



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98924; File No. SR-GEMX-2023-14]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX Options 7, Section 4 to Amend Route-Out Fees

November 14, 2023.

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 November 1, 2023, Nasdaq GEMX, LLC (“GEMX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange’s Pricing Schedule at Options 7, Section 4, Other Options Fees and Rebates.

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 4, Other Options Fees and Rebates. Specifically, the Exchange proposes to amend Part A, Route-Out Fees. The Routing Fees apply to executions of orders that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan.

Today, the Exchange assesses Market Makers,³ Non-Nasdaq GEMX Market Makers (FarMM),⁴ Firm Proprietary⁵/Broker-Dealers⁶ and Professional Customers⁷ a \$0.55 per contract Penny Symbol Routing Fee and a \$1.09 Non-Penny Symbol Routing Fee to route to another options exchange. Additionally, today, the Exchange assess Priority Customers⁸ a \$0.50 per contract Penny Symbol Routing Fee and a \$0.90 Non-Penny Symbol Routing Fee to route to another options exchange.

The Exchange proposes to instead assess a \$0.60 per contract Penny Symbol Routing Fee and a \$1.20 Non-Penny Symbol Routing Fee to route to another options exchange regardless of

³ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

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. See Options 7, Section 1(c).

⁵ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account. See Options 7, Section 1(c).

⁶ 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).

⁷ 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).

⁸ 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). Unless otherwise noted, when used in the Pricing Schedule the term “Priority Customer” includes “Retail”. See Options 7, Section 1(c).

the capacity of the order. The purpose of the proposed Routing Fees is to recoup costs incurred by the Exchange when routing orders to other options exchanges on behalf of options Members. In determining its proposed Routing Fees, the Exchange took into account transaction fees assessed by other options exchanges, the Exchange's projected clearing costs, and the projected administrative, regulatory, and technical costs associated with routing orders to other options exchanges. The Exchange will continue to use its affiliated broker-dealer, Nasdaq Execution Services, to route orders to other options exchanges. Routing services offered by the Exchange are completely optional and market participants can readily select between various providers of routing services, including other exchanges and broker-dealers. Also, the Exchange notes that market participants may elect to mark their orders as "Do Not Route" to avoid any Routing Fees. The proposed structure for Routing Fees is similar to another options market.⁹ The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the costs it incurs to route orders to away markets after taking into account the other costs associated with routing orders to other options exchanges.

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.

The Exchange's proposed changes to its Routing Fees are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for

⁹ See MEMX's Options Fee Schedule at <https://info.memxtrading.com/us-options-trading-resources/us-options-fee-schedule/>. MEMX assesses a \$0.60 per contract Penny Symbol routing fee and a \$1.20 Non-Penny Symbol routing fee.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

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’”¹²

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.”¹³

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.

¹² 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)).

¹³ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange's proposal to amend its Routing Fees such that all Members would pay a \$0.60 per contract Penny Symbol Routing Fee and a \$1.20 Non-Penny Symbol Routing Fee to route to another options exchange, regardless of capacity, is reasonable because the proposed Routing Fees would enable the Exchange to recover the costs it incurs to route orders to away markets after taking into account the other costs associated with routing orders to other options exchanges. Routing services offered by the Exchange are completely optional and market participants can readily select between various providers of routing services, including other exchanges and broker-dealers. Also, the Exchange notes that market participants may elect to mark their orders as "Do Not Route" to avoid any Routing Fees. The proposed structure for Routing Fees is similar to another options market.¹⁴

The Exchange's proposal to amend its Routing Fees such that all Members would pay a \$0.60 per contract Penny Symbol Routing Fee and a \$1.20 Non-Penny Symbol Routing Fee, regardless of capacity, to route to another options exchange is equitable and not unfairly discriminatory because these uniform Routing Fees will apply equally to all options Members.

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 intra-market competition, the Exchange's proposal to amend its Routing Fees such that all Members would pay a \$0.60 per contract Penny Symbol Routing Fee and a \$1.20 Non-Penny Symbol Routing Fee, regardless of capacity, to route to another options exchange does not impose an undue burden on competition because these uniform Routing Fees will apply equally to all options Members.

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

¹⁴ See MEMX's Options Fee Schedule at <https://info.memxtrading.com/us-options-trading-resources/us-options-fee-schedule/>. MEMX assesses a \$0.60 per contract Penny Symbol routing fee and a \$1.20 Non-Penny Symbol routing fee.

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.

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 Act¹⁵ and Rule 19b-4(f)(2)¹⁶ 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 (<https://www.sec.gov/rules/sro.shtml>); or

¹⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁶ 17 CFR 240.19b-4(f)(2).

- Send an email to rule-comments@sec.gov. Please include file number SR-GEMX-2023-14 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-2023-14. 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-2023-14 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.¹⁷

¹⁷ 17 CFR 200.30-3(a)(12).

Sherry R. Haywood,

Assistant Secretary.

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