

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101097; File No. SR-GEMX-2024-35)

September 19, 2024

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Codify the Definition of GEMX Open/Close End of Day and Intraday Trade Profile

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 September 6, 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 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 codify the definition of GEMX Open/Close End of Day and Intraday Trade Profile in the GEMX rulebook. This filing also incorporates previously proposed fee changes that: (i) adjusted fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduced fees for 36 months of historical data for current customers; and (iii) allowed unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.

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 codify the definition of GEMX Open/Close Trade Profile in the GEMX rulebook. This filing also incorporates previously proposed fee changes that: (i) adjusted fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduced fees for 36 months of historical data for current customers; and (iii) allowed unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.³

GEMX Open/Close Trade Profile

The GEMX Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical

³ The previously introduced fee proposal was initially filed on July 1, 2024, as SR-GEMX-2024-19. On July 15, 2024, that filing was withdrawn and refiled as SR-GEMX-2024-24. On July 29, 2024, that filing was withdrawn and refiled as SR-GEMX-2024-26. On August 12, 2024, that proposal was withdrawn and replaced with SR-GEMX-2024-28 to incorporate those fees into a filing that codifies the definition of GEMX Open/Close Trade Profile. On August 23, 2024, SR-GEMX-2024-28 was withdrawn and replaced with SR-GEMX-2024-31 to provide additional information. On September 6, 2024, SR-GEMX-2024-31 was withdrawn and replaced with the instant filing to provide further information.

strategies.⁴ This product is designed to provide data to subscribers regarding investor sentiment and trading activity.

The GEMX Open/Close Trade Profile provides aggregate quantity and volume information for trades on the Exchange for all series⁵ during a trading session. Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position, characterized by origin type (Priority Customer,⁶ Broker-Dealer,⁷ Firm Proprietary,⁸ and Professional Customer⁹), and for Priority Customers and Professional Customers, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position, characterized by origin type (Priority Customer, Broker-Dealer, Firm Proprietary, and Professional Customer), and for Priority Customers and Professional Customers, further subdivided by trade size buckets.

GEMX Open/Close Trade Profile End of Day also provides opening buy, closing buy, opening sell and closing sell information, which includes underlying close, option close, and moneyness.

⁴ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

⁵ Every options series trades as a distinct symbol; the terms “series” and “symbol” are therefore synonyms.

⁶ 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). See Options 7, Section 1(c).

⁷ A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. See Options 7 Section 1(c).

⁸ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account. See Options 7 Section 1(c).

⁹ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer. See Options 7 Section 1(c).

End of Day information is available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information is available upon request.

The GEMX Open/Close Trade Profile provides proprietary Exchange trade data and does not include any intraday trade data from any other exchange.¹⁰ The information provided, both in End of Day and Intraday formats, is not a real-time data feed.

GEMX Open/Close Trade Profile is a completely voluntary product in that the Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so.

This information is available to all market participants, including both members and non-members, for all series and symbols in End of Day, Intra-Day, and historical files (upon request).

Trade Profile data includes “Origin Code” (the type of trader participating in the transaction); opening and closing buys and sells;¹¹ trading volume and number of trades categorized by day and series;¹² the degree to which a series is “in” or “out” of the “money”;¹³

¹⁰ The End of Day report includes a field that presents Total Industry Volume for the Series.

¹¹ An opening buy is a transaction that creates or increases a long position and an opening sell is a transaction that creates or increases a short position. A closing buy is a transaction made to close out an existing position. A closing sell is a transaction to reduce or eliminate a long position.

¹² Trading volume is the number of contracts traded; the number of trades is the number of transactions.

¹³ The degree to which a series is “in” or “out” of the “money” is identified according to the following five levels of “moneyness”: (i) “Deep in the Money” means that the strike price of this option is more than 12% lower than the price of the underlying security if it is a call or more than 12% higher if it is a put; (ii) “In the Money” means that the strike price of this option is within the range of 5%-12% lower than the price of the underlying security if it is a call or within the range of 5%-12% higher if it is a put; (iii) “At the Money” means that the strike price of this option is within the range of 5% higher or lower than the price of the underlying security; (iv) “Out of the Money” means that the strike price of this option is within the range of 5%-12% higher than the price of the underlying security if it is a call or 5%-12% lower if it is a put; and (v) “Deep out of the Money” means that the strike price of this option is more than 12% higher than the price of the underlying security if it is a call or more than 12% lower if it is a put.

the number of days to expiration; an indication of the degree to which there is “Open Interest”¹⁴ for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The End of Day file is updated overnight and available for download the following morning.

