

Required fields are shown with yellow backgrounds and asterisks.

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

File No. * SR 2024 - * 24

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 proposed rule change to modify fees for GEMX Trade Profile.

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 * Daniel Last Name * Cantu

Title * Principal Associate General Counsel

E-mail * daniel.cantu@nasdaq.com

Telephone * (301) 978-8496 Fax

Signature

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

Date 07/15/2024

(Title *)

By John Zecca (Name *)

EVP and Chief Legal Officer

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: 2024.07.15 14:54:47 -04'00'

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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-2024-24 19b-4.docx

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-2024-24 Exhibit 1.docx

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-2024-24 Exhibit 5.docx

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”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to: (i) adjust fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduce fees for 36 months of historical data for current customers; and (iii) allow unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.

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:

Daniel A. Cantu
Principal Associate General Counsel
Nasdaq, Inc.
(301) 978-8469

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: (i) adjust fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduce fees for 36 months of historical data for current customers; and (iii) allow unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.³

GEMX Open/Close Trade Profile

The GEMX Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical strategies.⁴ This product is designed to provide data to subscribers regarding investor sentiment and trading activity. Primary fields are trade type, put or call, trade quantity and trade volume for every options series listed and traded in which an electronic trade occurred during the trading day. The information provided is designed to provide the ability to analyze option trade and volume data and create and test trading models and analytical strategies, as well as build customized sentiment indicators.

³ This proposal was initially filed on July 1, 2024, as SR-GEMX-2024-19. On July 15, 2024, that filing was withdrawn and refiled to provide additional information.

⁴ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

Trade Profile data includes “Origin Code” (the type of trader participating in the transaction);⁵ opening and closing buys and sells;⁶ trading volume and number of trades categorized by day and series;⁷ the degree to which a series is “in” or “out” of the “money”;⁸ the number of days to expiration; an indication of the degree to which there is “Open Interest”⁹ for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The data fields provided with the product include:

- Aggregate number of buy and sell transactions in the affected series;
- Aggregate volume traded electronically on the Exchange in the affected series;

⁵ “Origin Code” categories include Customer, Professional Customer, Firm and Market Maker. “Customer” applies to any transaction identified by a member or a member organization for clearing in the Customer range at the Options Clearing Corporation which is not for the account of a broker or dealer or a Professional. A “Professional Customer” is a high-activity customer that enters into more than 390 orders per day over the course of a one-month period. A “Firm” is a broker-dealer trading in its own proprietary account or on behalf of another broker-dealer. A “Market Maker” is a broker-dealer that assumes the risk of holding a position in a series to facilitate trading.

⁶ An opening buy is a transaction that creates or increases a long position and an opening sell is a transaction that creates or increases a short position. A closing buy is a transaction made to close out an existing position. A closing sell is a transaction to reduce or eliminate a long position.

⁷ Trading volume is the number of contracts traded; the number of trades is the number of transactions.

⁸ The degree to which a series is “in” or “out” of the “money” is identified according to the following five levels of “moneyness”: (i) “Deep in the Money” means that the strike price of this option is more than 12% lower than the price of the underlying security if it is a call or more than 12% higher if it is a put; (ii) “In the Money” means that the strike price of this option is within the range of 5%-12% lower than the price of the underlying security if it is a call or within the range of 5%-12% higher if it is a put; (iii) “At the Money” means that the strike price of this option is within the range of 5% higher or lower than the price of the underlying security; (iv) “Out of the Money” means that the strike price of this option is within the range of 5%-12% higher than the price of the underlying security if it is a call or 5%-12% lower if it is a put; and (v) “Deep out of the Money” means that the strike price of this option is more than 12% higher than the price of the underlying security if it is a call or more than 12% lower if it is a put.

⁹ “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

- Aggregate number of trades effected on the Exchange to open a position;
- Aggregate number of trades effected on the Exchange to close a position;
- Origin of the orders involved in trades on the Exchange in the affected series during a particular trading session, specifically aggregated in the following categories of participants: Customers, broker-dealers, market makers, and Professionals.

Information on the quantity of trades is subdivided according to the quantity of contracts (less than 100, 100-199, and greater than 200).

GEMX Open/Close Trade Profile is available in Intraday and End of Day files. The End of Day file is updated overnight and available for download the following morning. The Intraday file is captured in “snapshots” taken every 10 minutes throughout the trading day, available to subscribers within 2 minutes of the conclusion of each period. Subscribers receive the first calculation at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:39 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, continuing over the course of the trading day.

