

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100641; File No. SR-GEMX-2024-25)

August 2, 2024

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee for Remote Hands Service

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 July 19, 2024, Nasdaq GEMX, LLC (“GEMX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 for Remote Hands Services, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on August 19, 2024.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 a service fee relating to connectivity and co-location services. Specifically, the Exchange proposes to decrease its fee for Remote Hands Services, at General 8, Section 1, to \$151.50 per hour.

General 8, Section 1 includes the Exchange's fees that relate to co-location services, including "Remote Hands Services." The term "Remote Hands Services" refers to the use of Exchange engineers to perform on-site technical support tasks in its Data Center on behalf of its co-located customers, including the following: (1) power cycling of equipment; (2) patching and plugging in cabling and circuits; (3) observing, describing or reporting on display indicators; (4) configuration of hardware components instructed by the customer; (5) diagnosis and repairs as instructed by the customer; (6) swapping hardware components with customer-supplied spares or upgrades; (7) troubleshooting heat related issues as instructed by the Customer; and (8) returning defective equipment to the manufacturer or customer.

Earlier this year, the Exchange increased its \$150 per hour fee for Remote Hands Services, along with other connectivity and co-location services, by 5.5%, to partially account for the cumulative effects of inflation on the value to the Exchange of the revenues it earns

through such fees.³ Now, the Exchange proposes to lower the Remote Hands Services fee from its current level, \$158 per hour, to \$151.50 per hour, with the net effect of providing for an overall smaller 1% increase over the original \$150 hourly rate.

The purpose of the proposed change in the Exchange’s Remote Hands Services fee is the same as that which the Exchange expressed when it increased the fee by 5.5% earlier this year. That is, the change would enable the Exchange to maintain and improve its market technology and services. Prior to SR-GEMX-2024-15, the Exchange had not increased its Remote Hands fee since 2017.⁴ However, since 2017, there has been notable inflation. Between 2017 and 2024, the dollar had an average inflation rate of 3.34% per year, producing a cumulative price increase of 25.82%.⁵ Moreover, a more specific and pertinent gauge of inflation – the Producer Price Index (“PPI”) for data processing, hosting and related services, active services pages, and other IT infrastructure provisioning services – increased 16.1% from 2017 to 2024.⁶ An even more specific gauge of inflation – average hourly earnings (“AHE”) growth for Computing Infrastructure – increased 44% for non-managers and 38% for all employees from 2017 to 2024.⁷ Notwithstanding such significant inflation, the Exchange had not increased its Remote Hands

³ The Exchange initially filed this proposed pricing change on March 1, 2024 (SR-GEMX-2024-05). On April 29, 2024, the Exchange withdrew that filing and submitted SR-GEMX-2024-09. On June 27, 2024, the Exchange withdrew and replaced that filing with SR-GEMX-2024-15.

⁴ In 2017, the Exchange synchronized its options for connecting to the Exchange with that of its sister exchanges and adopted uniform colocation services, including the Remote Hands Service. See Securities Exchange Act Release No. 34-81902 (October 19, 2017), 82 FR 49453 (October 25, 2017) (SR-GEMX-2017-48).

⁵ See <https://www.officialdata.org/us/inflation/2017?amount=1> (Last updated February 27, 2024).

⁶ See <https://data.bls.gov/timeseries/PCU5182105182105> (Last updated June 24, 2024).

⁷ See <https://www.bls.gov/web/empsit/ceseeb3a.htm> (Last updated July 5, 2024); <https://www.bls.gov/web/empsit/ceseeb8a.htm> (Last updated July 5, 2024).

Service fees during this time, thereby eroding the value of the revenue it collects through this fee.⁸

The proposed fee represents a decrease in the existing \$158 per hour rate, and a net overall 1% increase from the original \$150 per month fee. The 1% fee increase, resulting in a proposed amended rate of \$151.50 per hour, is far below the rates of inflation, as measured by either the CPI, the PPI, or the AHE since 2017. Although the Exchange believes it would be reasonable to increase the fee by an amount equal to the full rates of inflation, however measured, to reestablish the initial value of the revenues it earns through its fees, the Exchange does not propose to do this. In fact, the Exchange now proposes to recalibrate even its initial 5.5% fee increase, because the Exchange is sensitive to the sticker shock that customers may experience when the Exchange raises rates. Instead, the Exchange proposes only a modest 1% increase over the prior \$150 per month rate, an amount that the Exchange believes to be reasonable on its face as it is significantly less than various measures of inflation discussed above, and even less than the original 5.5% increase.

The Exchange believes that it is reasonable to increase its fee to compensate for inflation because, over time, inflation has degraded the value of each dollar that the Exchange collects in fees, such that the real revenue collected today is considerably less than that same revenue collected in 2017. The Exchange notes that this inflationary effect is a general phenomenon that is independent of any change in the Exchange's costs in providing its goods and services. The Exchange believes that it is reasonable for it to offset, in part, this erosion in the value of the

⁸ Unregulated competitors providing connectivity and co-location services often have annual price increases written into their agreements with customers to account for inflation and rising costs.

revenues it collects. The Exchange notes that other exchanges have filed for comparable or higher increases in certain connectivity-related fees, based in part on similar rationale.⁹

In addition, the Exchange continues to invest in maintaining, improving, and enhancing its connectivity and co-location products, services, and facilities – for the benefit and often at the behest of its customers. Such enhancements include refreshing hardware and expanding the Exchange’s existing co-location facility to offer customers additional space and power. These investments, and the value they provide to customers, far exceed the amount of the proposed net price increase over the prior \$150 per hour rate. It is reasonable and consistent with the Act for the Commission to allow the Exchange to recoup these investments by charging fees, lest the Commission will disincentivize the Exchange to make similar investments in the future – a result that would be detrimental to the Exchange’s competitiveness as well as the interests of market participants and investors.

