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

File No. \* SR 2024 - \* 42

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"/>	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)		
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Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

**Description**

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

A proposal to amend GEMX's Pricing Schedule at Options 7, Section 5 regarding the Options Regulatory Fee.

**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 \* Angela    Last Name \* Dunn

Title \* Principal Associate General Counsel

E-mail \* Angela.Dunn@Nasdaq.com

Telephone \* (215) 496-5692    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 11/27/2024 (Title \*)

By John Zecca EVP and Chief Legal Officer  
(Name \*)

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

 Date: 2024.11.27 12:59:16 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

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SR-GEMX-2024-42 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-2024-42 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-2024-42 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend GEMX’s Pricing Schedule at Options 7, Section 5 regarding the Options Regulatory Fee.<sup>3</sup>

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments to be operative on January 1, 2025.

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.

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

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

<sup>3</sup> On October 31, 2024, SR-GEMX-2024-37 was filed to amend ORF. On November 27, 2024, SR-GEMX-2024-37 was withdrawn and this rule change was filed. The current proposal amends the ORF Rate for Local Customer “C” Origin Code transactions executed on GEMX, Local Firm “F” Origin Code transactions executed on GEMX, and Away ORF Rate Firm “F” Origin Code multi-list transactions executed on non-GEMX exchanges.

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

Angela Saccomandi Dunn  
Principal Associate General Counsel  
Nasdaq, Inc.  
(215) 496-5692

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

a. Purpose

GEMX proposes to amend its current ORF in several respects. GEMX proposes to amend its methodology of collection to: (1) specify that it is including options transactions in GEMX proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as "M" at The Options Clearing Corporation ("OCC"). Additionally, GEMX will assess a different rate for trades executed on GEMX ("Local ORF Rate") and trades executed on non-GEMX exchanges ("Away ORF Rate").

**Background on Current ORF**

Today, GEMX assesses its ORF for each Customer<sup>4</sup> option transaction that is either: (1) executed by a Member<sup>5</sup> on GEMX; or (2) cleared by an GEMX Member at OCC in the Customer range,<sup>6</sup> even if the transaction was executed by a non-Member of GEMX, regardless of the exchange on which the transaction occurs.<sup>7</sup> If the OCC clearing member is an GEMX Member, ORF is assessed and collected on all ultimately

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<sup>4</sup> Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the "C" range at OCC. See supra notes 13 and 14 for descriptions of Priority Customers and Professional Customers.

<sup>5</sup> The term "Member" means an organization that has been approved to exercise trading rights associated with Exchange Rights. See General 1, Section 1(a)(14).

<sup>6</sup> Market participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

<sup>7</sup> The Exchange uses reports from OCC when assessing and collecting the ORF.

cleared Customer contracts (after adjustment for CMTA<sup>8</sup>); and (2) if the OCC clearing member is not an GEMX Member, ORF is collected only on the cleared Customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.<sup>9</sup> The current GEMX ORF is \$0.0012 per contract side.

Today, in the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. Today, in the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. Today, in the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. Today, in the case where a Member executes a transaction on GEMX and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on GEMX and collected from the non-Member who cleared the transaction. Today, in the case where a Member executes a transaction at an away market and a non-Member ultimately clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who

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<sup>8</sup> CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

<sup>9</sup> By way of example, if Broker A, an GEMX Member, routes a Customer order to CBOE and the transaction executes on CBOE and clears in Broker A’s OCC Clearing account, ORF will be collected by GEMX from Broker A’s clearing account at OCC via direct debit. While this transaction was executed on a market other than GEMX, it was cleared by an GEMX Member in the member’s OCC clearing account in the Customer range, therefore there is a regulatory nexus between GEMX and the transaction. If Broker A was not an GEMX Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on GEMX nor was it cleared by an GEMX Member.

cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

*ORF Revenue and Monitoring of ORF*

Today, the Exchange monitors the amount of revenue collected from the ORF (“ORF Regulatory Revenue”) to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.<sup>10</sup> In determining whether an expense is considered an Options Regulatory Cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of member Customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Options Regulatory Costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations, and examinations. The indirect expenses are only those expenses that are in support of the regulatory functions, such

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<sup>10</sup> The regulatory costs for options comprise a subset of the Exchange’s regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all Members’ options activity (“Options Regulatory Cost”).

areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs. Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.<sup>11</sup>

The ORF is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

### **Proposal for January 1, 2025**

GEMX has been reviewing its methodologies for the assessment and collection of ORF. As a result of this review, GEMX proposes to revamp the current process of assessing and collecting ORF in various ways. Below GEMX will explain the modelling it performed and the outcomes of the modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, GEMX proposes to assess ORF to each GEMX Member for multi-listed options transactions, including options transactions in GEMX proprietary products,<sup>12</sup> cleared by OCC in all clearing ranges except market makers who clear as “M” at OCC (“Market Makers”)<sup>13</sup> where: (1) the execution occurs on GEMX or (2) the execution occurs on another exchange and is cleared by an GEMX Member. With this change, GEMX proposes to amend its current ORF to assess ORF on Priority

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<sup>11</sup> Direct and indirect expenses are based on the Exchange’s 2024 Regulatory Budget.