The End of Day subscription is available for \$500 per month. The Intraday subscription is available for \$1,000 per month. These fees were set in 2017.¹⁰

The GEMX Open/Close Trade Profile is also available as an historical database available upon request.¹¹ This data is intended to enhance a purchaser’s ability to

¹⁰ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

¹¹ See Securities Exchange Act Release No. 80722 (May 18, 2017), 82 FR 23891 (May 24, 2017) (SR-GEMX-2017-13) (establishing fees for historical information on GEMX Open/Close Trade Profile).

analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies.

The historical database provides the same fields of information available for the Intraday and End of Day products, respectively.

End of Day data is available for \$400 per request per month. Intraday information is available in 10-minute increments for \$750 per request per month. Historical data is available starting in August 2013.

Trade Profile is designed to enhance the ability of customers to understand market sentiment on the Exchange and to create and test trading models and analytical strategies useful in both options and equities markets. It is not necessary to execute a trade, but it supplies the customer with information about underlying market trends designed to improve the quality of that customer's investment decisions. Customers can, and often do, elect to forego this information.

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from the Nasdaq Phlx LLC ("Phlx"),¹² Nasdaq Options Market ("NOM"),¹³ Nasdaq ISE LLC ("ISE"),¹⁴ Cboe Options Exchange ("Cboe"),¹⁵ NYSE American Options ("NYSE

¹² See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

¹³ See Nasdaq Stock Market Rules, Options 7, Section 4 (Nasdaq Options Market Data Distributor Fees).

¹⁴ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

¹⁵ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

American”),¹⁶ NYSE Arca Options (“NUSE Arca”),¹⁷ BOX Options Market LLC (“BOX”),¹⁸ MIAX Pearl Options Exchange (“Pearl”),¹⁹ and others. In general, the relative value of these products depends on the volume of transactions included; the greater the volume of transactions, the greater the value of the data. The current purchasers of Trade Profile are investment banks, market makers, asset managers and other buy-side investors.

Proposed Changes

Fee Changes for End of Day and Intraday Products

The Exchange proposes to increase the fee for the End of Day product from \$500 to \$575, and the Intraday Product from \$1,000 to \$1,500.

Discount for Historical Data

The Exchange proposes to offer a discount for historical data for Current Intraday or End of Day Distributors.²⁰ Historical data is currently available for \$400 per request per month for End of Day information, and \$750 per request per month for Intraday information. The Exchange proposes to offer the most recent 36 months of historical

¹⁶ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

¹⁷ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

¹⁸ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

¹⁹ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

²⁰ A “Distributor” is any firm that receives Trade Profile information and then distributes it internally

data for current end of day product distributors for \$4,800, and the most recent 36 months of historical data for current Intraday product distributors for \$9,000.

These changes would substantially reduce fees for historical data. Under the current fee schedule, 36 months of end of day data at \$400 per month would cost \$14,400. The proposal would reduce this to \$4,800. Thirty-six months of intraday data would cost \$27,000 at the current rate of \$750 per month. The proposal would reduce this to \$9,000. Customers would be able to purchase historical information that exceeds 36 months at the current rates.

The historical data will continue to provide the same categories of information available for current subscribers under the new proposal.

Eligibility for the discount will depend on the type of current subscription. A current purchaser of End of Day data would be eligible for the historical End of Day product at the reduced rate. A current purchaser of the Intraday product would similarly be able to purchase the historical Intraday product at the reduced rate. A purchaser of both the current End of Day and Intraday products would be entitled to purchase both types of history at the reduced rate.

The 36-month period will be based on the date of purchase of the current subscription by a current distributor. For example, a customer that buys the current End of Day product for the first time in July 2024 would also be able to purchase historical End of Day data for the period July 2021 through July 2024 (inclusive) at the discounted rate. Similarly, a customer with an existing End of Day subscription that is current in July 2024 would be able to purchase the historical End of Day data from July 2021 through

July 2024 at the discounted rate. The same reasoning would apply to Intraday customers.²¹

The fees for historical data are linked to the current product because effective historical testing requires a comparison of similar products. Effective testing of the End of Day product, for example, requires End of Day historical data, and the same would hold true for Intraday data.

Historical data is useful in analyzing option trade and volume data, evaluating historical trends in the trading activity of a particular option series, and creating and testing trading models and analytical strategies, and is often purchased concurrently with a new subscription to GEMX Open/Close Trade Profile. Many customers use historical data to test their strategies and models, and our discussions with current and former customers and experience indicate that 36 months of data is sufficient for most customer needs, and is an effective baseline for review.