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 members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

This belief is based on a couple factors. First, the current fee does not properly reflect the value of the service, as fees for the service in question has been static in nominal terms, and

⁹ See, e.g., Securities Exchange Act Release No. 34-100342 (June 14, 2024), 89 FR 52132 (June 21, 2024) (SR-CboeBYX-2024-021).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

therefore falling in real terms due to inflation. Second, exchange fees are constrained by the fact that market participants can choose among 17 different venues for options trading, and therefore no single venue can charge excessive fees for its products without losing customers and market share.

Real Exchange Fees Have Fallen

As explained above, prior to SR-GEMX-2024-15, the Exchange had not increased its Remote Hands Service fee since it introduced the fee in 2017. This means that this fee has fallen in real terms due to inflation, which has been notable. Between 2017 and 2024, the dollar had an average inflation rate of 3.34% per year, producing a cumulative price increase of 25.82%.¹² Moreover, a more specific and pertinent gauge of inflation – the Producer Price Index (“PPI”) for data processing, hosting and related services, active services pages, and other IT infrastructure provisioning services – increased 16.1% from 2017 to 2024.¹³ An even more specific gauge of inflation – average hourly earnings (“AHE”) growth for Computing Infrastructure – increased 44% for non-managers and 38% for all employees from 2017 to 2024.¹⁴ Notwithstanding such significant inflation, the Exchange had not increased its connectivity fees until 2024, thereby eroding the value of the revenue it collects through such fee.

The proposed fee represents a decrease from the existing \$158 per hour fee and a 1% overall net increase from the original \$150 per hour fee, which is far below the rates of inflation, as measured by either the CPI, the PPI, or AHE since 2017. Although the Exchange believes it would be reasonable to increase the fee by an amount equal to the full rates of inflation, however

¹² See <https://www.officialdata.org/us/inflation/2017?amount=1> (Last updated February 27, 2024).

¹³ See <https://data.bls.gov/timeseries/PCU5182105182105> (Last updated June 24, 2024).

¹⁴ See <https://www.bls.gov/web/empsit/ceseeb3a.htm> (Last updated July 5, 2024); <https://www.bls.gov/web/empsit/ceseeb8a.htm> (Last updated July 5, 2024).

measured, to reestablish the initial value of the revenues it earns through its fees, the Exchange does not propose to do this. In fact, the Exchange now proposes to recalibrate even its initial 5.5% fee increase, because the Exchange is sensitive to the sticker shock that customers may experience when the Exchange raises rates. Instead, the Exchange proposes only a modest 1% increase over the prior \$150 per month rate, an amount that the Exchange believes to be reasonable on its face as it is significantly less than various measures of inflation discussed above, and even less than the original 5.5% increase.

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In addition, the Exchange continues to invest in maintaining, improving, and enhancing its connectivity and co-location products, services, and facilities – for the benefit and often at the behest of its customers. Such enhancements include refreshing hardware and expanding the Exchange's existing co-location facility to offer customers additional space and power. Again, these investments, and the value they provide to customers, far exceed the amount of the proposed price increase. It is reasonable and consistent with the Act for the Commission to allow the Exchange to recoup these investments by charging fees, lest the Commission will disincentivize the Exchange to make similar investments in the future – a result that would be detrimental to the Exchange's competitiveness as well as the interests of market participants and

investors.

Customers Have a Choice in Trading Venue

Customers face many choices in where to trade options. Market participants will continue to choose trading venues and the method of connectivity based on their specific needs. No broker-dealer is required to become a Member of the Exchange. There is no regulatory requirement that any market participant connect to any one exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one exchange whose membership includes every registered broker-dealer. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of options products within markets which do not require connectivity to the Exchange, such as the Over-the-Counter (OTC) markets.

There are currently 17 exchanges offering options trading services. No single options exchange trades more than 14% of the options market by volume and only one of the 17 options exchanges has a market share over 10 percent.¹⁵ This broad dispersion of market share demonstrates that market participants can and do exercise choice in trading venues. Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers.

¹⁵ See Nasdaq, Options Market Statistics (Last updated January 11, 2024), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

As such, the Exchange must set its fees, including its fees for Remote Hands Services, competitively. If not, customers may move to other venues or reduce use of the Exchange's services. "If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior."¹⁶ Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."¹⁷ Disincentivizing market participants from purchasing Remote Hands Services for Exchange connectivity would only serve to discourage participation on the Exchange. Moreover, if the Exchange charges excessive fees, it may stand to lose not only co-location and connectivity revenues but also other revenues, including revenues associated with the execution of orders.

In summary, the proposal represents an equitable allocation of reasonable dues, fees and other charges because Exchange fees have fallen in real terms and customers have a choice in trading venue and will exercise that choice and trade at another venue if exchange fees are not set competitively.

No Unfair Discrimination

The Exchange believes that the proposed fee change is not unfairly discriminatory because the fee is assessed uniformly across all market participants that voluntarily purchase Remote Hands Services, which are available to all customers.

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.

¹⁶ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 Fed. Reg. 74,770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁷ Id.

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the proposal does not impose any burden on the ability of other exchanges to compete. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative exchanges that they may participate on and direct their order flow, as well as off-exchange venues, where competitive products are available for trading.

Nothing in the proposal burdens intra-market competition (the competition among consumers) because the Exchange's Remote Hands Services are available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase such services can do so on a non-discriminatory basis.

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.¹⁸

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,

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2024-25 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-2024-25. 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-2024-25 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.¹⁹

Sherry R. Haywood,

Assistant Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).