

Required fields are shown with yellow backgrounds and asterisks.

Filing by Nasdaq GEMX, LLC  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**

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

A proposal to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information.

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Daniel Last Name \* Cantu  
 Title \* Associate General Counsel  
 E-mail \* daniel.cantu@nasdaq.com  
 Telephone \* (301) 978-8469 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 09/01/2017  
 By Edward S. Knight  
 (Name \*)

Executive Vice President and General Counsel

edward.knight@nasdaq.com

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

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq GEMX, LLC (“GEMX” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information; subscriptions will be available for both end-of-day and intraday updates. The proposal is described in further detail below.

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii).<sup>3</sup>

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange (the “Board”) on August 15, 2016. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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

Daniel A. Cantu  
Associate General Counsel

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6)(iii).

Nasdaq, Inc.  
(301) 978-8469

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

a. Purpose

The Exchange proposes to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information; subscriptions will be available for both end-of-day and intraday updates.<sup>4</sup>

The Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical strategies. Trade Profile data includes: "Origin Code" (the type of trader participating in the transaction);<sup>5</sup> opening and closing buys and sells;<sup>6</sup> trading volume and number of

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<sup>4</sup> The Exchange initially filed this proposal as a fee filing on August 25, 2017 (SR-GEMX-2017-41). The proposal was rejected on August 31, 2017, and is being resubmitted as a proposal that (i) does not significantly affect the protection of investors or the public interest, and (ii) does not impose any significant burden on competition under Exchange Act Rule 19b-4(f)(6)(iii).

<sup>5</sup> "Origin Code" categories include Customer, Professional Customer, Firm and Market Maker. "Customer" applies to any transaction identified by a member or a member organization for clearing in the Customer range at the Options Clearing Corporation which is not for the account of a broker or dealer or a Professional. 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.

<sup>6</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.

trades categorized by day and series;<sup>7</sup> the degree to which a series is “in” or “out” of the “money”;<sup>8</sup> the number of days to expiration; an indication of the degree to which there is “Open Interest”<sup>9</sup> for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The GEMX Open/Close Trade Profile is currently available as an historical database available upon request, and the Exchange proposes to offer intraday and end-of-day subscriptions to Trade Profile information as well. Such subscriptions will be available to both members and non-members, similar to the ISE Open/Close Trade Profile.<sup>10</sup> The end-of-day file is updated overnight and available for download the following morning. The intraday file is updated at 10 minute intervals to provide a

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<sup>7</sup> Trading volume is the number of contracts traded; the number of trades is the number of transactions.

<sup>8</sup> The degree to which a series is “in” or “out” of the “money” is 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>9</sup> “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.

<sup>10</sup> Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).

cumulative record of transactions that take place over the course of the trading day. The end-of-day subscription will be available for \$500 per month; the intraday subscription will be available for \$1,000 per month.

The proposed rule change will increase transparency in the market by increasing the amount of information available to market participants to assist them in making investment decisions related to GEMX-listed options.

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

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>12</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The proposal is to make open and close trade profile information, currently available only on an historical basis, available at 10 minute intervals over the course of the trading day and in summary form at the end of the trading day, thereby increasing the flow of information and removing impediments to a free and open market.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

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>13</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>14</sup> (“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 approach.<sup>15</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>16</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

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

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

<sup>15</sup> See NetCoalition, at 534 - 535.

<sup>16</sup> Id. at 537.

otherwise, in the execution of order flow from broker dealers' ...."<sup>17</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 adding the proposed subscriptions to the Exchange's Open/Close Trade Profile 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 providing information about options activity throughout and at the end of the trading day. The proposed fees, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow, and are subject to competition from other options exchanges. As explained in further detail below, the proposal will impose no burden on competition because GEMX transaction information is disseminated by the Options Price Reporting Authority, LLC ("OPRA"), and customers would not pay a premium for GEMX information when similar transaction information is available at a lower cost from OPRA, and because the price of GEMX proprietary data is constrained by the need for GEMX to compete for order flow. The Exchange further notes that GEMX Open/Close Trade Profile information is an optional service that only applies to firms that elect to purchase the product. Moreover, the proposed service is similar to services already provided by other exchanges, such as the ISE Open/Close Trade Profile.<sup>18</sup>

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<sup>17</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)).

<sup>18</sup> Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).



