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Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2017 - * 23
Amendment No. (req. for Amendments *)

Filing by Nasdaq GEMX, LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * ☑ Amendment * ☐ Withdrawal ☐

Section 19(b)(2) * ☐ Section 19(b)(3)(A) * ☑ Section 19(b)(3)(B) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☑ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐ Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposal to amend the Exchange Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 - 4 of the Total Affiliated Member ADV for purposes of calculating a member fees and rebates for purposes of Section I.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Andrew Last Name * Madar

Title * Senior Associate General Counsel

E-mail * Andrew.Madar@nasdaq.com

Telephone * (301) 978-8420 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 06/01/2017

By Edward S. Knight

(Name *)

(Title *)

Executive Vice President and General Counsel

edward.knight@nasdaq.com

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information * Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq GEMX, LLC ("GEMX" or "Exchange"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposal to amend the Exchange's Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member's fees and rebates for purposes of Section I, as described further below.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the "Board") on August 15, 2016. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Andrew Madar
Senior Associate General Counsel
Nasdaq, Inc.
301-978-8420

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

2 17 CFR 240.19b-4.

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

a. Purpose

The purpose of the proposed rule change is to amend the Exchange's Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member's fees and rebates for purposes of Section I.

The Exchange currently uses volume-based tiers, referred to as the Total Affiliated Member ADV, to assess the level of taker fees and maker rebates applicable to members. These tiers apply to both Penny Symbols and SPY, and to Non-Penny Symbols (excluding index options). These tiers apply to all different categories of market participants set forth in Section I, such as Market Makers, Firm Proprietary / Broker-Dealer, and Priority Customers.[3] The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the Price Improvement Mechanism ("PIM"), Facilitation, Solicitation, and Qualified Contingent Cross ("QCC") mechanisms. All eligible volume from affiliated members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the members as reflected on each member's Form BD, Schedule A.

The Exchange currently uses numeric thresholds for the purpose of determining a member's eligibility for Tiers 1-4. Currently, a member would qualify for Tier 1 if its

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3 The Exchange also uses a separate set of tiers to determine the amount of a Priority Customer's maker rebate. These volume requirements of these tiers are a subset of a member's Total Affiliated Member ADV. The Exchange is not changing the Priority Customer Maker ADV tiers as part of this proposed rule change.

ADV is 0 – 99,999 contracts in a given month; Tier 2 if its ADV is 100,000 – 224,999 contracts in a given month; Tier 3 if its ADV is 225,000 – 349,999 contracts in a given month, and Tier 4 if its ADV is 350,000 or more contracts in a given month.

The Exchange now proposes to add a percentage-based calculation that may be used as an alternative to the numeric thresholds for determining a member's eligibility for the Total Affiliated Member ADV tiers. Specifically, a member would be eligible for Tier 2 if it executes 100,000 – 224,999 contracts or 1% to less than 2% of Customer Total Consolidated Volume; Tier 3 if it executes 225,000 – 349,999 contracts or 2% to less than 3% of Customer Total Consolidated Volume; and Tier 4 if it executes 350,000 or more contracts or 3% or greater of Customer Total Consolidated Volume. For purposes of measuring Total Affiliated Member ADV, 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 Exchange developed these percentage requirements based on historical data, and believes that there is a close correlation between the proposed percentage requirements and the current numeric requirements.

As is the case currently, the Total Affiliated Member ADV category will continue to include 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. Similarly, all eligible volume from affiliated members will continue to be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the members as reflected on each member's Form BD, Schedule A.

The fees and rebates in Section I to which the Total Affiliated Member ADV tiers apply remain unchanged.

In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

b. Statutory Basis

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

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4 15 U.S.C. 78f(b).

