

and is the industry standard that all brokers with street name accounts and issuers rely upon. Approval of NYSE's proposed elimination of its rate schedule therefore would do more than simply conform NYSE's rules to those of other exchanges; it would result in NYSE's relinquishment of an important market-wide regulatory function that it currently performs, and without there being evidence in the record of this filing of an available and equally viable alternative for that function.

When assessing this proposed rule change, the Commission must consider its consistency with the Act and the applicable rules and regulations issued thereunder.<sup>52</sup> As stated above, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Exchange] Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."<sup>53</sup> For the foregoing reasons, the Exchange has not met its burden to demonstrate that it would be consistent with the Act for the Exchange to relinquish its current role in setting the maximum reimbursement rates that establish the industry standard. In particular, the Exchange has not adequately demonstrated that,

<sup>52</sup>The Commission notes that almost all commenters urged comprehensive, Commission-led reform to the current reimbursement structure. See First FINRA Letter, Second FINRA Letter, First STA Letter, Second STA Letter, First Computershare Letter, Second Computershare Letter, SCC Letter, First ICI Letter, Second ICI Letter. See also letters from: Timothy W. McHale, Senior Vice President & Senior Counsel, Capital Research and Management Company, and Anthony M. Seiffert, Chief Compliance Officer, American Funds Service Company, dated January 11, 2021; Catherine L. Newell, General Counsel and Executive Vice President, Dimensional Fund Advisors LP, dated January 11, 2021; Peter J. Germain, Chief Legal Officer, Federated Hermes, Inc., dated January 11, 2021; Basil K. Fox, Jr., President, Franklin Templeton Investor Services, LLC, dated January 11, 2021; Heidi Hardin, Executive Vice President and General Counsel, MFS Investment Management, dated January 11, 2021; Thomas E. Faust Jr., Chairman and Chief Executive Officer, Eaton Vance Corp., dated January 14, 2021; Noah Hamman, Chief Executive Officer, AdvisorShares Investments, LLC, dated January 14, 2021; Timothy W. McHale, Senior Vice President & Senior Counsel, Capital Research and Management Company, and Anthony M. Seiffert, Chief Compliance Officer, American Funds Service Company, dated May 18, 2021; and Heidi Hardin, Executive Vice President and General Counsel, MFS Investment Management, dated May 19, 2021. The Commission must consider the proposed rule change that was filed, and thus such reform is beyond the scope of this proposed rule change. As noted above, the Exchange stated that the proposed rule change is not intended to take a position on the appropriateness of the fee schedules for proxy and other distributions currently set forth in NYSE Rules 451 and 465 or in the rules of any other SRO. See *supra* note 19 and accompanying text.

<sup>53</sup>Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

in its absence from that role, issuer interests would continue to be considered and not unfairly discriminated against. As a result, the Commission does not have sufficient information to find that the Exchange's proposal would promote just and equitable principles of trade and protect investors and the public interest, and not permit unfair discrimination between customers, issuers, brokers, or dealers. Accordingly, the Commission must disapprove the proposal because the Exchange has not met its burden to demonstrate that the proposal is consistent with Section 6(b)(5) of the Act.<sup>54</sup>

#### IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Act, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Act.<sup>55</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>56</sup> that the proposed rule change (SR-NYSE-2020-96) is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>57</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2021-18119 Filed 8-23-21; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92698; File No. SR-GEMX-2021-08]

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

August 18, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 9, 2021, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission (the

<sup>54</sup>In disapproving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>55</sup>15 U.S.C. 78f(b)(5).

<sup>56</sup>15 U.S.C. 78s(b)(2).

<sup>57</sup>17 CFR 200.30-3(a)(12).

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

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

"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 related to the Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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

Currently, GEMX assesses an ORF of \$0.0018 per contract side as specified in GEMX's Pricing Schedule at Options 7, Section 5. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted GEMX's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection,

in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during that timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. GEMX would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, GEMX will examine its ORF rate to determine if the \$0.0018 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that time. GEMX would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if e.g., the Exchange believes that the volumes GEMX experiences in the second half of 2021 are likely to persist throughout 2022. Of note, GEMX proposes to continue to operate with the ORF fee waived in January 2022 to allow its members and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

Collection of ORF

Currently, GEMX assesses its ORF for each customer option transaction that is

either: (1) Executed by a member on GEMX; or (2) cleared by an GEMX member at The Options Clearing Corporation ("OCC") in the customer range,<sup>3</sup> even if the transaction was executed by a non-member of GEMX, regardless of the exchange on which the transaction occurs.<sup>4</sup>

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a 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 ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the 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. 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 include support from such areas as Office of the General Counsel,

technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the 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

Based on the Exchange's most recent review, the Exchange proposes to waive ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. GEMX would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on August 9, 2021 indicating the proposed rate change for October 1, 2021.<sup>5</sup>

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.<sup>6</sup> Below is industry data from OCC<sup>7</sup> which illustrates the significant increase in volume during the fourth quarter of 2020.