External Distribution of Derived Data

The Exchange proposes to offer a license for the unlimited external distribution of Derived Data from GEMX Trade Profile for \$3,000 per month. Derived Data is “any Information generated in whole or in part from Exchange Information such that the Information generated cannot be reverse engineered to recreate Exchange Information,”²²

²¹ A customer may use the proposed historical data discount more than once. For example, a Current Distributor that purchases 36 months of historical data at a discount, but later terminates that subscription, would be eligible to purchase another 36 months of historical data (based on the date of purchase) upon renewing that subscription. (Current Distributors that never terminate would have no need for a second purchase, as they would already possess the most recent months of historical data.)

²² “Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) Eligible securities or other financial instruments, markets, products, vehicles, indicators, or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that

or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.”

Fees for external distribution of Derived Data from GEMX Trade Profile are in addition to fees for the End of Day product or the Intraday product, or both, as applicable.

This is a new license; external distribution of Derived Data is not currently permitted. The proposal, based on a similar license offered by the Phlx exchange,²³ will allow the external distribution of analytic products derived from GEMX Trade Profile to the general investing public. A similar product is also being proposed for the Nasdaq Options Market and the ISE Exchange.

Experience with Phlx indicates that this license provides an effective mechanism for market data vendors to identify, develop, and sell derived market data products, such as sentiment indicators, harnessing the power of the competitive marketplace to promote innovation. The Exchange expects that this product will have the greatest utility for the general investing public.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and

Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

²³ See Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58).

²⁴ 15 U.S.C. 78f(b).

²⁵ 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.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade outline products offered by multiple exchanges are substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from

Phlx,²⁶ ISE,²⁷ GEMX,²⁸ Cboe,²⁹ NYSE American,³⁰ NYSE Arca,³¹ BOX,³² MIAX Pearl,³³ and others.

Trade outline products offer the same categories of data through end of day or intraday reports. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of the data. Customers can choose not to purchase the trade outline product of one exchange and substitute it for that of another exchange.

²⁶ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

²⁷ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

²⁸ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intraday Trade Profile)

²⁹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

³⁰ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³¹ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³² See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

³³ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

Customers can also choose not to purchase a trade outline product at all. Trade outline products are designed to help investors understand underlying market trends to improve the quality of investment decisions, but are not necessary to execute a trade. Customers can, and do, choose to forego the information from Trade Profile or any of its competitor products when making a trade.

Nasdaq and its affiliates have observed that customers purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing returns. As a result, all exchanges are limited in what they will be able to charge for Trade Profile.

As the Commission and courts³⁴ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”³⁵ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁶ The Commission and the courts have repeatedly expressed their

³⁴ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC 615 F.3d 525 (D.C. Cir. 2010). upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535. (quoting H.R. Rep. No. 94-229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” Id. (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74771 (December 9, 2008) (SR-NYSEArca-2006-21)).

³⁵ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

³⁶ See id.

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.”³⁷ Trade Profile is in direct competition with multiple exchanges that offer similar products in end of day and intraday formats.³⁸

The license to allow the external distribution of Derived Data, like the purchase of the end of day and intraday licenses, is also subject to competition. Any exchange that wishes to allow distribution of a Derived Data product based on options trading information would be able to do so with an immediately effective fee filing similar to this proposal.

Moreover, as explained above, the proposal is designed to promote the dissemination of a variety of analytical insights—generally used only by investment banks, market makers, asset managers and other buy-side investors—to the general investing public by creating an incentive for market data vendors to identify, develop, and sell such indicators. As such, the proposal will spur competition among not only exchanges, but vendors as well.

³⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

³⁸ These substitute products include: NOTO, ISE Trade Profile, GEMX Trade Profile data; open-close data from Cboe C1, C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

The discounted fees for historical data, like the purchase of the end of day, intraday and Derived Data licenses, is also subject to competition. Any exchange that wishes to provide discounts for historical data would be able to do so with an immediately effective fee filing in response.

Comparability of Proposed Fees

The proposed fees are comparable to the fees charged by similarly-situated exchanges.

As explained above, the value of Trade Profile is determined in part by the number of underlying transactions reflected in the data. GEMX has a market share comparable to Cboe C2 and MIAX Emerald, at approximately 3% to 4% during the second quarter of 2024.³⁹ For intraday products, MIAX Emerald charges \$2,000⁴⁰ and Cboe C2 charges \$1,000.⁴¹ The proposed fee of \$1,500 is within that range. For End of Day products, MIAX Emerald charges \$600,⁴² and Cboe C2 charges \$500.⁴³ The proposed fees of \$575 are within the range of fees charged by these exchanges.

