing Schedule the term “Priority Customer” includes “Retail”. See Options 7, Section 1(c).

<sup>5</sup> The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

<sup>6</sup> 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 Options 7, Section 1(c).

<sup>7</sup> A “Firm Proprietary” order is an order submitted by a member for its own proprietary account. See Options 7, Section 1(c).

<sup>8</sup> A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. See Options 7, Section 1(c).

<sup>9</sup> A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

per contract; a Tier 2 Taker Fee of \$0.50 per contract; a Tier 3 Taker Fee of \$0.50 per contract; a Tier 4 Taker Fee of \$0.50 per contract; and a Tier 5 Taker Fee of \$0.49 per contract. Finally, Priority Customers are assessed the following Penny Symbol Taker Fees: a Tier 1 Taker Fee of \$0.48 per contract; a Tier 2 Taker Fee of \$0.48 per contract; a Tier 3 Taker Fee of \$0.48 per contract; a Tier 4 Taker Fee of \$0.48 per contract; and a Tier 5 Taker Fee of \$0.43 per contract.

At this time, GEMX proposes to decrease the Penny Symbol Priority Customer Taker Fees. Specifically, GEMX proposes to decrease Penny Symbol Priority Customer Taker Fees Tiers 1 through 4 from \$0.48 per contract to \$0.41 per contract. Additionally, GEMX proposes to decrease Penny Symbol Priority Customer Taker Fee Tier 5 from \$0.43 to \$0.41 per contract. GEMX is not proposing to amend the Qualifying Tier Thresholds to achieve these tiers. GEMX believes that decreasing the Priority Customer Taker Fees in Penny Symbols will incentivize GEMX Members to send additional order flow to GEMX.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>11</sup> 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 the Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is

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<sup>10</sup> See 15 U.S.C. 78f(b).

<sup>11</sup> See 15 U.S.C. 78f(b)(4) and (5).

competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, 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 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’ ....”<sup>12</sup>

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.

GEMX’s proposal to decrease Penny Symbol Priority Customer Taker Fees Tiers 1 through 4 from \$0.48 per contract to \$0.41 per contract and Penny Symbol Priority Customer Taker Fee Tier 5 from \$0.43 to \$0.41 per contract is reasonable because decreasing the Priority Customer Taker Fees in Penny Symbols should incentivize GEMX Members to send additional order flow to GEMX.

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<sup>12</sup> See NetCoalition, 615 F.3d at 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)).

GEMX's proposal to decrease Penny Symbol Priority Customer Taker Fees Tiers 1 through 4 from \$0.48 per contract to \$0.41 per contract and Penny Symbol Priority Customer Taker Fee Tier 5 from \$0.43 to \$0.41 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, to 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 Exchange believes its proposal remains competitive with other options markets, and will offer market participants with another choice of venue 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. 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

GEMX's proposal to decrease Penny Symbol Priority Customer Taker Fees Tiers 1 through 4 from \$0.48 per contract to \$0.41 per contract and Penny Symbol Priority Customer Taker Fee Tier 5 from \$0.43 to \$0.41 per contract does not impose an undue burden on intermarket 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, to the benefit of all market participants.

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.<sup>13</sup> 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

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-GEMX-2023-07 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-2023-07. 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. 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-2023-07 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.<sup>14</sup>

Sherry R. Haywood  
Assistant Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).