

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99172; File No. SR-GEMX-2023-20)

December 14, 2023

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fees for Options on the Nasdaq 100 Index in the Exchange's Pricing Schedule at 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 December 8, 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 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 the transaction fees for Nasdaq 100 Index options in the Exchange's Pricing Schedule at Options 7, Section 3. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 purpose of the proposed rule change is to amend the transaction fees for NDX³ in Options 7, Section 3. The Exchange initially filed the proposed pricing changes on November 30, 2023 (SR-GEMX-2023-18). On December 8, 2023, the Exchange withdrew that filing and submitted this filing.

Today, the Exchange assesses a transaction fee of \$0.75 per contract for all Non-Priority Customer⁴ orders in NDX. Priority Customers⁵ currently receive free executions in NDX. The Exchange now proposes to begin assessing Priority Customer NDX orders a \$0.25 per contract

³ NDX represents A.M. settled options on the full value of the Nasdaq 100 Index traded under the symbol NDX.

⁴ "Non-Priority Customers" include Market Makers, Non-Nasdaq GEMX Market Makers (FarMMs), Firm Proprietary / Broker-Dealers, and Professional Customers. As discussed later in this filing, the Exchange will codify this definition in Options 7, Section 1.

⁵ 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).

transaction fee. The Exchange notes that the proposed fee amount is in line with customer transaction fees assessed on other index products.⁶

The Exchange also proposes a change in Options 7, Section 1(c) to add “Non-Priority Customers” as a defined term. The Exchange notes that this term is already used in its Pricing Schedule,⁷ and aligns with how it is currently used in the Pricing Schedule as well as with the definition in the pricing schedule of its affiliate, Nasdaq ISE, LLC (“ISE”).⁸ The Exchange will also capitalize the current reference to “non-Priority Customer” in Options 7, Section 3, footnote 11 to align with the proposed change to add Non-Priority Customer as a defined term. The Exchange also proposes to alphabetize the definitions in Options 7, Section 1(c) for better readability.

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 Exchange believes it is reasonable to begin assessing Priority Customer orders in NDX a \$0.25 per contract fee because the proposed pricing reflects the proprietary nature of this

⁶ For example, Cboe Options (“Cboe”) currently assesses a \$0.25 per contract customer transaction fee for MXEA and MXEF options, \$0.35 per contract for OEX and XEO options, and \$0.36 per contract (if premium < \$1.00) or \$0.45 per contract (if premium >= \$1.00) for SPX and SPESG options. See Cboe Fees Schedule.

⁷ See e.g., Options 7, Section 3, footnotes 4 and 11.

⁸ See ISE Options 7, Section 1(c).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

product. Similar to other proprietary products, the Exchange seeks to recoup the operational costs of listing such products.¹¹ Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.¹² Further, the Exchange notes that market participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange's proprietary products like NDX options, or separately through multi-listed options overlying Invesco QQQ Trust ("QQQ").¹³ Offering such products provides market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index. When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

While the transaction fee for Priority Customer NDX orders is increasing under this proposal, the Exchange believes that the proposal is reasonable and would continue to incentivize market participants to transact in Priority Customer NDX orders because Priority Customers would continue to be assessed a lower fee for NDX than Non-Priority Customers (i.e., \$0.25 versus \$0.75 per contract). As a result, the Exchange believes that the proposed pricing is structured in a way that continues to encourage market participants, especially Priority Customers, to transact in NDX on GEMX. As noted above, the proposed fee amount is in line with customer transaction fees assessed on other index products at another options exchange.¹⁴

¹¹ By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

¹² See supra note 6.

¹³ QQQ is an exchange-traded fund based on the same Nasdaq 100 Index as NDX.

¹⁴ See supra note 6.

The Exchange's proposal to assess a \$0.25 per contract transaction fee to Priority Customer NDX orders is equitable and not unfairly discriminatory it will apply uniformly to all similarly situated market participants. The Exchange believes it is equitable and not unfairly discriminatory to continue charging Priority Customers a lower transaction fee because Priority Customer orders bring valuable liquidity to the market by providing more trading opportunities, which, in turn, 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 to the benefit of all market participants.

Lastly, the Exchange believes that the proposed changes in Options 7, Section 1(c) to add "Non-Priority Customers" as a defined term, to capitalize the reference to "non-Priority Customer" in footnote 11 of Options 7, Section 3, and to alphabetize the definitions are reasonable, equitable and not unfairly discriminatory. As noted above, the term "Non-Priority Customers" is already used in the Exchange's Pricing Schedule and codifying this definition in the manner it is used today will bring greater clarity to the Exchange's rules to the benefit of all market participants. The Exchange likewise believes that alphabetizing the definitions in Options 7, Section 1(c) for better readability will add more clarity to the Pricing Schedule.

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. In terms of inter-market competition, 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. As noted above, market participants are offered an opportunity to transact in NDX or separately execute options overlying QQQ. Offering these products provides market participants

with a variety of choices in selecting the product they desire to use to gain exposure to the Nasdaq 100 Index. Furthermore, the proposed fee amount is in line with customer transaction fees assessed on other index products at another options exchange.¹⁵

Further, the Exchange does not believe that its proposal to begin assessing a \$0.25 per contract transaction fee for Priority Customer NDX orders will impose an undue burden on intra-market competition because Priority Customers will continue to be assessed lower fees than Non-Priority Customers for NDX orders. As discussed above, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

Finally, the Exchange believes that the proposed changes in Options 7 to add Non-Priority Customers as a defined term, to capitalize the reference to “non-Priority Customer,” and to alphabetize the Pricing Schedule definitions do not impose an undue burden on competition because these are non-competitive changes that are intended to bring clarity to the Exchange’s Pricing Schedule.

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 Act¹⁶ and Rule 19b-4(f)(2)¹⁷ 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

¹⁵ See supra note 6.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-GEMX-2023-20 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-2023-20. 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-2023-20 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.¹⁸

Sherry R. Haywood,
Assistant Secretary.

¹⁸ 17 CFR 200.30-3(a)(12).