

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81431; File No. SR-GEMX-2017-39]

### Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Create the Market Access and Routing Subsidy Program

August 18, 2017.

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 August 9, 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 create a subsidy program, the Market Access and Routing Subsidy (“MARS”), for GEMX Members that provide certain order routing functionalities<sup>3</sup> to other GEMX

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The order routing functionalities permit a GEMX Member to provide access and connectivity to other Members as well utilize such access for themselves. The Exchange notes that under this arrangement it will be possible for one GEMX Member to be eligible for payments under MARS, while another GEMX Member might potentially be liable for transaction charges associated with the execution of the order, because those orders were delivered to the Exchange through a GEMX Member’s connection to the Exchange and that Member qualified for the MARS Payment.

Consider the following example: Both Members A and B are GEMX Members but A does not utilize its own connections to route orders to the Exchange, and instead utilizes B’s connections. Under this program, B will be eligible for the MARS Payment while A is liable for any transaction charges resulting from the execution of orders that originate from A, arrive at the Exchange via B’s connectivity, and subsequently execute and clear at The Options Clearing Corporation or “OCC,” where A is the valid executing clearing Member or give-up on the transaction. Similarly, where B utilizes its own connections to execute transactions, B will be eligible for the MARS Payment, but would also

Members and/or use such functionalities themselves.

The text of the proposed rule change is available on the Exchange’s Web site 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 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 a new subsidy program, MARS, which would pay a subsidy to GEMX Members that provide certain order routing functionalities to other GEMX Members and/or use such functionalities themselves. Generally, under MARS, GEMX proposes to make payments to participating GEMX Members to subsidize their costs of providing routing services to route orders to GEMX. The Exchange believes that MARS will attract higher volumes of equity and ETF options volume to the Exchange from non-GEMX market participants as well as GEMX Members.

###### MARS System Eligibility

To qualify for MARS, a GEMX Member’s order routing functionality would be required to meet certain criteria. Specifically the Member’s routing system (hereinafter “System”) would be required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including GEMX; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with GEMX’s API to access current GEMX match engine functionality. The Member’s System would also need to cause GEMX to be one of the top four default destination

be liable for any transaction resulting from the execution of orders that originate from B, arrive at the Exchange via B’s connectivity, and subsequently execute and clear at OCC, where B is the valid executing clearing Member or give-up on the transaction.

exchanges for (a) individually executed marketable orders if GEMX is at the national best bid or offer (“NBBO”), regardless of size or time or (b) orders that establish a new NBBO on GEMX’s Order Book, but allow any user to manually override GEMX as the default destination on an order-by-order basis.

The Exchange would require GEMX Members desiring to participate in MARS<sup>4</sup> to complete a form, in a manner prescribed by the Exchange, and reaffirm their information on a quarterly basis to the Exchange. Any GEMX Member would be permitted to apply for MARS, provided the above-referenced requirements are met, including a robust and reliable System. The Member would be solely responsible for implementing and operating its System.

###### MARS Eligible Contracts

A MARS Payment would be made to GEMX Members that have System Eligibility and have routed the requisite number of Eligible Contracts daily in a month, which were executed on GEMX. For the purpose of qualifying for the MARS Payment, Eligible Contracts would include Non-Nasdaq GEMX Market Maker (FARMM)<sup>5</sup>, Firm Proprietary<sup>6</sup>/Broker-Dealer<sup>7</sup> and Professional Customer<sup>8</sup> Orders that are executed. Eligible Contracts do not

<sup>4</sup> If a GEMX Member desires to qualify for MARS, that Member must submit an application and certify to the System Eligibility requirements for the entire time period in which the Member will be eligible for MARS Rebates. A GEMX Member may apply anytime during the month in which the GEMX Member desires to participate in MARS and would be eligible for the entire month, provided the GEMX Member certified System Eligibility for that entire month. For example, a GEMX Member submitting an application on the 15th of the month, would have to certify System Eligibility for that entire month. A form must be submitted no later than the last business day of the month in which the GEMX Member desires to participate in MARS. The application will require the GEMX Member to identify the GEMX Member seeking the MARS Payment and must list, among other things, the connections utilized by the GEMX Member to provide Exchange access to other GEMX Members and/or itself. MARS Payments would be made one month in arrears (*i.e.*, a MARS Payment earned for activity in September would be paid to the qualifying GEMX Member in October), as is the case with all other transactional payments and assessments made by the Exchange.

<sup>5</sup> A “Non-Nasdaq GEMX Market Maker” is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange.

<sup>6</sup> A “Firm Proprietary” order is an order submitted by a Member for its own proprietary account.

<sup>7</sup> A “Broker-Dealer” order is an order submitted by a Member for a broker-dealer account that is not its own proprietary account.

