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 (*http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2023–009, and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–03487 Filed 2–17–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–96918; File No. SR–GEMX–2023–03]**

## Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend GEMX Pricing Schedule at Options 7, Section 3 To Add a New Priority Customer Maker Rebate

February 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 February 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, 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 GEMX 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 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 to introduce incentives for Members to add liquidity in Priority Customer[3] orders and qualify for the Exchange's Market Access and Routing Subsidy (''MARS'') program.

Background

Today, Members that add liquidity in Priority Customer orders are currently eligible for tiered Priority Customer Maker Rebates of $0.25 (Tier 1), $0.40 (Tier 2), $0.48 (Tier 3), $0.51 (Tier 4), and $0.53 (Tier 5) in Penny Symbols. In Non-Penny Symbols (excluding Index Options),[4] the Priority Customer Maker Rebates are $0.75 (Tier 1), $0.80 (Tier 2), $0.85 (Tier 3), $0.90 (Tier 4), and $1.05 (Tier 5) in Non-Penny Symbols. The foregoing rebates are paid per the highest tier achieved below.

Qualifying Tier Thresholds

TABLE 1

| Tier | Percent of customer total consolidated volume | Priority customer maker % of customer total consolidated volume |
|---|---|---|
| Tier 1 .. | Executes less than 0.65% of Customer Total Consolidated Volume. | Executes Priority Customer Maker volume of less than 0.10% of Customer Total Consolidated Volume. |
| Tier 2 .. | Executes 0.65% to less than 1.5% of Customer Total Consolidated Volume. | Executes Priority Customer Maker volume of 0.10% to less than 0.65% of Customer Total Consolidated Volume. |
| Tier 3 .. | Executes 1.5% to less than 2.25% of Customer Total Consolidated Volume. | Executes Priority Customer Maker volume of 0.65% to less than 1.05% of Customer Total Consolidated Volume. |
| Tier 4 .. | Executes 2.25% to less than 2.50% of Customer Total Consolidated Volume. | Executes Priority Customer Maker volume of 1.05% to less than 1.20% of Customer Total Consolidated Volume. |
| Tier 5 .. | Executes 2.5% or greater of Customer Total Consolidated Volume | Executes Priority Customer Maker volume of 1.20% or greater of Customer Total Consolidated Volume. |

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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).

[4] Index Options fees are set forth separately in Options 7, Section 3 and apply only to NDX executions.

- For purposes of measuring Total Affiliated Member or Affiliated Entity % of Customer Total Consolidated Volume, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.
- The highest tier threshold attained above applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants.
- All eligible volume from Affiliated Members or an Affiliated Entity will be aggregated in determining applicable tiers for each of the Qualifying Tier Thresholds above in Table 1.
- The Total Affiliated Member or Affiliated Entity % of Customer Total Consolidated Volume category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms.
- The Priority Customer Maker % of Customer Total Consolidated Volume category includes all Priority Customer volume that adds liquidity in all symbols.

In addition, GEMX currently offers a MARS program under Options 7, Section 4.B whereby the Exchange pays a subsidy to Members that provide certain order routing functionalities to other Members and/or use such functionalities themselves. Generally, under MARS, the Exchange pays any participating Members to subsidize their costs of providing routing services to route orders to GEMX. The purpose of this program is to attract higher volumes of equity and ETF options to GEMX from non-GEMX market participants as well as from GEMX Members.

To qualify for MARS, Members must have System Eligibility.[5] Participants that have System Eligibility and have routed and executed the requisite number of Eligible Contracts[6] daily in a month (''Average Daily Volume'' or ''ADV'') that add liquidity on GEMX are entitled to tiered MARS Payments, which are currently paid per the highest tier achieved below.[7]

| Tiers | Average daily volume (''ADV'') | MARS payment |
|---|---|---|
| 1 | 10,000 | $0.08 |
| 2 | 15,000 | 0.11 |
| 3 | 20,000 | 0.14 |

Proposal

The Exchange now proposes in note 13 of Options 7, Section 3 to introduce two new incentives for Members who qualify for MARS and add liquidity in Priority Customer orders. First, Members who execute Priority Customer Maker volume of 0.04% or more of Customer Total Consolidated Volume in a given month and qualify for MARS will be eligible for a Priority Customer Maker Rebate of ($0.43) per contract in Penny Symbols and a Priority Customer Maker Rebate of ($0.90) per contract in Non-Penny Symbols. Second, Members who execute Priority Customer Maker volume of 0.07% or more of Customer Total Consolidated Volume in a given month and qualify for MARS will be eligible for a Priority Customer Maker Rebate of ($0.48) per contract in Penny Symbols and a Priority Customer Maker Rebate of ($1.00) per contract in Non-Penny Symbols. Priority Customer orders that qualify for this note 13 incentive and qualify for the tiered Priority Customer Maker Rebates described above will receive the greater of the note 13 incentive or the applicable tiered Priority Customer Maker Rebate, but not both. The purpose of the proposed note 13 incentive is to attract additional order flow to GEMX by encouraging Members to qualify for MARS and increase their liquidity adding activity in Priority Customer orders on GEMX.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] 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 Pricing Schedule 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'. . . .''[10]

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.''[11]

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

[5] Specifically, a Member's routing system (hereinafter ''System'') would be required to: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including GEMX; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with GEMX's API to access current GEMX match engine functionality. Further, the Member's System would also need to cause GEMX to be the one of the top four default destination exchanges for (a) individually executed marketable orders if GEMX is at the national best bid or offer (''NBBO''), regardless of size or time or (b) orders that establish a new NBBO on GEMX's Order Book, but allow any user to manually override GEMX as a default destination on an order-by-order basis. Any Member would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies GEMX that it appears to be robust and reliable. The Member remains solely responsible for implementing and operating its System.