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

market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[6]

Likewise, in NetCoalition v. Securities and Exchange Commission[7] ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost."[9]

Further, "[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] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

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

7 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

8 See NetCoalition, at 534 - 535.

9 Id. at 537.

10 Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

The Exchange believes that determining a member's eligibility for a Total Affiliated Member ADV tier by using percentage requirements as an alternative to the existing numeric requirements is reasonable. In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. The Exchange also believes that the actual proposed percentage requirements are reasonable. Using historical data, the Exchange has formulated percentage requirements that it believes are closely correlated to the existing numeric requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

The Exchange believes that it is reasonable to calculate the percentage based on the total volume cleared at the OCC in the Customer range in that month. The Exchange notes that other exchanges have similar programs that use percentage requirements based on national customer volume. For example, NASDAQ PHLX LLC ("Phlx") operates a Customer Rebate Program, which has five volume tiers that consist of percentage thresholds of national customer volume in multiply-listed equity and ETF options classes (excluding monthly SPY options).[11] Similarly, the NASDAQ Options Market ("NOM")

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11 See Phlx Pricing Schedule, Preface B.

operates a tiered rebate program, which consists of eight tiers, using both numeric and percentage thresholds, that is based on the total industry customer equity and ETF option average daily volume contracts per day in a month.[12] As with these programs, the Exchange believes that the use of customer volume in equity and ETF options here as the baseline provides a meaningful metric by which to measure a member's activity.

The Exchange believes that it is reasonable to add the percentage requirements to Tiers 2 - 4. Since a member may qualify for the Tier 1 with an ADV of 0, the Exchange does not believes that a percentage requirement is necessary for this Tier.

The Exchange also believes that it is reasonable to add percentage requirements to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

The Exchange also believes that the proposal is an equitable allocation and is not unfairly discriminatory. As noted above, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements, which are closely aligned to the current numeric requirements, recognize that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the same time, the Exchange will apply the same percentage requirements to all similarly situated members. The Exchange believes

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12 See NOM Chapter XV, Section 2.

it is equitable and not unfairly discriminatory to add the percentage requirements to Tiers 2-4, since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that it is equitable and not unfairly discriminatory to add percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

4. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

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.

The proposed addition of percentage requirements to Tiers 2 - 4 of the Total Affiliated Member ADV tiers does not impose a burden on competition not necessary or appropriate because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. More specifically, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements recognize that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the same time, the Exchange will apply the same percentage requirements to all similarly situated members.

The Exchange believes that adding the percentage requirements to Tiers 2-4 does not impose a burden on competition not necessary or appropriate since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that adding the percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, does not impose a burden on competition not necessary or appropriate because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

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.

5. <u>Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others</u>

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,[13] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

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

5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. ; File No. SR-GEMX-2017-23)

June __, 2017

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fee Schedule

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 June 1, 2017, 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 Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member's fees and rebates for purposes of Section I, as described further below.

The text of the proposed rule change is available on the Exchange's Website at http://nasdaqgemx.cchwallstreet.com/, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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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 amend the Exchange's Fee Schedule to add a percentage measurement as an alternative way of qualifying for Tiers 2 – 4 of the Total Affiliated Member ADV for purposes of calculating a member's fees and rebates for purposes of Section I.

The Exchange currently uses volume-based tiers, referred to as the Total Affiliated Member ADV, to assess the level of taker fees and maker rebates applicable to members. These tiers apply to both Penny Symbols and SPY, and to Non-Penny Symbols (excluding index options). These tiers apply to all different categories of market participants set forth in Section I, such as Market Makers, Firm Proprietary / Broker-Dealer, and Priority Customers.[3] The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and

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[3] The Exchange also uses a separate set of tiers to determine the amount of a Priority Customer's maker rebate. These volume requirements of these tiers are a subset of a member's Total Affiliated Member ADV. The Exchange is not changing the Priority Customer Maker ADV tiers as part of this proposed rule change.

volume executed in the Price Improvement Mechanism ("PIM"), Facilitation, Solicitation, and Qualified Contingent Cross ("QCC") mechanisms. All eligible volume from affiliated members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the members as reflected on each member's Form BD, Schedule A.