<sup>12</sup> Proprietary products are products with intellectual property rights that are not multi-listed. GEMX lists proprietary products.

<sup>13</sup> Capacity “M” covers Market Makers registered on GEMX and market makers registered at non-GEMX exchanges.

Customer,<sup>14</sup> Professional Customer,<sup>15</sup> and Firm Proprietary<sup>16</sup> and Broker-Dealer<sup>17</sup> transactions. All market participants, except Market Makers, would be subject to ORF.

The ORF would be collected by OCC on behalf of GEMX from (1) GEMX clearing members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear or (2) non-members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear that were executed on GEMX. This model collects ORF where there is a nexus with GEMX and does not collect ORF from a non-Member where the transaction takes place away from the Exchange.

Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on GEMX (“Local ORF Rate”) and trades executed on non-GEMX exchanges (“Away ORF Rate”) by market participants. For Priority Customer, Professional Customer, and broker-dealer (not affiliated with a clearing member) transactions that clear in the “C” range at OCC transactions (collectively “Customers”) the Exchange proposes to assess a Local ORF Rate of \$0.0170 per contract and an Away ORF Rate of \$0.00 per contract. For Firm Proprietary and Broker-Dealer transactions

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<sup>14</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 this Pricing Schedule the term “Priority Customer” includes “Retail.” See Options 7, Section 1(c).

<sup>15</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). The “C” range at OCC includes both Priority Customer and Professional Customer transactions.

<sup>16</sup> A “Firm Proprietary” order is an order submitted by a Member for its own proprietary account. See Options 7, Section 1(c).

<sup>17</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). A Broker-Dealer clears in the “F” range at OCC.



that clear in the “F” range at OCC (collectively “Firm Proprietary and Broker-Dealer Transactions”) the Exchange proposes to assess a Local ORF Rate of \$0.00020 per contract and an Away ORF Rate of \$0.00020 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. GEMX will ensure that ORF Regulatory Revenue does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify Members via an Options Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.<sup>18</sup> To that end, the Exchange plotted Customer volumes from each exchange<sup>19</sup> against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a “slope” of the line, representing the marginal cost of regulation, as well as an “intercept,” representing the fixed cost of regulation.<sup>20</sup> The Exchange considered using non-linear models, but concluded that the best R<sup>2</sup> (“R-Squared”)<sup>21</sup> results came from a standard  $y = Mx + B$  format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects

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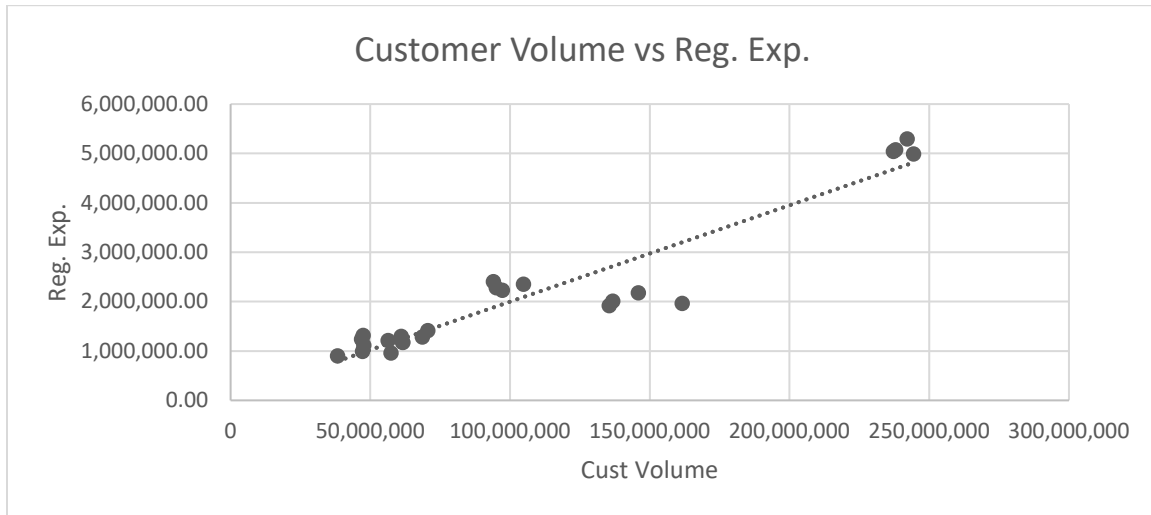
<sup>18</sup> This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

<sup>19</sup> The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024 Q2 (“Time Period”).

<sup>20</sup> The Exchange utilized data from 2023 Q1 to 2024 Q3 to calculate the slope and intercept.

<sup>21</sup> R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is:  $R^2 = 1 - \text{Unexplained Variation} / \text{Total Variation}$ .

Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.