Volume	October 2020	November 2020	December 2020	Q4 2020
Total .....	633,365,184	673,660,858	753,568,354	2,060,594,396
Customer .....	587,707,301	630,297,252	708,037,956	1,926,042,509
Total ADV .....	28,789,326.55	33,683,042.90	34,253,107.00	32,196,787.44
Customer ADV .....	26,713,968.23	31,514,862.60	32,183,543.45	30,094,414.20

Below is industry data from OCC<sup>8</sup> which illustrates the significant increase in volume from January 2021 through

March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and

May 2021 volumes remain significantly high as compared to 2020 options volume in general.

Volume	January 2021	February 2021	March 2021	April 2021	May 2021
Total .....	838,339,790	823,412,827	898,653,388	711,388,828	718,368,993
Customer .....	784,399,878	782,113,450	837,247,059	667,208,963	659,913,862
Total ADV .....	44,123,146.84	43,337,517.20	39,071,886.40	33,875,658.50	35,918,449.70

<sup>3</sup> 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>4</sup> The Exchange uses reports from OCC when assessing and collecting the ORF.

<sup>5</sup> See Options Trader Alert 2021-45.

<sup>6</sup> See data from OCC at: <https://www.businesswire.com/news/home/>

[20210202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago](https://www.theocc.com/20210202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago).

<sup>7</sup> See data from OCC at: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type>.

<sup>8</sup> Id.

Volume	January 2021	February 2021	March 2021	April 2021	May 2021
Customer ADV .....	41,284,204.11	41,163,865.79	36,402,046.04	31,771,855.38	32,995,693.10

As a result of the historical anomaly created by these high options volumes, GEMX has no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID-19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for 2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.<sup>9</sup>

GEMX would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the

<sup>9</sup> The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

Commission and notifying<sup>10</sup> its members via an Options Trader Alert.<sup>11</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 the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>12</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>13</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>14</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a

<sup>10</sup> The Exchange will provide members with such notice at least 30 calendar days prior to the effective date of the change.

<sup>11</sup> The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it is reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no member would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from January through September 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange's regulatory costs without collecting in excess of those costs. Unexpectedly high and sustained customer volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange's prior representations and undertaking to not collect ORF in excess of regulatory expenses. The Exchange did not decrease the amount of the ORF earlier in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each member for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by a GEMX member is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.<sup>15</sup>

<sup>15</sup> If the OCC clearing member is a GEMX member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a GEMX member, ORF is collected only on the cleared customer contracts executed at GEMX, taking into account any CMTA instructions which

The Exchange believes recommending the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expense at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of \$0.0018 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are 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.<sup>16</sup>

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons. First, while GEMX's ORF has been not [sic] been amended

may result in collecting the ORF from a non-member.

<sup>16</sup> See Securities Exchange Act Release No. 85140 (February 14, 2019), 84 FR 5511 (February 21, 2019) (SR-GEMX-2019-01) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Options Regulatory Fee). The Exchange also noted in this rule change that, "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 (e.g., member proprietary transactions) of its regulatory program." Further, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its members."

since its inception in 2013,<sup>17</sup> other exchanges have amended their ORF. For example, ISE amended its ORF rate on April 1, 2021, from \$0.0020 to \$0.0018 per contract side.<sup>18</sup> With respect to that filing, members who either executed a transaction on ISE or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on ISE on March 31, 2021 (\$0.0020 per contract side) as compared to April 1, 2021 (\$0.0018 per contract side). Second, GEMX's regulatory costs have varied over time. For example, if GEMX received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause GEMX to require less regulatory revenue for a particular period. The changing regulatory costs would impact the ORF assessed by GEMX to members. Third, options markets assess ORF at different rates. For instance, today, Nasdaq MRX, LLC ("MRX") assesses a lower ORF of \$0.0004 per contract side.<sup>19</sup> MRX has assessed this rate since February 1, 2019.<sup>20</sup> Depending on where a customer order is executed, a member could be assessed a much different ORF. For example, in the case where a customer order is sent to GEMX and routed to MRX, and a non-member cleared that transaction, the GEMX ORF of \$0.0018 would not be assessed to the member who executed the transaction or cleared the transaction, rather the MRX rate of \$0.0004 per contract side would be assessed. In that same scenario presuming a non-member cleared the transaction, if the customer order could have executed on GEMX instead of routing away the member would have been assessed the GEMX ORF of \$0.0018 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, members could be

