

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89048; File No. SR-GEMX-2020-14)

June 11, 2020

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX's Pricing Schedule at Options 7, Sections 3 and 4

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 1, 2020, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("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 GEMX's Pricing Schedule at Options 7, Section 3, "Regular Order Fees and Rebates," and Options 7, Section 4, "Other Options Fees and Rebates," regarding the Market Access and Routing Subsidy ("MARS").

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqgemx.cchwallstreet.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

¹ 15 U.S.C. 78s(b)(1).

² 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

GEMX proposes to amend its Pricing Schedule at Options 7, Section 3, “Regular Order Fees and Rebates,” and Options 7, Section 4, “Other Options Fees and Rebates,” regarding the Market Access and Routing Subsidy (“MARS”). Specifically, the Exchange proposes to: (1) amend the MARS Payment tiers within Options 7, Section 4B; and (2) pay a rebate in connection with MARS within Options 7, Section 3. Each change is described below in greater detail.

By way of background, MARS pays a subsidy to GEMX Members that provide certain order routing functionalities to other GEMX Members and/or use such functionalities themselves. GEMX pays participating GEMX Members to subsidize their costs of providing routing services to route orders to GEMX. The Exchange believes that MARS will continue to 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 is required to meet certain criteria. Specifically the Member’s routing system (hereinafter “System”) is 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 also needs to cause GEMX to be one of the top four default destination

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. Any GEMX Member may apply for MARS, provided the above-referenced requirements are met, including a robust and reliable System.

MARS Eligible Contracts

A MARS Payment is paid 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 include: Non-Nasdaq GEMX Market Maker (FarMM);³ Firm Proprietary⁴/Broker-Dealer;⁵ and Professional Customer⁶ orders that are executed. Eligible Contracts do not include qualified contingent cross or “QCC” Orders⁷ or Price Improvement Mechanism or “PIM” Orders.⁸ Options overlying NDX are not considered Eligible Contracts.

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

⁴ A “Firm Proprietary” order is an order submitted by a Member for its own proprietary account.

⁵ A “Broker-Dealer” order is an order submitted by a Member for a broker-dealer account that is not its own proprietary account.

⁶ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

⁷ 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 of GEMX Options 3, Section 7, coupled with a contra-side order or orders totaling an equal number of contracts. See Options 3, Section 7(j).

⁸ Price Improvement Mechanism (“PIM”) is the Exchange’s price improvement mechanism for crossing transactions. See Options 3, Section 13.

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 is 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. Also, 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.

Proposal – MARS Payment

The Exchange proposes to amend the MARS Payment tiers to increase each of the 3 tiers by \$0.01. Therefore, Tier 1, which requires an average daily value (“ADV”) of 10,000 contracts and currently pays a rebate of \$0.07 per contract, would be amended to pay \$0.08 per contract. Tier 2, which requires an ADV of 15,000 contracts and currently pays a rebate of \$0.10 per contract, would be amended to pay \$0.11 per contract. Tier 3, which requires an ADV of 20,000 contracts and currently pays a rebate of \$0.13 per contract, would be amended to pay \$0.14 per contract. The Exchange believes that paying a higher rebate will attract even higher volumes of equity and ETF options volume to the Exchange from non-GEMX market participants as well as GEMX Members. The Exchange would continue to pay the MARS Payment 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. The Exchange would continue to make no payment with respect to orders that are routed to GEMX, but not executed.

Proposal - Rebate

The Exchange proposes to pay an additional \$0.05 per contract rebate, in addition to the Tier 1 Maker Rebate in Options 7, Section 3 for Penny Symbols and SPY, for Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders that qualify as MARS Eligible Contracts,⁹ pursuant to Options 7, Section 4B, and were routed through a qualifying GEMX Member's routing system.¹⁰ Today, the Exchange pays a Tier 1 Maker Rebate of \$0.20 per contract for Market Maker, Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders. Priority Customers are paid a \$0.25 per contract Tier 1 Maker Rebate. The proposed rebate would be in addition to the Tier 1 Maker Rebate for Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders. The additional rebate would not apply to Market Maker and Priority Customer orders.

With this rebate, the Exchange proposes to incentivize Members to send order flow to GEMX Members that qualify for MARS and, in turn, attract higher volumes of equity and ETF

⁹ As noted herein, Eligible Contracts do not include QCC Orders or PIM Orders. Options overlying NDX are not considered Eligible Contracts. See Options 7, Section 4B.

¹⁰ As noted herein, to qualify for MARS, a GEMX Member's 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. Further, the Member's System would also need 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 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 a default destination on an order-by-order basis. See Options 7, Section 4B.

options volume to the Exchange. This additional \$0.05 per contract rebate, in addition to the Tier 1 Maker Rebates, will benefit all market participants who will have an opportunity to interact with this order flow.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹² 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.”¹³

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁴ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

¹³ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁴ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.¹⁵ 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.”¹⁶

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’”¹⁷ 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.

Proposal - MARS Payment

The Exchange’s proposal to increase the MARS Payments, which are currently paid based on certain average daily volumes for Eligible Contracts which add liquidity, is reasonable because the Exchange believes that the MARS program will continue to attract liquidity to GEMX in the form of order flow, which will 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 increased MARS Payments should enhance the competitiveness of the Exchange. Further, as is the case today, the proposed tier structure would continue to allow GEMX Members to price their services at a level that will enable them to attract order flow from

¹⁵ See NetCoalition, at 534 - 535.