The proposed changes are an equitable allocation of reasonable dues, fees, and other charges because fees will be the same for all of the purchasers of each product and it is equitable to charge more for the intraday product—which provides updates at 10 minute intervals over the course of the trading day—than the end-of-day product, which provides updates once per day.

4. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes will allow the Exchange to offer intraday and end-of-day subscriptions to options trading data. If the price of the proposed subscriptions were to be set above a competitive price, the Exchange may lose revenue as a result.

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 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 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.

As such, the price of the GEMX Open/Close Trade Profile product is constrained by other exchanges in the competition for order flow and the availability of similar data from OPRA. Customers choose exchanges based on the total cost of interacting with the exchange; if the GEMX Open/Close Trade Profile were set above market price, the total cost of interacting with GEMX would be above market price, and GEMX would lose market share as a result. In addition, the availability of trading information from OPRA will constrain the price of the GEMX Open/Close Trade Profile because customers would

not pay an excessive amount for proprietary data when similar information is available at a lower price; two products need not be identical for each product to act as a constraint on the price of the other. For these reasons, 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.

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

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

Not Applicable.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)<sup>19</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>20</sup> in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The proposed filing does not significantly affect the protection of investors or the public interest because the product is increasing the amount of information in the marketplace by making data currently available only on an historical basis available throughout and at the end of the trading day, thereby removing impediments to a free and

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<sup>19</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

open market. The proposed product is very similar to the ISE Open/Close Trade Profile, and the introduction of a similar product will increase competition. The proposal does not impose any significant burden on competition because, for the reasons set forth above, its price will be constrained by the need of the Exchange to compete for order flow and because the existence of similar products will constrain the price of the proposed product.

Furthermore, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.<sup>21</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.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b-4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii) because a product similar to

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<sup>21</sup> As noted above, the Exchange initially filed this proposal as a fee filing on August 25, 2017 (SR-GEMX-2017-41). The proposal was rejected on August 31, 2017, and the Exchange is resubmitting the proposal under Exchange Act Rule 19b-4(f)(6)(iii).

the proposed product is already being sold by another exchange, and the addition of the proposed product can only increase competition, and will not harm firms that do not purchase the product because the service is optional.

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

Not applicable.

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

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
5. Text of the proposed rule change.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-GEMX-2017-42)

September \_\_, 2017

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees to Offer Monthly Subscriptions for Open and Close Trade Profile Information

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 September 1, 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, 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 its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information.

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.

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

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

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 proposes to amend its Schedule of Fees to offer monthly subscriptions for Open and Close Trade Profile Information; subscriptions will be available for both end-of-day and intraday updates.<sup>3</sup>

The Open/Close Trade Profile provides over 80 fields of trading and volume data for GEMX-listed options that can be used to create and test trading models and analytical strategies. Trade Profile data includes: "Origin Code" (the type of trader participating in the transaction);<sup>4</sup> opening and closing buys and sells;<sup>5</sup> trading volume and number of

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<sup>3</sup> The Exchange initially filed this proposal as a fee filing on August 25, 2017 (SR-GEMX-2017-41). The proposal was rejected on August 31, 2017, and is being resubmitted as a proposal that (i) does not significantly affect the protection of investors or the public interest, and (ii) does not impose any significant burden on competition under Exchange Act Rule 19b-4(f)(6)(iii).

<sup>4</sup> "Origin Code" categories include Customer, Professional Customer, Firm and Market Maker. "Customer" applies to any transaction identified by a member or a member organization for clearing in the Customer range at the Options Clearing Corporation which is not for the account of a broker or dealer or a Professional. 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-

trades categorized by day and series;<sup>6</sup> the degree to which a series is “in” or “out” of the “money”;<sup>7</sup> the number of days to expiration; an indication of the degree to which there is “Open Interest”<sup>8</sup> for each series; and a comparison of the volume of trading at GEMX relative to the industry as a whole.

The GEMX Open/Close Trade Profile is currently available as an historical database available upon request, and the Exchange proposes to offer intraday and end-of-day subscriptions to Trade Profile information as well. Such subscriptions will be available to both members and non-members, similar to the ISE Open/Close Trade

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dealer. A “Market Maker” is a broker-dealer that assumes the risk of holding a position in a series to facilitate trading.