<sup>8</sup> A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

include qualified contingent cross or “QCC” Orders<sup>9</sup> or Price Improvement Mechanism or “PIM” Orders.<sup>10</sup>

GEMX Members using an order routing functionality provided by another Member or its own functionality will continue to be required to comply with best execution obligations. Specifically, just as with any Priority Customer<sup>11</sup> order and any other routing functionality, a GEMX Member will continue to have an obligation to consider the availability of price improvement at various markets and whether routing a Priority Customer order through a functionality that incorporates the features described above would allow for access to such opportunities if readily available. Moreover, a GEMX Member would need to conduct best execution evaluations on a regular basis, at a minimum quarterly, that include its use of any router incorporating the features described above.

**MARS Payment**

GEMX Members that have System Eligibility and have executed the requisite number of Eligible Contracts in a month would be paid the following per contract rebates:

Tiers	Average daily volume (“ADV”)	MARS payment
1 .....	10,000	\$0.07
2 .....	15,000	0.10
3 .....	20,000	0.13

The specified MARS Payment will be paid on all executed Eligible Contracts that add liquidity, which are routed to GEMX through a participating GEMX Member’s System and meet the requisite Eligible Contracts ADV. No payment will be made with respect to orders that are routed to GEMX, but not executed. This three-tiered proposal is intended to encourage GEMX Members to execute

<sup>9</sup> A QCC Order is comprised of an originating order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Supplementary Material .01 below, coupled with a contra-side order or orders totaling an equal number of contracts. See Rule 715(j).

<sup>10</sup> Price Improvement Mechanism (“PIM”) is the Exchange’s price improvement mechanism for crossing transactions. See Rule 723.

<sup>11</sup> “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 GEMX Rule 100(a)(37A). Unless otherwise noted, the term “Priority Customer” includes “Retail.” A “Retail” order is a Priority Customer order that originates from a natural person, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

the maximum number of contracts to achieve the highest rebate.

No payment will be made with respect to orders that are routed to GEMX, but not executed.<sup>12</sup> Further, a GEMX Member would not be entitled to receive any other revenue<sup>13</sup> for the use of its System specifically with respect to orders routed to GEMX.

The Exchange proposes to add the MARS to Section II as Part B of the Fee Schedule, entitled “Market Access and Routing Subsidy (“MARS”).” Additionally, the Exchange proposes to amend the Table of Content to include the new section.

**2. Statutory Basis**

The Exchange believes that the proposed MARS program is reasonable because it is designed to attract higher volumes of equity and ETF options volume to the Exchange, which will benefit all GEMX Members by offering greater price discovery, increased transparency, and an increased opportunity to trade on the Exchange. Moreover, the Exchange believes that the proposed subsidy offered by MARS is both equitable and not unfairly discriminatory because any qualifying GEMX Member that offers market access and connectivity to the Exchange and/or utilizes such functionality themselves may earn the MARS Payment for all Eligible Contracts.

**MARS System Eligibility**

The Exchange believes that requiring GEMX Members to maintain their Systems according to the various requirements set forth by the Exchange in order to qualify for the proposed MARS program is reasonable because the Exchange seeks to encourage market participants to send higher volumes of orders to GEMX, which will contribute to the Exchange’s depth of book as well as to the top of book liquidity. The Exchange also believes that the proposed MARS program is reasonable because it is designed to enhance the competitiveness of the Exchange. The Exchange believes that requiring Members to maintain their Systems according to the various requirements set forth by the Exchange in order to qualify for MARS is equitable and not unfairly discriminatory because these requirements will uniformly apply to all

<sup>12</sup> A GEMX Member will not be entitled to receive any other revenue for the use of its System specifically with respect to orders routed to GEMX.

<sup>13</sup> This requirement would not prevent the Member from charging fees (for example, a flat monthly fee) for the general use of its System. Nor would it prevent the Member from charging fees or commissions in accordance with its general practices with respect to transactions effected through its System.

market participants desiring to qualify for MARS.

The Exchange’s proposal to require a Member’s System to cause GEMX to be the one of the top four default destination exchanges for (a) individually executed marketable orders if GEMX is at the NBBO, regardless of size or time or (b) orders that establish a new NBBO on GEMX’s Order Book, but allow any user to manually override GEMX as the default destination on an order-by-order basis is reasonable. Offering Members the ability to select either of the aforementioned requirements to qualify for System Eligibility would incentivize GEMX Members to quote at the NBBO on GEMX to qualify for MARS. Also, the Exchange seeks to encourage market participants to send higher volumes of orders to GEMX, which will contribute to the Exchange’s depth of book as well as to the top of book liquidity. The MARS program is designed to enhance the competitiveness of the Exchange and the Exchange believes that these proposed requirements will cause GEMX to be an attractive market to send orders. The Exchange also notes that The NASDAQ Options Market LLC currently offers a MARS program today with similar requirements.<sup>14</sup>

The Exchange’s proposal to require Members to cause GEMX to be the one of the top four default destination exchanges is equitable and not unfairly discriminatory because these requirements will uniformly apply to all Participants desiring to qualify for MARS. Any GEMX Member desiring to participate in MARS would be required to meet the aforementioned System Eligibility requirements.

