

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

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## SECURITIES AND EXCHANGE COMMISSION

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

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

November 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 1, 2023, Nasdaq GEMX, LLC (“GEMX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/gemx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

the most significant aspects of such statements.

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

##### 1. Purpose

The purpose of the proposed rule change is to amend the Exchange’s Pricing Schedule at Options 7, Section 4, Other Options Fees and Rebates. Specifically, the Exchange proposes to amend Part A, Route-Out Fees. The Routing Fees apply to executions of orders that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan.

Today, the Exchange assesses Market Makers,<sup>3</sup> Non-Nasdaq GEMX Market Makers (FarMM),<sup>4</sup> Firm Proprietary<sup>5</sup>/ Broker-Dealers<sup>6</sup> and Professional Customers<sup>7</sup> a \$0.55 per contract Penny Symbol Routing Fee and a \$1.09 Non-Penny Symbol Routing Fee to route to another options exchange. Additionally, today, the Exchange assesses Priority Customers<sup>8</sup> a \$0.50 per contract Penny Symbol Routing Fee and a \$0.90 Non-Penny Symbol Routing Fee to route to another options exchange.

The Exchange proposes to instead assess a \$0.60 per contract Penny Symbol Routing Fee and a \$1.20 Non-Penny Symbol Routing Fee to route to another options exchange regardless of the capacity of the order. The purpose of the proposed Routing Fees is to recoup costs incurred by the Exchange when routing orders to other options exchanges on behalf of options Members. In determining its proposed Routing Fees, the Exchange took into

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

<sup>4</sup> A “Non-Nasdaq GEMX Market Maker” is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange. See Options 7, Section 1(c).

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

<sup>6</sup> A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. See Options 7, Section 1(c).

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

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

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

##### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>11</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 Routing Fees 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

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

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

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

percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . ."<sup>12</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>13</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 seventeen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market.

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

<sup>12</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>13</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

The proposed structure for Routing Fees is similar to another options market.<sup>14</sup>

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

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section

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

19(b)(3)(A)(ii) of the Act<sup>15</sup> and Rule 19b–4(f)(2)<sup>16</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR–GEMX–2023–14 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. All submissions should refer to file number SR–GEMX–2023–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

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

<sup>16</sup> 17 CFR 240.19b–4(f)(2).

copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–GEMX–2023–14 and should be submitted on or before December 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Sherry R. Haywood,**  
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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98930; File No. SR–NSCC–2023–007]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, Concerning Modifications to the Amended and Restated Stock Options and Futures Settlement Agreement Between The Options Clearing Corporation and the National Securities Clearing Corporation

November 14, 2023.

#### I. Introduction

On August 10, 2023, the National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR–NSCC–2023–007 (“Proposed Rule Change”) pursuant to section 19(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 19b–4<sup>2</sup> thereunder to modify the Amended and Restated Stock Options and Futures Settlement Agreement dated August 5, 2017, between OCC and National Securities Clearing Corporation, NSCC’s related rules.<sup>3</sup> The Proposed Rule Change was published for public comment in the **Federal Register** on

August 30, 2023.<sup>4</sup> The Commission has received no comments regarding the Proposed Rule Change.

On September 25, 2023, pursuant to section 19(b)(2) of the Exchange Act,<sup>5</sup> the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.<sup>6</sup> On November 8, 2023, NSCC filed a Partial Amendment No. 1 to the Proposed Rule Change.<sup>7</sup> The Commission is publishing this notice to solicit comments on Partial Amendment No. 1 from interested persons and is instituting proceedings, pursuant to section 19(b)(2)(B) of the Exchange Act,<sup>8</sup> to determine whether to approve or disapprove the proposed rule change, as modified by the Partial Amendment No. 1 (hereinafter defined as “Proposed Rule Change”).