- <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> Trading volume is the number of contracts traded; the number of trades is the number of transactions.
- <sup>7</sup> The degree to which a series is “in” or “out” of the “money” is 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>8</sup> “Open Interest” is the total number of outstanding contracts for each series across all options exchanges for the trade date of the file.



Profile.<sup>9</sup> The end-of-day file is updated overnight and available for download the following morning. The intraday file is updated at 10 minute intervals to provide a cumulative record of transactions that take place over the course of the trading day. The end-of-day subscription will be available for \$500 per month; the intraday subscription will be available for \$1,000 per month.

The proposed rule change will increase transparency in the market by increasing the amount of information available to market participants to assist them in making investment decisions related to GEMX-listed options.

The proposed fees are optional in that they apply only to firms that elect to purchase these products. The 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>10</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>11</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The proposal is to make open and close trade profile information, currently available only on an historical basis, available at 10 minute intervals over the course of the trading day and in

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<sup>9</sup> Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

summary form at the end of the trading day, thereby increasing the flow of information and removing impediments to a free and open market.

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>12</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>13</sup> (“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 approach.<sup>14</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>15</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

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<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>13</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>14</sup> See NetCoalition, at 534 - 535.

<sup>15</sup> Id. at 537.

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>16</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 adding the proposed subscriptions to the Exchange’s Open/Close Trade Profile 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 providing information about options activity throughout and at the end of the trading day. The proposed fees, like all proprietary data fees, are constrained by the Exchange’s need to compete for order flow, and are subject to competition from other options exchanges. As explained in further detail below, the proposal will impose no burden on competition because GEMX transaction information is disseminated by the Options Price Reporting Authority, LLC (“OPRA”), and customers would not pay a premium for GEMX information when similar transaction information is available at a lower cost from OPRA, and because the price of GEMX proprietary data is constrained by the need for GEMX to compete for order flow. The Exchange further notes that GEMX Open/Close Trade Profile information is an optional service that only applies to firms that elect to purchase the

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<sup>16</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)).

product. Moreover, the proposed service is similar to services already provided by other exchanges, such as the ISE Open/Close Trade Profile.<sup>17</sup>

The proposed changes are an equitable allocation of reasonable dues, fees, and other charges because fees will be the same for all of the purchasers of each product and it is equitable to charge more for the intraday product—which provides updates at 10 minute intervals over the course of the trading day—than the end-of-day product, which provides updates once per day.

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 allow the Exchange to offer intraday and end-of-day subscriptions to options trading data. If the price of the proposed subscriptions were to be set above a competitive price, the Exchange may lose revenue as a result.

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.

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<sup>17</sup> Nasdaq ISE Rulebook, Fee Schedule, Chapter VIII (Market Data), A (offering an annual subscription to Nasdaq ISE Open/Close Trade Profile End of Day for \$759 per month) and B (offering a monthly subscription to the Nasdaq ISE Open/Close Trade Profile Intraday for \$2,000 per month).

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 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 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.

As such, the price of the GEMX Open/Close Trade Profile product is constrained by other exchanges in the competition for order flow and the availability of similar data

from OPRA. Customers choose exchanges based on the total cost of interacting with the exchange; if the GEMX Open/Close Trade Profile were set above market price, the total cost of interacting with GEMX would be above market price, and GEMX would lose market share as a result. In addition, the availability of trading information from OPRA will constrain the price of the GEMX Open/Close Trade Profile because customers would not pay an excessive amount for proprietary data when similar information is available at a lower price; two products need not be identical for each product to act as a constraint on the price of the other. For these reasons, 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>18</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>19</sup>

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</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

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-2017-42 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-GEMX-2017-42. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The

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proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 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-2017-42 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>20</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).



**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

**Nasdaq GEMX Rulebook**

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**Nasdaq GEMX Schedule of Fees**

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**V. Market Data**

**A. – C.** No change.

**D. Nasdaq GEMX Open/Close End of Day Trade Profile**

Subscription - \$500 per month.

Ad-hoc requests (historical data) - \$400 per request per month. An ad-hoc request can be made for any number of months, beginning in August 2013, for which data is available.

**E. Nasdaq GEMX Open/Close Intraday Trade Profile**

Subscription - \$1,000 per month.

Ad-hoc requests (historical data) - \$750 per request per month. An ad-hoc request can be made for any number of months, beginning in August 2013, for which data is available.

**H.** No change.