The Intraday file is captured in “snapshots” taken every 10 minutes throughout the trading day, available to subscribers within 2 minutes of the conclusion of each period. Subscribers receive the first calculation at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:39 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, continuing over the course of the trading day.

The End of Day subscription is available for \$500 per month. The Intraday subscription is available for \$1,000 per month. These fees were set in 2017.¹⁵

The GEMX Open/Close Trade Profile is also available as an historical database available upon request.¹⁶ This data is intended to enhance a purchaser’s ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies. The historical database provides the same fields of information available for the Intraday and End of Day products, respectively.

¹⁴ “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

¹⁵ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

¹⁶ See Securities Exchange Act Release No. 80722 (May 18, 2017), 82 FR 23891 (May 24, 2017) (SR-GEMX-2017-13) (establishing fees for historical information on GEMX Open/Close Trade Profile).

End of Day data is available for \$400 per request per month. Intraday information is available in 10-minute increments for \$750 per request per month. Historical data is available starting in August 2013.

Trade Profile is designed to enhance the ability of customers to understand market sentiment on the Exchange and to create and test trading models and analytical strategies useful in both options and equities markets. It is not necessary to execute a trade, but it supplies the customer with information about underlying market trends designed to improve the quality of that customer's investment decisions. Customers can, and often do, elect to forego this information.

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from the Nasdaq Phlx LLC ("Phlx"),¹⁷ Nasdaq Options Market ("NOM"),¹⁸ Nasdaq ISE LLC ("ISE"),¹⁹ Cboe Options Exchange ("Cboe"),²⁰ NYSE American Options ("NYSE American"),²¹ NYSE Arca Options

¹⁷ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

¹⁸ See Nasdaq Stock Market Rules, Options 7, Section 4 (Nasdaq Options Market Data Distributor Fees).

¹⁹ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

²⁰ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price, and transaction type).

²¹ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

(“NYSE Arca”),²² BOX Options Market LLC (“BOX”),²³ MIAX Pearl Options Exchange (“Pearl”),²⁴ and others. In general, the relative value of these products depends on the volume of transactions included; the greater the volume of transactions, the greater the value of the data. The current purchasers of Trade Profile are investment banks, market makers, asset managers and other buy-side investors.

Proposed Changes

Definition of GEMX Open/Close Trade Profile

The Exchange proposes to codify the definition of GEMX Open/Close Trade Profile. Nothing in this codification is intended to change the product in any way, but rather is intended to describe the product exactly as it exists. Specifically, the Exchange proposes the following definition:

GEMX Open/Close Trade Profile provides aggregate quantity and volume information for trades on the Exchange for all series during a trading session. Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position, characterized by origin type (Priority Customer, Broker-Dealer, Firm Proprietary, and Professional Customer), and for Priority Customers and Professional Customers, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position, characterized by origin type (Priority Customer, Broker-Dealer, Firm Proprietary, and Professional Customer), and for Priority Customers and Professional Customers, further subdivided by trade size buckets.

²² See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

²³ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

²⁴ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

GEMX Open/Close Trade Profile End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, underlying close, option close, and moneyness.

End of Day information will be available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information will be available upon request.

The purpose of the proposed change is to add clarity and specificity to the GEMX rulebook.

Previously Introduced Fee Changes

Fee Changes for End of Day and Intraday Products

The Exchange proposes to increase the fee for the End of Day product from \$500 to \$575, and the Intraday Product from \$1,000 to \$1,500.

In addition, the Exchange proposes to insert a comma after the phrase “or the Intraday Product for the current month” into the definition of Current Distributor. The revised sentence will read as follows:

A “Current Distributor” is any firm that purchases either the End of Day Product for the current month, or the Intraday Product for the current month, in the same month that the 36 months of historical End of Day or Intraday data is ordered.

The change is designed to clarify that the phrase “the same month that the 36 months of historical End of Day or Intraday data is ordered” applies to both firms that purchase End of Day data in the current month and firms that purchase Intraday data for the current month. The clarification will not change how the fee is charged.

Discount for Historical Data

The Exchange proposes to offer a discount for historical data for Current Intraday or End of Day Distributors.²⁵ Historical data is currently available for \$400 per request per month for End of Day information, and \$750 per request per month for Intraday information. The Exchange proposes to offer the most recent 36 months of historical data for current end of day product distributors for \$4,800, and the most recent 36 months of historical data for current Intraday product distributors for \$9,000.

