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Page 1 of \* 29

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

File No. \* SR 2023 - \* 03

Amendment No. (req. for Amendments \*)

Filing by Nasdaq GEMX, LLC

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

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 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 \*).

A proposal to amend the GEMX Pricing Schedule at Options 7, Section 3.

**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 \* Sun Last Name \* Kim

Title \* Associate General Counsel

E-mail \* sun.kim@nasdaq.com

Telephone \* (646) 420-7816 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange of 1934, Nasdaq GEMX, LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 02/01/2023


(Title \*)

By John Zecca

EVP and Chief Legal Officer

(Name \*)

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

 Date: 2023.02.01 10:55:57 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

**Form 19b-4 Information \***

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SR-GEMX-2023-03 19b-4.doc

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 \***

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SR-GEMX-2023-03 Exhibit 1.doc

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 Advanced Notice by Clearing Agencies \***

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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 2- Notices, Written Comments, Transcripts, Other Communications**

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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 Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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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 Sent As Paper Document

**Exhibit 4 - Marked Copies**

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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**

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SR-GEMX-2023-03 Exhibit 5.doc

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**

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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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s Pricing Schedule at Options 7, Section 3.

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”). 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:

Sun Kim  
Associate General Counsel  
Nasdaq, Inc.  
646-420-7816

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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 Pricing Schedule at Options 7, Section 3 to introduce incentives for Members to add liquidity in Priority Customer<sup>3</sup> 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),<sup>4</sup> 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

<b>Tier</b>	<b>% of Customer Total Consolidated Volume</b>	<b>Priority Customer Maker % of Customer Total Consolidated Volume</b>
<b>Tier 1</b>	Executes less than 0.65% of Customer Total Consolidated Volume	Executes Priority Customer Maker volume

<sup>3</sup> 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).

<sup>4</sup> Index Options fees are set forth separately in Options 7, Section 3 and apply only to NDX executions.

		of less than 0.10% of Customer Total Consolidated Volume
		Executes Priority Customer Maker volume of 0.10% to less than 0.65% of Customer Total Consolidated Volume
<b>Tier 2</b>	Executes 0.65% to less than 1.5% of Customer Total Consolidated Volume	Executes Priority Customer Maker volume of 0.65% to less than 1.05% of Customer Total Consolidated Volume
		Executes Priority Customer Maker volume of 1.05% to less than 1.20% of Customer Total Consolidated Volume
<b>Tier 3</b>	Executes 1.5% to less than 2.25% of Customer Total Consolidated Volume	Executes Priority Customer Maker volume of 1.20% or greater of Customer Total Consolidated Volume
<b>Tier 4</b>	Executes 2.25% to less than 2.50% of Customer Total Consolidated Volume	
<b>Tier 5</b>	Executes 2.5% or greater of Customer Total Consolidated Volume	

- 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.<sup>5</sup> Participants that have System Eligibility and have routed and executed the requisite number of Eligible Contracts<sup>6</sup> daily in a month (“Average Daily Volume” or “ADV”) that add liquidity on

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<sup>5</sup> 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.

<sup>6</sup> 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.

GEMX are entitled to tiered MARS Payments, which are currently paid per the highest tier achieved below.<sup>7</sup>

<b>Tiers</b>	<b>Average Daily Volume (“ADV”)</b>	<b>MARS Payment</b>
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

<sup>7</sup> 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.

flow to GEMX by encouraging Members to qualify for MARS and increase their liquidity adding activity in Priority Customer orders on GEMX.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> 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

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<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).



monopoly, regulatory or otherwise, in the execution of order flow from broker dealers? ....”<sup>10</sup>

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.”<sup>11</sup>

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 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

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<sup>10</sup> 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)).

<sup>11</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

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").<sup>12</sup>

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<sup>12</sup> 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.

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.

4. 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.

5. 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.

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,<sup>13</sup> 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.

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
5. Text of the proposed rule change.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-GEMX-2023-03)

February \_\_, 2023

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> 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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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<sup>3</sup> 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),<sup>4</sup> 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.

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<sup>3</sup> 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).

<sup>4</sup> Index Options fees are set forth separately in Options 7, Section 3 and apply only to NDX executions.



**Qualifying Tier Thresholds**

Table 1

<b>Tier</b>	<b>% of Customer Total Consolidated Volume</b>	<b>Priority Customer Maker % of Customer Total Consolidated Volume</b>
<b>Tier 1</b>	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
<b>Tier 2</b>	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
<b>Tier 3</b>	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
<b>Tier 4</b>	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
<b>Tier 5</b>	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

- 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.<sup>5</sup> Participants that have System Eligibility and have routed and executed the requisite number of Eligible

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<sup>5</sup> 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.

Contracts<sup>6</sup> 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.<sup>7</sup>

<b>Tiers</b>	<b>Average Daily Volume (“ADV”)</b>	<b>MARS Payment</b>
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

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<sup>6</sup> 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.

<sup>7</sup> 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.

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,<sup>8</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> 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

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<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).