Nasdaq is not aware of another exchange that provides a similar discount for historical data other than its own affiliates.

³⁹ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>

⁴⁰ See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁴¹ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

⁴² See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁴³ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

If the Exchange is incorrect in its assessment of the marketplace, current and prospective customers will elect not to purchase Trade Profile.

The Proposal Does Not Permit Unfair Discrimination

Nothing in the proposal treats any category of market participant any differently from any other category of market participant. On the contrary, the proposal expands distribution of Trade Profile beyond investment banks, market makers, asset managers and other buy-side investors to market data vendors and the general investing public. Allowing the distribution of Derived Data to the general investing public will broaden the availability of such information while not treating any current recipient of the product differently in any way. The new fee structure, which modifies fees to reflect current market value and offers historical data at a discount, applies equally to all current and potential distributors. Trade Profile is available to all market participants, including members and non-members, and all market participants receive the same information in the Trade Profile data feed.

With respect to the specific fee changes, it is reasonable and not unfair discrimination to charge an external distributor of Derived Data a \$3,000 licensing fee. Vendors will ordinarily charge a fee to their downstream customers for this service, and, even if the vendor is not charging a specific fee for this particular service, derived data products from the Exchange will be part of a suite of offerings that generally promote sales. External distribution is fundamentally different than internal use, in that the former generates revenue from external sales while the latter does not. It is not unfair discrimination to charge a licensing fee for a product that generates downstream revenue.

Nor is it unfair discrimination to allow the redistribution of Derived Data, but not the underlying information, to the general investing public. As explained above, neither exchanges nor vendors ordinarily allow redistribution of analytic products—such products are typically designed solely for the use of direct customers, not for redistribution to the customers of customers in the manner of a data feed. Allowing the redistribution of Derived Data provides an incentive for vendors to innovate with new compelling and varied analytic products for the general investing public that will provide access to market sentiment insights that are now generally used by sophisticated investors. This proposal is therefore not unfair discrimination, but rather allows for more equitable access to market sentiment information to the general investing public.

It is also not unfair discrimination to provide a discount for 36 months of historical data to current distributors, but not former distributors or firms that have never purchased the product. Any firm would be able to become a current distributor at any time by subscribing to Trade Profile, and would be able to cancel the subscription at any time after receiving the 36 months of historical data for the proposed discounted fee. It is not unfair discrimination to limit the historical data discount to current distributors. Historical information is generally used by current users to test their strategies and trading models, and they are therefore in the best position to benefit from the historical data. Firms that do not currently receive the service would have less use for the information, although, to the extent that they find such information useful, they would still be able to purchase the information on an ad hoc basis without a current subscription.

For all of these reasons, the proposal does not permit unfair discrimination.

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 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.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations).

As discussed above, Trade Profile is subject to direct competition from other options exchanges that offer substitutes. Any of these exchanges can replicate this proposal in full or in part, and nothing in the proposal would interfere with the ability of any exchange to do so.

Offering the 36 months of historical data to current distributors, but not former distributors or firms that have never purchased the product, will not burden competition because non-subscribers are free to purchase a current subscription or purchase historical data on an ad hoc basis.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Profile is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase these products can do so on a non-discriminatory basis. Indeed, the proposal will foster competition by expanding dissemination of data to vendors and the general investing public, and by encouraging more market participants to use Trade Profile data to help inform their investments strategies and analytic models.

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,⁴⁴ 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

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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.
5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-GEMX-2024-24)

July 15, 2024

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Fees for GEMX Trade Profile

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 July 1, 2024, 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: (i) adjust fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduce fees for 36 months of historical data for current customers; and (iii) allow unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.

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.

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: (i) adjust fees for GEMX Open/Close End of Day and Intraday Trade Profile; (ii) reduce fees for 36 months of historical data for current customers; and (iii) allow unlimited external distribution of GEMX Open/Close End of Day and Intraday Trade Profile for a fixed monthly fee.³

GEMX Open/Close Trade Profile

The GEMX Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical strategies.⁴ This product is designed to provide data to subscribers regarding investor sentiment and trading activity. Primary fields are trade type, put or call, trade quantity and trade volume for every options series listed and traded in which an electronic trade occurred during the trading day. The information provided is designed to provide the ability to analyze option trade and volume data and create and

³ This proposal was initially filed on July 1, 2024, as SR-GEMX-2024-19. On July 15, 2024, that filing was withdrawn and refiled to provide additional information.