The Exchange currently uses numeric thresholds for the purpose of determining a member's eligibility for Tiers 1-4. Currently, a member would qualify for Tier 1 if its ADV is 0 – 99,999 contracts in a given month; Tier 2 if its ADV is 100,000 – 224,999 contracts in a given month; Tier 3 if its ADV is 225,000 – 349,999 contracts in a given month, and Tier 4 if its ADV is 350,000 or more contracts in a given month.

The Exchange now proposes to add a percentage-based calculation that may be used as an alternative to the numeric thresholds for determining a member's eligibility for the Total Affiliated Member ADV tiers. Specifically, a member would be eligible for Tier 2 if it executes 100,000 – 224,999 contracts or 1% to less than 2% of Customer Total Consolidated Volume; Tier 3 if it executes 225,000 – 349,999 contracts or 2% to less than 3% of Customer Total Consolidated Volume; and Tier 4 if it executes 350,000 or more contracts or 3% or greater of Customer Total Consolidated Volume. For purposes of measuring Total Affiliated Member ADV, 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 Exchange developed these percentage requirements based on historical data, and believes that there is a close correlation between the proposed percentage requirements and the current numeric requirements.

As is the case currently, the Total Affiliated Member ADV category will continue to include 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. Similarly, all eligible volume from affiliated members will continue to be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the members as reflected on each member's Form BD, Schedule A.

The fees and rebates in Section I to which the Total Affiliated Member ADV tiers apply remain unchanged.

In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and

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

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

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 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."[6]

Likewise, in NetCoalition v. Securities and Exchange Commission[7] ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost."[9]

Further, "[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

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

7 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

8 See NetCoalition, at 534 - 535.

9 Id. at 537.

share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…."[10] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that determining a member's eligibility for a Total Affiliated Member ADV tier by using percentage requirements as an alternative to the existing numeric requirements is reasonable. In using a percentage-based measurement that considers a member's volume relative to total customer industry volume, rather than a member's absolute volume, the Exchange is providing members with an alternative way to achieve a tier even if that member's absolute volume no longer meets the tier's requirements. The Exchange also believes that the actual proposed percentage requirements are reasonable. Using historical data, the Exchange has formulated percentage requirements that it believes are closely correlated to the existing numeric requirements. In using a relative measurement, the Exchange is recognizing that both the industry and a member's volume may change due to a variety of factors, and is providing an alternative measurement that may allow that member to continue to meet its existing tier. At the same time, the proposed requirements, which are closely aligned to the current numeric requirements, still require a member to add meaningful volume in order to qualify for a given tier.

The Exchange believes that it is reasonable to calculate the percentage based on the total volume cleared at the OCC in the Customer range in that month. The Exchange notes that other exchanges have similar programs that use percentage requirements based

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[10] Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

on national customer volume. For example, NASDAQ PHLX LLC ("Phlx") operates a Customer Rebate Program, which has five volume tiers that consist of percentage thresholds of national customer volume in multiply-listed equity and ETF options classes (excluding monthly SPY options).[11] Similarly, the NASDAQ Options Market ("NOM") operates a tiered rebate program, which consists of eight tiers, using both numeric and percentage thresholds, that is based on the total industry customer equity and ETF option average daily volume contracts per day in a month.[12] As with these programs, the Exchange believes that the use of customer volume in equity and ETF options here as the baseline provides a meaningful metric by which to measure a member's activity.

The Exchange believes that it is reasonable to add the percentage requirements to Tiers 2 - 4. Since a member may qualify for the Tier 1 with an ADV of 0, the Exchange does not believes that a percentage requirement is necessary for this Tier.

The Exchange also believes that it is reasonable to add percentage requirements to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

The Exchange also believes that the proposal is an equitable allocation and is not unfairly discriminatory. As noted above, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements, which are closely aligned to the current numeric requirements, recognize

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11 See Phlx Pricing Schedule, Preface B.