**MARS Eligible Contracts**

The Exchange believes that excluding the volumes attributable to QCC and PIM Orders is reasonable, equitable, and not unfairly discriminatory for the reasons below. Today, GEMX reduces taker fees for any GEMX Member that achieves a certain volume threshold as displayed in Table 1 of the Schedule of Fees.<sup>15</sup> Today, QCC and PIM Order volume is counted towards the Total Affiliated Member average daily volume to meet those tier thresholds and reduce taker fees. The Exchange does not desire to pay an additional subsidy on top of offering discounted taker fees for QCC and PIM Orders. Because the Exchange would calculate Eligible Contracts in the same manner for all GEMX Members seeking to qualify for MARS, and the calculation would exclude QCC and

<sup>14</sup> See NOM’s Rules at Chapter XV, Section 2(6).

<sup>15</sup> See GEMX’s Schedule of Fees in Section I.

PIM Order volume, the proposal to exclude these volumes from the MARS Payment is not inequitable or unfairly discriminatory.

The Exchange further notes that while MARS is only being offered to qualifying GEMX Members for Non-Nasdaq GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer equity option Orders and is not including Priority Customer or Market Maker<sup>16</sup> Orders volume the Exchange believes this is reasonable, equitable and not unfairly discriminatory for the reasons below. With respect to Priority Customer orders, the Exchange notes that, today, Priority Customer Orders may earn the highest Market Maker rebates available on GEMX.<sup>17</sup> The Exchange believes that the availability of these rebates for Priority Customer Orders does not warrant paying an additional subsidy on Priority Customer Orders for MARS. With respect to Market Maker Orders, today the Exchange offers certain rebates on Market Maker Orders.<sup>18</sup> The Exchange believes that these rebates provide ample incentive for attracting Market Maker Orders to the Exchange and that no further subsidy is warranted at this time.<sup>19</sup>

Further, the proposed MARS Subsidy is designed to attract higher margin business to the Exchange. To offer the proposed subsidy on Priority Customer or Market Maker Orders would require funding from some other source, such as raising fees for other participants. As a result, the Exchange believes it is appropriate to only count Non-Nasdaq GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer Orders toward the Eligible Contracts, which unlike Priority Customer and Market Maker Orders are not eligible for Market Maker rebates today beyond \$0.25 per contract on GEMX. The Exchange notes that it is commonplace within the options industry for exchanges to charge different rates and/or offer different rebates depending upon the capacity in which a participant is trading. For these reasons, the Exchange believes that the proposal to only count certain order flow as Eligible Contracts is reasonable, equitable and not unfairly

discriminatory for the reasons mentioned herein.

#### MARS Payment

The Exchange's proposal to pay a MARS Payment based on certain average daily volumes for Eligible Contracts, which add liquidity, is reasonable because the Exchange believes that the MARS program will attract order flow which would be beneficial for all GEMX Members in that it would generate greater price discovery, increased transparency, and an increased opportunity to trade on the Exchange. The MARS Payments should enhance the competitiveness of the Exchange. Further, the proposed tier structure would allow GEMX Members to price their services at a level that will enable them to attract order flow from market participants who would otherwise utilize an existing front-end order entry mechanism instead of incurring the cost in time and money to develop their own internal systems to be able to deliver orders directly to the Exchange's System. The Exchange also seeks to reward market participants that bring a greater amount of order flow to the Exchange by paying a higher rebate based on the average daily volume that qualified as Eligible Contracts.<sup>20</sup> The Exchange believes that the tiers are reasonable because the Exchange is incentivizing GEMX Members to transact a greater amount of qualifying volume to earn the rebate. The additional order flow will benefit all market participants.