The results of this modelling indicated a high correlation and intercept for the baseline cost of regulating the options market as a whole. Specifically, the regression model indicated that (1) the marginal cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the “intercept” element of cost. When seeking to offset the “set-up” cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm Proprietary and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data

Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to >97% across multiple historical periods.<sup>22</sup>

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm Proprietary and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a “normalization” by per options exchange. This “normalization” encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for “normalization” are negotiated regulatory contracts that were negotiated at different points in time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange’s historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed values (for Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The “normalization” was then multiplied to a “targeted collection rate” of approximately 88% to arrive at ORF rates for Customer, Firm Proprietary and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there

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<sup>22</sup> The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs. The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an expense is considered an Options Regulatory Cost, the Exchange would continue to review all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost. Members will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of Members' transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include direct

regulatory expenses<sup>23</sup> and certain indirect expenses in support of the regulatory function.<sup>24</sup>

Finally, the Exchange notes that this proposal will sunset on July 1, 2025, at which point the Exchange would revert back to the ORF methodology and rate (\$0.0012 per contract side) that was in effect prior to this rule change.<sup>25</sup>

b. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>26</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act<sup>27</sup>, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>28</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>23</sup> The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations, and examinations.

<sup>24</sup> The indirect expenses include support from such areas as Office of the General Counsel, technology, finance, and internal audit.

<sup>25</sup> The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.

<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(4).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

**Proposal for January 1, 2025**

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an GEMX Member or cleared by an GEMX Member. With this amendment, GEMX would begin to assess Firm Proprietary and Broker-Dealer Transactions an ORF, provided the transactions were executed by an GEMX Member or cleared by an GEMX Member, including options transactions in proprietary products. Second, as of January 1, 2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options Regulatory Cost as all Members, except Market Makers, would be assessed ORF.

The Exchange believes that assessing all Members, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.<sup>29</sup> Additionally, Market Makers may enter quotes in the Opening Process to

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<sup>29</sup> See GEMX Options 3, Section 8 and Options 2, Section 5.

open an option series and they are required to quote intra-day.<sup>30</sup> Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.<sup>31</sup> Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees<sup>32</sup> in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to GEMX and are necessary for opening the market. Excluding Market Maker transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on GEMX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange

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<sup>30</sup> Id.

<sup>31</sup> See GEMX Options 2, Section 4(b)(1) and (3).

<sup>32</sup> See GEMX Options 7, Section 6B.

believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap<sup>33</sup> and therefore de minimis.

The Exchange believes including options transactions in GEMX proprietary products is reasonable, equitable and not unfairly discriminatory because GEMX lists various proprietary products for which the Exchange incurs Options Regulatory Costs. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. GEMX notes that there are a small number of GEMX proprietary products transacted as compared to multi-list options. Also, GEMX would only collect an ORF for proprietary products transacted on its market. As such, the Exchange believes that only a Local ORF should be applied to a GEMX proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for

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<sup>33</sup> See GEMX Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.



a material portion of GEMX's Options Regulatory Cost.<sup>34</sup> Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.<sup>35</sup> For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to GEMX.<sup>36</sup> The

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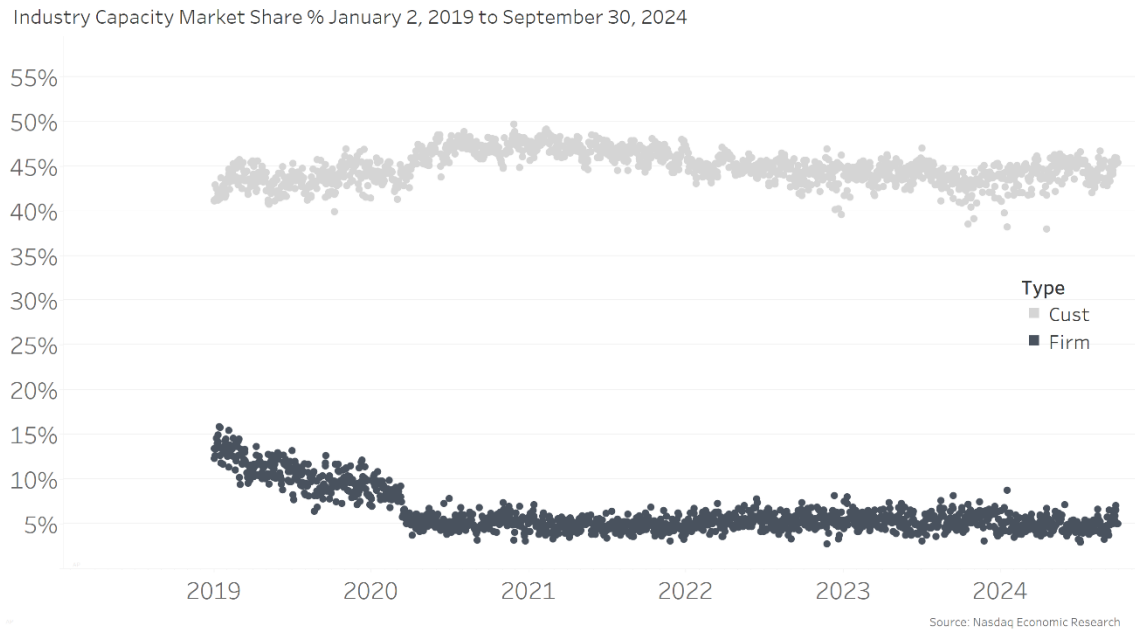
<sup>34</sup> The Exchange notes that the regulatory costs relating to monitoring Members with respect to Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

<sup>35</sup> See GEMX Options 10 Rules. GEMX Options 10 Rules are incorporated by reference to ISE Options 10 Rules.