<sup>17</sup> The Exchange adopted the ORF in 2013. See Securities Exchange Act Release No. 70200 (August 14, 2013), 78 FR 51242 (August 20, 2013) (SR-Topaz-2013-01). GEMX amended its ORF in 2017, but no rate change occurred at that time. See Securities Exchange Act Release No. 81342 (August 8, 2017), 82 FR 37971 (August 14, 2017) (SR-GEMX-2017-31).

<sup>18</sup> See Securities Exchange Act Release No. 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR-ISE-2021-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Pricing Schedule at Options 7, Section 9, Part C To Reduce the Options Regulatory Fee).

<sup>19</sup> See Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03).

<sup>20</sup> Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where members were assessed no ORF for a period similar to what is proposed.

assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the member would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

The Exchange believes recommending the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expense at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommending the assessment of the current ORF does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

#### *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) of the Act<sup>21</sup> and paragraph (f) of Rule 19b-4<sup>22</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change 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.

<sup>21</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>22</sup> 17 CFR 240.19b-4(f).

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-GEMX-2021-08 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 No. SR-GEMX-2021-08. 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 (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-GEMX-2021-08, and should be submitted on or before September 14, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Jill M. Peterson,**  
Assistant Secretary.

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**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-92701; File No. SR-CboeBZX-2021-056]

**Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Allow the Invesco Focused Discovery Growth ETF and Invesco Select Growth ETF To Strike and Publish an Intra-Day NAV and an End-of-Day NAV**

August 18, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 12, 2021, Cboe BZX Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") is filing with the Securities and Exchange Commission ("Commission") a proposed rule amendment to allow the Invesco Focused Discovery Growth ETF and Invesco Select Growth ETF (each a "Fund" and, collectively, the "Funds"), each a series of the Invesco Actively Managed Exchange-Traded Fund Trust (the "Trust"), to strike and publish an intra-day net asset value ("NAV") and an end-of-day NAV.

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

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

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

the most significant aspects of such statements.

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

1. Purpose

The Exchange proposed and the Commission approved a rule to permit the listing and trading of the Shares of each Fund.<sup>3</sup> On December 22, 2020, the Exchange commenced trading in the Shares of each Fund. The Exchange now proposes to continue listing and trading the Shares of each Fund pursuant to Rule 14.11(m) and to permit the Funds to strike and publish a single intra-day NAV in addition to the current practice of striking and publishing an end-of-day NAV. This proposal is designed to assist market makers in assessing and managing their intra-day risk, provide greater flexibility in creating and redeeming shares and provide the marketplace with additional information about the Funds. The Exchange believes this feature of the Funds will allow market participants to better assess and manage their intra-day risk in making a market in the Funds' shares, and provide additional certainty around intra-day price and hedging for the Funds' shares.

The NAV represents the value of a fund's assets minus its liabilities divided by the number of shares outstanding and is used in valuing exchange-traded products ("ETPs"), including Tracking Fund Shares. By way of background, an ETP issues shares that can be bought or sold throughout the day in the secondary market at a market-determined price. Authorized participants that have contractual arrangements with the ETP (and/or its distributor) purchase and redeem ETP shares directly from the ETP in blocks called creation units at a price equal to the next-calculated NAV, and may then purchase or sell individual ETP shares in the secondary market at market-determined prices. ETP shares trade at market prices, but the market price typically will be more or less than the fund's NAV per share due to a variety of factors, including the underlying prices of the ETP's assets and the demand for the ETP shares. Nonetheless, an ETP's market price is generally kept close to the ETP's end-of-day NAV because of the arbitrage function inherent to the structure of the ETP. An arbitrage opportunity is

<sup>3</sup> See Securities Exchange Act Release No. 90684 (December 16, 2020) 85 FR 83637 (December 22, 2020) (SR-CboeBZX-2020-091) (the "Initial Filing").

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

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

<sup>23</sup> 17 CFR 200.30-3(a)(12).