¹⁶ Id. at 537.

¹⁷ 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)).

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 continues to seek to reward market participants that bring a greater amount of order flow to the Exchange by paying higher rebates¹⁸ based on the average daily volume that qualified as Eligible Contracts. 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 increase the MARS Payments, which are currently paid 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 qualifying GEMX Members, that offer market access and connectivity to the Exchange and/or utilize such functionality themselves, 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 Payments for all Eligible Contracts.

¹⁸ Currently, the Exchange pays 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 rebate to qualifying GEMX Members who transact 20,000 ADV. The qualifying ADV is not being amended with this proposal. This proposal would increase each of the 3 rebate tiers by \$0.01 per contract.

Proposal - Rebate

The Exchange's proposal to pay an additional \$0.05 per contract rebate, in addition to the Tier 1 Maker Rebates in Options 7, Section 3 for Penny Symbols and SPY,¹⁹ for Non-Nasdaq GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer orders that qualify as MARS Eligible Contracts,²⁰ pursuant to Options 7, Section 4B, and were routed through a qualifying GEMX Member's System²¹ is reasonable. The Exchange believes that its proposal will incentivize Members to send order flow to GEMX Members that qualify for MARS and, in turn, attract higher volumes of equity and ETF options volume to the Exchange. The rebate will benefit all market participants who will have an opportunity to interact with this order flow.

The Exchange's proposal to pay an additional \$0.05 per contract rebate, in addition to the Tier 1 Maker Rebate in Options 7, Section 3 for Penny Symbols and SPY, for Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders that qualify as MARS Eligible Contracts, pursuant to Options 7, Section 4B, and were

¹⁹ Today, the Exchange pays a Tier 1 Maker Rebate of \$0.20 per contract for Market Makers, Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders. Priority Customers are paid a \$0.25 per contract Tier 1 Maker Rebate.

²⁰ As noted herein, Eligible Contracts do not include QCC Orders or PIM Orders. Options overlying NDX are not considered Eligible Contracts. See Options 7, Section 4B.

²¹ As noted herein, to qualify for MARS, a GEMX Member's 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. Further, the Member's System would also need 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 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 a default destination on an order-by-order basis. See Options 7, Section 4B.

routed through a qualifying GEMX Member's routing system is equitable and not unfairly discriminatory. 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 would not pay an additional rebate for Priority Customer or Market Maker²² orders, the Exchange believes this is 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 Maker Rebates available on GEMX.²³ The Exchange believes that the availability of these aforementioned rebates for Priority Customer Orders does not warrant the Exchange paying an additional rebate on Priority Customer orders for MARS. With respect to Market Maker orders, today the Exchange offers certain Maker Rebates on Market Maker orders.²⁴ 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.²⁵ 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 Maker Rebates today beyond \$0.20 per contract on GEMX. The Exchange notes that it is

²² The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21).

²³ See Options 7, Section 3.

²⁴ Id.

²⁵ Market Maker and Priority Customer orders are eligible for higher Maker Rebates based on achieving certain volume requirements specified in the Table 1 Qualifying Tier Thresholds. See Options 7, Section 3.

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 equitable and not unfairly discriminatory for the reasons mentioned herein.

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.

Intermarket Competition

The proposal does not impose an undue burden on intermarket competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges 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.

Intramarket Competition

The proposed amendments do not impose an undue burden on intramarket competition.

Proposal – MARS Payment

The Exchange's proposal to increase the MARS Payments, which are currently paid based on certain average daily volumes for Eligible Contracts which add liquidity, does not impose an undue burden on competition because the Exchange will uniformly pay all qualifying GEMX Members, that offer market access and connectivity to the Exchange and/or utilize such functionality themselves, 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 do not impose an undue burden on competition because any qualifying GEMX Member that offers market access and connectivity to the Exchange and/or utilizes such functionality themselves may earn the MARS Payments for all Eligible Contracts.

Proposal - Rebate

The Exchange's proposal to pay an additional \$0.05 per contract rebate, in addition to the Tier 1 Maker Rebate in Options 7, Section 3 for Penny Symbols and SPY,²⁶ for Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders that qualify as MARS Eligible Contracts, pursuant to Options 7, Section 4B, and were routed through a qualifying GEMX Member's routing system, does not impose an undue burden on competition. 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 would not pay an additional rebate for Priority Customer or

²⁶ Today, the Exchange pays a Tier 1 Maker Rebate of \$0.20 per contract for Market Makers, Non-Nasdaq GEMX Market Maker (FarMM), Firm Proprietary/Broker-Dealer and Professional Customer orders. Priority Customers are paid a \$0.25 per contract Tier 1 Maker Rebate.

Market Maker orders, the Exchange believes this does not impose an undue burden on competition. With respect to Priority Customer orders, the Exchange notes that, today, Priority Customer orders may earn the highest Maker Rebates available on GEMX.²⁷ 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 Maker Rebates on Market Maker orders.²⁸ 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 Maker Rebates today beyond \$0.20 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 does not impose an undue burden on competition.

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.

²⁷ See Options 7, Section 3.

²⁸ Id.

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,²⁹ and Rule 19b-4(f)(2)³⁰ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-GEMX-2020-14 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-2020-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

²⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁰ 17 CFR 240.19b-4(f)(2).

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 Number SR-GEMX-2020-14 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.³¹

J. Matthew DeLesDernier
Assistant Secretary

³¹ 17 CFR 200.30-3(a)(12).