<sup>36</sup> The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that GEMX's Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm Proprietary and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.



With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm Proprietary and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote

tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm Proprietary and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.<sup>37</sup> The Exchange believes that assessing the Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.<sup>38</sup> While not large in number, when

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<sup>37</sup> GEMX pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

<sup>38</sup> GEMX conducts surveillances and enforces GEMX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some GEMX trading rules are automatically enforced by GEMX's System.

compared to the overall number of Exchange rules that are surveilled by GEMX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-GEMX exchanges avoids overlapping ORFs that would otherwise be assessed by GEMX and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.<sup>39</sup>

#### 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 intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on inter-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed

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<sup>39</sup> GEMX would submit a rule change to the Commission to amend ORF rates.

to address any competitive issues. The Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

### **Proposal for January 1, 2025**

Excluding Market Makers does not impose an undue burden intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.<sup>40</sup> Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.<sup>41</sup> Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.<sup>42</sup> Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees<sup>43</sup> in addition to other fees paid by other market participants.

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<sup>40</sup> See GEMX Options 3, Section 8 and Options 2, Section 5.

<sup>41</sup> Id.

<sup>42</sup> See GEMX Options 2, Section 4(b)(1) and (3).

<sup>43</sup> See GEMX Options 7, Section 6B.

These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to GEMX and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on GEMX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange, in addition to submitting quotes. The Exchange's proposal to except orders submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap<sup>44</sup> and therefore de minimis.

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<sup>44</sup> See GEMX Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

Uniformly including options transactions in GEMX proprietary products in ORF for all GEMX Members does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. GEMX notes that there are a small number of GEMX proprietary products transacted as compared to multi-list options. Also, GEMX would only collect an ORF for proprietary products transacted on its market.

The Exchange's proposal to expand the clearing ranges to specifically include Firm Proprietary and Broker-Dealer Transactions, in addition to Priority Customer and Professional Customer transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of GEMX's Options Regulatory Cost.<sup>45</sup> Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.<sup>46</sup> For these reasons, regulating Customer

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<sup>45</sup> The Exchange notes that the regulatory costs relating to monitoring Members with respect to customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of customers, but also the Member's relationship with its customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component of the regulatory program.

<sup>46</sup> See GEMX Options 10 Rules. GEMX Options 10 Rules are incorporated by reference to ISE Options 10 Rules.



trading activity is “much more labor-intensive” and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to GEMX.<sup>47</sup> The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange’s overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that GEMX’s Customer regulation occurs to a large extent on Exchange.

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<sup>47</sup> The Know Your Customer or “KYC” provision is the obligation of the broker-dealer.

The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as GEMX Members, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an GEMX Member. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm Proprietary and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition

because while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets.<sup>48</sup> The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.<sup>49</sup> While not large in number, when compared to the overall number of Exchange rules that are surveilled by GEMX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer Transactions would account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-GEMX exchanges does not impose a burden on intra-market competition, rather it avoids overlapping ORFs that would otherwise be assessed by GEMX and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm Proprietary and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of

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<sup>48</sup> GEMX pays the Financial Industry Regulatory Authority (“FINRA”) to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail (“CAT”) data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

<sup>49</sup> GEMX conducts surveillances and enforces GEMX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some GEMX trading rules are automatically enforced by GEMX’s System.

regulatory responsibility and Options Regulatory Costs borne by different Members of the Exchange in light of the volume different Members transact on the Exchange.

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

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

Not applicable.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>50</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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

Not applicable.

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

Not applicable.

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<sup>50</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2024-42)

November \_\_, 2024

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

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 27, 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 amend GEMX’s Pricing Schedule at Options 7, Section 5 regarding the Options Regulatory Fee.<sup>3</sup>

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments to be operative on January 1, 2025.

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

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

<sup>3</sup> On October 31, 2024, SR-GEMX-2024-37 was filed to amend ORF. On November 27, 2024, SR-GEMX-2024-37 was withdrawn and this rule change was filed. The current proposal amends the ORF Rate for Local Customer “C” Origin Code transactions executed on GEMX, Local Firm “F” Origin Code transactions executed on GEMX, and Away ORF Rate Firm “F” Origin Code multi-list transactions executed on non-GEMX exchanges.