⁴ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

test trading models and analytical strategies, as well as build customized sentiment indicators.

Trade Profile data includes “Origin Code” (the type of trader participating in the transaction);⁵ opening and closing buys and sells;⁶ trading volume and number of trades categorized by day and series;⁷ the degree to which a series is “in” or “out” of the “money”;⁸ the number of days to expiration; an indication of the degree to which there is “Open Interest”⁹ for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The data fields provided with the product include:

- Aggregate number of buy and sell transactions in the affected series;

⁵ “Origin Code” categories include Customer, Professional Customer, Firm and Market Maker. “Customer” applies to any transaction identified by a member or a member organization for clearing in the Customer range at the Options Clearing Corporation which is not for the account of a broker or dealer or a Professional. A “Professional Customer” is a high-activity customer that enters into more than 390 orders per day over the course of a one-month period. A “Firm” is a broker-dealer trading in its own proprietary account or on behalf of another broker-dealer. A “Market Maker” is a broker-dealer that assumes the risk of holding a position in a series to facilitate trading.

⁶ An opening buy is a transaction that creates or increases a long position and an opening sell is a transaction that creates or increases a short position. A closing buy is a transaction made to close out an existing position. A closing sell is a transaction to reduce or eliminate a long position.

⁷ Trading volume is the number of contracts traded; the number of trades is the number of transactions.

⁸ The degree to which a series is “in” or “out” of the “money” is identified according to the following five levels of “moneyness”: (i) “Deep in the Money” means that the strike price of this option is more than 12% lower than the price of the underlying security if it is a call or more than 12% higher if it is a put; (ii) “In the Money” means that the strike price of this option is within the range of 5%-12% lower than the price of the underlying security if it is a call or within the range of 5%-12% higher if it is a put; (iii) “At the Money” means that the strike price of this option is within the range of 5% higher or lower than the price of the underlying security; (iv) “Out of the Money” means that the strike price of this option is within the range of 5%-12% higher than the price of the underlying security if it is a call or 5%-12% lower if it is a put; and (v) “Deep out of the Money” means that the strike price of this option is more than 12% higher than the price of the underlying security if it is a call or more than 12% lower if it is a put.

⁹ “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

- Aggregate volume traded electronically on the Exchange in the affected series;
- Aggregate number of trades effected on the Exchange to open a position;
- Aggregate number of trades effected on the Exchange to close a position;
- Origin of the orders involved in trades on the Exchange in the affected series during a particular trading session, specifically aggregated in the following categories of participants: Customers, broker-dealers, market makers, and Professionals.

Information on the quantity of trades is subdivided according to the quantity of contracts (less than 100, 100-199, and greater than 200).

GEMX Open/Close Trade Profile is available in Intraday and End of Day files. The End of Day file is updated overnight and available for download the following morning. The Intraday file is captured in “snapshots” taken every 10 minutes throughout the trading day, available to subscribers within 2 minutes of the conclusion of each period. Subscribers receive the first calculation at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:39 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, continuing over the course of the trading day.

The End of Day subscription is available for \$500 per month. The Intraday subscription is available for \$1,000 per month. These fees were set in 2017.¹⁰

¹⁰ See Securities Exchange Act Release No. 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42) (setting current fees for GEMX Open/Close Trade Profile).

The GEMX Open/Close Trade Profile is also available as an historical database available upon request.¹¹ This data is intended to enhance a purchaser's ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies. The historical database provides the same fields of information available for the Intraday and End of Day products, respectively.

End of Day data is available for \$400 per request per month. Intraday information is available in 10-minute increments for \$750 per request per month. Historical data is available starting in August 2013.

Trade Profile is designed to enhance the ability of customers to understand market sentiment on the Exchange and to create and test trading models and analytical strategies useful in both options and equities markets. It is not necessary to execute a trade, but it supplies the customer with information about underlying market trends designed to improve the quality of that customer's investment decisions. Customers can, and often do, elect to forego this information.

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from the Nasdaq Phlx LLC ("Phlx"),¹² Nasdaq Options Market ("NOM"),¹³ Nasdaq ISE LLC

¹¹ See Securities Exchange Act Release No. 80722 (May 18, 2017), 82 FR 23891 (May 24, 2017) (SR-GEMX-2017-13) (establishing fees for historical information on GEMX Open/Close Trade Profile).

¹² See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

¹³ See Nasdaq Stock Market Rules, Options 7, Section 4 (Nasdaq Options Market Data Distributor Fees).

