

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100722; File No. SR-GEMX-2024-27)

August 13, 2024

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7, Section 3

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 August 1, 2024, 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 the Exchange's Pricing Schedule at Options 7, Section 3.

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 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 amend the Exchange’s Pricing Schedule at Options 7, Section 3.

Today, as set forth in Options 7, Section 3, the Exchange assesses Market Makers³ and Priority Customers⁴ the below tiered maker/taker pricing for adding/removing liquidity in Penny Symbols.

Market Participant	Maker Rebate: Tier 1	Maker Rebate: Tier 2	Maker Rebate: Tier 3	Maker Rebate: Tier 4	Maker Rebate: Tier 5	Taker Fee: Tier 1	Taker Fee: Tier 2	Taker Fee: Tier 3	Taker Fee: Tier 4	Taker Fee: Tier 5
Market Maker	(\$0.20)	(\$0.25)	(\$0.30)	(\$0.32)	(\$0.41)	\$0.50	\$0.50	\$0.50	\$0.50	\$0.48
Priority Customer	(\$0.25)	(\$0.43)	(\$0.48)	(\$0.51)	(\$0.53)	\$0.41	\$0.41	\$0.41	\$0.41	\$0.41

The Exchange now proposes to assess Market Makers and Priority Customers separate pricing for SPY, QQQ, and IWM in lieu of the maker/taker pricing set forth above for other Penny Symbols. First, the Exchange proposes to pay Market Makers a \$0.41 per contract Maker Rebate in Tiers 1-5 for SPY, QQQ, and IWM (instead of the current Maker Rebates in Tiers 1-5 ranging from \$0.20 to \$0.41 per contract).⁵ Second, the Exchange proposes to assess Priority

³ A "Market Maker" is a market maker as defined in Nasdaq GEMX Options 1, Section 1(a)(21).

⁴ 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).

⁵ See proposed note 15 of Options 7, Section 3.

Customers a \$0.45 per contract Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM (instead of the current \$0.41 per contract Taker Fee in Tiers 1-5).⁶ Third, the Exchange proposes to reduce the new \$0.45 per contract Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM by \$0.02 per contract when the Preferred Market Maker⁷ transacts against a Priority Customer Order directed to that Preferred Market Maker for execution.⁸

The Exchange will set forth the above changes in proposed notes 15 and 17 of Options 7, Section 3. Proposed note 15 will provide: “Market Maker Tier 1 through Tier 5 Maker Rebates in Penny Symbols will be (\$0.41) per contract for the following option symbols: SPY, QQQ and IWM. Priority Customer Tier 1 through Tier 5 Taker Fees in Penny Symbols will be \$0.45 per contract for the following option symbols: SPY, QQQ and IWM.” Proposed note 17 will provide: “Priority Customer Tier 1 through Tier 5 Taker Fees in SPY, QQQ, and IWM set forth in note 15 above will be decreased by \$0.02 per contract when the Preferred Market Maker transacts against a Priority Customer Order directed to that Preferred Market Maker for execution.”

⁶ See id.

⁷ Today, an Electronic Access Member may designate a “Preferred Market Maker” on orders it enters into the System. A Preferred Market Maker may be the Primary Market Maker appointed to the options class or any Competitive Market Maker appointed to the options class. Market Makers may be categorized as Preferred Market Makers when such Market Makers execute against a “Preferred Order” directed to them for execution by an Order Flow Provider. An Order Flow Provider means any Member that submits, as agent, orders to the Exchange. The Preferred Market Maker must be quoting at the better of the internal BBO or NBBO at the time the Preferred Order is received in order to receive the Preferred Market Maker allocation described in Options 3, Section 10(c)(1)(C). See Options 2, Section 10. See also Securities Exchange Act Release No. 100612 (July 29, 2024) (SR-GEMX-2024-20) (amending, among other changes that are immediately effective but not yet operative, Options 2, Section 10 that sets forth the aforementioned definitions) .

⁸ See proposed note 17 of Options 7, Section 3.

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's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[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’”¹¹

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

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

¹¹ NetCoalition v. SEC, 615 F.3d 525, 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)).

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

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of seventeen 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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that the proposed changes to the maker/taker pricing in SPY, QQQ, and IWM for Market Makers and Priority Customers in the manner described above are reasonable, equitable and not unfairly discriminatory for the reasons that follow.

The Exchange believes it is reasonable to pay Market Makers a \$0.41 per contract Maker Rebate in Tiers 1-5 for SPY, QQQ, and IWM (instead of the current Maker Rebates in Tiers 1-5 ranging from \$0.20 to \$0.41 per contract) because the proposed changes are intended to encourage Market Makers to add more liquidity in these three symbols. Specifically, the proposal generally provides Market Makers significantly higher Maker Rebates in SPY, QQQ, and IWM than they receive today except for the Tier 5 Maker Rebate, which is currently the highest Maker Rebate in Penny Symbols for Market Makers and will remain the same as today.

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

Accordingly, the Exchange believes that Market Makers will continue to be incentivized to add liquidity in these symbols on the Exchange. Increased liquidity benefits all market participants by deepening the Exchange's liquidity pool and supporting the quality of price discovery.