These changes would substantially reduce fees for historical data. Under the current fee schedule, 36 months of end of day data at \$400 per month would cost \$14,400. The proposal would reduce this to \$4,800. Thirty-six months of intraday data would cost \$27,000 at the current rate of \$750 per month. The proposal would reduce this to \$9,000. Customers would be able to purchase historical information that exceeds 36 months at the current rates.

The historical data will continue to provide the same categories of information available for current subscribers under the new proposal.

Eligibility for the discount will depend on the type of current subscription. A current purchaser of End of Day data would be eligible for the historical End of Day product at the reduced rate. A current purchaser of the Intraday product would similarly be able to purchase the historical Intraday product at the reduced rate. A purchaser of both the current End of Day and Intraday products would be entitled to purchase both types of history at the reduced rate.

The 36-month period will be based on the date of purchase of the current subscription by a Current Distributor. For example, a customer that buys the current End of Day product for the

²⁵ The Exchange proposes to define “Current Distributor” as any firm that purchases either the End of Day Product for the current month, or the Intraday Product for the current month in the same month that the 36 months of historical End of Day or Intraday data is ordered.

first time in July 2024 would also be able to purchase historical End of Day data for the period July 2021 through July 2024 (inclusive) at the discounted rate. Similarly, a customer with an existing End of Day subscription that is current in July 2024 would be able to purchase the historical End of Day data from July 2021 through July 2024 at the discounted rate. The same reasoning would apply to Intraday customers.²⁶

The fees for historical data are linked to the current product because effective historical testing requires a comparison of similar products. Effective testing of the End of Day product, for example, requires End of Day historical data, and the same would hold true for Intraday data.

Historical data is useful in analyzing option trade and volume data, evaluating historical trends in the trading activity of a particular option series, and creating and testing trading models and analytical strategies, and is often purchased concurrently with a new subscription to GEMX Open/Close Trade Profile. Many customers use historical data to test their strategies and models, and our discussions with current and former customers and experience indicate that 36 months of data is sufficient for most customer needs, and is an effective baseline for review.

External Distribution of Derived Data

The Exchange proposes to offer a license for the unlimited external distribution of Derived Data from GEMX Trade Profile for \$3,000 per month. Derived Data is “any Information generated in whole or in part from Exchange Information such that the Information

²⁶ A customer may use the proposed historical data discount more than once. For example, a Current Distributor that purchases 36 months of historical data at a discount, but later terminates that subscription, would be eligible to purchase another 36 months of historical data (based on the date of purchase) upon renewing that subscription. (Current Distributors that never terminate would have no need for a second purchase, as they would already possess the most recent months of historical data.).

generated cannot be reverse engineered to recreate Exchange Information,²⁷ or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.”

Fees for external distribution of Derived Data from GEMX Trade Profile are in addition to fees for the End of Day product or the Intraday product, or both, as applicable.

This is a new license; external distribution of Derived Data is not currently permitted. The proposal, based on a similar license offered by the Phlx exchange,²⁸ will allow the external distribution of analytic products derived from GEMX Trade Profile to the general investing public. A similar product is also being proposed for the Nasdaq Options Market and the ISE Exchange.

Experience with Phlx indicates that this license provides an effective mechanism for market data vendors to identify, develop, and sell derived market data products, such as sentiment indicators, harnessing the power of the competitive marketplace to promote innovation. The Exchange expects that this product will have the greatest utility for the general investing public.

2. Statutory Basis

The Exchange believes that its proposal to codify the definition of GEMX Open/Close Trade Profile is consistent with Section 6(b) of the Act,²⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁰ in particular, in that it is designed to promote just and equitable

²⁷ “Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) Eligible securities or other financial instruments, markets, products, vehicles, indicators, or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

²⁸ See Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58).

²⁹ 15 U.S.C. 78f(b).

³⁰ 15 U.S.C. 78f(b)(5).

principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Adding the definition of GEMX Open/Close Trade Profile will provide additional clarity and specificity to the GEMX rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product exactly as it exists today. Providing additional clarity about an exchange product will help investors make better informed decisions about GEMX Open/Close Trade Profile, and therefore will help protect investors and promote the public interest.

Similarly, clarifying the definition of Current Distributor will also add specificity to the rulebook without changing the underlying fees. This additional clarity will help investors make better informed decisions about GEMX Open/Close Trade Profile, and thereby help protect investors and promote the public interest.

