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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80722; File No. SR-GEMX-2017-13)

May 18, 2017

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Schedule of Fees to Offer the Historical GEMX Open/Close Trade Profile

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 May 5, 2017, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Exchange's Schedule of Fees to offer the historical GEMX Open/Close Trade Profile, which will offer historical opening and closing trade data for each GEMX-listed option on both an intraday and end-of-day basis, as described further below.

The text of the proposed rule change is available on the Exchange's Website at [www.ise.com](http://www.ise.com), 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

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

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

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 proposes to amend its Schedule of Fees to offer the historical GEMX Open/Close Trade Profile, which will offer historical opening and closing trade data for GEMX-listed options on both an intraday and end-of-day basis. The data provided with this product is similar to the historical data provided with the ISE Open/Close Trade Profile products.<sup>3</sup> The Exchange is prepared to offer this product upon filing.

The historical GEMX Open/Close Trade Profile, available to both members and non-members, will provide subscribers with the ability to analyze trade and volume data for options and create and test trading models and analytical strategies. The service will provide over 80 fields of data for GEMX-listed options, which will include an "Origin Code"<sup>4</sup> identifying the type of trader participating in a transaction; data on opening buys and sells and closing buys and

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<sup>3</sup> Nasdaq ISE, Schedule of Fees, Chapter VIII (Market Data), A (Nasdaq ISE Open/Close Trade Profile End of Day) and B (Nasdaq ISE Open/Close Trade Profile Intraday); see also Securities Exchange Act Release 56254 (August 15, 2007) 72 FR 47104 (August 22, 2007) (SR-ISE-2007-70).

<sup>4</sup> The "Origin Code" identifies the type of trader involved in a transaction: Customer, Professional Customer, Firm or Market Maker. "Customer" includes both retail and institutional customers. A "Professional Customer" is a high-activity customer that enters into more than 390 orders per day over the course of a one-month period. A "Firm" is a broker-dealer trading in its own proprietary account or on behalf of another broker-dealer. A "Market Maker" is a broker-dealer that assumes the risk of holding a position in a series to facilitate trading.

sells;<sup>5</sup> trading volume and number of trades information summarized by day and series; a code indicating the degree to which a series is “in” or “out” of the “money”;<sup>6</sup> the number of days to expiration; an indication of the degree to which there is “Open Interest”<sup>7</sup> for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole. The data will help subscribers understand the market, identifying, for example, the types of market participants— Customers, Professional Customers, Firms or Market Makers—trading in certain options or engaging in particular trading strategies.

Requests for end-of-day data will be charged \$400 per request per month, and requests for intraday data (available in 10 minute increments) will be charged \$750 per request per month. Historical data is available starting in August 2013.

The proposed rule change is fair and reasonable and will increase transparency in the market by making previously unavailable data on GEMX-listed options available to both

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<sup>5</sup> An opening buy is a transaction that creates or increases a long position and an opening sell is a transaction that creates or increases a short position. A closing buy is a transaction made to close out an existing position. A closing sell is a transaction to reduce or eliminate a long position.

<sup>6</sup> The degree to which a series is “in” or “out” of the “money” will be identified according to the following five levels of “moneyness”: (i) “Deep in the Money” means that the strike price of this option is more than 12% lower than the price of the underlying security if it is a call or more than 12% higher if it is a put; (ii) “In the Money” means that the strike price of this option is within the range of 5%-12% lower than the price of the underlying security if it is a call or within the range of 5%-12% higher if it is a put; (iii) “At the Money” means that the strike price of this option is within the range of 5% higher or lower than the price of the underlying security; (iv) “Out of the Money” means that the strike price of this option is within the range of 5%-12% higher than the price of the underlying security if it is a call or 5%-12% lower if it is a put; and (v) “Deep out of the Money” means that the strike price of this option is more than 12% higher than the price of the underlying security if it is a call or more than 12% lower if it is a put.

<sup>7</sup> “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

members and non-members. This newly-available data will allow firms to create and test trading models and analytical strategies that may be used to improve market performance.

The proposed fees are entirely optional in that they apply only to firms that elect to purchase these products. The proposed changes do not impact the cost of any other GEMX product.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>10</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>11</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness

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

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

<sup>10</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>11</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>12</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>13</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . . .”<sup>14</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that the creation of the historical GEMX Open/Close Trade Profile product is reasonable and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. The proposed changes will increase transparency by allowing firms currently unable to access the information contained in the GEMX Open/Close Trade Profile the ability to analyze option trade and volume data and create and test trading models and analytical strategies. The proposed fees, like all proprietary data fees, are constrained by the Exchange’s need to compete for order flow, and are

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<sup>12</sup> See NetCoalition, at 534 - 535.

<sup>13</sup> Id. at 537.

<sup>14</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

subject to competition from other options exchanges.<sup>15</sup> The proposed fees are not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated subscribers.

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 proposed changes will amend the Exchange's Schedule of Fees to offer the historical GEMX Open/Close Trade Profile, which will offer historical opening and closing trade data for GEMX-listed options on both an intraday and end-of-day basis. End-of-day data will be available for \$400 per request per month, and intraday data will be available for \$750 per request per month.

GEMX market data fees are constrained by competition among exchanges and other entities seeking to attract order flow, and the existence of substitutes that are offered, or may be offered, by other entities. Order flow is the "life blood" of the exchanges. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade, as demonstrated by the proliferation of new options exchanges such as EDGX Exchange and MIAX Options within the last four years. Each options exchange is permitted to produce proprietary data products.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with GEMX and other exchanges. Data fees are but one factor in a total

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<sup>15</sup> The Exchange notes that the fees for the proposed product are less than the fees for similar products sold by the Nasdaq ISE exchange. See Nasdaq ISE, Schedule of Fees, Chapter VIII (Market Data), A (Nasdaq ISE Open/Close Trade Profile End of Day) and B (Nasdaq ISE Open/Close Trade Profile Intraday).

platform analysis. If the cost of the product exceeds its expected value, the prospective customer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products.

The price of options data is also constrained by the existence of multiple substitutes offered by a number of entities, and non-proprietary data disseminated by the Options Price Reporting Authority, LLC (“OPRA”). OPRA is a securities information processor that disseminates last sale reports and quotations, as well as the number of options contracts traded, open interest and end-of-day summaries. Many customers that obtain information from OPRA do not also purchase proprietary data, but in cases in which customers buy both products, they may shift purchasing decisions based on price changes. OPRA constrains the price of proprietary data products on options exchanges because no customer would pay an excessive price for these products when they already have data from OPRA. Similarly, no customer would pay an excessive price for Exchange data when they have the ability to obtain similar proprietary data from other exchanges. It is not necessary that products be identical in order to be reasonable substitutes for each other.

For these reasons, the competition for order flow and the existence of multiple substitutes will constrain prices for the GEMX Trade Profile product. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>17</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>18</sup> normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>19</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange can immediately offer subscribers the historical GEMX Open/Close Trade Profile. The Exchange represents that waiver of the 30-day operative delay would allow it to provide data to customers who have expressed a specific interest in purchasing it. The Exchange also represents that the data is purely historical and only of use to create and test trading models and analytical strategies, similar data is already being provided by the ISE, and the purchase of such data is purely optional. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>18</sup> 17 CFR 240.19b-4(f)(6).

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>20</sup>

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

#### IV. Solicitation of Comments

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

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-GEMX-2017-13 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-2017-13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2017-13 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).

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