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’ ....”<sup>10</sup>

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.”<sup>11</sup>

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 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.

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<sup>10</sup> 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)).

<sup>11</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

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").<sup>12</sup>

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<sup>12</sup> Today, NOM offers Customer and Professional Rebates to Add Liquidity in

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

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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.

proposal will place any category of market participant at a competitive disadvantage. As discussed 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.<sup>13</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-GEMX-2023-03 on the subject line.

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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 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-2023-03 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.<sup>14</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

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

**NASDAQ GEMX, LLC RULES**

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**OPTIONS 7 PRICING SCHEDULE**

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**Section 3. Regular Order Fees and Rebates**

**Penny Symbols**

Market Participant	Rebate:	Maker Rebate: Tier 1	Maker Rebate: Tier 2	Maker Rebate: Tier 3	Maker Rebate: Tier 4	Maker Rebate: Tier 5	Taker Fee: Tier 1 <sup>(4)</sup>	Taker Fee: Tier 2 <sup>(4)</sup>	Taker Fee: Tier 3 <sup>(4)</sup>	Taker Fee: Tier 4 <sup>(4)</sup>	Taker Fee: Tier 5 <sup>(4)</sup>	Fee for Crossin	g	Fee for Respon	ses to Crossi
												ng Orders (excludi	ng Orders (excludi		
	ng PIM) <sup>(1)</sup>	ng PIM) <sup>(8)</sup>													
Market Maker <sup>(2)(3)(5)</sup>	(\$0.20)	(\$0.25)	(\$0.30)	(\$0.32)	(\$0.41)	\$0.50	\$0.50	\$0.50	\$0.50	\$0.48	\$0.20	\$0.20	\$0.50		
Non-Nasdaq GEMX Market Maker (FarMM) <sup>(3)</sup>	(\$0.20) <sup>(7)</sup>	n/a	n/a	n/a	n/a	\$0.50	\$0.50	\$0.50	\$0.50	\$0.48	\$0.20	\$0.20	\$0.50		
Firm Proprietary / Broker-Dealer <sup>(3)</sup>	(\$0.20) <sup>(7)</sup>	n/a	n/a	n/a	n/a	\$0.50	\$0.50	\$0.50	\$0.50	\$0.49	\$0.20	\$0.20	\$0.50		
Professional Customer <sup>(3)</sup>	(\$0.20) <sup>(7)</sup>	n/a	n/a	n/a	n/a	\$0.50	\$0.50	\$0.50	\$0.50	\$0.49	\$0.20	\$0.20	\$0.50		
Priority Customer <sup>(3)(5)(13)</sup>	(\$0.25)	(\$0.40)	(\$0.48)	(\$0.51)	(\$0.53)	\$0.48	\$0.48	\$0.48	\$0.48	\$0.43	\$0.00	\$0.00	\$0.50		

**Non-Penny Symbols (Excluding Index Options)<sup>(6)</sup>**

Market Participant	Mak er	Mak er	Mak er	Mak er	Mak er	Tak er	Tak er	Tak er	Tak er	Tak er	Fee for Crossin	g	Fee for Respon	ses to Crossi
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t	Rebate: Tier 1	Rebate: Tier 2	Rebate: Tier 3	Rebate: Tier 4	Rebate: Tier 5	Fee: Tier 1 (4)(16)	Fee: Tier 2 (4)(16)	Fee: Tier 3 (4)(16)	Fee: Tier 4 (4)(16)	Fee: Tier 5 (4)(16)	g Orders (excluding PIM) <sup>(1)(8)(11)</sup>	ses to Crossing Orders (excluding PIM) <sup>(8)(12)</sup>
Market Maker <sup>(2)(3)(5)</sup>	(\$0.40)	(\$0.42)	(\$0.45)	(\$0.50)	(\$0.75)	\$0.99	\$0.99	\$0.99	\$0.99	\$0.94	\$0.20	\$1.10
Non-Nasdaq GEMX Market Maker (FarMM) <sup>(3)</sup>	(\$0.25)	n/a	n/a	n/a	n/a	\$0.99	\$0.99	\$0.99	\$0.99	\$0.94	\$0.20	\$1.10
Firm Proprietary / Broker-Dealer <sup>(3)</sup>	(\$0.25)	n/a	n/a	n/a	n/a	\$0.99	\$0.99	\$0.99	\$0.99	\$0.94	\$0.20	\$1.10
Professional Customer <sup>(3)</sup>	(\$0.25)	n/a	n/a	n/a	n/a	\$0.99	\$0.99	\$0.99	\$0.99	\$0.94	\$0.20	\$1.10
Priority Customer <sup>(3)(5)(13)</sup>	(\$0.75)	(\$0.80)	(\$0.85)	(\$0.90)	(\$1.05)	\$0.85	\$0.85	\$0.85	\$0.85	\$0.82	\$0.00	\$1.10

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13. [Reserved.]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. 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 above will receive the greater of the note 13 incentive or the applicable tiered Priority Customer Maker Rebate, but not both.

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