(“ISE”),¹⁴ Cboe Options Exchange (“Cboe”),¹⁵ NYSE American Options (“NYSE American”),¹⁶ NYSE Arca Options (“NYSE Arca”),¹⁷ BOX Options Market LLC (“BOX”),¹⁸ MIAX Pearl Options Exchange (“Pearl”),¹⁹ and others. In general, the relative value of these products depends on the volume of transactions included; the greater the volume of transactions, the greater the value of the data. The current purchasers of Trade Profile are investment banks, market makers, asset managers and other buy-side investors.

Proposed Changes

Fee Changes for End of Day and Intraday Products

The Exchange proposes to increase the fee for the End of Day product from \$500 to \$575, and the Intraday Product from \$1,000 to \$1,500.

¹⁴ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

¹⁵ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

¹⁶ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

¹⁷ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

¹⁸ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

¹⁹ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

Discount for Historical Data

The Exchange proposes to offer a discount for historical data for Current Intraday or End of Day Distributors.²⁰ Historical data is currently available for \$400 per request per month for End of Day information, and \$750 per request per month for Intraday information. The Exchange proposes to offer the most recent 36 months of historical data for current end of day product distributors for \$4,800, and the most recent 36 months of historical data for current Intraday product distributors for \$9,000.

These changes would substantially reduce fees for historical data. Under the current fee schedule, 36 months of end of day data at \$400 per month would cost \$14,400. The proposal would reduce this to \$4,800. Thirty-six months of intraday data would cost \$27,000 at the current rate of \$750 per month. The proposal would reduce this to \$9,000. Customers would be able to purchase historical information that exceeds 36 months at the current rates.

The historical data will continue to provide the same categories of information available for current subscribers under the new proposal.

Eligibility for the discount will depend on the type of current subscription. A current purchaser of End of Day data would be eligible for the historical End of Day product at the reduced rate. A current purchaser of the Intraday product would similarly be able to purchase the historical Intraday product at the reduced rate. A purchaser of both the current End of Day and Intraday products would be entitled to purchase both types of history at the reduced rate.

²⁰ A “Distributor” is any firm that receives Trade Profile information and then distributes it internally

The 36-month period will be based on the date of purchase of the current subscription by a current distributor. For example, a customer that buys the current End of Day product for the first time in July 2024 would also be able to purchase historical End of Day data for the period July 2021 through July 2024 (inclusive) at the discounted rate. Similarly, a customer with an existing End of Day subscription that is current in July 2024 would be able to purchase the historical End of Day data from July 2021 through July 2024 at the discounted rate. The same reasoning would apply to Intraday customers.²¹

The fees for historical data are linked to the current product because effective historical testing requires a comparison of similar products. Effective testing of the End of Day product, for example, requires End of Day historical data, and the same would hold true for Intraday data.

Historical data is useful in analyzing option trade and volume data, evaluating historical trends in the trading activity of a particular option series, and creating and testing trading models and analytical strategies, and is often purchased concurrently with a new subscription to GEMX Open/Close Trade Profile. Many customers use historical data to test their strategies and models, and our discussions with current and former customers and experience indicate that 36 months of data is sufficient for most customer needs, and is an effective baseline for review.

²¹ A customer may use the proposed historical data discount more than once. For example, a Current Distributor that purchases 36 months of historical data at a discount, but later terminates that subscription, would be eligible to purchase another 36 months of historical data (based on the date of purchase) upon renewing that subscription. (Current Distributors that never terminate would have no need for a second purchase, as they would already possess the most recent months of historical data.).

External Distribution of Derived Data

The Exchange proposes to offer a license for the unlimited external distribution of Derived Data from GEMX Trade Profile for \$3,000 per month. Derived Data is “any Information generated in whole or in part from Exchange Information such that the Information generated cannot be reverse engineered to recreate Exchange Information,²² or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.”

Fees for external distribution of Derived Data from GEMX Trade Profile are in addition to fees for the End of Day product or the Intraday product, or both, as applicable.

This is a new license; external distribution of Derived Data is not currently permitted. The proposal, based on a similar license offered by the Phlx exchange,²³ will allow the external distribution of analytic products derived from GEMX Trade Profile to the general investing public. A similar product is also being proposed for the Nasdaq Options Market and the ISE Exchange.