The Exchange also believes that it is reasonable to assess Priority Customers a \$0.45 per contract Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM (instead of the current \$0.41 per contract Taker Fee in Tiers 1-5). While Priority Customers will be charged higher Taker Fees for SPY, QQQ, and IWM than the Taker Fees currently assessed, the Exchange believes that the increased Taker Fees are appropriate to offset the proposed Maker Market Maker Rebates for SPY, QQQ, and IWM. Furthermore, Priority Customers will continue to be assessed lower Taker Fees in Penny Symbols compared to all other market participants today.¹³

The Exchange believes that reducing the Priority Customer Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM by \$0.02 per contract when the Preferred Market Maker transacts against a Priority Customer Order directed to that Preferred Market Maker for execution is reasonable because the Exchange seeks to incentivize Members to direct more Priority Customer order flow in these symbols to the Exchange. As discussed above, the proposal provides the reduced Taker Fee benefit to the Priority Customer. To the extent the proposal attracts more Priority Customer order flow in SPY, QQQ, and IWM to the Exchange, the Exchange believes that this will benefit all market participants through increased trading opportunities. The Exchange also represents that for orders directed to Preferred Market Makers, Preferred Market Makers are unaware of the identity of the contra-party prior to and at the time of the trade. Furthermore, Options 9, Section 1 (Just and Equitable Principles of Trade) and Options 9, Section 9 (Prevention of the Misuse of

¹³ Specifically, Market Makers and Non-Nasdaq GEMX Market Makers are currently assessed Taker Fees in Penny Symbols ranging from \$0.48 to \$0.50 per contract. In addition, Firm Proprietary / Broker-Dealers and Professional Customers are currently assessed Taker Fees ranging from \$0.49 to \$0.50 per contract. See Options 7, Section 3.

Material Nonpublic Information)¹⁴ are intended to prohibit coordinated actions between Preferred Market Makers and Order Flow Providers,¹⁵ and the Exchange proactively conducts surveillance for, and enforces against, such violations. Finally, of note, a Market Maker must be quoting at the better of the internal BBO or the NBBO at the time the Preferred Order is received to be allocated, as required by Options 2, Section 10.

The Exchange also believes that assessing different pricing for SPY, QQQ and IWM, as compared to other symbols, is reasonable because trading in SPY, QQQ and IWM is different from trading in other symbols in that they are more liquid, have higher volume and competition for executions is more intense.

The Exchange believes that it is equitable and not unfairly discriminatory to provide the proposed Maker Rebate Tiers 1-5 for SPY, QQQ, and IWM to Market Makers because they have different requirements and additional obligations that other market participants do not (such as quoting requirements).¹⁶ As discussed above, the proposed Maker Rebates of \$0.41 per contract are designed to continue to incentivize Market Maker add liquidity activity in SPY, QQQ, and IWM, thereby facilitating tighter spreads and contributing towards a robust, well-balanced market ecosystem, to the benefit of all market participants.

The Exchange further believes that it is equitable and not unfairly discriminatory to assess Priority Customers a \$0.45 per contract Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM because Priority Customers will continue to be assessed lower Taker Fees in Penny Symbols compared to all other market participants today. As such, the Exchange believes that the

¹⁴ GEMX Options 9, Sections 1 and 9 incorporates ISE Options 9, Sections 1 and 9 by reference.

¹⁵ An Order Flow Provider means any Member that submits, as agent, orders to the Exchange. See supra note 7

¹⁶ See Options 2, Section 5.

proposed taker pricing will continue to incentivize Priority Customer order flow in SPY, QQQ, and IWM to the Exchange. An increase in Priority Customer order flow 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.

The Exchange further believes it is equitable and not unfairly discriminatory to reduce the Priority Customer Taker Fee in Tiers 1-5 for SPY, QQQ, and IWM set forth in proposed note 15 by \$0.02 per contract when the Preferred Market Maker transacts against a Priority Customer Order directed to that Preferred Market Maker for execution. Any Member can be an Order Flow Provider (as defined in Options 2, Section 10) and may direct a Priority Customer order to any Market Maker on the Exchange.¹⁷ Furthermore, the proposal seeks to encourage more Priority Customer order flow in SPY, QQQ, and IWM to the Exchange by providing a reduced Taker Fee to Priority Customers in the manner discussed above. An increase in Priority Customer order flow 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.

¹⁷ An Order Flow Provider, by definition, means any Member that submits, as agent, orders to the Exchange. See supra note 7.

In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participants at a competitive disadvantage. The Exchange believes that all of the changes proposed above will incentivize market participants to direct more order flow to the Exchange, to the benefit of all market participants who may interact with this order flow. While some aspects of the proposal apply directly to Market Makers (through the Market Maker Tier 1 through Tier 5 Maker Rebates for SPY, QQQ, and IWM) or Priority Customers (through the Priority Customer Tier 1 through Tier 5 Taker Fees for SPY, QQQ, and IWM; and the reduced Priority Customer Tier 1 through 5 Taker Fees for SPY, QQQ, and IWM when the Preferred Market Maker transacts against a Priority Customer Order directed to that Preferred Market Maker for execution), the Exchange believes that the proposed changes taken together will fortify and encourage activity, especially Market Maker and Priority Customer activity, on the Exchange. As discussed above, all market participants will benefit from any increase in market activity that the proposal effectuates. As it relates to the reduced Taker Fee in SPY, QQQ, and IWM for Priority Customers, any Member can be an Order Flow Provider, and may direct a Priority Customer Order to any Market Maker at any time on an order by order basis.

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 options 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 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.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, 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

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an email to rule-comments@sec.gov. Please include file number SR-GEMX-2024-27 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-2024-27. 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-2024-27 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).