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

GEMX proposes to amend its current ORF in several respects. GEMX proposes to amend its methodology of collection to: (1) specify that it is including options transactions in GEMX proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as "M" at The Options Clearing Corporation ("OCC"). Additionally, GEMX will assess a different rate for trades executed on GEMX ("Local ORF Rate") and trades executed on non-GEMX exchanges ("Away ORF Rate").

### **Background on Current ORF**

Today, GEMX assesses its ORF for each Customer<sup>4</sup> option transaction that is either: (1) executed by a Member<sup>5</sup> on GEMX; or (2) cleared by an GEMX Member at OCC in the Customer range,<sup>6</sup> even if the transaction was executed by a non-Member of GEMX, regardless of the exchange on which the transaction occurs.<sup>7</sup> If the OCC clearing member is an GEMX Member, ORF is assessed and collected on all ultimately cleared Customer contracts (after adjustment for CMTA<sup>8</sup>); and (2) if the OCC clearing member is not an GEMX Member, ORF is collected only on the cleared Customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.<sup>9</sup> The current GEMX ORF is \$0.0012 per contract side.

Today, in the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. Today, in the

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<sup>4</sup> Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the “C” range at OCC. See supra notes 13 and 14 for descriptions of Priority Customers and Professional Customers.

<sup>5</sup> The term “Member” means an organization that has been approved to exercise trading rights associated with Exchange Rights. See General 1, Section 1(a)(14).

<sup>6</sup> Market participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

<sup>7</sup> The Exchange uses reports from OCC when assessing and collecting the ORF.

<sup>8</sup> CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

<sup>9</sup> By way of example, if Broker A, an GEMX Member, routes a Customer order to CBOE and the transaction executes on CBOE and clears in Broker A’s OCC Clearing account, ORF will be collected by GEMX from Broker A’s clearing account at OCC via direct debit. While this transaction was executed on a market other than GEMX, it was cleared by an GEMX Member in the member’s OCC clearing account in the Customer range, therefore there is a regulatory nexus between GEMX and the transaction. If Broker A was not an GEMX Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on GEMX nor was it cleared by an GEMX Member.



case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. Today, in the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. Today, in the case where a Member executes a transaction on GEMX and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on GEMX and collected from the non-Member who cleared the transaction. Today, in the case where a Member executes a transaction at an away market and a non-Member ultimately clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

#### *ORF Revenue and Monitoring of ORF*

Today, the Exchange monitors the amount of revenue collected from the ORF (“ORF Regulatory Revenue”) to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.<sup>10</sup> In determining whether an expense is considered an Options Regulatory Cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function.

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<sup>10</sup> The regulatory costs for options comprise a subset of the Exchange’s regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all Members’ options activity (“Options Regulatory Cost”).

The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of member Customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Options Regulatory Costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses are only those expenses that are in support of the regulatory functions, such areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs. Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.<sup>11</sup>

The ORF is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

### **Proposal for January 1, 2025**

GEMX has been reviewing its methodologies for the assessment and collection of ORF. As a result of this review, GEMX proposes to revamp the current process of

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<sup>11</sup> Direct and indirect expenses are based on the Exchange's 2024 Regulatory Budget.

assessing and collecting ORF in various ways. Below GEMX will explain the modelling it performed and the outcomes of the modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, GEMX proposes to assess ORF to each GEMX Member for multi-listed options transactions, including options transactions in GEMX proprietary products,<sup>12</sup> cleared by OCC in all clearing ranges except market makers who clear as “M” at OCC (“Market Makers”)<sup>13</sup> where: (1) the execution occurs on GEMX or (2) the execution occurs on another exchange and is cleared by an GEMX Member. With this change, GEMX proposes to amend its current ORF to assess ORF on Priority Customer,<sup>14</sup> Professional Customer,<sup>15</sup> and Firm Proprietary<sup>16</sup> and Broker-Dealer<sup>17</sup> transactions. All market participants, except Market Makers, would be subject to ORF.

The ORF would be collected by OCC on behalf of GEMX from (1) GEMX clearing members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear or (2) non-members for all Priority Customer,

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<sup>12</sup> Proprietary products are products with intellectual property rights that are not multi-listed. GEMX lists proprietary products.

<sup>13</sup> Capacity “M” covers Market Makers registered on GEMX and market makers registered at non-GEMX exchanges.

<sup>14</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 this Pricing Schedule the term “Priority Customer” includes “Retail”. See Options 7, Section 1(c).

<sup>15</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). The “C” range at OCC includes both Priority Customer and Professional Customer transactions.

<sup>16</sup> A “Firm Proprietary” order is an order submitted by a Member for its own proprietary account. See Options 7, Section 1(c).

<sup>17</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). A Broker-Dealer clears in the “F” range at OCC.

Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear that were executed on GEMX. This model collects ORF where there is a nexus with GEMX and does not collect ORF from a non-Member where the transaction takes place away from the Exchange.