Experience with Phlx indicates that this license provides an effective mechanism for market data vendors to identify, develop, and sell derived market data products, such as sentiment indicators, harnessing the power of the competitive marketplace to promote

²² “Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) Eligible securities or other financial instruments, markets, products, vehicles, indicators, or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

²³ See Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58).

innovation. The Exchange expects that this product will have the greatest utility for the general investing public.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁵ 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.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade outline products offered by multiple exchanges are substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

Products similar to Trade Profile have been available on multiple exchanges for many years and are well-established in the market. Such products are available from

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(4) and (5).

Phlx,²⁶ ISE,²⁷ GEMX,²⁸ Cboe,²⁹ NYSE American,³⁰ NYSE Arca,³¹ BOX,³² MIAX Pearl,³³ and others.

Trade outline products offer the same categories of data through end of day or intraday reports. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of the data. Customers can choose not to purchase the trade outline product of one exchange and substitute it for that of another exchange.

²⁶ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

²⁷ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

²⁸ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intraday Trade Profile)

²⁹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

³⁰ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³¹ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³² See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

³³ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

Customers can also choose not to purchase a trade outline product at all. Trade outline products are designed to help investors understand underlying market trends to improve the quality of investment decisions, but are not necessary to execute a trade. Customers can, and do, choose to forego the information from Trade Profile or any of its competitor products when making a trade.

Nasdaq and its affiliates have observed that customers purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing returns. As a result, all exchanges are limited in what they will be able to charge for Trade Profile.

As the Commission and courts³⁴ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”³⁵ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁶ The Commission and the courts have repeatedly expressed their

³⁴ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC 615 F.3d 525 (D.C. Cir. 2010). upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535. (quoting H.R. Rep. No. 94-229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” Id. (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74771 (December 9, 2008) (SR-NYSEArca-2006-21)).

³⁵ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

³⁶ See id.

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.”³⁷ Trade Profile is in direct competition with multiple exchanges that offer similar products in end of day and intraday formats.³⁸

The license to allow the external distribution of Derived Data, like the purchase of the end of day and intraday licenses, is also subject to competition. Any exchange that wishes to allow distribution of a Derived Data product based on options trading information would be able to do so with an immediately effective fee filing similar to this proposal.

Moreover, as explained above, the proposal is designed to promote the dissemination of a variety of analytical insights—generally used only by investment banks, market makers, asset managers and other buy-side investors—to the general investing public by creating an incentive for market data vendors to identify, develop, and sell such indicators. As such, the proposal will spur competition among not only exchanges, but vendors as well.

³⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

³⁸ These substitute products include: NOTO, ISE Trade Profile, GEMX Trade Profile data; open-close data from Cboe C1, C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

The discounted fees for historical data, like the purchase of the end of day, intraday and Derived Data licenses, is also subject to competition. Any exchange that wishes to provide discounts for historical data would be able to do so with an immediately effective fee filing in response.

Comparability of Proposed Fees

The proposed fees are comparable to the fees charged by similarly-situated exchanges.

As explained above, the value of Trade Profile is determined in part by the number of underlying transactions reflected in the data. GEMX has a market share comparable to Cboe C2 and MIAX Emerald, at approximately 3% to 4% during the second quarter of 2024.³⁹ For intraday products, MIAX Emerald charges \$2,000⁴⁰ and Cboe C2 charges \$1,000.⁴¹ The proposed fee of \$1,500 is within that range. For End of Day products, MIAX Emerald charges \$600,⁴² and Cboe C2 charges \$500.⁴³ The proposed fees of \$575 are within the range of fees charged by these exchanges.

Nasdaq is not aware of another exchange that provides a similar discount for historical data other than its own affiliates.

³⁹ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>

⁴⁰ See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁴¹ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

⁴² See MIAX Emerald Options Exchange Fee Schedule as of April 18, 2024,” available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_04182024.pdf.

⁴³ See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

If the Exchange is incorrect in its assessment of the marketplace, current and prospective customers will elect not to purchase Trade Profile.

The Proposal Does Not Permit Unfair Discrimination

Nothing in the proposal treats any category of market participant any differently from any other category of market participant. On the contrary, the proposal expands distribution of Trade Profile beyond investment banks, market makers, asset managers and other buy-side investors to market data vendors and the general investing public. Allowing the distribution of Derived Data to the general investing public will broaden the availability of such information while not treating any current recipient of the product differently in any way. The new fee structure, which modifies fees to reflect current market value and offers historical data at a discount, applies equally to all current and potential distributors. Trade Profile is available to all market participants, including members and non-members, and all market participants receive the same information in the Trade Profile data feed.