#### II. Summary of the Proposed Rule Change

NSCC is a clearing agency that provides clearing, settlement, risk management, and central counterparty services for trades involving equity securities. OCC is the sole clearing agency for standardized equity options listed on national securities exchanges registered with the Commission, including options that contemplate the physical delivery of equities cleared by NSCC in exchange for cash (“physically settled” options).<sup>9</sup> OCC also clears certain futures contracts that, at maturity, require the delivery of equity securities cleared by NSCC in exchange for cash. As a result, the exercise and

assignment of certain options or maturation of certain futures cleared by OCC effectively results in stock settlement obligations to be cleared by NSCC (“E&A Activity”). NSCC and OCC maintain a legal agreement, generally referred to by the parties as the “Accord” agreement, that governs the processing of such E&A Activity for firms that are members of both OCC and NSCC (“Common Members”).

Under certain circumstances, the Accord currently allows NSCC not to guaranty the settlement of securities arising out of E&A Activity for a defaulted Common Member. To the extent NSCC chooses not to guaranty such transactions, OCC would have to engage in an alternate method of settlement outside of NSCC to manage the default of the Common Member, which presents two issues. First, based on historical data, the cash required for such alternative settlement could be as much as \$300 billion.<sup>10</sup> Second, settlement outside of NSCC introduces significant operational complexities.<sup>11</sup>

NSCC proposes to revise the Accord to address the liquidity and operational issues that arise under the current Accord. Specifically, the proposed changes to the Accord would require NSCC to guaranty the positions of a defaulting Common Member if OCC makes a payment to cover the incremental risk posed by such positions (the “Guaranty Substitution Payment” or “GSP”). Based on historical data, the GSP could be as much as \$6 billion (in contrast with the potential \$300 billion required for alternative settlement).<sup>12</sup>

The total amount owed by the Common Member would be a combination of the member’s unpaid deposit to the NSCC Clearing Fund (“Required Fund Deposit”) and Supplemental Liquidity Deposit.<sup>14</sup> The SLD portion of the GSP would be the unpaid SLD associated with any E&A Activity. The Required Fund Deposit portion of the GSP, however, would be estimated by reference to the day-over-day change in gross market value of the Common Member’s positions at NSCC

<sup>4</sup> Securities Exchange Act Release No. 98213 (Aug. 24, 2023), 88 FR 59968 (Aug. 30, 2023) (File No. SR–NSCC–2023–007) (“Notice of Filing”).

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> Securities Exchange Act Release No. 98508 (Sep. 25, 2023), 88 FR 67407 (Sep. 29, 2023) (File No. SR–NSCC–2023–007).

<sup>7</sup> Partial Amendment No. 1 delays implementation of the proposed change. As amended, NSCC would implement the proposed rule change within 90 days of receiving all necessary regulatory approvals and would announce the specific date of implementation on its public website at least 14 days prior to implementation. The delay is proposed in light of the technical system changes that are required to implement the liquidity stress testing enhancements and to be able to provide sufficient notice to Clearing Members following receipt of approval.

<sup>8</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>9</sup> The term “physically-settled” refers to cleared contracts that settle into their underlying interest (i.e., options or futures contracts that are not cash-settled). When a contract settles into its underlying interest, shares of stock are sent (i.e., delivered) to contract holders who have the right to receive the shares from contract holders who are obligated to deliver the shares at the time of exercise/assignment in the case of an option and maturity in the case of a future.

<sup>10</sup> See Notice of Filing, 88 FR at 59969.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> The Required Fund Deposit is calculated pursuant to Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the NSCC Rules. See Notice of Filing, 88 FR at 59971, n.26.

<sup>14</sup> Under the NSCC Rules, NSCC collects additional cash deposits from those Members who would generate the largest settlement debits in stressed market conditions, referred to as “Supplemental Liquidity Deposits” or “SLD.” See Rule 4A of the NSCC Rules. See also Notice of Filing, 88 FR at 59971, n.27.

<sup>17</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Notice of Filing *infra* note 4, at 88 FR 59976.