12 See NOM Chapter XV, Section 2.

that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the same time, the Exchange will apply the same percentage requirements to all similarly situated members. The Exchange believes it is equitable and not unfairly discriminatory to add the percentage requirements to Tiers 2-4, since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that it is equitable and not unfairly discriminatory to add percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

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.

The proposed addition of percentage requirements to Tiers 2 - 4 of the Total Affiliated Member ADV tiers does not impose a burden on competition not necessary or appropriate because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. More specifically, the Total Affiliated Member ADV applies to all market participants that are subject to Maker Rebates and Taker Fees pursuant to Section I, and the proposed percentage requirements will correspondingly apply. The percentage requirements recognize that both a member's and industry volume may change for a number of reasons, and provides members with an alternative way to qualify for a given tier that uses a relative, rather than an absolute, measurement. At the same time, the Exchange will apply the same percentage requirements to all similarly situated members.

The Exchange believes that adding the percentage requirements to Tiers 2-4 does not impose a burden on competition not necessary or appropriate since, as described above, it believes the percentage requirement for Tier 1 is unnecessary. The Exchange believes that adding the percentage requirement to the Total Affiliated Member ADV, and not Priority Customer Maker ADV, does not impose a burden on competition not necessary or appropriate because the proposed change will apply to all members subject to maker rebates and taker fees in Section I, not just the subset of market participants and activity that is covered by the Priority Customer Maker ADV tiers.

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:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-GEMX-2017-23 on the subject line.

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

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-GEMX-2017-23. This file number should be included on the subject line if e-mail 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 Web site (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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-GEMX-2017-23 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Robert W. Errett
Deputy Secretary

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14 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

Nasdaq GEMX Rules

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Fee Schedule

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I. Regular Order Fees and Rebates

Penny Symbols and SPY

Market Participant	Maker Rebate: Tier 1	Maker Rebate: Tier 2	Maker Rebate: Tier 3	Maker Rebate: Tier 4	Taker Fee: Tier 1(4)(13)	Taker Fee: Tier 2(4)(13)	Taker Fee: Tier 3(4)(13)	Taker Fee: Tier 4(4)(13)	Fee for Crossing Orders (excluding PIM)(1)(11)	Fee for Responses to Crossing Orders (excluding PIM)(12)
Market Maker (2)(3)(5)	($0.30)	($0.32)	($0.34)	($0.45)	$0.49	$0.49	$0.49	$0.48	$0.20	$0.49
Non-Nasdaq GEMX Market Maker (FarMM) (3)	($0.25)	n/a	n/a	n/a	$0.49	$0.49	$0.49	$0.48	$0.20	$0.49
Firm Proprietary / Broker-Dealer (3)	($0.25)	n/a	n/a	n/a	$0.49	$0.49	$0.49	$0.49	$0.20	$0.49
Professional Customer (3)	($0.25)	n/a	n/a	n/a	$0.49	$0.49	$0.49	$0.49	$0.20	$0.49
Priority Customer (3)(5)	($0.25)(7)	($0.40)	($0.48)	($0.53)	$0.48	$0.47	$0.47	$0.45	$0.00	$0.45

Non-Penny Symbols (Excluding Index Options)(6)

Market Participant	Maker Rebate: Tier 1	Maker Rebate: Tier 2	Maker Rebate: Tier 3	Maker Rebate: Tier 4	Taker Fee: Tier 1(4)(16)	Taker Fee: Tier 2(4)(16)	Taker Fee: Tier 3(4)(16)	Taker Fee: Tier 4(4)(16)	Fee for Crossing Orders (excluding PIM)(1)(11)	Fee for Responses to Crossing Orders (excluding PIM)(12)
Market Maker (2)(3)(5)	($0.40)	($0.42)	($0.50)	($0.75)	$0.89	$0.89	$0.89	$0.89	$0.20	$0.89

