

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81023; File No. SR-GEMX-2017-25)

June 26, 2017

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Non-Priority Customer License Surcharge

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 12, 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 apply the Non-Priority Customer license surcharge set forth in Section I of the Schedule of Fees to orders that are routed to away markets.

The text of the proposed rule change is available on the Exchange’s Website at www.ise.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 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 purpose of the proposed rule change is to apply the Non-Priority Customer (i.e., Market Maker,³ Non-Nasdaq GEMX Market Maker,⁴ Firm Proprietary⁵ / Broker-Dealer,⁶ and Professional Customer⁷) license surcharge set forth in Section I of the Schedule of Fees to NDX⁸ orders that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan (the “Plan”). The Exchange initially filed the proposed pricing changes on June 1, 2017 (SR-GEMX-2017-22). On June 12, 2017, the Exchange withdrew that filing and submitted this filing.

³ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Rule 100(a)(25).

⁴ 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.

⁵ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account.

⁶ A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

⁷ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer. 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 Rule 100(a)(37A).

⁸ NDX represents options on the Nasdaq-100 Index traded under the symbol NDX (“NDX”).

Today, the Exchange charges Non-Priority Customers route-out fees for orders in Non-Penny Symbols⁹ that are routed to away markets in connection with the Plan. Specifically as set forth in Section II.A of the Schedule of Fees, Non-Priority Customer orders pay a route-out fee of \$0.95 per contract in Non-Penny Symbols. The route-out fees offset costs incurred by the Exchange in connection with using unaffiliated broker-dealers to access other exchanges for linkage executions. Also as set forth in Section I of the Schedule of Fees, the Exchange presently charges a \$0.25 license surcharge for all Non-Priority Customer orders in NDX (“NDX Surcharge”). The NDX Surcharge currently applies to all NDX orders executed on the Exchange, but is not applied when those orders are routed to away markets in connection with the Plan. The Exchange therefore proposes to apply the NDX Surcharge to such orders by adding language in note 9 of Section I of the Schedule of Fees to state that the NDX Surcharge applies to all NDX executions, including executions of NDX orders that are routed to one or more exchanges in connection with the Plan. As such, all Non-Priority Customer orders in NDX that are routed to away markets would be assessed a \$0.25 per contract NDX Surcharge and a \$0.95 per contract route-out fee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among

⁹ “Non-Penny Symbols” are options overlying all symbols that are not in the Penny Pilot Program. NDX is a Non-Penny Symbol.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

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 been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹²

Likewise, in NetCoalition v. Securities and Exchange Commission¹³ (“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.¹⁴ 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.”¹⁵

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

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹³ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁴ See NetCoalition, at 534 - 535.

¹⁵ Id. at 537.

of order flow from broker dealers'"¹⁶ 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 its proposal to apply the NDX Surcharge to Non-Priority Customer orders in NDX that are routed to away markets in connection with the Plan is reasonable and equitable because it offsets both the costs associated with executing orders on away markets as well as the licensing costs associated with listing and trading NDX. The Exchange's route-out fees are presently not calculated to cover the licensing costs for NDX. The Exchange notes that a license agreement is required to trade NDX regardless of whether the NDX order is executed on the Exchange or routed to another exchange in connection with the Plan. As such, the Exchange believes that extending the NDX Surcharge to NDX orders routed to away markets (in addition to those orders executed on the Exchange) is a reasonable and equitable means of recovering the costs of the license. Furthermore, the Exchange must pay the actual transaction fees charged by the exchange the NDX order is routed to, which includes the license surcharge that such exchange assesses for NDX orders. The Exchange's route-out fees are currently not calculated to cover these license surcharges assessed by other exchanges and therefore seeks to recover these costs under this proposal. For example, an NDX order that is routed to the Chicago Board Options Exchange ("CBOE") in connection with the Plan would be assessed a \$0.25 license surcharge by CBOE on top of the actual transaction fees CBOE would charge for the NDX order.¹⁷ The Exchange's route-out fees are presently assessed as fixed fees,

¹⁶ 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)).

¹⁷ See CBOE's fee schedule, at: <https://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf>.

unlike other exchanges, which, in addition to a fixed route-out fee, assess the actual transaction fees charged by the exchange the order is routed to.¹⁸

The Exchange also believes that its proposal is reasonable and equitable because Non-Priority Customers would be able to avoid paying the NDX Surcharge by sending the Exchange NDX orders to be routed to another market and only pay the Exchange's route-out fee. The Exchange would, however, still be required to pay all of the actual transaction fees (including the license surcharge) charged by the exchange the order is routed to. For example, a Non-Priority Customer order in NDX that is routed to CBOE today would only be assessed the \$0.95 per contract route-out fee while the Exchange would pay the \$0.25 per contract license surcharge on top of the actual transaction fees CBOE would charge for the NDX order. The Exchange therefore believes that it is reasonable and equitable to assess the NDX Surcharge to NDX orders that are routed to other exchanges in order to avoid this scenario.

Finally, the Exchange believes that the proposed fee change is equitable and not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members. In particular, the NDX Surcharge would be applied to all Non-Priority Customer orders routed to away markets in connection with the Plan. The Exchange believes it is equitable and not unfairly discriminatory to assess this surcharge on all participants other than Priority Customers because the Exchange seeks to encourage Priority Customer order flow and the liquidity such order flow brings to the marketplace, which in turn benefits all market participants.

¹⁸ See, e.g., MIAX Options Fee Schedule, 1) Transaction Fees, c) Fees and Rebates for Customer Orders Routed to Another Options Exchange, at: https://www.miaxoptions.com/sites/default/files/page-files/MIAX_Options_Fee_Schedule_05012017.pdf.

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 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. 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.

In this instance, the proposed application of the NDX Surcharge to NDX orders that are routed to one or more exchanges in connection with the Plan does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition from other exchanges. 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 its proposal will impair the ability of members 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,¹⁹ and Rule 19b-4(f)(2)²⁰ 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-2017-25 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-2017-25. 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

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁰ 17 CFR 240.19b-4(f)(2).

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-2017-25 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.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).