The Exchange also believes that its proposal to change fees is consistent with Section 6(b) of the Act,³¹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,³² 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.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade outline products offered by multiple exchanges are substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are

³¹ 15 U.S.C. 78f(b).

³² 15 U.S.C. 78f(b)(4) and (5).

comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from Phlx,³³ ISE,³⁴ GEMX,³⁵ Cboe,³⁶ NYSE American,³⁷ NYSE Arca,³⁸ BOX,³⁹ MIAX Pearl,⁴⁰ and others.

Trade outline products offer the same categories of data through end of day or intraday reports. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of

³³ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

³⁴ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

³⁵ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intraday Trade Profile)

³⁶ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

³⁷ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³⁸ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³⁹ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

⁴⁰ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

the data. Customers can choose not to purchase the trade outline product of one exchange and substitute it for that of another exchange.

Customers can also choose not to purchase a trade outline product at all. Trade outline products are designed to help investors understand underlying market trends to improve the quality of investment decisions, but are not necessary to execute a trade. Customers can, and do, choose to forego the information from Trade Profile or any of its competitor products when making a trade.

Nasdaq and its affiliates have observed that customers purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing returns. As a result, all exchanges are limited in what they will be able to charge for Trade Profile.

As the Commission and courts⁴¹ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”⁴² 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.”⁴³ The Commission and the courts have repeatedly

⁴¹ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC 615 F.3d 525 (D.C. Cir. 2010). upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535. (quoting H.R. Rep. No. 94-229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” Id. (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74771 (December 9, 2008) (SR-NYSEArca-2006-21)).

⁴² See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

⁴³ See id.

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.”⁴⁴ Trade Profile is in direct competition with multiple exchanges that offer similar products in end of day and intraday formats.⁴⁵

The license to allow the external distribution of Derived Data, like the purchase of the end of day and intraday licenses, is also subject to competition. Any exchange that wishes to allow distribution of a Derived Data product based on options trading information would be able to do so with an immediately effective fee filing similar to this proposal.

Moreover, as explained above, the proposal is designed to promote the dissemination of a variety of analytical insights—generally used only by investment banks, market makers, asset managers and other buy-side investors—to the general investing public by creating an incentive for market data vendors to identify, develop, and sell such indicators. As such, the proposal will spur competition among not only exchanges, but vendors as well.

The discounted fees for historical data, like the purchase of the end of day, intraday and Derived Data licenses, is also subject to competition. Any exchange that wishes to provide

⁴⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁴⁵ These substitute products include NOTO, ISE Trade Profile, GEMX Trade Profile data; open-close data from Cboe C1, C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

discounts for historical data would be able to do so with an immediately effective fee filing in response.

Comparability of Proposed Fees

The proposed fees are comparable to the fees charged by similarly situated exchanges.

As explained above, the value of Trade Profile is determined in part by the number of underlying transactions reflected in the data. GEMX has a market share comparable to Cboe C2 and MIAX Emerald, at approximately 3% to 4% during the second quarter of 2024.⁴⁶ For intraday products, MIAX Emerald charges \$2,000⁴⁷ and Cboe C2 charges \$1,000.⁴⁸ The proposed fee of \$1,500 is within that range. For End of Day products, MIAX Emerald charges \$600,⁴⁹ and Cboe C2 charges \$500.⁵⁰ The proposed fees of \$575 are within the range of fees charged by these exchanges.

Nasdaq is not aware of another exchange that provides a similar discount for historical data other than its own affiliates. The Phlx exchange, which is affiliated with Nasdaq, offers the most recent 36 months of historical End of Day data to Current Distributors for \$6,000, and the most recent 36 months of Intraday data for \$12,000. The proposed GEMX fees of \$4,800 for 36 months of historical End of Day data and \$9,000 for 36 months of Intraday data are reasonable in

⁴⁶ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>

⁴⁷ See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁴⁸ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

⁴⁹ See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁵⁰ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

comparison to Phlx because GEMX has a much lower market share (approximately 9% for Phlx and about 3% for GEMX).

If the Exchange is incorrect in its assessment, current and prospective customers will elect not to purchase Trade Profile.

As noted above, clarifying the definition of Current Distributor will not change fees, and therefore will not impact the equitable allocation of reasonable dues, fees and other charges.