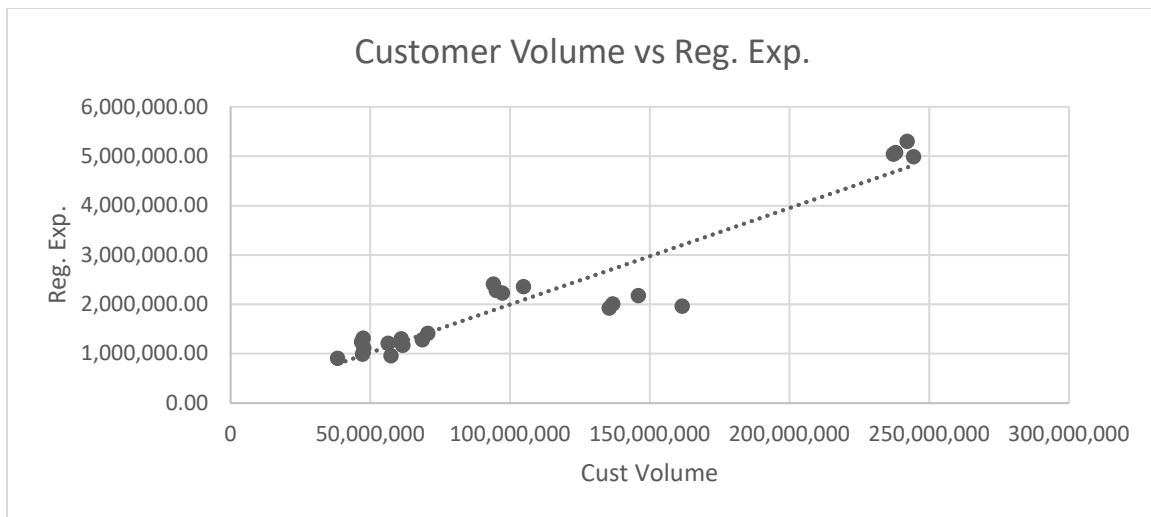
Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on GEMX (“Local ORF Rate”) and trades executed on non-GEMX exchanges (“Away ORF Rate”) by market participants. For Priority Customer, Professional Customer, and broker-dealer (not affiliated with a clearing member) transactions that clear in the “C” range at OCC transactions (collectively “Customers”) the Exchange proposes to assess a Local ORF Rate of \$0.0170 per contract and an Away ORF Rate of \$0.00 per contract. For Firm Proprietary and Broker-Dealer transactions that clear in the “F” range at OCC (collectively “Firm Proprietary and Broker-Dealer Transactions”) the Exchange proposes to assess a Local ORF Rate of \$0.00020 per contract and an Away ORF Rate of \$0.00020 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. GEMX will ensure that ORF Regulatory Revenue does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify Members via an Options Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.<sup>18</sup> To that end, the Exchange plotted Customer volumes

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<sup>18</sup> This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

from each exchange<sup>19</sup> against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a “slope” of the line, representing the marginal cost of regulation, as well as an “intercept,” representing the fixed cost of regulation.<sup>20</sup> The Exchange considered using non-linear models, but concluded that the best R<sup>2</sup> (“R-Squared”)<sup>21</sup> results came from a standard  $y = Mx + B$  format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.



The results of this modelling indicated a high correlation and intercept for the baseline cost of regulating the options market as a whole. Specifically, the regression

<sup>19</sup> The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024 Q2 (“Time Period”).

<sup>20</sup> The Exchange utilized data from 2023 Q1 to 2024 Q3 to calculate the slope and intercept.

<sup>21</sup> R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is:  $R^2 = 1 - \text{Unexplained Variation} / \text{Total Variation}$ .

model indicated that (1) the marginal cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the “intercept” element of cost. When seeking to offset the “set-up” cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm Proprietary and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to >97% across multiple historical periods.<sup>22</sup>

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm Proprietary and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a “normalization”

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<sup>22</sup> The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

by per options exchange. This “normalization” encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for “normalization” are negotiated regulatory contracts that were negotiated at different points in time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange’s historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed values (for Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The “normalization” was then multiplied to a “targeted collection rate” of approximately 88% to arrive at ORF rates for Customer, Firm Proprietary and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs. The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an

expense is considered an Options Regulatory Cost, the Exchange would continue to review all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost. Members will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of Members' transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include direct regulatory expenses<sup>23</sup> and certain indirect expenses in support of the regulatory function.<sup>24</sup>

Finally, the Exchange notes that this proposal will sunset on July 1, 2025, at which point the Exchange would revert back to the ORF methodology and rate (\$0.0012 per contract side) that was in effect prior to this rule change.<sup>25</sup>

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to

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<sup>23</sup> The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations.

<sup>24</sup> The indirect expenses include support from such areas as Office of the General Counsel, technology, finance and internal audit.