With respect to the specific fee changes, it is reasonable and not unfair discrimination to charge an external distributor of Derived Data a \$3,000 licensing fee. Vendors will ordinarily charge a fee to their downstream customers for this service, and, even if the vendor is not charging a specific fee for this particular service, derived data products from the Exchange will be part of a suite of offerings that generally promote sales. External distribution is fundamentally different than internal use, in that the former generates revenue from external sales while the latter does not. It is not unfair discrimination to charge a licensing fee for a product that generates downstream revenue.

Nor is it unfair discrimination to allow the redistribution of Derived Data, but not the underlying information, to the general investing public. As explained above, neither exchanges nor vendors ordinarily allow redistribution of analytic products—such products are typically designed solely for the use of direct customers, not for redistribution to the customers of customers in the manner of a data feed. Allowing the redistribution of Derived Data provides an incentive for vendors to innovate with new compelling and varied analytic products for the general investing public that will provide access to market sentiment insights that are now generally used by sophisticated investors. This proposal is therefore not unfair discrimination, but rather allows for more equitable access to market sentiment information to the general investing public.

It is also not unfair discrimination to provide a discount for 36 months of historical data to current distributors, but not former distributors or firms that have never purchased the product. Any firm would be able to become a current distributor at any time by subscribing to Trade Profile, and would be able to cancel the subscription at any time after receiving the 36 months of historical data for the proposed discounted fee. It is not unfair discrimination to limit the historical data discount to current distributors. Historical information is generally used by current users to test their strategies and trading models, and they are therefore in the best position to benefit from the historical data. Firms that do not currently receive the service would have less use for the information, although, to the extent that they find such information useful, they would still be able to purchase the information on an ad hoc basis without a current subscription.

For all of these reasons, the proposal does not permit unfair discrimination.

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.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations).

As discussed above, Trade Profile is subject to direct competition from other options exchanges that offer substitutes. Any of these exchanges can replicate this proposal in full or in part, and nothing in the proposal would interfere with the ability of any exchange to do so.

Offering the 36 months of historical data to current distributors, but not former distributors or firms that have never purchased the product, will not burden competition because non-subscribers are free to purchase a current subscription or purchase historical data on an ad hoc basis.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Profile is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase these products can do so on a non-discriminatory basis. Indeed, the proposal will foster competition by expanding dissemination of data to vendors and the general investing public, and by encouraging more market participants to use Trade Profile data to help inform their investments strategies and analytic models.

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.⁴⁴ 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.

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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. Please include file number SR-GEMX-2024-24 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-2024-24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3

p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-GEMX-2024-24 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

Sherry R. Haywood,

Assistant Secretary.

⁴⁵ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

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

NASDAQ GEMX, LLC RULES**Options Rules****Options 7: Pricing Schedule**

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Section 7. Market Data

A – C No change.

D. Nasdaq GEMX Open/Close End of Day Trade Profile

Subscription - \$575[\$500] per month.

Ad-hoc requests (historical data) - \$400 per request per month. An ad-hoc request can be made for any number of months, beginning in August 2013, for which data is available.

E. Nasdaq GEMX Open/Close Intraday Trade Profile

Subscription - \$1,500[\$1,000] per month.

Ad-hoc requests (historical data) - \$750 per request per month. An ad-hoc request can be made for any number of months, beginning in August 2013, for which data is available.

F. Nasdaq GEMX Trade Profile Historical Data

<u>Account Type</u>	<u>Fee</u>
<u>Historical Data for Current End of Day Product Distributors:</u>	<u>\$4,800 for the most recent 36 months</u>
<u>Historical Data for Current Intraday Product Distributors:</u>	<u>\$9,000 for the most recent 36 months</u>

The most recent 36 months is measured based on the date of purchase of the 36 months of data by a Current Distributor.

A “Distributor” is any firm that receives Trade Profile information and then distributes it internally.

A “Current Distributor” is any firm that purchases either the End of Day Product for the current month, or the Intraday Product for the current month in the same month that the 36 months of historical End of Day or Intraday data is ordered.

G. Nasdaq GEMX Trade Profile External Distribution of Derived Data

Unlimited External Distribution of Derived Data from GEMX Trade Outline: \$3,000 per month

Fees for external distribution of Derived Data from GEMX Trade Outline are in addition to fees for the End of Day product or the Intraday product, or both, as applicable.

“Derived Data” is any information generated in whole or in part from Exchange Information such that the information generated cannot be reverse engineered to recreate Exchange Information, or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.

“Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) eligible securities or other financial instruments, markets, products, vehicles, indicators or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

H. No change.

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