The Proposal Does Not Permit Unfair Discrimination

Nothing in the proposal treats any category of market participant any differently from any other category of market participant. On the contrary, the proposal expands distribution of Trade Profile beyond investment banks, market makers, asset managers and other buy-side investors to market data vendors and the general investing public. Allowing the distribution of Derived Data to the general investing public will broaden the availability of such information while not treating any current recipient of the product differently in any way. The new fee structure, which modifies fees to reflect current market value and offers historical data at a discount, applies equally to all current and potential distributors. Trade Profile is available to all market participants, including members and non-members, and all market participants receive the same information in the Trade Profile data feed.

With respect to the specific fee changes, it is reasonable and not unfair discrimination to charge an external distributor of Derived Data a \$3,000 licensing fee. Vendors will ordinarily charge a fee to their downstream customers for this service, and, even if the vendor is not charging a specific fee for this particular service, derived data products from the Exchange will be part of a suite of offerings that generally promote sales. External distribution is fundamentally different than internal use, in that the former generates revenue from external sales while the

latter does not. It is not unfair discrimination to charge a licensing fee for a product that generates downstream revenue.

Nor is it unfair discrimination to allow the redistribution of Derived Data, but not the underlying information, to the general investing public. As explained above, neither exchanges nor vendors ordinarily allow redistribution of analytic products—such products are typically designed solely for the use of direct customers, not for redistribution to the customers of customers in the manner of a data feed. Allowing the redistribution of Derived Data provides an incentive for vendors to innovate with new compelling and varied analytic products for the general investing public that will provide access to market sentiment insights that are now generally used by sophisticated investors. This proposal is therefore not unfair discrimination, but rather allows for more equitable access to market sentiment information for the general investing public.

It is also not unfair discrimination to provide a discount for 36 months of historical data to Current Distributors, but not former distributors or firms that have never purchased the product. Any firm would be able to become a Current Distributor at any time by subscribing to Trade Profile, and would be able to cancel the subscription at any time after receiving the 36 months of historical data for the proposed discounted fee. More specifically, a firm that is not a Current Distributor may obtain access to the 36 months of historical data at a discount by becoming a Current Distributor for a limited time and then terminating the subscription.

It is not unfair discrimination to limit the historical data discount to Current Distributors. Historical information is generally used by Current Distributors to test their strategies and trading models, and Current Distributors are therefore in the best position to benefit from the

historical data. Outside of the 36 month period, all firms will have the opportunity to purchase historical data on an ad hoc basis.

For all of these reasons, the proposal does not permit unfair discrimination.

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.

Adding the definition of GEMX Open/Close Trade Profile will promote competition by helping investors make better informed decisions about GEMX Open/Close Trade Profile.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations).

As discussed above, Trade Profile is subject to direct competition from other options exchanges that offer substitutes. Any of these exchanges can replicate this proposal in full or in part, and nothing in the proposal would interfere with the ability of any exchange to do so.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Profile is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase these products can do so on a non-discriminatory basis. Indeed, the proposal will foster competition by expanding dissemination of data to vendors and the general investing public, and by encouraging more market participants to use Trade Profile data to help inform their investments strategies and analytic models.

Offering the 36 months of historical data to Current Distributors, but not former distributors or firms that have never purchased the product, will not burden competition because non-subscribers are free to purchase a current subscription. Moreover, a firm that is not a Current Distributor may become a Current Distributor and then cancel the product after receiving the historical discount. As such, firms that are not Current Distributors will have an opportunity to pay the same fees for the most recent 36 months of historical data as Current Distributors. Outside of the 36 month period, all firms will have the opportunity to purchase historical data on an ad hoc basis.

Adding language to clarify the definition of Current Distributor will not change fees, and will promote competition by better informing investors.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition;

and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁵¹ and Rule 19b-4(f)(6)⁵² thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)⁵³ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁵⁴ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that adding the definition of GEMX Open/Close Trade Profile will provide additional clarity and specificity to the GEMX rulebook, and nothing in the clarification changes the product or the way it functions, but rather describes the product exactly as it exists today. The Exchange also states that the fees included in this filing have been in effect since July 1, 2024, and waiver of the operative delay will allow application of those fees to continue uninterrupted. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of

⁵¹ 15 U.S.C. 78s(b)(3)(A).

⁵² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁵³ 17 CFR 240.19b-4(f)(6).

⁵⁴ 17 CFR 240.19b-4(f)(6)(iii).

investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.⁵⁵

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 necessary or appropriate in the public interest, for the protection of investors, or 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-2024-35 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.

⁵⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to file number SR-GEMX-2024-35. 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-2024-35 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.⁵⁶

Vanessa A. Countryman,
Secretary.

⁵⁶ 17 CFR 200.30-3(a)(12).