<sup>25</sup> The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.



the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>26</sup>

Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act<sup>27</sup>, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>28</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

### **Proposal for January 1, 2025**

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an GEMX Member or cleared by an GEMX Member. With this amendment, GEMX would begin to assess Firm Proprietary and Broker-Dealer Transactions an ORF, provided the transactions were executed by an GEMX Member or cleared by an GEMX Member, including options transactions in proprietary products. Second, as of January 1, 2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options Regulatory Cost as all Members, except Market Makers, would be assessed ORF.

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<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(4).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that assessing all Members, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.<sup>29</sup> Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.<sup>30</sup> Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.<sup>31</sup> Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees<sup>32</sup> in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to GEMX and are necessary for opening the market. Excluding Market Maker

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<sup>29</sup> See GEMX Options 3, Section 8 and Options 2, Section 5.

<sup>30</sup> Id.

<sup>31</sup> See GEMX Options 2, Section 4(b)(1) and (3).

<sup>32</sup> See GEMX Options 7, Section 6B.

transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on GEMX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap<sup>33</sup> and therefore de minimis.

The Exchange believes including options transactions in GEMX proprietary products is reasonable, equitable and not unfairly discriminatory because GEMX lists various proprietary products for which the Exchange incurs Options Regulatory Costs. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. GEMX notes that there are a small number of

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<sup>33</sup> See GEMX Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

GEMX proprietary products transacted as compared to multi-list options. Also, GEMX would only collect an ORF for proprietary products transacted on its market. As such, the Exchange believes that only a Local ORF should be applied to a GEMX proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for a material portion of GEMX's Options Regulatory Cost.<sup>34</sup> Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.<sup>35</sup>

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<sup>34</sup> The Exchange notes that the regulatory costs relating to monitoring Members with respect to Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

<sup>35</sup> See GEMX Options 10 Rules. GEMX Options 10 Rules are incorporated by reference to ISE Options 10 Rules.

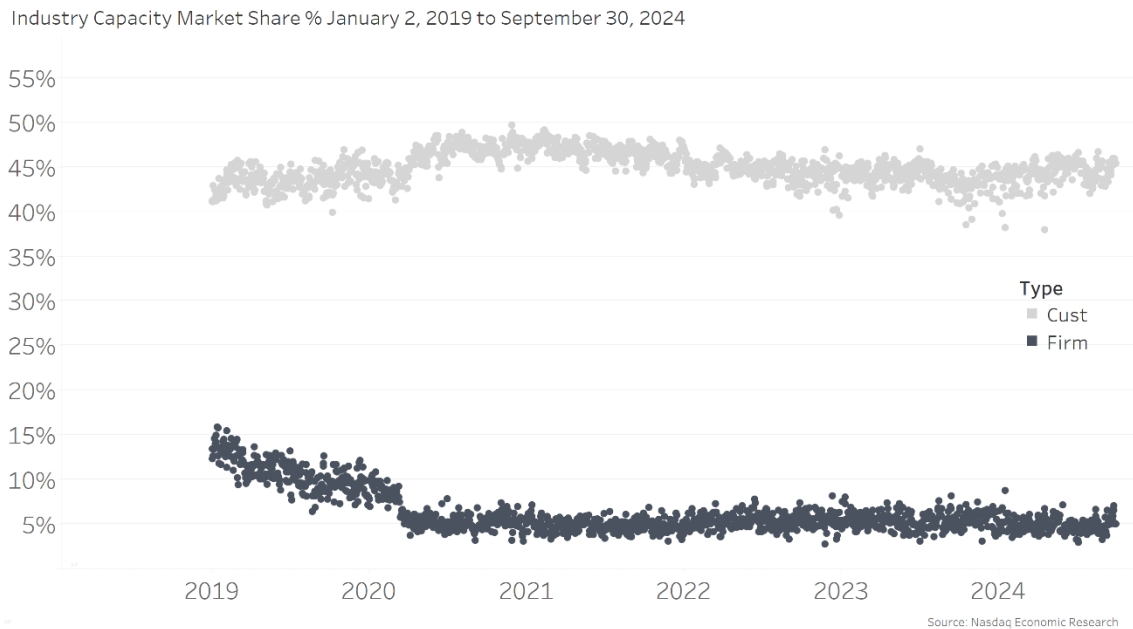
For these reasons, regulating Customer trading activity is “much more labor-intensive” and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to GEMX.<sup>36</sup> The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange’s overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that GEMX’s Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers

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<sup>36</sup> The Know Your Customer or “KYC” provision is the obligation of the broker-dealer.

for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm Proprietary and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.



With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm Proprietary and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that

unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm Proprietary and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.<sup>37</sup> The Exchange believes that assessing the Firm Proprietary and Broker-Dealer Transactions the same

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<sup>37</sup> GEMX pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.<sup>38</sup> While not large in number, when compared to the overall number of Exchange rules that are surveilled by GEMX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-GEMX exchanges avoids overlapping ORFs that would otherwise be assessed by GEMX and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.<sup>39</sup>

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<sup>38</sup> GEMX conducts surveillances and enforces GEMX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some GEMX trading rules are automatically enforced by GEMX's System.