[6] For the purpose of qualifying for the MARS Payment, Eligible Contracts include the following: Non-Nasdaq GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer Orders that are executed. Eligible Contracts do not include qualified contingent cross or ''QCC'' Orders or Price Improvement Mechanism or ''PIM'' Orders. Options overlying NDX are not considered Eligible Contracts.

[7] The specified MARS Payment will be paid on all executed Eligible Contracts that add liquidity, which are routed to GEMX through a participating GEMX Member's System and meet the requisite Eligible Contracts ADV. No payment will be made with respect to orders that are routed to GEMX, but not executed.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *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)).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

Exchange is only one of sixteen 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 its proposal to add the new incentives in note 13 is a reasonable attempt by the Exchange to attract additional liquidity, particularly in Priority Customer orders that add liquidity. With this proposal, Members would have the opportunity to receive rebates of $0.43 (Penny Symbols) and $0.90 (Non-Penny Symbols) if they execute Priority Customer Maker volume of 0.04% or more of Customer Total Consolidated Volume in a given month and qualify for MARS. Additionally, Members would have the opportunity to receive higher rebates of $0.48 (Penny Symbols) and $1.00 (Non-Penny Symbols) if they execute Priority Customer Maker volume of 0.07% or more of Customer Total Consolidated Volume in a given month and qualify for MARS. The Exchange believes that this will encourage liquidity adding activity in Priority Customer orders to earn the note 13 incentives. The proposal will also incentivize Members to qualify for the MARS program, which is designed to attract higher volumes of equity and ETF options volume to the Exchange. As discussed above, Members must have System Eligibility to qualify for MARS, which imposes various requirements for Members to maintain their routing systems, including the requirement that GEMX be the one of the top four default destination exchanges on the Member's routing system for execution for orders that meet the specified criteria. If more Members seek to qualify for MARS, the proposal will bring higher volumes of orders to GEMX, which will enhance market quality by offering greater price discovery and increased opportunities to trade, which benefits all market participants. The Exchange also notes that the proposed qualifications in new note 13 are similar to the existing rebate qualifications on its affiliate, The Nasdaq Options Market (''NOM'').[12]

The Exchange also believes that it is reasonable to offer Members whose Priority Customer orders qualify for the new note 13 incentive and also qualify for the current tiered Priority Customer Maker Rebates described in Options 7, Section 3 the greater of the note 13 incentive or the applicable tiered Priority Customer Maker Rebate because Members will be able to receive the greater of the rebates for which they qualify under this proposal.

The Exchange believes that the proposed note 13 incentives described above are equitable and not unfairly discriminatory because the Exchange will uniformly apply the changes to all qualifying Members. All Members may qualify for MARS provided they have requisite System Eligibility. Furthermore, the Exchange believes it is equitable and not unfairly discriminatory to pay the proposed note 13 incentives to eligible Priority Customer liquidity adding orders. Priority Customer liquidity 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. In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. As discuss above, while the Exchange's proposal provides incentives for certain order flow and activity on the Exchange (*i.e.,* Priority Customer liquidity adding activity), the proposed changes are ultimately aimed at attracting greater liquidity to the Exchange, which benefits all market participants in the quality of order interaction.

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.

The Exchange's proposed note 13 incentives are pro-competitive as the Exchange intends for the changes to increase liquidity addition and activity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to existing and prospective market participants. 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.[13] 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:

[12] Today, NOM offers Customer and Professional Rebates to Add Liquidity in Penny Symbols Tiers 1–6. NOM Participants can qualify for the Tier 3 rebate by adding Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols above 0.05% of total industry customer equity and ETF option ADV contracts per day in a month and qualifying for MARS. *See* NOM Options 7, Section 2(1), note 1.

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

*Electronic Comments*

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–GEMX–2023–03 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–2023–03. 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 (*http://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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–GEMX–2023–03 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Sherry R. Haywood,**

*Assistant Secretary.*

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[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–96922; File No. SR–NYSEAMER–2023–12]**

## Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend Rule 7.19E Pertaining to Pre-Trade Risk Controls

February 14, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 9, 2023, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''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 Rule 7.19E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those 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 parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 7.19E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on November 17, 2022 to make this change immediately effective and that filing was published for comment on December 5, 2022.[4] In light of a comment letter dated January 5, 2023,[5] the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist ETP Holders' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19E (Pre-Trade Risk Controls),[6] which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms[7] could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit[8] (collectively, the ''2020 Risk Controls'').

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,[9]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 96403 (November 29, 2022), 87 FR 74459 (December 5, 2022) (SR–NYSEAMER–2022–53).

[5] *See* Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. (''HPR Letter'') dated January 5, 2023, available at *https://www.sec.gov/comments/sr-nyseamer-2022-53/srnyseamer202253-20154615-322842.pdf.* HPR is a provider of (among other things) non-exchange based risk controls solutions.

[6] *See* Securities Exchange Act Release No. 88878 (May 14, 2020), 85 FR 30770 (May 20, 2020) (SR–NYSEAMER–2020–38).

[7] The terms ''Entering Firm'' and ''Clearing Firm'' are defined in Rule 7.19E.

[8] The terms ''Gross Credit Risk Limit,'' ''Single Order Maximum Notional Value Risk Limit, and ''Single Order Maximum Quantity Risk Limit'' are defined in Rule 7.19E.

[9] *See* Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR–BatsBYX–2017–07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR–BatsEDGA–2017–07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR–BatsEDGX–2017–16) (same).