

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80921; File No. SR-GEMX-2017-23)

June 14, 2017

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

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 June 1, 2017, 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 Exchange’s Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member’s fees and rebates for purposes of Section I, as described further below.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange's Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member's fees and rebates for purposes of Section I.

The Exchange currently uses volume-based tiers, referred to as the Total Affiliated Member ADV, to assess the level of taker fees and maker rebates applicable to members. These tiers apply to both Penny Symbols and SPY, and to Non-Penny Symbols (excluding index options). These tiers apply to all different categories of market participants set forth in Section I, such as Market Makers, Firm Proprietary / Broker-Dealer, and Priority Customers.³ The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the Price Improvement Mechanism ("PIM"), Facilitation, Solicitation, and Qualified Contingent Cross ("QCC") mechanisms. 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.

³ The Exchange also uses a separate set of tiers to determine the amount of a Priority Customer's maker rebate. These volume requirements of these tiers are a subset of a member's Total Affiliated Member ADV. The Exchange is not changing the Priority Customer Maker ADV tiers as part of this proposed rule change.

The Exchange currently uses numeric thresholds for the purpose of determining a member's eligibility for Tiers 1-4. Currently, a member would qualify for Tier 1 if its ADV is 0 – 99,999 contracts in a given month; Tier 2 if its ADV is 100,000 – 224,999 contracts in a given month; Tier 3 if its ADV is 225,000 – 349,999 contracts in a given month, and Tier 4 if its ADV is 350,000 or more contracts in a given month.

The Exchange now proposes to add a percentage-based calculation that may be used as an alternative to the numeric thresholds for determining a member's eligibility for the Total Affiliated Member ADV tiers. Specifically, a member would be eligible for Tier 2 if it executes 100,000 – 224,999 contracts or 1% to less than 2% of Customer Total Consolidated Volume; Tier 3 if it executes 225,000 – 349,999 contracts or 2% to less than 3% of Customer Total Consolidated Volume; and Tier 4 if it executes 350,000 or more contracts or 3% or greater of Customer Total Consolidated Volume. For purposes of measuring Total Affiliated Member ADV, 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 developed these percentage requirements based on historical data, and believes that there is a close correlation between the proposed percentage requirements and the current numeric requirements.

As is the case currently, the Total Affiliated Member ADV category will continue to include 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. Similarly, all eligible volume from affiliated members will continue to 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 fees and rebates in Section I to which the Total Affiliated Member ADV tiers apply remain unchanged.

In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

2. Statutory Basis

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

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.⁸ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”⁹

Further, “[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’”¹⁰ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that determining a member’s eligibility for a Total Affiliated Member ADV tier by using percentage requirements as an alternative to the existing numeric

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ See NetCoalition, at 534 - 535.

⁹ Id. at 537.

¹⁰ 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)).

requirements is reasonable. In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. The Exchange also believes that the actual proposed percentage requirements are reasonable. Using historical data, the Exchange has formulated percentage requirements that it believes are closely correlated to the existing numeric requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

The Exchange believes that it is reasonable to calculate the percentage based on the total volume cleared at the OCC in the Customer range in that month. The Exchange notes that other exchanges have similar programs that use percentage requirements based on national customer volume. For example, NASDAQ PHLX LLC ("Phlx") operates a Customer Rebate Program, which has five volume tiers that consist of percentage thresholds of national customer volume in multiply-listed equity and ETF options classes (excluding monthly SPY options).¹¹ Similarly, the NASDAQ Options Market ("NOM") operates a tiered rebate program, which consists of eight tiers, using both numeric and percentage thresholds, that is based on the total industry customer equity and ETF option average daily volume contracts per day in a month.¹² As with these programs, the Exchange believes that the use of customer volume in equity and ETF

¹¹ See Phlx Pricing Schedule, Preface B.

¹² See NOM Chapter XV, Section 2.

options here as the baseline provides a meaningful metric by which to measure a member's activity.

The Exchange believes that it is reasonable to add the percentage requirements to Tiers 2 - 4. Since a member may qualify for the Tier 1 with an ADV of 0, the Exchange does not believe that a percentage requirement is necessary for this Tier.

The Exchange also believes that it is reasonable to add percentage requirements to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

The Exchange also believes that the proposal is an equitable allocation and is not unfairly discriminatory. As noted above, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements, which are closely aligned to the current numeric requirements, recognize that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the same time, the Exchange will apply the same percentage requirements to all similarly situated members. The Exchange believes it is equitable and not unfairly discriminatory to add the percentage requirements to Tiers 2-4, since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that it is equitable and not unfairly discriminatory to add percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply

to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

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. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems 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.

The proposed addition of percentage requirements to Tiers 2 - 4 of the Total Affiliated Member ADV tiers does not impose a burden on competition not necessary or appropriate because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. More specifically, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements recognize that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the

same time, the Exchange will apply the same percentage requirements to all similarly situated members.

The Exchange believes that adding the percentage requirements to Tiers 2-4 does not impose a burden on competition not necessary or appropriate since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that adding the percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, does not impose a burden on competition not necessary or appropriate because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

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.

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,¹³ and Rule 19b-4(f)(2)¹⁴ 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

¹³ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁴ 17 CFR 240.19b-4(f)(2).

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-2017-23 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-2017-23. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2017-23 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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).