<sup>39</sup> GEMX would submit a rule change to the Commission to amend ORF rates.



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 intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on inter-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed to address any competitive issues. The Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

**Proposal for January 1, 2025**

Excluding Market Makers does not impose an undue burden intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.<sup>40</sup> Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.<sup>41</sup> Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to

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<sup>40</sup> See GEMX Options 3, Section 8 and Options 2, Section 5.

<sup>41</sup> Id.

update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.<sup>42</sup> Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees<sup>43</sup> in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to GEMX and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on GEMX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange, in addition to submitting quotes. The Exchange's proposal to except orders submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to

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<sup>42</sup> See GEMX Options 2, Section 4(b)(1) and (3).

<sup>43</sup> See GEMX Options 7, Section 6B.

hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap<sup>44</sup> and therefore de minimis.

Uniformly including options transactions in GEMX proprietary products in ORF for all GEMX Members does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. GEMX notes that there are a small number of GEMX proprietary products transacted as compared to multi-list options. Also, GEMX would only collect an ORF for proprietary products transacted on its market.

The Exchange's proposal to expand the clearing ranges to specifically include Firm Proprietary and Broker-Dealer Transactions, in addition to Priority Customer and Professional Customer transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of GEMX's Options Regulatory Cost.<sup>45</sup> Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the

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<sup>44</sup> See GEMX Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

<sup>45</sup> The Exchange notes that the regulatory costs relating to monitoring Members with respect to customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of customers, but also the Member's relationship with its customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component of the regulatory program.

Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.<sup>46</sup> For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to GEMX.<sup>47</sup> The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer

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<sup>46</sup> See GEMX Options 10 Rules. GEMX Options 10 Rules are incorporated by reference to ISE Options 10 Rules.

<sup>47</sup> The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that GEMX's Customer regulation occurs to a large extent on Exchange.

The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as GEMX Members, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an GEMX

Member. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm Proprietary and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition because while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets.<sup>48</sup> The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.<sup>49</sup> While not large in number, when compared to the overall number of Exchange rules that are surveilled by GEMX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer Transactions would account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-GEMX exchanges does not impose a burden on intra-market

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<sup>48</sup> GEMX pays the Financial Industry Regulatory Authority (“FINRA”) to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail (“CAT”) data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

<sup>49</sup> GEMX conducts surveillances and enforces GEMX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some GEMX trading rules are automatically enforced by GEMX’s System.

competition, rather it avoids overlapping ORFs that would otherwise be assessed by GEMX and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm Proprietary and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Costs borne by different Members of the Exchange in light of the volume different Members transact on the Exchange.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>50</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

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<sup>50</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2024-42 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-2024-42. 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-2024-42 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.<sup>51</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>51</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

*New text is underlined; deleted text is in brackets.*

**Nasdaq GEMX, LLC Rules**

\* \* \* \* \*

**Options Rules**

\* \* \* \* \*

**Options 7 Pricing Schedule**

\* \* \* \* \*

**Section 5. Legal & Regulatory**

**Effective January 1, 2025**

[As of August 1, 2023, the ORF shall be \$0.0012 per contract side.]

The Options Regulatory Fee (“ORF”) is assessed by GEMX to each GEMX Member for multi-listed options transactions and options transactions in GEMX proprietary products cleared by The Options Clearing Corporation (“OCC”) in [the customer] all clearing ranges except market makers who clear as “M” at OCC where: (1) the execution occurs on GEMX or (2) the execution occurs on another exchange and is cleared by a GEMX Member. The ORF is collected by OCC on behalf of GEMX from (1) GEMX clearing members for all Priority Customer, Professional [c]Customer, Firm Proprietary and Broker-Dealer transactions they clear or (2) non-members for all Priority Customer, Professional [c]Customer, Firm Proprietary and Broker-Dealer transactions they clear that were executed on GEMX. GEMX uses reports from OCC when assessing and collecting ORF. The Exchange will notify Members via an Options Trader Alert of any change in the amount of the fee at least 30 calendar days prior to the effective date of the change. GEMX will assess a different rate for trades executed on GEMX (“Local ORF Rate”) and trades executed on non-GEMX exchanges (“Away ORF Rate”) as specified below.

<b><u>Local ORF Rate for Customer “C” Origin Code transactions executed on GEMX (Local)</u></b>	<b><u>Local ORF Rate for Firm “F” Origin Code transactions executed on GEMX (Local)</u></b>
<u>\$0.0170 per contract side</u>	<u>\$0.00020 per contract side</u>

<b><u>Away ORF Rate for Customer “C” Origin Code multi-list transactions executed on non-GEMX exchanges</u></b>	<b><u>Away ORF Rate for Firm “F” Origin Code multi-list transactions executed on non-GEMX exchanges</u></b>

<u>\$0.00 per contract side</u>	<u>\$0.00020 per contract side</u>
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The ORF will sunset on July 1, 2025 at which point the Exchange would revert back to the ORF methodology and rate (\$0.0012 per contract side) that was in effect prior to this rule change.

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