Non-Nasdaq GEMX Market Maker (FarMM) [3]	($0.25)	n/a	n/a	n/a	$0.89	$0.89	$0.89	$0.89	$0.20	$0.89
Firm Proprietary / Broker-Dealer [3]	($0.25)	n/a	n/a	n/a	$0.89	$0.89	$0.89	$0.89	$0.20	$0.89
Professional Customer [3]	($0.25)	n/a	n/a	n/a	$0.89	$0.89	$0.89	$0.89	$0.20	$0.89
Priority Customer [3][5]	($0.75)[8]	($0.80)	($0.85)	($1.05)	$0.82	$0.81	$0.81	$0.81	$0.00	$0.82

Index Options[6][9]	
Market Participant	**Fee**[10]
Market Maker [2]	$0.75
Non-Nasdaq GEMX Market Maker (FarMM)	$0.75
Firm Proprietary / Broker-Dealer	$0.75
Professional Customer	$0.75
Priority Customer	$0.00

There will be no fees or rebates for trades in options overlying Symbol CPN executed on February 27 – 28, 2017.

1. Fees apply to the originating and contra order.
2. This fee applies to Nasdaq GEMX Market Maker orders sent to the Exchange by Electronic Access Members.
3. All market participants are eligible for lower taker fees based on achieving volume thresholds in Table 1 below. Members who do not achieve a higher Tier under Table 1 will be charged Tier 1 taker fees.
4. Non-Priority Customer orders will be charged the taker fee for trades executed during the opening rotation. Priority Customer orders executed during the opening rotation will receive the applicable maker rebate based on the tier achieved.
5. Market Maker and Priority Customer orders are eligible for higher maker rebates based on achieving volume thresholds in Table 1 below. Members who do not achieve a higher Tier under Table 1 will receive Tier 1 maker rebates.
6. The index options fees apply only to NDX. These fees are assessed to all executions in NDX.
7. This rebate is $0.32 per contract for members that execute a Priority Customer Maker ADV of 5,000 to 19,999 contracts in a given month.
8. This rebate is $0.76 per contract for members that execute a Priority Customer Maker ADV of 5,000 to 19,999 contracts in a given month.
9. For transactions in NDX, a license surcharge of $0.25 will be assessed to Non-Priority Customers.
10. This fee is not subject to tier discounts.
11. This fee is $0.05 per contract for Priority Customer orders on the contra-side of a PIM auction and all non-Priority Customer orders executed in the PIM. There is no fee for Priority Customer orders on the agency side of a PIM auction.
12. This fee is $0.05 per contract for all Responses to Crossing Orders executed in the PIM.
13. Non-Priority Customer orders will be charged a taker fee of $0.50 per contract for trades executed against a Priority Customer. Priority Customer orders will be charged a taker fee of $0.49 per contract for trades executed against a Priority Customer.

14. Reserved.
15. Reserved.
16. Non-Priority Customer orders will be charged a taker fee of $1.10 per contract for trades executed against a Priority Customer. Priority Customer orders will be charged a taker fee of $0.85 per contract for trades executed against a Priority Customer.

Qualifying Tier Thresholds

Table 1		
Tier	**Total Affiliated Member ADV**	**Priority Customer Maker ADV**
Tier 1	0 – 99,999	0 – 19,999
Tier 2	100,000 – 224,999, or executes 1% to less than 2% of Customer Total Consolidated Volume	20,000 – 99,999
Tier 3	225,000 – 349,999, or executes 2% to less than 3% of Customer Total Consolidated Volume	100,000 – 149,999
Tier 4	350,000 or more, or executes 3% or greater of Customer Total Consolidated Volume	150,000 or more

For March 2017 only, all Qualifying Tier Threshold ADV calculations will be based on the better of (1) the member's full month ADV for the period of March 1 – 31, 2017, or (2) the member's ADV for the period of March 1 – 24, 2017.

Volume executed in options overlying Symbol CPN on February 27 – 28, 2017 will not be counted towards a member's tier for February activity.

- For purposes of measuring Total Affiliated Member ADV, 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.
- Any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.
- 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 will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.
- The Total Affiliated Member ADV 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 ADV category includes all Priority Customer volume that adds liquidity in all symbols.

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