The Exchange's proposal to pay a MARS Payment based on certain average daily volumes for Eligible Contracts, which add liquidity, is equitable and not unfairly discriminatory because the Exchange will uniformly pay all GEMX Members the proposed rebates specified in the proposed MARS Payment tiers provided the GEMX Member has executed the requisite number of Eligible Contracts. Moreover, the Exchange believes that the proposed MARS Payments offered by the Exchange are equitable and not unfairly discriminatory because any qualifying GEMX Member that offers market access and connectivity to the Exchange and/or utilizes such functionality themselves may earn the MARS Payment for all Eligible Contracts. The Exchange believes that the tiers are equitable and not unfairly discriminatory because the Exchange

would pay the same rebates to all qualifying GEMX Members who transact the requisite volume to earn the rebate.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to pay the proposed MARS Payment to GEMX Members that have System Eligibility and have executed the Eligible Contracts, even when a different GEMX Member may be liable for transaction charges resulting from the execution of the orders upon which the subsidy might be paid. The Exchange notes that this sort of arrangement already exists on The NASDAQ Options Market LLC ("NOM") with its MARS Program.<sup>21</sup> The intent of the MARS Program is to incentivize GEMX Members to offer order routing functionalities to other GEMX Members and/or use such functionalities themselves. By paying the MARS Payments to GEMX Members that have System Eligibility, the Exchange is providing an incentive for GEMX Members to offer the order routing functionalities described in this proposal. Also, all qualifying GEMX Members would be uniformly paid the subsidy on all qualifying volume that was routed by them to the Exchange and executed.

The Exchange believes that preventing Members from receiving any other revenue for the use of its routing system, specifically with respect to orders routed to GEMX is reasonable because Members could still charge fees for the general use of its order routing system as well as charging fees or commissions in accordance with its general practices with respect to transactions effected through its system. The Exchange believes that preventing Members from receiving any other revenue for the use of its routing system, specifically with respect to orders routed to GEMX is equitable and not unfairly discriminatory because the Exchange would uniformly apply the MARS requirements to all qualifying GEMX Members.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other

<sup>16</sup> The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See GEMX Rule 100(a)(25).

<sup>17</sup> See GEMX's Schedule of Fees in Section I.

<sup>18</sup> *Id.*

<sup>19</sup> Market Maker and Priority Customer Orders are eligible for higher maker rebates based on achieving volume thresholds in Table 1 below. GEMX Members who do not achieve a higher Tier under Table 1 will receive Tier 1 maker rebates. See GEMX's Schedule of Fees in Section I.

<sup>20</sup> The Exchange proposes to pay a \$0.07 per contract rebate to qualifying GEMX Members who transact 10,000 ADV; a rebate of \$0.10 per contract to qualifying GEMX Members who transact 15,000 ADV and a \$0.13 per contract to qualifying GEMX Members who transact 20,000 ADV.

<sup>21</sup> See note 14 above.

venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

#### MARS System Eligibility

The Exchange believes that requiring Members to maintain their order routing systems according to the various requirements set forth by the Exchange in order to qualify for MARS does not create an undue burden on intra-market competition because the proposed requirements will uniformly apply to all market participants desiring to qualify for MARS.

#### MARS Eligible Contracts

The Exchange believes that excluding QCC and PIM Orders does not create an undue burden on intra-market competition because these types of orders will uniformly be excluded from the volume calculation for all qualifying GEMX Members for MARS.

The Exchange believes that excluding Priority Customer and Market Makers Orders from the types of orders that would be eligible for MARS does not create an undue burden on intra-market competition because Priority Customer and Market Makers Orders are eligible for rebates today and reduced fees.

#### MARS Payment

The Exchange believes that paying the proposed tiered MARS Payments to qualifying GEMX Members that have System Eligibility and have executed the Eligible Contracts does not create an undue burden on intra-market competition, even when a different GEMX Member, other than the GEMX Member receiving the subsidy, may be liable for transaction charges, because this sort of arrangement should encourage GEMX Members to offer order routing functionalities to other market participants.

The Exchange believes that paying the proposed tiered MARS Payments to qualifying GEMX Members that have System Eligibility and have executed the Eligible Contracts in a month, does not create an undue burden on intra-market competition because the Exchange would count all Non-Nasdaq

GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer Order volume toward the Eligible Contracts. Priority Customer and Market Maker Orders are offered other pricing incentives today in the form of enhanced rebates and lower fees.<sup>22</sup> The MARS Program should generate increased order flow which should bring increased liquidity to the Exchange for the benefit of all market participants. To the extent the purpose of the proposed MARS program is achieved, all market participants should benefit from the improved market liquidity.

The Exchange believes that preventing Members from receiving any other revenue for the use of its routing system, specifically with respect to orders routed to GEMX does not create undue burden on intra-market competition because the Exchange would continue to uniformly apply its MARS requirements to all GEMX Members.

#### *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>23</sup> and Rule 19b-4(f)(2)<sup>24</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://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-2017-39 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-2017-39. 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 Web site (<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 Web site 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-2017-39 and should be submitted on or before September 14, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

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<sup>22</sup> See GEMX's Schedule of Fees at Section I.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

<sup>25</sup> 17 CFR 200.30-3(a)(12).